COMPANY LAW

*Frederick B. Sussmann**

I. INTRODUCTION

Recently company law in Canada has been an area of increasing legislative ferment and innovation.[1] Continuing this trend, the past year has seen much activity at the legislative level, particularly with the previously proposed complete revision of the Ontario Corporations Act,[2] and most recently with the introduction of proposed major amendments to the Canada Corporations Act.[3] The policy of the sponsoring governments has under-

*B.A., 1935, M.S. in Ed., 1937, College of the City of New York; J.D., 1943, Columbia University. Associate Professor of Law, Faculty of Law (Common Law Section), University of Ottawa.

[1] The major example has been in securities legislation, pioneered by The Securities Act, Ont. Stat. 1966 c. 142, *as amended by*, Ont. Stat. 1967 c. 92, based upon the *Kimber Report* of March, 1965 submitted by the Ontario Committee on Securities Legislation. To date, British Columbia, Alberta, Saskatchewan, and Manitoba have adopted similar securities acts. The Securities Act, B.C. Stat. 1967 c. 45; The Securities Act, Alta. Stat. 1967 c. 76; The Securities Act, Sask. Stat. 1967 c. 81; The Securities Act, Man. Stat. 1968 c. 57. The general effect of the legislation is to increase the investor's protection by requiring greater disclosure of corporate information. *See generally* Bray, *Recent Developments in Securities Administration in Ontario: The Securities Act, 1966, in* STUDIES IN CANADIAN COMPANY LAW 415 (J. Ziegel ed. 1967).

[2] Bill 125, The Business Corporations Act, 1968, and Bill 126, The Business Corporations Information Act, 1968, were both given first reading in the Legislative Assembly on May 17, 1968. As stated by Premier Robarts in introducing the bills, they "form a complete revision and updating of The Corporations Act and The Corporations Information Act," and their basic philosophy is to "allow simplified methods of incorporation and to raise the standards of protection for shareholders and creditors." This proposed legislation was based upon the report of the Select Committee on Company Law (Lawrence Committee) [hereinafter cited as the LAWRENCE REPORT] and also upon suggestions and advice received since the trial introduction of Bill 141, a prior bill to amend The Corporations Act in the preceding legislature. At the same time, Premier Robarts stated that the government did not intend to go beyond the introductory stage at that legislative session, and invited the presentation of views before the standing committee on legal bills at the next session. Statement of Hon. John P. Robarts, delivered in Legislative Assembly May 17, 1968, LEG. ASS. DEB. 3089-91 (Ont.). Although notice of intent was given, the 1968-69 legislative session closed without reintroduction of the bills, which will apparently be submitted at the next session.

[3] Bill C-198, "An Act to amend the Canada Corporations Act . . . ," received first reading in the House of Commons May 22, 1969. The amendments included provisions for public disclosure by major private companies, new reporting rules for conglomerates, expanded investigatory powers for federal officials, extensive insider trading regulations, new rules for takeover bids, and additional shareholder rights in proxy solicitations. In introducing the bill, Mr. Basford, Minister of Consumer and Corporate Affairs, indicated that the new legislation was not expected to proceed beyond second reading stage and would have to be reintroduced in the fall of 1969; he hoped it would be passed by the end of the year to allow proclamation for the start of 1970. The Globe and Mail (Toronto) May 23, 1969, at B-1 & B-7, cols. 2-9 & 2-8. The Bill has been reintroduced in the second session as Bill C-4.

standably been to move cautiously, allowing the fullest opportunity for consultation and deliberation, with the result that no major new laws were passed during the survey period.[4] This survey will, therefore, be primarily concerned with the recent case law.

In a recent decision, the Supreme Court of Canada followed and gave its express approval to the soundness of the rule in *Foss* v. *Harbottle*.[5] Other decisions dealt with the application of statutory safeguards for the protection of dissenting shareholders, such as the potential right to be bought out by the majority to avoid continued oppressive treatment. The courts have also been concerned with problems of insolvency and winding-up. Also of importance for major Canadian companies, although not involving Canadian law as such, is a recent denial of review by the United States Supreme Court in a derivative action by an American shareholder of a Canadian corporation. The Court thus let stand a federal appellate court decision holding the Canadian corporation's directors subject to provisions of the American Securities and Exchange Act,[6] where the company's only connection with the United States was a listing of its shares on a New York stock exchange.[7]

The recent publication of two books useful for students and practitioners in this field should be specially noted: *Studies in Canadian Company Law*,[8] and the Special Lectures of the Law Society of Upper Canada, 1968 on *Developments in Company Law*.[9]

II. Protection of Dissenting Shareholders

A. *Shareholders' Actions—Foss v. Harbottle Rule Upheld*

In *Burrows v. Becker*[10] the Supreme Court of Canada followed and expressly endorsed the soundness of the *Foss v. Harbottle* rule generally precluding shareholders' derivative actions.[11] Against a background of sub-

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[4] *Supra* notes 2 & 3.

[5] 2 Hare 461, 67 Eng. Rep. 189 (Vice-Chancellor's Ct. 1843).

[6] Securities Exchange Act, 15 U.S.C.A. § 78 j(b) (1964).

[7] Schoenbaum v. Firstbrook, 405 F.2d 200, at 215 (en banc rehearing) (C.A.2d 1968), *cert. denied* 89 S.Ct. 1747 (1969).

[8] Studies in Canadian Company Law (J. Ziegel ed. 1967).

[9] Upper Can. L. Soc'y Spec. Lectures: Developments in Company Law (1968).

[10] [1969] Sup. Ct. 162, 70 D.L.R.2d 433 (1968).

[11] The rule is that generally a court will not interfere with a company's internal management, and that where a company has been wronged, the action should prima facie be brought by the company itself. Burland v. Earle, [1902] A.C. 83 (P.C. 1901). For present purposes, the pertinent exceptions are for acts which are ultra vires the company or a fraud on the minority, and thus may not be confirmed by a majority of the shareholders. Edwards v. Halliwell, [1950] 2 All E.R. 1064, at 1067 (C.A.) (Jenkins, L.J.). In a case of fraud on the minority, individual shareholders may sue to right the wrong done to the corporation if, but only if, the shareholders have refused to authorize the company to bring the action, or a demand upon them to do so can be demonstrated to be futile, usually because majority control is held by the wrong-

stantial legislative movement toward modification of the rule in order to do better justice to minority shareholders,[12] the judgment further confirms that significant liberalization of the rule through judicial interpretation was not to be anticipated.[13]

The plaintiffs in the *Burrows* case, minority shareholder-residents of a large apartment building of "self-owned suites," brought a derivative action against the promoters of the building and directors of the company operating it, claiming breach of fiduciary duty and misconduct. Plaintiffs won at trial but lost in the British Columbia Court of Appeal where it was held, without reaching the merits, that the matters complained of were covered by the *Foss v. Harbottle* rule.[14] Dismissing the further appeal, the Supreme Court agreed with the Court of Appeal and concluded, through Justice Judson, that "the facts of this case show that the rule is a salutary rule and not one of mere technicality."[15]

Quite apart from the debatable question of the soundness, speaking generally, of the Court's conclusion that the rule is a salutary one, it is difficult to see how the facts of the case demonstrate it. The Court concluded that the challenged transactions were not ultra vires and could

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doers. Burland v. Earle, *supra*; Russell v. Wakefield Waterworks Co., L.R. 20 Eq. 474, at 482 (Ch. 1875) (Jessel, M.R.); Burrows v. Becker, 63 D.L.R.2d 100, at 141-46 (B.C. 1967) (Tysoe, J.A.), affirmed by the Supreme Court in the instant case, adopting the reasoning and analysis of Tysoe, J.A.: [1969] Sup. Ct. 162, at 172, 70 D.L.R.2d 433, at 440-42. For a detailed analysis of the rule, see Beck, *An Analysis of Foss v. Harbottle, in* STUDIES IN CANADIAN COMPANY LAW 545 (J. Ziegel ed. 1967).

[12] Following a recommendation of the Lawrence Committee, Bill 125 was introduced into the Ontario Legislature in 1968. Section 87 provided that a shareholder of a corporation might sue in a representative capacity for himself and all other shareholders on behalf of the corporation to enforce, or obtain damages for the breach of, any corporate right upon obtaining a court order permitting the commencement of the action. It further provided that the court might make such order upon ex parte application by the shareholder, if satisfied that he was a shareholder at the time of the act or acts complained of, that he "has made reasonable efforts to cause the corporation to commence or prosecute diligently the action on its own behalf," was acting in good faith, and that it was prima facie in the interests of the corporation or its shareholders that the action be commenced. The court was empowered by the section to make the order on such terms as it thought fit, except that it could not require the shareholder to give security for costs. A similar provision was included in the predecessor Bill 141. *Supra* note 2.

[13] This of course was a major premise underlying the Lawrence Committee's recommendations and the legislation proposed in Ontario, *supra* note 12. *See also*, Beck, *supra* note 11, at 596-600 and MacKinnon, *The Protection of Dissenting Shareholders, in* STUDIES IN CANADIAN COMPANY LAW 507, at 507-10 (J. Ziegel ed. 1967).

[14] 63 D.L.R.2d 100 (B.C. 1967). The principal matter at issue was whether the discharge of the 162,000 dollar portion of the building mortgage attributable to the garage was the responsibility of the defendant promoters, or of the owning corporation of which the tenants were shareholders. As to this issue, the trial judge had held that there had been a breach of fiduciary duty on the promoters' part in failing to disclose to share applicants that the responsibility was the company's, and he had granted substantial relief. Another matter at issue was as to the financial responsibility for a caretaker's suite, as to which the trial judge had also found for the plaintiff shareholders and against the defendant promoters. *See* [1969] Sup. Ct. 162, at 166-70, 70 D.L.R.2d 433, at 436-40.

[15] [1969] Sup. Ct. 162, at 171, 70 D.L.R.2d 433, at 440.

be confirmed by the majority of the shareholders.[16] It went on to hold that the "exception" to the rule in the case of fraudulent acts where the alleged wrongdoers control the majority of the shares could in any event not be relied upon because the defendant promoter did not possess such a majority even with the directors' shares added; the views of an uncommitted, potentially decisive group holding over twenty per cent of the issued shares had not been shown; and the plaintiffs' group, while they had expressed their dissatisfaction at general meetings, had never requisitioned a special general meeting to instruct the directors to bring the action in the company's name. Thus, it was held, the plaintiffs had not shown that any such attempt would have been futile.[17]

Presumably, the above were the facts of the case viewed as establishing that the rule is salutary.[18] But obviously all that they established was that the question whether a shareholder majority could have been obtained for bringing suit was an open one. It is difficult to escape the conviction that the court was primarily motivated to conclude the rule salutary by its finding that on the facts of this case there was no fraud, and that the acts complained of were intra vires the company and capable of ratification by the majority.[19] With respect, the utter fallacy of such a process of reasoning is plain. While the ultimate judgment in this particular case purportedly showed that application of the rule served to bar a groundless action, a meritorious claim would have been likewise barred.[20] It would seem clear that in many cases of breach of fiduciary duty or fraud, even where an independent majority

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[16] *Id.* at 171, 70 D.L.R.2d at 441.

[17] *Id.* at 171-72, 70 D.L.R.2d at 441-42.

[18] The language of the judgment, *id.* at 170-72, 70 D.L.R.2d at 440-42, makes it difficult to be certain on this point. Perhaps an added fact was the independence of the board of directors at the pertinent times. Perhaps also, the intra vires character of the challenged acts as found by the court was intended to be referred to as among the "facts" relied on. It is submitted, however, that none of these uncertainties invalidates the criticism made in the following text.

[19] *Supra* note 18.

[20] In the instant case, while the statements in the judgment of the Supreme Court ultimately vindicated the defendant promoters, the trial judge had held them guilty of breaches of fiduciary duty and afforded substantial relief against them, and while the British Columbia Court of Appeal did not reach the merits since it allowed the appeal on the basis of the *Foss v. Harbottle* rule, of the three judges one indicated that in his view there had been breaches of fiduciary duty, one indicated the contrary, and the third declined to express an opinion on the issue on the ground of possible embarrassment in the event of future litigation in a properly constituted action. *See* [1969] Sup. Ct. 162, at 167-68, 70 D.L.R.2d 433, at 437-38. It had also been the view of the trial judge upon the record that the holding of a shareholders' meeting would have been futile and a waste of time, with no possibility of a decision being taken to overrule the directors' decision not to sue, 63 D.L.R.2d 100, at 147. If we assume *arguendo* that the trial judge's view of the merits was the correct one, does not the application of the *Foss v. Harbottle* rule to bar the action establish the rule as one of mere technicality? Certainly the substantial possibility arises of permitting a wrong to go unredressed, if in good time the corporation then does not itself bring the action or the shareholders do not "properly constitute" the action by appealing to the shareholders to bring it and being refused.

exists, one would not expect the majority of the shareholders to approve bringing an action. It is submitted that reasonable efforts to obtain corporate approval, as in the proposed Ontario legislation,[21] are the most that should be required.

If the currently proposed legislation is generally enacted, the rule in *Foss v. Harbottle* will go the way of the deceit rule of *Derry v. Peek*[22] as applied to company-prospective shareholder relations.[23] It is of interest, at any rate, as an episode in the constant interplay of judicial and legislative action in the elaboration of the law, that the Supreme Court has here taken its stand not on a strict stare decisis application of *Foss v. Harbottle* (with the concomitant implication that only the legislature can change it), but on an endorsement of the rule as a matter of policy as well.

B. *Statutory Safeguards—The Minority's Right to be Bought Out*

Heretofore, legislative action both in England and in Canada has been resorted to in an attempt to avoid at least some of the instances of injustice to the dissenting shareholder to which his unsatisfactory position at common law—under the *Foss v. Harbottle* rule and its inadequate exceptions—leaves him exposed. The statutes referred to are not direct modifications of the rule such as has now been proposed in Ontario, but rather pinpoint situations, however generally stated, in which majority shareholder oppression of the minority, established to a court's satisfaction, will lead to a prescribed remedy.[24] Recent cases exemplify the application of two such remedies, the minority's right to be bought out by the majority and the right to have the corporation wound up.

In *Re B.C. Aircraft Propeller & Engine Co.*,[25] a twenty-five per cent minority shareholder unsuccessfully sought a court order under section 185 of the British Columbia Companies Act[26] compelling the holder of the remaining seventy-five per cent of the shares to buy him out at "going value." Section 185, the only Canadian provision of its kind, was directly modeled on section 210 of the United Kingdom Companies Act, 1948.[27] Under the section, the petitioner had to show, in order to succeed, that the affairs of the company were "being conducted in a manner oppressive to some part of the members (including himself)," and "that to wind up the company would un-

[21] *Supra* note 12.

[22] 14 App. Cas. 337 (1889).

[23] *See* the English Companies Act, 11 & 12 Geo. 6, c. 38, § 44 (1948); Companies Act, CAN. REV. STAT. c. 53, § 78 (1952); The Securities Act, ONT. REV. STAT. c. 363, § 69 (1960).

[24] MacKinnon, *supra* note 13.

[25] 66 D.L.R.2d 628 (B.C. 1968).

[26] B.C. REV. STAT. c. 67, § 185 (1960).

[27] 11 & 12 Geo. 6, c. 38. Section 210 was introduced into the Companies Act as a result of a recommendation of the Cohen Committee contained in the REPORT OF THE COMMITTEE ON COMPANY LAW AMENDMENT, CMD. 6659, (1945) and Recommendation II, *id.* at 95. See MacKinnon, *supra* note 13, at 510-15.

fairly prejudice that part of the members," but that otherwise the facts would justify a winding-up order as "just and equitable." Upon such findings, the section empowers the court, among other things, to order a shareholder to purchase another's shares. [28]

The facts complained of indicated that the petitioner, who had also been the manager and director of the two-man company, had been dismissed from the office of manager and removed as a director by the majority shareholder for personal reasons, and without just cause. The court, stating that it was relying on dicta in the *Elder* case, [29] denied the application on the basis that whatever the merits of the claim that the respondent majority shareholder had dealt unfairly and without probity with the petitioner in the stated respect, it could not be said that the respondent had thereby evidenced lack of probity or unfair dealing with the petitioner in the matter of his proprietary rights as a shareholder. It was the latter form of oppression, the court held, which would be required to ground the order. The ruling is unexceptionable, since plainly the intent of the section is to prevent continued oppression of a minority shareholder *qua* shareholder, and not in some other capacity such as director or employee. [30]

C. *Statutory Safeguards—Winding-Up as "Just and Equitable"*

In contrast, the Ontario High Court granted an order to wind up a substantial public corporation under section 256(d) of the Ontario Corporations Act (the "just and equitable" provision) upon finding that the chairman of the board and leader of the controlling interest group had regarded and manipulated the corporation and its assets as though they were his own property and not merely entrusted to his care and management by members of the general investing public. [31] On appeal, the order was affirmed. [32]

The lower court interpreted the "just and equitable" standard broadly, and closely scrutinized the facts. [33] These showed, in essence, a history of manoeuvres resulting in the takeover of the company by the controlling person apparently for the purpose of realizing upon its disposable assets and

[28] Section 210 of the U.K. Companies Act provides that the court may, if it is of such opinion, "with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any member of the company by other members or by the company . . . ."

[29] Elder v. Elder & Watson, Ltd., [1952] Sess. Cas. 49, *applying*, § 210 of The Companies Act, 11 & 12 Geo. 6, c. 38 (1948).

[30] Such was the holding in the *Elder* case, *supra* note 29, where relief was denied to two shareholders in a private company whose complaint was that other shareholders had caused the removal of the petitioners as directors and from their respective employments as secretary and manager.

[31] *Re* R. J. Jowsey Mining Co., 3 D.L.R.3d 23 (Ont. High Ct. 1968).

[32] *Id.*, [1969] 2 Ont. 549, 6 D.L.R.3d 97.

[33] Applying the statement of Mr. Justice Neville in *Re* Blériot Mfg. Aircraft Co., 32 T.L.R. 253, at 255 (Ch. 1916): "The words 'just and equitable' are words of the widest significance, and do not limit the jurisdiction of the Court to any case. It is a question of fact, and each case must depend on its own circumstances."

utilizing the proceeds for his own purposes rather than those of the company, with evidence of lack of probity giving rise, in the court's view, to a justifiable lack of confidence in the management of the company's affairs. Whether or not the result may be justified in terms of the precedents, [34] it points up, as the court recognized, the anomalies of a situation where the court has no middle ground available to it; that is, to make an order regulating the future conduct of the company's affairs (as under the British Columbia and United Kingdom provisions) and must either dismiss the petition or order the company to be wound up. [35] When, as well, the stringencies of the *Foss v. Harbottle* rule limit the remedies available to the aggrieved minority shareholder, it is of little wonder that the court is moved to grant this extreme remedy, which may do less than justice to so large a body of shareholders. [36]

D. *Statutory Safeguards—Take-Over Bids*

In another Ontario High Court decision involving a large public company, the court rejected an application by a dissenting shareholder to prevent the compulsory acquisition of his shares by a successful take-over bidder under section 128(1) of the Canada Corporations Act. [37] The section, modeled upon what is now section 209(1) of the English Companies Act of 1948, provides for such compulsory acquisition where the acquiring company has secured acceptance of its offer by nine-tenths of the shareholders of the subject company, unless the court, on application by a dissenting shareholder within one month, "thinks fit to order otherwise." Applying the decision construing the U.K. provision, the court held that in such a situation the onus upon the dissenting shareholders to establish valid grounds for it to "order otherwise" is a heavy one, and was not satisfied merely by showing that the offered price per share was less than the market value and book value of the shares. [38] The court ruled that the question in such a case is whether the offer is unfair to the body of shareholders as a whole. [39] Needless to say, this is very difficult to establish when nine-tenths of them have in effect expressed themselves otherwise.

The majority of Canadian jurisdictions have a similar compulsory acquisi-

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[34] The burden imposed by the courts upon a petitioner to show circumstances justifying the winding-up of a company as "just and equitable" has been recognized to be an onerous one. MacKinnon, *supra* note 13, at 512-13.

[35] 3 D.L.R.3d 23, at 30 (Ont. High Ct. 1968); *supra* notes 26-28 and accompanying text.

[36] As stated in the judgment, the company had issued and left outstanding some 3,587,013 shares, which were listed for trading on the Toronto Stock Exchange. While the judgment does not disclose the number of shares owned by the petitioner, it was obviously less than the control block of some 840,073 shares, which enabled the controlling person to elect his own nominees as directors of the company.

[37] *Re* Shoppers City Ltd., 3 D.L.R.3d 35 (Ont. High Ct. 1968).

[38] *See Re* Sussex Brick Co., [1960] 1 All E.R. 772, at 774 (Ch. 1959). *Cf.* Esso Standard (Inter-America) Inc. v. J.W. Enterprises Inc., [1963] Sup. Ct. 144, at 149, 37 D.L.R.2d 598, at 501-02.

[39] In *re* Grierson, Oldham & Adams Ltd., [1968] 1 Ch. 17, at 32 (1966).

tion provision.[40] A number of the Canadian cases construing this provision in the Canada Corporations Act have regarded it as confiscatory, and have held that it must be strictly construed against the company attempting the takeover, in the sense that any ambiguity in the statute is construed against it, and that it is held to a strict adherence to procedural requirements.[41] A recent commentator, pointing to the English authorities interpreting section 209 by placing a heavy onus on the dissenter to show the proposed scheme unfair, has suggested that while the English courts have leaned in favour of the convenience of the controlling group, the Canadian courts have in contrast been hostile to the section.[42] If the English onus test of the instant case is generally applied, however, and the takeover company's counsel mind their procedural *p*'s and *q*'s, an acquiring company which has managed to persuade ninety percent of the other's shareholders to accept its offer will generally be able to acquire the dissenters' shares at the same price. Recent legislation and proposed legislation on takeover bids does nevertheless afford or promise additional protections for shareholders of companies subjected to such bids.[43]

E. *Application of United States Securities Exchange Act to Derivative Action by Dissenting Shareholder of Canadian Corporation—Abuse of Inside Information*

Plaintiff, an American shareholder of defendant Banff Oil Ltd., a Canadian corporation conducting all of its operations within Canada, brought a derivative action in the United States District Court in New York against Banff, its individual directors, and Aquitaine Co. of Canada. Aquitaine was also a Canadian corporation and Banff's controlling shareholder. The transaction principally complained of was the purchase in Canada by Aquitaine in early 1965 of 500,000 shares of Banff treasury stock at the then current market price of one dollar and thirty-five cents per share, when a year later the market price had risen to as high as eighteen dollars per share. The price rise occurred soon after Banff publicly disclosed a rich oil and gas discovery in the Rainbow Lake area of Northwestern Alberta which it had kept secret for a year, availing itself of an Alberta law permitting it to do so. The complaint alleged that for some time prior to the purchase Aquitaine and other defendants knew of the discovery and withheld the information in order

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[40] CAN. REV. STAT. c. 53, § 128 (1952); ALTA REV. STAT. c. 53, § 138 (1955); B.C. REV. STAT. c. 67, § 181 (1960); N.S. REV. STAT. c. 42, § 119 (1967); SASK. REV. STAT. c. 131, § 189 (1965); QUE. REV. STAT. c. 271, § 48 (1964).

[41] Rathie v. Montreal Trust Co., [1953] 2 Sup. Ct. 204, [1953] 4 D.L.R. 289; *Re* Canadian Breweries Ltd., [1964] Qué. C.S. 600 (1963); *Re* John Labatt Ltd., 29 W.W.R. (n.s.) 323, 20 D.L.R.2d 159 (B.C. Sup. Ct. 1959); In *re* Day, 29 Can. Bankr. Ann. 230 (Que. 1949).

[42] Mackinnon, *supra* note 13, at 516-17.

[43] See *e.g.*, Part IX of The Securities Act, Ont. Stat. 1966 c. 142. *Cf.* sections 127(A), 127(L) of Bill C-198, introduced by the Government in the House of Commons, May 22, 1969, *supra* note 3. Bray, *supra* note 1, at 437-39; UPPER CAN. L. SOC'Y SPEC. LECTURES: DEVELOPMENTS IN COMPANY LAW: *Take-Over Bids, Insider Trading, and Proxy Requirements* 235, at 245-49 (1968).

to enable Aquitaine to purchase the treasury shares at an artificially low market price. [44]

On the issue of jurisdiction over the subject matter, the court held that the United States Securities Exchange Act of 1934 was to be given extra-territorial application, and applied to the challenged transaction. On the substantive issue, the court held that the complaint stated a triable claim under section 10(b) and rule 10b-5 of the act, on the ground that the defendants had through the use of interstate instrumentalities engaged in acts operating as a fraud or deceit upon others (notably the Banff shareholders other than Aquitaine) in connection with the purchase or sale of a security. [45] The court's ground for finding extraterritorial applicability of the anti-fraud provisions of section 10(b) was that Congress intended to protect American investors who had purchased foreign securities on American exchanges, and to protect the American securities market from the effects of improper foreign transactions in American securities. [46] In this connection, it pointed to the fact that Banff common stock is registered with the Securities and Exchange Commission and traded on the American Stock Exchange, and that "to protect United States shareholders" of this stock, Banff is required to comply with the provisions of the Securities Exchange Act concerning financial reports to the commission, proxy solicitation, and reports of insider holdings. [47]

As previously noted, the United States Supreme Court denied review of this decision. [48] Whatever view one may take of the decision as to extra-territorial application of the act, the result is to bring its far-reaching anti-fraud provisions to bear for the protection of Canadian as well as American

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[44] *Supra* note 7.

[45] Section 10(b) of the Securities Exchange Act. 1934, *contained in*, 15 U.S.C.A. § 78j(b) (1934) and rule 10b-5, 17 C.F.R. § 240, 10b-5(1967). Section 10 provides: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." Rule 10b-5 of the Securities and Exchange Commission, implementing this § repeats the quoted "It shall be unlawful" phrase, and continues: "(1) to employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." The court held that there had been sufficient use of interstate commerce or the mails to bring the transaction within the scope of the §.

[46] The Court cited Strassheim v. Daily, 221 U.S. 280, at 285, 31 S. Ct. 558, at 560 (1911): "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he (the actor) had been present at the time of the detrimental effect, if the state should succeed in getting him within its power." 405 F.2d 200, 206 (en banc rehearing) (2d Cir. 1968).

[47] 405 F.2d 200, at 206.

[48] 89 S. Ct. 1747 (1969). *Supra* text accompanying note 7.

shareholders of Canadian corporations registered on an American exchange. While recent Canadian legislation is moving in the same direction, this represents a considerable addition to the protection available to shareholders in many major Canadian corporations. [49]

III. WINDING-UP AND INSOLVENCY

Two recent cases in the prior section involved the application of the rule permitting the winding-up of a company as "just and equitable." [50] Other company winding-up and insolvency cases during the survey period included two arising out of the winding-up of the still-born Bank of Western Canada, a decision under the Saskatchewan statute on the right to continue an action against a company in liquidation, and an Ontario case involving conflict between provincial and federal provisions as to creditors' priorities in the distribution of assets of an insolvent insurance company.

A. *Summary Proceedings in Winding-Up*

In the Bank of Western Canada cases it is the jurisdictional and procedural aspects of corporate litigation, conducted as winding-up proceedings, which are of interest. In one of them the High Court of Ontario found that there was a resulting trust applicable to the proceeds of a special issue of securities by a finance corporation which were to have been invested in shares of the proposed bank, in favour of certificate holders, with priority over a creditor of the finance corporation to which the corporation had pledged the bank shares it had purchased with the proceeds of the certificate sales. [51] The winding-up proceedings of the bank were initiated and carried on in the Manitoba Queen's Bench Court. [52] The issues decided were transferred to the Ontario court, with its concurrence, as an auxiliary court pursuant to section 127 of the federal Winding-up Act. [53] The issues included those in an action by a certificate-holder on behalf of herself and others which were disposed of by the same judgment as coming within the definition of "any matter or thing relating" to the winding-up which could be disposed of by summary

[49] All shareholders would of course benefit through corporate recovery in a derivative action. And both shareholders and potential shareholders benefit through the broad application given to these provisions, particularly as to required disclosure of material inside information. See *supra* note 45; *cf.* S.E.C. v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 89 S. Ct. 1454 (1969), *noted in* 82 HARV. L. REV. 938 (1968).

[50] *Supra* at p. xx.

[51] *Re* Bank of Western Canada, 70 D.L.R.2d 113 (Ont. High Ct. 1968).

[52] *Id.* at 115.

[53] The Winding-Up Act, CAN. REV. STAT. c. 296, § 127 (1952) states: "The courts of the various provinces, and the judges of the said courts respectively, are auxiliary to one another for the purposes of this Act; and the winding up of the business of the company or any matter or proceeding relating thereto may be transferred from one court to another with the concurrence, or by the order or orders of the two courts, or by an order of the Supreme Court of Canada."

proceedings under the act.[54] Although going beyond the reported cases in that the liquidator was not a party to the action, the court was no doubt correct in giving a broad interpretation to the quoted phrase and thus expediting the decision of the issues in the action.[55]

In an interesting split decision, the Manitoba Court of Appeal has now decided that not it, but (in its view) the Ontario Court of Appeal, has jurisdiction to hear an appeal from the above judgment.[56]

The other Bank of Western Canada case decided in the survey period involved the interpretation of the provisions as to permissive appeals.[57]

B. *Continuing Company Existence for Legal Proceedings*

It was held that under the Saskatchewan Companies Winding-Up Act[58] there was no automatic restriction which would prevent the continuance of an action against a company for damages for wrongful dismissal even though the action had been commenced more than a month after a special resolution of the company had been passed pursuant to the act to go into voluntary liquidation and to appoint a liquidator.[59] The court ruled that a section of the act providing for a summary proceeding rather than an action for enforcing certain claims against property held by a liquidator[60] related to remedies only, and not to the determination of rights. This conclusion was reinforced by the existence of a provision of the act empowering the court to make an order "that no action or other proceedings shall be continued or commenced against the company except with the leave of the court."[61]

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[54] *Id.* The action in question was commenced in the Supreme Court of Ontario. The plaintiff subsequently moved in the Court of Queen's Bench of Manitoba, pursuant to the above-quoted § 127 of The Dominion Winding-Up Act, for an order transferring the action to the latter court, or for such other order as might be right and just under the circumstances. It was in accordance with the latter branch of plaintiff's application that the court ordered the transfer of the issues in the action as part of the matter to be decided by the Ontario court. The relevant procedural steps are set forth chronologically in *Re* Bank of Western Canada, 4 D.L.R.3d 58, at 71-4 (Man. 1969) (Dickson, J.A., dissenting).

[55] *See* 70 D.L.R.2d 113, at 120 (Ont. High Ct. 1968).

[56] *Re* Bank of Western Canada, 4 D.L.R.3d 58 (Man. 1969).

[57] *Re* Bank of Western Canada, 66 D.L.R.2d 649 (Man. 1967). Construing § 103 of the Winding-Up Act, CAN. REV. STAT. c. 296 (1952), the court held that the § provides for three separate avenues of appeal from a winding-up order, but not three separate applications for leave to appeal; thus, a judge of the court making the order having refused such leave, no further avenue is open, and the court or a judge of the court to which an appeal would otherwise lie has no jurisdiction to grant such leave.

[58] SASK. REV. STAT. c. 141 (1965).

[59] Squarebriggs v. Security Life Ins. Co., 1 D.L.R.3d 298 (Sask. 1968).

[60] The Companies Winding-Up Act, SASK. REV. STAT. c. 141, § 18(2) (1965).

[61] The Companies Winding-Up Act, SASK. REV. STAT. c. 141, § 22(3) (1965). As noted by the court below, Squarebriggs v. Security Life Ins. Co., 70 D.L.R.2d 418, at 419 (Sask. Q.B. 1968), there is no specific provision in the act as in the statutes of other provinces such as Ontario and Manitoba whereby, after the commencement of a voluntary winding-up, no action or proceeding may be commenced against the company without the court's leave. *See* The Corporations Act, ONT. REV. STAT. c. 71, § 264 (1960).

In an Exchequer Court case, an Ontario company had been dissolved by the provincial secretary after it had filed a notice of appeal from a Tax Appeal Board decision. [62] While the statute provided that such a corporation continues in existence for continuing legal proceedings until such time as any order or judgment is fully executed, [63] the court held that the board decision could not be said not to be fully executed since it did not require anything to be done, and the company being non-existent, it quashed the appeal. [64]

C. *Paramountcy of Federal Legislation—Creditors' Priorities in Winding-Up of Insolvent Insurance Company*

Given the close provincial regulation of insurance companies, [65] it is not surprising to find a conflict arising upon such a company's insolvency, between the provincial law and the federal provisions for the winding-up of insolvent companies, specifically including insurance companies. [66] The Ontario Court of Appeal resolved such a conflict in favour of the federal provisions, on familiar grounds, in *Re Wentworth Insurance Co.* [67] At stake was the distribution of a fund consisting of convertible securities deposited with the minister as a statutory prerequisite to a licence to carry on an insurance business in Ontario. [68] Policy-holders having loss claims would have been entitled under the Ontario act to priority over policy-holders claiming refunds of unearned premiums. [69] Under the federal Winding-up Act, however, both classes ranked equally. [70] The court ruled the provincial provisions were invalid per se as an invasion of federal jurisdiction over bankruptcy and insolvency, unsupportable on any theory of supplementary powers of enforcement or of regulation of insurance as a provincial matter. Assuming the validity of the provincial legislation, the court further held that the provincial provisions must be deemed overborne by the paramountcy and superseding effect of the federal legislation once an order had been made under the applicable federal provision, with which the provincial provisions could not be compatibly administered. [71] The Supreme Court of Canada, in a five-to-four decision, has recently affirmed this decision, declaring itself in entire agreement with the reasons of the Court of Appeal. [72]

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[62] The dissolution was for failure to file its annual returns. The Corporations Act, ONT. REV. STAT. c. 71, § 326(2) (1960).

[63] *Id.* § 326a(b).

[64] Lord Elgin Hotel Ltd. v. Minister of National Revenue, 69 D. Tax Cas. 5059 (Exch. Ct. 1968).

[65] UPPER CAN. L. SOC'Y SPEC. LECTURES: DEVELOPMENTS IN COMPANY LAW: *Special Status Corporations* 129, at 152-7 (1968).

[66] The Winding-Up Act, CAN. REV. STAT. c. 296, § 162, 165 (1952).

[67] 69 D.L.R.2d 448 (Ont. 1968), *aff'd sub. nom.*, Attorney General for Ontario v. Wentworth Ins. Co., Sup. Ct., June 30, 1969 (not yet reported).

[68] The Insurance Act, ONT. REV. STAT. c. 190, § 41(1) (1960).

[69] Id. § 59 (1).

[70] The Winding-Up Act, CAN. REV. STAT. c. 296, § 162, 165 (1952).

[71] Produits de Caoutchouc Marquis Inc. v. Trottier, [1962] Sup. Ct. 676, at 678, 34 D.L.R.2d 751, at 752.

[72] *Supra* note 67.

IV. MISCELLANEOUS

A. *Company Meetings—Proxies*

The Ontario Court of Appeal, construing section 310 of the Corporations Act, [73] which permits the calling of a shareholders' meeting by court order where it is "impracticable" to call a general meeting in any of the ordinary ways, held that the section is procedurally facilitative only, and does not authorize a court-ordered meeting to conduct any business which could not lawfully have been conducted had the meeting been otherwise convened. [74] Plaintiff shareholders, who were appellants, had instituted the action to attack the validity of a general meeting of the corporation which had purported to elect a new board of directors not including plaintiffs, who had been directors, and had obtained from the trial court an interim injunction until trial. Respondents then obtained the order under appeal for a general meeting to elect directors. [75] In allowing the appeal, the court ruled that under other provisions of the act plaintiffs continued in office as directors if the impugned election were held invalid, and if it were valid the new members were confirmed in office until the end of the year. However, there was no authority under the act or the letters patent to hold what amounted to a second election of an entire board of directors within one year. [76]

Following well-established authority, it was held in a British Columbia case that directors' acts and resolutions as set forth in unsigned minutes could be proved *aliunde*. [77]

In a decision construing section 79(1) of the Ontario Securities Act, 1966, [78] involving the validity of proxies voted at a shareholders' meeting,

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[73] ONT. REV. STAT. c. 71, § 310 (1960).

[74] *Re* British Int'l Fin. (Canada) Ltd., 68 D.L.R.2d 578 (Ont. 1968).

[75] The object of the order was evidently to provide the company with a legally constituted board, and thus to resolve the dilemma that until the action was tried "no one will know with certainty which is, in law, the board entitled to control the affairs of this company." *Id.* at 580.

[76] Provisions similar to § 310 of The Corporations Act, ONT. REV. STAT. c. 71 (1960); § 104 of The Canada Companies Act, CAN. REV. STAT. c. 53 (1952), and § 135 of The Companies Act, 11 & 12 Geo. 6, c. 38 (1948). While there is comparatively little jurisprudence construing the Canada and Ontario Acts, the courts seem in accord that when ordering the calling or the conduct of a meeting the court should be careful to do as little violence as possible to the corporate articles or regulations. *See Re* Zimmerman, 58 D.L.R.2d 160, at 173 (P.E.I. 1966). *See generally* UPPER CAN. L. SOC'Y SPEC. LECTURES: DEVELOPMENTS IN COMPANY LAW: *Company Meetings* 185, at 196-97 (1968). While it is to be noted that the allowance of the appeal in the instant case left unresolved the dilemma referred to *supra* note 75, the Ontario Court of Appeal did refer to the possibility, not before it on the record, of appealing to § 66(1) of the Ontario act, providing in given circumstances for the removal of a director by a two-thirds vote at a general meeting before the end of his term, and his replacement for the remainder of his term by majority vote at the same meeting: *Re* British Int'l Fin. (Canada) Ltd., 68 D.L.R.2d 578, at 581-82 (Ont. 1968).

[77] Associated Stevedoring Co. v. Callanan, 70 D.L.R.2d 687, at 690-91 (B.C. Sup. Ct. 1968).

[78] The Securities Act, Ont. Stat. 1966 c. 142.

the court had held, on a motion for directions, that the chairman of the meeting had no right to institute, of his own motion, an investigation as to whether the proxies complied with the requirements of the section.[79] On appeal, however, the decision was reversed on the special ground that the question put to the court should not be answered; section 79 should not be construed in the abstract, and to construe it would decide nothing at issue in the action.[80]

B. *Unlicensed Extra-provincial Companies—Disability to Maintain Action*

Two decisions in different jurisdictions construed the familiar but variant legislation on this subject.[81] A Nova Scotia court held that a foreign corporation not registered under the Nova Scotia act or the Canada Corporations Act might not apply for leave to enforce an arbitrator's award, such proceeding being construed as an "action" under the act.[82] The Yukon Territorial Court held that a similar unlicensed extraterritorial company was disentitled to bring an action on a contract in a court of the Territory, but might proceed with the action if it subsequently obtained the required licence.[83]

C. *Arrangement—Capital Withdrawal—Reduction of Issued Shares*

An "arrangement" consisting of a reorganization of the company's authorized capital, reducing the issued capital by fifty percent and returning capital to retiring shareholders, was authorized by the court under section 95 of The Corporations Act.[84] The court held, after the model of the corresponding section of the U.K. Companies Act, 1948,[85] that the section

[79] Murphy v. Lindzon, [1969] 1 Ont. 631, 3 D.L.R.3d 423 (High Ct.). The chairman had disallowed the proxy votes he had thus challenged, on the ground that no evidence had been filed establishing that the registered shareholders giving the proxies were the beneficial owners of the shares, or alternatively that the registered shareholders had obtained the written instructions of the beneficial owners regarding their voting. The court applied Pender v. Lushington, 6 Ch. D. 70, at 78 (1877), *per* Jessel, M.R., who ruled that "the company has no right whatever to enter into the question of the beneficial ownership of the shares."

[80] Murphy v. Lindzon, [1969] 2 Ont. 704. The lower court had also refused to answer, as too broad, the question put to it as to whether compliance with Ont. Stat. 1966 c. 142, § 79 was a necessary condition to the validity of the meeting. The reversal was apparently predicated on the appellate court's finding that the lower court should not have ruled on the question which it did rule on, and which it felt resolved the problems raised in the litigation.

[81] For a listing of special provisions of the provinces concerning the licensing of extra-provincial companies, Ziegel, *Constitutional Aspects of Canadian Companies, in* STUDIES IN CANADIAN COMPANY LAW 149 (J. Ziegel ed. 1967). The Ontario provisions are to be found in ONT. REV. STAT. c. 71, Pt. IX (1960), and are discussed in UPPER CAN. L. SOC'Y SPEC. LECTURES: DEVELOPMENTS IN COMPANY LAW: *Special Status Corporation* 129, at 143-48 (1968). As to the position of extra-provincial corporations in court proceedings, see W. FRASER & J. STEWART, COMPANY LAW OF CANADA 82-85 (5th ed. 1962).

[82] *Re* Provinces & Central Properties Ltd., 70 D.L.R.2d 156 (N.S. 1948).

[83] Ben Ginter Constr. Co. v. Primary Constr. Co., 4 D.L.R.3d 54 (Yukon Terr. Ct. 1969).

[84] ONT. REV. STAT. c. 71, § 95 (1960).

[85] The Companies Act, 11 & 12 Geo. 6, c. 38, § 206 (1948).

should be given a broad interpretation so as to authorize the court to approve such a plan where the requirements of the law were met and the creditors had ample protection. [86]

D. *Issue of Shares—Effect*

Construing section 101 of the Canada Companies Act, it was held by a British Columbia court that corporation shares are "issued" within the meaning of the section when they are allotted, or by some other act of the appropriate officers segregated from the authorized but unissued stock of the company, whether or not certificates for them have been prepared. [87] The effect of a share issue was assessed in a case construing a lease clause which gave the lessor the privilege of cancellation when control of the lessee corporation changed "by sale or other disposition." The court held that an issue of treasury shares of the lessee corporation resulting in a change in the membership of the controlling interest group within the corporation satisfied the clause requirement, being a change by sale or other disposition of the control, and thus gave the lessor the privilege of cancelling the lease. [88]

[86] *Re* West Humber Apartments Ltd., 2 D.L.R.3d 110 (Ont. High Ct. 1968). The application was motivated by a disagreement between the shareholders, one-half of them wishing to retire, and one-half to carry on the company.

[87] Associated Stevedoring Co. v. Callanan, 70 D.L.R.2d 687 (B.C. Sup. Ct. 1968).

[88] J.M.P.M. Enterprises Ltd. v. Danforth Fabrics (Humbertown) Ltd., [1969] 1 Ont. 785 (High Ct.).