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Canadian Tire Corp., Re

RE CANADIAN TIRE CORPORATION; RE C.T.C. DEALER HOLDINGS LTD.; RE BILLES et al.

Ontario Securities Commission

Beck, Chairman; Carmichael, Wigle and Waitzer, Commrs.; Cote and Cusson, Que. Securities Commrs.

Heard: December 18-20 and 22, 1986; January 5-9, 1987
Judgment: January 14, 1987

Counsel: *J.E.A. Turner*, *J.P. Groia*, *S. Griffith* and *J. Mountain*, for Ontario Securities Commission.

J.-P. Cristel, for Commission des valeurs mobilieres du Québec.

S. Block, for Canadian Tire Corporation.

P.J. Dey, Q.C., for W.N. Gula and *D.R. O'Connor*, Q.C., for C.T.C. Dealer Holdings Limited.

T.G. Heintzman, Q.C. and *W.G. Hopkins*, for Alfred W. Billes.

D.J. Wright, Q.C. and *R.N. Waterman*, for David G. Billes.

S.N. Lederman, Q.C., *J.M. Stransman* and P.F.C. Howard, for Martha Gardiner-Billes.

S.G. Fisher, Q.C. and *J.A. Kazanjian*, for Class A Shareholders — Aetna Capital Management Limited; Air Canada, Trustee for Air Canada Pension Trust Fund; Allenvest Group Limited; The Canada Trust Company; Central Capital Corporation; Canadian National Railway Company, Trustee for Canadian National Railways Pension Trust Fund; Elliott & Page Limited; Beutel Goodman; Jarislowsky, Fraser & Co. Ltd.; London Life Insurance Company; Metropolitan Life Insurance Company; Montreal Investment Management and Toronto Investment Management; Montreal Transportation Commission Pension Fund; Mu-Cana Investment Counselling Ltd.; Mutual Life of Canada; National Trust Company; Ontario Hydro; Reed Monahan Micholishen, Investment Counsel Inc.; Sceptre Investment Counsel Limited; Standard Life Assurance Company; Sun Life Assurance Company of Canada; Timmins' and Associates Limited; M.K. Wong & Associates Ltd.

J.A. Geller, Q.C. and *V.P. Alboini*, for Class A Shareholders — Confederation Life Insurance Co.; Confederation Investment Counselling Ltd.; Bolton Tremblay Inc.

J.A. Campion and *C.L. Sugiyama*, for The Trustees of the Canadian Tire Corporation, Limited Employees Profit Sharing Plans, Deferred Profit Sharing Plan and Staff Retirement Fund (Common Shareholders and Class A Shareholders).

H.J. Riva, for Bell Canada Pension Fund.

R. Shay, for The Toronto Stock Exchange.

Subject: Securities; Corporate and Commercial

Securities and Commodities --- Commissions and exchanges — Nature and powers — General.

Securities and Commodities --- Commissions and exchanges — Orders — Cease trading orders.

Take-over bids — Corporation having common shares and non-voting Class A shares outstanding — Class A shares to become voting if take-over bid for common shares made and majority of common shares tendered and taken up — Take-over bid made for 49 per cent of common shares which guaranteed controlling shareholders substantial premium over market price without triggering Class A share coattail provisions — Take-over bid held to be abusive — Cease-trading order issued.

In 1983, A, his brother D, and his sister M purchased common shares of Canadian Tire Corporation ("Tire") from their father's estate and thereby consolidated a 61 per cent control position. A, D and M then entered into a shareholders' agreement with right of first refusal provisions. In order to finance the purchase, A, D and M proposed to the management of Tire that the existing common shares be split into one common and four Class A shares. The purpose of the reorganization was to permit A, D and M to sell their Class A shares to the public without diluting their control position. A key component of the proposal was that the Class A shares be given take-over protection. Such a feature was necessary in order to convince the existing Class A shareholders to approve the proposal and in order to make the Class A shares marketable. The take-over protection that was inserted in the articles of Tire provided for the Class A shares to become fully voting at all meetings of shareholders if (a) an offer were made or was required to be made by statute, to all holders of common shares resident in Ontario; and (b) if a majority of the then issued common shares were taken up under the offer. A, D and M obtained an order from the Ontario Securities Commission permitting them to sell their Class A shares to the public. Tire then made its own substantial issue of Class A treasury shares on a private placement basis. It was the understanding of all parties concerned with the reorganization that the take-over protection in the articles would be triggered if A, D and M sold their control position.

In the fall of 1985, A and D on the one hand and M on the other could no longer agree with respect to the management of Tire and could no longer act as a controlling group. In 1986, A and D began actively to explore the possibilities of selling their shares. They sought valuations for their shares and other professional advice. A's solicitors suggested that the take-over protection would not be triggered if an offer were made to all common shareholders for up to 49 per cent of the issued common shares. A and D were given a professional valuation of their shares in a price range of $67 to $91. They wished to sell their shares at the maximum price obtainable. They first offered their shares to M at a price based on a formula which guaranteed them $100 per share (presuming they could sell all of their common shares not sold to M at $12 per share in the market).

"Dealers" was a corporation whose sole shareholder was the Canadian Tire Dealers Association and the sole purpose of Dealers was to hold shares of Tire. In the fall of 1986 it owned 17.4 per cent of the common shares of Tire. Dealers became interested in making a take-over bid for the shares of A, D and M. Dealers entered into agreements with A, D and M pursuant to which they agreed to tender their shares to a take-over bid made by Dealers to all common shareholders for up to 49 per cent of the oustanding common shares. The price to be paid to A, D and M set forth in such agreements was based on the same formula as had been offered to M. Dealers then made a take-over bid (the "bid") to all common shareholders for up to 49 per cent of the issued common shares at a price of $160.24 per share. This price was calculated using the formula set forth in the agreements with A, D and M and assuming at least 49 per cent of the common shares would be tendered. Because Dealers already owned 17.4 per cent of the common shares, the agreements with A, D and M assured them of obtaining control of Tire without triggering the take-over protection for the Class A shares.

The Ontario Securities Commission and the Commission des valeurs mobiliers du Quebec (collectively the "Commission") convened a joint hearing to determine whether a cease-trading order should be issued under s. 123 of the Securities Act (Ontario) (the "Act") to restrain the bid. At the commencement of the hearing a number of Class A shareholders sought standing at the hearing.

Held:

The bid was abusive and contrary to the public interest and a cease-trade order was issued pursuant to s. 123 of the Act.

Holders of Class A shares had a right to be granted standing at the hearing as they had a direct economic interest in the outcome and would be directly affected by the Commission's decision.

The Commission held that it had jurisdiction to grant the cease-trade order under s. 123 of the Act on the ground that the transaction was contrary to the public interest even if that were the sole ground. No specific breach of the Act, the regulations or policy statement was required. Although the Commission normally prefers to regulate by way of policy statement with public review and comment before finalization, there are circumstances where immediate regulatory intervention is necessary to prevent an abusive transaction that will have a deleterious effect on a class of investors, in particular, or the capital markets, in general.

In this case, the articles of Tire were expressly amended to provide take-over protection for the Class A shareholders. All parties to the reorganization understood that if the control position of A, D and M were sold, the take-over protection would be triggered. The bid was artificially structured to ensure a control premium to A, D and M but to avoid triggering the take-over protection. The take-over protection for the Class A shares was well known and an important factor in marketing the shares. The transaction was grossly abusive and was clearly contrary to the public interest. Although the Commission acknowledged that it was important for investors to be able to rely on the precise terms of publicly traded securities such as the Class A share take-over protections, it was more important in this case to prevent an abusive transaction which would undermine confidence in the capital markets. In order to proceed under s. 123, where there is no demonstrated breach of the Act, regulations or policy statements, the transaction must be clearly demonstrated to be abusive to shareholders in particular or the capital markets in general. A showing of abuse is different from and goes beyond a complaint of unfairness.

The Commission rejected the argument that the issue before it was a private matter between the two classes of shareholders of Tire and not properly the subject-matter of a review by the Commission. This was a public matter involving a major public company and one that had an impact on the public market place.

Although the Commission did not base its decision on any breach of fiduciary duty owed by the controlling shareholder to the minority, it considered the presentation of such evidence as helpful in supporting its decision under s. 123 of the Act.

Cases considered:

Cablecasting Ltd., Re, [1978] O.S.C.B. 37 — *applied*

Ctee. for Justice & Liberty v. National Energy Bd., [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115 (S.C.C.) — *referred to*

Ebrahimi v. Westbourne Galleries, [1973] A.C. 360, [1972] 2 All E.R. 492 (H.L.) — *considered*

Fed. Commerce & Navigation Ltd., Re, [1981] 1 O.S.C.B. 20(c) — *considered*

Goldex Mines Ltd. v. Regill; Probe Mines Ltd. v. Goldex Mines Ltd. (1974), 7 O.R. (2d) 216, 54 D.L.R. (3d) 672 (Ont. C.A.) — *considered*

Lindzon, Re, [1982] 42 O.S.C.B. 43(c) — *referred to*

O.S.C. v. Electra Investments (Can.) Ltd. (1983), 44 O.R. (2d) 61, 38 C.P.C. 47 (Ont. C.A.) — *followed*

Starr and Puslinch, Re (1976), 12 O.R. (2d) 40 (Ont. Div. Ct.) — *considered*

Torstar Corp. and Southam Inc., Re (1985), 17 Admin. L.R. 303, 8 O.S.C.B. 5068, additional reasons at (1986), 9 O.S.C.B. 3088 — *referred to*

Statutes considered:

Securities Act, R.S.O. 1980, c. 466 —

s. 2(4)

s. 9

s. 73

s. 123

s. 123(1)

APPLICATION to the Ontario Securities Commission and the Commission des valeurs mobilieres de Québec for a cease-trade order with respect to a take-over bid.

***Beck, Chairman*:**

1 On December 9, 1986, C.T.C. Dealer Holdings Limited ("Dealers") made an offer (the "Offer") to purchase 49 per cent of the outstanding common shares of Canadian Tire Corporation, Limited ("Tire") at a price of $160.24 per common share. The Offer revealed that Alfred W. Billes ("Fred"), David G. Billes ("David") (collectively, the "Brothers") and Martha Gardiner-Billes ("Martha") (collectively, the "Billeses") had, pursuant to agreements entered into with Dealers, agreed irrevocably to deposit their total holdings of 2,101,150 common shares of Tire pursuant to the terms of the Offer and not to withdraw such shares. The Billeses' common shares amounted to 60.9 per cent of the outstanding common shares of Tire.

2 As Dealers was the owner of approximately 17.4 per cent of the outstanding common shares of Tire at the time of the bid, the bid for 49 per cent guaranteed it control of Tire if its Offer were successful.

3 The sole registered shareholder of Dealers is the Canadian Tire Dealers' Association (the "Association"), an Ontario non-share corporation whose members are 361 Tire dealers.

4 On December 10, 1986, the Ontario Securities Commission (the "Commission") issued a notice of hearing pursuant to s. 123(1) of the Securities Act, R.S.O. 1980, c. 466, as amended (the "Act"), to consider whether it was in the public interest to impose a cease-trading order on the Offer and on the common shares held by the Billeses.

5 Paragraph 14 of the notice of hearing alleged that the offer was contrary to the public interest and therefore ought to be restrained on the following five grounds:

(i) the making of the bid and/or the tendering thereto of the Billes' common shares is in breach of the duties owned by C.T.C. Dealer Holdings and/or the Billeses to the Class A shareholders of Canadian Tire;

(ii) the holders of the Class A shares have been misled as to the efficiency of the coattail;

(iii) the bid is, in substance, a purchase of all of the common shares of Canadian Tire but has been structured as a purchase of only 49 per cent of the common shares, to circumvent the operation of the coattail;

(iv) the bid as structured may contravene s. 91 of the Act and is, in any event, inconsistent with the principles which underly the provisions of s. 91 and Commission Policy 1.3; and

(v) if the bid is successful, the principal customers of Canadian Tire will have acquired control of the company through the acquisition of only approximately 2 per cent of the participating shares. The Dealers will thereby have created a fundamental conflict of interest which is contrary to the interests of the holders of the Class A shares and the public at large.

6 Following a nine-day hearing (the "hearing") which was held in conjunction with the Commission des valeurs mobilieres du Québec pursuant to authority granted under s. 2(4) of the Act, the Commission announced on January 14, 1987 that it had issued a cease-trade order against the Offer and against the common shares held by the Billeses. In its announcement, the Commission said that full written reasons would follow. The reasons will be structured as:

I. Reasonable Apprehension of Bias - Charles Salter, Q.C.

II. Standing

III. Background

IV. Evidence

V. Arguments

VI. Reasons for Decision.

I. Reasonable Apprehension of Bias - Charles Aalter, Q.C.

7 At the outset of the hearing, counsel for David, supported by counsel for Fred, Martha and the Dealers, raised the matter of a reasonable apprehension of bias on the part of the vice-chairman of the Commission, Charles Salter, Q.C. ("Salter"). The matter of reasonable apprehension of bias arose from the fact that, in 1983, Salter was the director of the Commission and, as such, was involved in discussions with respect to the reorganization of Tire. During the course of the discussions, a matter that was certain to be important in this hearing, the take-over bid protection provided to the Class A shares of Tire, was raised.

8 Moreover, the Director, on the basis of representations that were made to him by counsel for the Billeses and Tire, recommended the granting of a s. 73 order under the Act, which order was subsequently granted. There was also a possibility that Salter would be called as a witness with respect to some of the discussions with counsel and the granting of the s. 73 order.

9 Counsel made it clear that they were not alleging actual bias on Salter's part, but rather were making the argument that as Salter was involved in a discussion in 1983 of matters that would be important in this hearing, that there was a reasonable apprehension of bias, as that term is used in such leading cases as *Ctee. for Justice & Liberty v. National Energy Bd.*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115 (S.C.C.).

10 After adjourning to consider the matter, we agreed with the submissions of counsel for the Billeses and the Dealers. Accordingly, Salter excused himself and took no further part in the proceedings.

II. Standing

11 At the commencement of the hearing, standing was requested on behalf of a number of parties apart from the Billeses and the Dealers. Those who asked for standing were:

(i) members of the Canadian Tire Class A Shareholders Action Committee, being 18 institutional investors who owned or managed 19,682,865 Class A non-voting shares of Tire;

(ii) Confederation Life Insurance Company, Confederation Investment Counselling Ltd. and Bolton Tremblay Inc., holders or managers of significant blocks of Class A shares;

(iii) the Trustees of the Canadian Tire Corporation Limited Employees Profit Sharing Plans, which Plans hold some 10,000,000 Class A non-voting shares of Tire and some 419,000 common shares;

(iv) the Bell Canada Pension Plan, which is a substantial holder of Class A non-voting shares.

The four parties who requested standing were, collectively, holders of some 30,000,000 Class A shares.

12 The argument of the applicants for standing was put on the basis that they had a direct financial interest in the outcome of the proceeding and their rights would be directly affected. The Offer is for the voting shares only and is structured in such a way that it would not trigger the take-over protection provision attaching to the Class A shares (the "coattail"). The coattail would have the effect of converting the Class A shares to voting shares if a majority of the common shares then issued and outstanding were tendered and taken up pursuant to a take-over bid.

13 If the Offer were to succeed, the coattail provision would not be triggered, the Class A shares would not become voting shares and there would be no need to deal with the Class A shareholders to secure control of Tire. If, on the other hand, the bid were cease-traded and Dealers, or another offeror, still wished to obtain control of Tire, they likely would have to do so in such a way that would allow the Class A shareholders to share, to some degree, in the premium for control, along with the common shareholders. Accordingly, it was argued, the Class A shareholders have a direct economic interest in the outcome of the hearing and would be directly affected by the Commission's decision. O.S.C. staff counsel supported the application for standing.

14 Counsel for the Billeses and the Dealers submitted that the nature of this hearing, a hearing as to whether a cease-trade order should issue on a take-over bid and on tendering their common shares to that bid by three shareholders, argued against granting standing to the Class A shareholders. Put simply, the argument was that the Class A shareholders have no direct interest in the dispute such that they should be granted standing. The Offer is not made to the Class A shareholders, and the Class A shares are different from the common shares in that they are non-voting. There may well be a dispute between the Class A shareholders and the common shareholders, but that dispute is best resolved in the Courts. Such a dispute does not give a Class A shareholders a direct interest in the outcome of these proceedings.

15 The fact of a dispute between the Class A and the common shareholders would, it was argued, overwhelm the nature of this proceeding. The panel would have difficulty in controlling the proceedings if four representatives of the Class A shareholders were granted standing. The hearing would evolve into a lengthy one in which the central issue would become the dispute between the non-voting Class A shares and the voting common shares, rather than concentrating on the issues raised in the notice of hearing. That type of a private dispute is best left to the Courts where counsel would have the benefit of examinations for discovery and pleadings to refine the issues.

16 A related argument was that the allegation that the Class A shareholders have an economic interest in the outcome of the hearing was misplaced in that such an economic interest could only arise if the coattail provisions were triggered. There was no power in the Commission to make a decision that would have the effect of triggering the coattail. The Commission could only decide to cease-trade the bid or to allow it to proceed. What it could not do was give the Class A shareholders the right to trigger the coattail provisions. Accordingly, the Class A shareholders did not have the economic interest that they argued for.

17 Upon a consideration of the cases cited, we had no doubt that the Class A shareholders had such an interest in the outcome of the hearing, as the nature of that interest has been defined by the Courts in this province, that they ought to be granted standing and we so ordered.

18 The case that is most in point on the issue of standing is the decision of the Ontario Court of Appeal in *O.S.C. v. Electra Investments (Can.) Ltd.* (1983), 44 O.R. (2d) 61, 38 C.P.C. 57. In that case, the Commission sought a compliance order to require Electra to make a take-over bid to the shareholders of EPM, Electra having purchased control in a private transaction. EPM was granted standing as its shareholders were held to have a direct interest in the matter of whether a take-over bid should be ordered or not. In upholding the rule of the Motions Court Judge, Mr. Justice Cory held as follows [at p. 62, C.P.C.]:

> Next, it must be considered whether or not the Motions Court Judge properly exercised his discretion to add parties. We are of the view that a person who may acquire a benefit as a result of a hearing or proceeding is just as much affected in his financial condition as one who may incur a liability. It is thus clear that these shareholders were likely to be financially affected and to acquire a benefit as a result of the hearing. They were then properly before the Court.

19 It is true that a cease-trade order in this case would not result in a take-over bid being made to the Class A shareholders, nor would it trigger the coattail provision applicable to the Class A shares. Nonetheless, it is clear that the Class A shareholders would be financially affected by a cease-trade order. If the bid were to proceed, the common shareholders would receive $160.24 for each share taken up under the Offer. The Class A shares would not participate in the take-over bid, the coattail provision would not be triggered and the Class A shares would be likely to continue to trade in the $13 range.

20 On the other hand, if a cease-trade were ordered, the take-over bid would be stopped and control would remain with the Billeses. In that case, if the Billeses continued to want to sell their control block, a desire that they have publicly expressed, it is likely that they would have to do so in a way that would take into account the position of the Class A shareholders. Consideration of that position would not necessarily mean that the Class A shareholders would receive the same price for their shares as the common shareholders. It simply would mean that consideration would have to be given to their position, which consideration might well translate into an economic benefit. In short, the Class A shareholders would have a much better chance of sharing in a subsequent change in control of Tire, to a greater or lesser extent, than they would if the Dealers' Offer proceeded, in which case they would not share at all.

21 Accordingly, we held that the Class A shareholders have standing on the basis of the holding of the Ontario Court of Appeal in *Electra*, supra.

22 Also in point in the decision of the Divisional Court in *Re Starr and Puslinch* (1976), 12 O.R. (2d) 40. In that case, the Divisonal Court granted standing in an application for judicial review to set aside an official plan to interveners with "a considerable commercial interest in the result of the judicial review application". The following remarks [at p. 46] of Mr. Justice Grange are relevant here:

> I can only conclude from [a review of the authorities] that there is no absolute rule that for a party to be added he must have a direct interest in the very issue to be determined. It is, I think, sufficient in the words of Lord Denning [in *Gurtner v. Circuit*, [1968] 2 Q.B. 587] that the 'determination of that dispute will directly affect a third person in his legal rights or in his pocket' .... I think we should ... lay down no fixed rule, but I do believe that in this instance, where the very enterprise of the applicants will be in danger of prohibition and where both applicants appear to have acted in reliance on the official plan that is now attacked, they should be permitted to intervene.

23 In our opinion, there is little doubt that substantial equity shareholders in a company that is the subject of a take-over bid, when that bid is being made at a very high premium in which they will not participate, have a direct interest in the outcome of a hearing, one result of which could be to block the bid. The Class A shareholders here clearly have a direct commercial interest in the outcome of this hearing. Accordingly, we granted each of the four applicants standing.

24 Standing was also granted to Tire itself, and to the Toronto Stock Exchange (the "TSE"). The TSE, however, was granted standing only to make argument at the end of the case consistent with the Commission's ruling as to standing to make argument only in *Re Torstar Corp. and Southam Inc.* (1985), 17 Admin. L.R. 303, 8 O.S.C.B. 5068, additional reasons at (1986), 9 O.S.C.B. 3088. No objection was taken to the granting of standing to Tire or to the TSE.

III. Background

25 Tire is Canada's largest retail hardware and automotive supplies company. It was founded in 1913 by J.W. Billes ("J.W.") who was soon joined by his brother, A.J. Billes ("A.J."), the father of the Billeses. The retail outlets are operated by 361 Canadian Tire dealers. Under the system developed by Tire, each dealer is an independent entrepreneur and is entitled to retain all operating profits. Tire does not receive a franchise fee, a royalty or a percentage of profits from the dealer. It sells to the dealer the product which the dealer resells to the public, and also provides the dealer with marketing and other services.

26 Every dealer is required to be a member of the Association. The Association is an Ontario non-share corporation whose members are the 361 Tire dealers. Dealers is a holding company incorporated under the laws of Ontario on June 26, 1963. Dealers' sole registered shareholder is the Association and Dealers' only business is to hold shares of Tire. Dealers is the registered and beneficial owner of 600,650 common shares, representing approximately 17.4 per cent of the issued common shares outstanding. Sixteen of the 361 Tire dealers do not have an interest in Dealers.

27 From 1913 until November 1956, Tire was controlled and run by J.W. and A.J. J.W. died on November 16, 1956 and left his holdings in Tire, primarily 1.05 million voting common shares, in trust to a number of charitable and educational institutions (the "estate"). A voting trust agreement entered into in 1962 between the trustees of the estate and A.J.'s children, the Billeses, ensured that voting control remained within the family. The estate and the Billeses each held some 30.4 per cent of the voting common shares of Tire.

28 On June 15, 1983, the Ontario Supreme Court, as a result of a motion brought by National Trust, one of the trustees of the estate, ordered the sale of the estate's holdings of Tire common shares. Accordingly, the trustees announced that the Tire block of shares was being put up for sale and advertised for tenders.

29 On October 3, 1983, the Billeses purchased the estate's 1.05 million common shares at a price of $73 per share, for a total purchase price of $76.7 million. As a result of the purchase, Fred, David and Martha each held 700,383 common shares, being 60.9 per cent of the outstanding voting common shares of Tire.

30 On July 20, 1983, the Billeses entered into a shareholders' agreement (the "Aldamar agreement") under which if any party wishes to sell his or her common shares, such party must make an offer to each of the other parties. Each of the other parties has a right to accept the offer within 10 days. If the offer is not accepted, the party desiring to sell is free to do so at a price equal to or greater than the offering price.

IV. Evidence

A. The Events of 1983

31 On October 28, 1983, the Billeses wrote to Dean Muncaster ("Muncaster"), the president and chief executive officer of Tire from 1966 through June, 1985. In that letter, the Billeses suggested a reorganization of Tire that would involve subdividing the Class A shares on a 6-for-1 basis and subdividing the common shares into one common and five class A shares. The Billeses stated that it was their:

> present intention to sell sufficient Class A shares resulting from this reorganization to recover our cost of the acquisition of the estate's shares and related expenses. To this end, we have retained First Marathon Securities Limited ("Marathon"), as our fiscal agent to effect this sale.

Apart from the reorganization of the share capital, the Billeses also proposed that:

> Takeover protection (not presently enjoyed) will be granted to the Class A shareholders in the event of a sale by our family of a controlling interest in the Corporation resulting in a follow-up obligation to all common shareholders. We believe this is an extremely valuable addition to the rights of the Class A shareholders, and will be well received by the market.

32 In fact, Muncaster's evidence indicated that he was considering a reorganization in the mid-summer of 1983 and had written to Burns Fry Limited ("Burns"), Tire's then fiscal agent, seeking its advice on a stock split. Muncaster assumed that if the Billeses were the buyers of the estate's shares, they would want to finance their purchase through a reorganization and subsequent sale of Class A shares.

33 In a letter to Muncaster on July 11, 1983, Wilmot Matthews ("Will"), a senior executive of Burns, discussed various aspects of a reorganization. Among the things that Will recommended was that take-over protection be included in the new share provisions of the Class A shares. In his words, "this feature must be such that if a take-over offer is successfully concluded, the Class A shareholders will have been treated in exactly the same way as if they had been common shareholders."

34 The parties primarily involved in structuring the reorganization were Muncaster, R.B. Matthews ("Matthews"), Fred's lawyer, and Robin Law ("Law"), counsel to Tire. It was the evidence of Muncaster, as well as of Alex Barron ("Barron"), an investment dealer who was chairman of the board of Tire from 1966 to mid-1984, that the company had three main concerns with respect to the reorganization. The first was with respect to the size of the stock split, a concern being expressed about the 6-for-1 originally proposed by the Billeses; second, to secure arrangements for an independent board of directors; third, to provide take-over protection for the Class A shareholders.

35 In the event, as a result of negotiations between Muncaster, Law and Matthews, a reorganization was agreed to along the following lines:

> 1. Each Class A share would be subdivided into five Class A shares and each common share would be divided into four Class A shares and one common share.
>
> 2. Take-over protection would be afforded to the Class A shareholders.
>
> 3. Holders of the Class A shares would be entitled to elect three independent directors and the Billeses would agree to nominate four independent directors to be elected by the common shareholders. As a result, a majority of the directors would be independent in the sense that they would not be officers or employees of Tire, or associated with the Billeses.

The actual take-over protection, added to the Class A share attributes, is as follows:

> **Change of Class A Non-Voting Shares into Voting Class A Shares**
>
> (1) For the purpose of this paragraph 6, 'Offer' means an offer to purchase Common Shares which is made to all or substantially all of the holders of Common Shares or which must, by reason of then applicable securities legislation or the by-laws, regulations or policies of a stock exchange on which the Common Shares are then listed, be made to all holders of Common Shares whose last address on the records of the Corporation is in Ontario and 'Expiry Date' means the last date upon which holders of Common Shares may accept an Offer.
>
> (2) Subject to subparagraph (3) of this paragraph 6, in the event an Offer is made and a majority of the Common Shares then issued and outstanding have been tendered and taken up pursuant to the Offer, each Class A Non-Voting Share shall thereupon and thereafter be entitled to notice of, and one vote for each Class A Non-Voting Share held at, all meetings of the shareholders of the Corporation and the Class A Non-Voting Shares shall thereupon and thereafter be designated as 'Class A Shares'.
>
> (3) The entitlement to receive notice and to vote provided for in subparagraph (2) of this paragraph 6 shall not come into

effect in the event that the Offer is an offer to purchase both Common Shares and Class A Non-Voting Shares at the same price per share and on the same terms and conditions, without distinction between the two classes of shares.

(4) If the entitlement to receive notice and to vote provided for in subparagraph (2) of this paragraph 6 becomes effective, the Secretary of the Corporation shall, within five days after the Expiry Date, forward to each holder of Class A Shares a notice of such entitlement.

It will be noted that the take-over bid protection is not of the type that requires a bid to be made to the non-voting shares when a bid is made to all of the common shares. Rather, it is of the type that provides for the conversion of the non-voting shares into voting shares after a take-over bid for the common shares has been successfully completed. The event that triggers the conversion of the non-voting shares into voting shares is, as set out in paragraph (2) of the Class A Share Provisions, the tendering and taking up of "a majority of the Common Shares then issued and outstanding. ..."

36 There was a great deal of evidence as to the negotiations that led to the final form of take-over protection for the Class A shares. It is not necessary to deal at any length with that evidence, as it was conceded by counsel for the Commission that all the parties were acting in good faith in 1983 and that all had a common goal of providing take-over bid protection to the Class A shareholders. The evidence is important, however, with respect to what all of the parties thought they were providing by way of protection to the Class A shareholders and what their concerns and understandings were at that time.

37 Take-over bid protection clauses were referred to as being of two types. The conversion type was taken to be a clause structured so that if a take-over bid were made for the common shares only, the non-voting shares would convert into voting shares or a take-over bid have to be made to the non-voting shares on the same terms as to the voting shares. The voting-type clause was taken to mean the type of clause that eventually became an attribute of the Class A shares whereby the non-voting shares were converted to voting shares after the completion of a successful take-over bid.

38 The evidence is clear that initial take-over protection that was drafted in November of 1983 was of the conversion type. Ultimately, at the suggestion of Matthews, the voting type of protection clause, as set out above, was used. It was Law's evidence that, in the circumstances of the particular case, he did not see any significant difference between the original conversion-type clause that his law firm had drafted and the final clause that became part of the Class A share attributes.

39 Law testified that he considered that the final voting type of take-over protection clause that was adopted was preferable in that it was simpler in wording and simpler and more straightforward in operation than the more complex conversion-type clause that his firm had originally drafted. From his perspective, it met the requirement of providing fairness to the Class A shareholders in the event that the control block, that is, the Billeses, were to sell their shares. Law characterized the desire for fairness for the Class A shareholders as "... placing the Class A shareholders, after this very significant split, in a similar position to the minority common". The minority voting common shares would, of course, share in any premium over the current market price paid to the controlling shareholders for their control block (a premium of up to 15 per cent over current market being allowed under the Act).

40 The significant split referred to by Law is the 5-for-1 split of the Class A shares and the split of the common into one common and four Class A shares. The result of that split was to create a share capital structure in Tire whereby the voting common shares constituted 8 per cent of the outstanding equity shares and the non-voting A shares constituted 92 per cent of the outstanding equity shares. From a control perspective, the Billeses, with 4 per cent of the equity, had full control. Hence, the evidence of all the parties involved in the 1983 reorganization, Will for Burns, Barron and Muncaster for Tire, Law as counsel to Tire, Matthews as counsel for Fred, and Fred himself, of a desire to provide take-over protection to the Class A shares as well as providing them the assurance of an independent board of directors and a reasonable share split ratio. It was the evidence of each of these parties that the protections noted were essential in seeking the approval of the Class A shareholders for the reorganization and for the subsequent sale of their Class A shares by the Billeses.

41 In his evidence, Law agreed that if satisfactory coattails were not provided, the Class A shareholders, especially institutional holders, might not have approved the reorganization.

42 It is also important to note the attitude toward, and the understanding of, the coattail of Fred and of his counsel, Matthews. The voting coattail that was ultimately adopted on the reorganization was drafted by Matthews and accepted by Law. It was Matthews' evidence that it was his understanding that Tire management wished to have take-over protection for the Class A shareholders. The concerns of the Billeses, as understood by Matthews, was that the take-over protection be structured in such a way that their control position could not be lost by any triggering of the coattail that was beyond their control. That is, there was to be no conversion of the Class A non-voting shares into voting shares unless the Billeses decided to sell their control position. As Matthews expressed it, the Billeses had just obtained control after considerable effort "... and in their eyes ... only after other people had attempted to deny that control position that they wanted so badly".

> They were very concerned, at this point in time, that this control position which they had finally acquired, not somehow be taken away from them.
>
> We made the point, and I think we made it quite strongly ... we did not want Class A shares to become voting, if the Billes block were not sold.
>
> ... they were concerned about any sort of provision that might allow a triggering of that coattail in circumstances which we might not contemplate at the time.
>
> For that reason, they wanted a very short, clear and concise coattail that spelled out the terms in very precise fashion, so that we all knew what we were dealing with and, in particular, we all knew that it wouldn't be triggered in any event that we perhaps, had not contemplated.

43 Matthews summed up the Billes' concern with respect to the coattail as follows:

> From our point of view, the concern was simply it [the coattail] not be triggered if the Billeses did not sell their control block.

44 Matthews also testified that he did not direct his mind to events that would trigger the coattail. In this, his evidence is consistent with that of Barron, Muncaster, Law and Fred. Matthews' testimony is as follows:

> I really did not direct my mind to what would trigger the coattail. Our position was to ensure that the coattail would not be triggered in circumstances other than the sale of the block that the Billeses held.

45 Matthews also testified that he never turned his mind to the type of offer made by Dealers — that is, a prorated bid for less than a majority of the common shares. Again, Matthews' evidence in this regard is consistent with the evidence of Barron, Muncaster, Law and Fred. That is, neither of the two chief officers of Tire, Tire's counsel, Fred, the spokesman for the controlling shareholders, nor his counsel, ever contemplated the type of take-over bid being made by the Dealers. The matter is summed up in Matthews' own words: "... we simply did not direct our mind to the possibility of a pro rata bid for less than a majority of the common shares."

46 It was also the evidence of Barron and Muncaster that they would not have approved of the terms of the reorganization if they had understood that the take-over protection being provided to the Class A shareholders would allow for the type of transaction contemplated in the Dealers' bid. Law's evidence was that if he had been aware that a pro rata bid for less than a majority of the common shares would not trigger the coattail, he would have "sent people back to the drafting board".

47 Will's evidence was to the same effect. That is, he would not have supported the reorganization and Burns would not have participated in the sale of Tire's shares had he been aware that the coattail would not be effective on a transfer of control by the Billeses at a premium in the type of transaction contemplated by the Offer.

48 Fred's testimony as to the events of 1983 and the take-over bid protection for the Class A shares is consistent with that of Matthews. Fred expressed indifference to the coattail at that time, except that it would not be triggered in any accidental way. The indifference arose from the fact that the Billeses had just acquired control and had no intention of selling out. Fred, in 1983,

was speaking for himself as well as David and Martha; a family split occurred in 1985 and as to most events in that year, Fred spoke and acted for himself and David only.

49 Fred's evidence was that he understood that management was "firm in its resolve" to have a coattail for the Class A shareholders. He said that he was prepared to go along with that, as long as "it be absolutely clear ... that it not accidentally be triggerable". He testified that he never addressed himself to a premium for control, but was only concerned that the clause not be triggered in such a way that it could put the Billeses out of their control position. Fred's understanding of the coattail, and the reason for its wording, is succinctly expressed in the following excerpt from Fred's examination-in-chief by Commission staff counsel:

> Q. What did you understand would be the circumstances that would trigger the coattail?
>
> A. That more than 50% of the shares would be sold and taken up, so it couldn't be accidental, because we own more than 51% of the shares.
>
> So, it had to be us selling those shares that would trigger this clause.

50 With respect to the current bid by the Dealers, the following dialogue ensued in examination-in-chief.

> Q. ... What I would like to know is what your understanding was of the circumstances under which it would be triggered and, most particularly, whether that would allow you to sell all of the company under circumstances where a majority of the shares were not sold, and not trigger the coattail.
>
> Did you think you could sell control and not a majority, and be on side with the coattail?
>
> A. In 1983, we didn't think about selling at all, period.

51 In cross-examination by Mr. Geller, Fred again expressed the point that he did not put his mind to the coattail provision because in "1983 we had no intention of selling our shares". Indeed, in answer to a question about "never contemplating the possibility of wanting to sell your shares at some future date, Fred replied "that is about true".

52 With respect to the operation of the coattail, Fred expressed his understanding in the following cross-examination by Mr. Geller:

> Q. ... You wanted to control the trigger, is that correct?
>
> A. Our group, with its shareholding of above 50%, as long as we held those shares, the trigger could not be released, so to that degree we controlled that trigger, yes.
>
> Q. ... certainly, if you and your brother and sister sold your 60% interest, then the take-over protection should have been there for the protection of the A holders, is that correct? ...
>
> A. We would expect the clause would be triggered should we sell our interest, that's correct.

53 Following the agreement as to the terms of the reorganization, a special meeting of each class of shareholders of Tire was held on December 15, 1983 to vote on the terms of the reorganization. The covering letter from Muncaster to the Class A and the common shareholders that accompanied the management information circular for the meeting contained the following paragraph with respect to the take-over protection that was being provided to the Class A shareholders:

> With a view to putting the holders of Class A shares in a position similar in effect to that of the minority holders of Common Shares in the event of a change in control of the Corporation pursuant to a take-over bid, a further amendment to the Articles is proposed. This amendment will provide that if a majority of the oustanding Common Shares of the Cor-

> poration are purchased pursuant to an offer made generally to all holders of Common Shares, the Class A Shares will become voting in all circumstances unless the same offer is made to the holders of Class A Shares.

The reorganization was approved by a majority of 97 per cent of the Class A shares represented in person or by proxy at the meeting.

54 Following the reorganization, the Billeses arranged with Marathon to sell 5 million Class A shares to realize approximately $58 million, the proceeds to be used to pay for the purchase of J.W.'s shares from the estate. A the same time, the company arranged to sell, on a private placement basis through Burns and Marathon, some 4,500,000 Class A shares to raise approximately $50 million for Tire's treasury. Both share sales were completed.

55 In order for the Billeses, as controlling shareholders, to be able to sell their shares to the public without filing a prospectus, they required an exemption order from the Commission pursuant to s. 73 of the Act. Counsel for the Billeses met with Salter, the then director of the Commission, and Harry Malcolmson ("Malcolmson"), associate director, to discuss the reorganization and the proposed sale of the Class A shares. A memorandum by William Sheridan ("Sheridan"), counsel for David, of the meeting contains the following sentences:

> We also stressed that the Class A shareholders would, as a separate group, vote on the proposal. This aspect, as well as the insertion of the anti take-over bid provisions, both were very warmly received and it was my distinct impression that without them, we would have met with much greater resistance.

56 In the result, staff recommended the granting of a s. 73 order. The Commission granted the application and, as noted, some 5 million Class A non-voting shares held by the Billeses as a result of the reorganization were sold to the public. The proceeds were used to pay down the financing obtained to purchase the common shares held by J.W.'s estate.

B. The Events of 1986

57 The solidarity of the Billeses with respect to continuing control of Tire changed in the fall of 1985. Fred testified that in the Fall of 1985, he first began to consider that something had to be done about the situation that had developed between himself and David, on the one hand, and Martha, on the other. They could not agree on matters with respect to the management of Tire, and hence, could not always act as a controlling group. As to actually selling their shares, the first time it was discussed was in April of 1986 upon receipt of a letter from Gordon S. Carpenter ("Carpenter"), the president of Shane Morgan Investments Limited.

58 Carpenter's letter refers to a meeting he had the previous day with Fred to discuss the fact that his client, Carling O'Keefe Limited ("Carling") was interested in purchasing Tire. The letter refers to the fact that Carling was interested in purchasing both classes of shares and would be prepared to offer three times market value for each common share. The Carling proposal, as recapitulated in a letter from Matthews to the Billeses, would have involved an offer for approximately 45 per cent of the Class A shares, the purchase of the Billeses' common shares at three times market value and a follow-up offer to the remaining common shareholders.

59 From early June forward, the evidence is that the Billeses took active steps to sell their stock; at the least, Fred, David and Martha wanted a valuation of their stock and Fred and David might be sellers at an acceptable price. On June 2, 1986, Fred met with Matthews and Matthews' partners, Peter Beattie ("Beattie") and Rene Sorell ("Sorell") to discuss the Carling offer. At that meeting, Sorell suggested that there was another way to structure the sale of the Billeses' shares. That alternative is set out in a letter dated June 3, 1986 from Matthews to Fred and reads as follows:

> We discussed a number of ways of doing this and concluded that some thought should be given to proposing to Carling O'Keefe or any other prospective purchaser that a pro rata offer be made to all common shareholders to purchase for a high multiple of market value 49% of the common shares. If only 49% of the common shares were purchased, the purchaser would acquire effective control of the Corporation without the necessity of purchasing Class A shares.

60 The reason that the Sorell suggestion could work was, as Matthews pointed out in his letter of June 3, that the coattail provision depended upon "a majority of the common shares then issued and outstanding" being tendered and taken up pursuant to a takeover bid. Accordingly, a bid to all common shareholders for only 49 per cent of the outstanding common shares could not result in a majority of the outstanding common shares being tendered and taken up. With respect to Sorell's 49 per cent scenario, Matthews testified that "we were surprised, but it struck us as a very interesting idea." When asked why he was surprised, Matthews replied:

> Simply, as you know from evidence to date, I was involved at the time that coattail was drafted and it was not something that I had contemplated, and I certainly did not think anyone else had contemplated either.

61 In his letter of June 3, Matthews also suggested to Fred that the Billeses retain an investment dealer to ascertain if other purchasers were interested in buying their control position. As a result, a meeting was held at the offices of Merrill Lynch Canada Ltd. ("Merrill") on June 11, 1986. Fred was present at that meeting for the Billeses. It was clear from notes of the meeting of June 11, and a memorandum to file from E. Duff Scott ("Scott"), the then vice-chairman of Merrill, that the discussions related to a number of possible sale plans aimed at obtaining the maximum possible price for the Billeses' shares. Scott's memorandum refers to the 49 per cent scenario as one possibility.

62 At the bottom of p. 4 of the notes of the June 11 meeting at Merrill, there is a heading entitled "Mandate" and then the words "Maximize Value to Billeses" and "Cultural Fit Consistent to Canadian Tire". Matthews testified that these two goals were maintained throughout the period; that is, in Matthews' words, "the Billeses wanted to maximize the value of their shares and they wanted to find a purchaser who would be culturally compatible ... with the traditions of Canadian Tire." On June 23, 1986, William Biggar, ("Biggar"), a vice-president and director of Merrill specializing in acquisitions and mergers, telephoned Tull Gearalld, head of mergers and acquisitions in the Merrill, Lynch Inc., New York office. Biggar's notes of the conversation contain the following passage:

> Skimming value from Class A to get more for common. How do we get indemnification from the Corporation. Fact that Class A vote shifts with sale of control of common underscores the problem — clearly, the Class A are intended to have take-over protection.

63 On June 25, 1986, a meeting took place in Merrill's offices attended by Matthews, Beattie, Sorrel, the Billeses, Scott and Biggar. Scott is noted as raising "two possibilities — get bid for *all* holders or — get best deal". Scott is also quoted as stating "we don't think that any purchaser is going to be terribly interested in getting into controversy."

64 Matthews testified that he presumed that Scott was referring to the issue of making a bid for the common shares only and that the kind of controversy he had in mind was "the sort of controversy that is going on right now". The notes also speak of getting a range of reasonable value and one of the matters that Merrill was ultimately retained for was to value the Billeses' shares. Matthews testified that the Billeses were not, at that point, entirely certain they wanted to sell and Merrill was brought into the picture to ascertain what the shares might be worth. The Billeses could then decide whether they wished Merrill to solicit offers.

65 During this time, negotiations continued with Carling. On July 3, 1986, the Billeses wrote to Carling and asked them to make a formal offer. Further negotations ensued and, in the result, Rod McInnes, the then chief executive officer of Carling, wrote to Fred on September 22, 1986 indicating that Carling was no longer interested in purchasing control of Tire.

66 Biggar testified extensively as to his involvement in the sale of the Billeses' shares and the events leading up to the bid by the Dealers. Although meetings with Merrill continued throughout the summer, Merrill was not actually retained until September 19, 1986 and the formal retainer, by the Brothers, is dated October 14, 1986. Biggar was clear that Martha was particularly interested in having a valuation of her shares. On October 2, 1986, Biggar advised the Billeses of a range of value of between $67 and $91 per common share. On October 3, 1986, Martha's solicitor advised Merrill that Martha did not wish to sell her shares.

67 It was at this time that Fred and David decided to sell their shares. The price they settled on as being the price they

wanted for their shares was $99.95. Biggar described that as "Fred and David's decision" and said that he considered that price realistic. Merrill then proceeded to draft and circulate an information memorandum to potential Canadian acquirers of the Tire shares.

68 One of the recipients of the Merrill memorandum was Allen Warren ("Warren"), the president of Dealers. A memorandum to file by Matthews of October 21, 1986 indicates that Gordon Capital ("Gordon") had informed Biggar that they had been talking to Warren and that the Dealers might be interested in making a bid. A memorandum to file dated November 5, 1986 by Matthews indicates that at a meeting at Merrill attended by Scott, Biggar and the Brothers, it was concluded that "the most likely purchaser would be the Dealers. ..."

69 A memorandum to file of November 6, 1986 from Matthews records that on November 5 he received a call that Fred was meeting with Bob Fung ("Fung"), a Gordon representative, at Gordon's offices and he proceeded to join them. Fung reported that the Dealers had engaged Gordon and that, at that point, the Dealers were less interested in buying shares than:

> ... in achieving *stability* by entering into some sort of contract with Fred and David which would give them the power they desire. If necessary, the Dealers would be prepared to buy some shares, but would prefer not to buy all of the common shares from Fred and David.

Matthews testified that Fred thought it unlikely that an agreement could be reached among the Billeses and that he was more interested in selling than in remaining a shareholder.

70 A meeting was held at Merrill's offices on November 7 to discuss the sale of the Brothers' shares, with Dealers being considered the likeliest purchaser. It was at that meeting that Merrill suggested that notice be given to Martha under the Aldamar agreement as any possible purchaser of the Brothers' shares would be concerned about Martha's right of first refusal. Accordingly, Fred and David gave notice to Martha on November 7, 1986.

71 As there was a possibility that Martha might purchase their shares, the Brothers had to set a price that would be satisfactory to them if Martha decided to buy. That is how the $100 per share price came to be set. To recapitulate, Biggar, after a study of the matter, gave the Brothers a price range of between $67 and $91 per common share. The Brothers then chose a price of $99.95 per share.

72 In the notice to Martha, the price is set pursuant to a formula. Biggar testified that he was the person who drafted the formula. A formula was required because there was no certainty as to who the ultimate buyer would be and all possibilities had to be covered. The price had to be set such that it would be satisfactory to the Brothers if Martha were a buyer. If she were not, the price had to be satisfactory to the Brothers for sale to a third party at or above the price set under the formula so that they would not have to go back to Martha pursuant to the terms of the Aldamar agreement. The formula in the notice to Martha was as follows:

$$\text{Price per share} = \frac{\$140 \text{ million} - 12\,(1{,}400{,}767 - x)}{x}$$

where x is the number of common shares to be sold by the Vendors.

73 The most helpful description of the operation of the formula is contained in the notice itself. It provides as follows:

> (This formula has been designed to permit the Vendors to sell and a purchaser to purchase, at its option, a number of common shares to provide to the purchaser the greatest possible amount of flexibility in acquiring shares of the Corporation. It will be noted that the formula, notwithstanding the number of shares purchased thereunder, will result in the Vendors realizing upon the sale of their common shares hereunder, and a subsequent sale of their remaining common shares (if any) at $12.00 per share an aggregate of $140 million for their common shares of the Corporation.)

74 As the number of shares offered for sale by the Brothers is an aggregate of 1,400,776 shares, the formula would operate as follows:

75 Assume one common share is sold by the Brothers

```
Price per share = $140 million - 12 (1,400,767 - 1)
                  ---------------------------------
                                1
                =  $140 million - 12 (1,400,766)
                   -----------------------------
                                1
                =    $140 million - 16,809,192
                     -------------------------
                                1
                =          $123,190,808
```

The result is that the one common share is purchased for a price of $123,190,808. If the balance of the common shares (i.e., 1,400,766 common shares) are sold as common shares, or more likely, converted into Class A shares and sold into the market at $12, the resulting consideration received is $16,809,192. The aggregate consideration received by the Brothers would therefore equal $140 million (i.e., $123,190,808 under an offer and $16,809,192 as a result of market sales). Of course, the economics are such that no purchaser would purchase one share. Accordingly, Martha would purchase all the shares or none. If she purchased all the shares, the formula would work as follows: Assume 1,400,767 shares are purchased by Martha from the Brothers

```
Price per share = $140 million -- 12 (1,400,767 -- 1,400,767)
                  -------------------------------------------
                                 1,400,767
                =           $140 million -- 0
                            -----------------
                                 1,400,767
                =         $100 per share (approx.)
```

In the event, Martha rejected the notice as not being in accord with the terms of the Aldamar agreement.

76 It is critical to note that under either scenario, the Brothers receive $99.95 per share for all of their shares, albeit with the sale in the market of the tag end of their common shares under the first scenario. One hundred dollars per share is what the Brothers decided was the consideration they wished for a sale of all their shares, after hearing Biggar's estimate of value of between $67 and $91 per common share.

77 The evidence is clear that the Brothers' desire was to sell all of their common shares and to realize a per share consideration of $100. Matthews, who was acting for the Brothers throughout, testified with respect to an internal memorandum prepared by his partner, Sorrel, which formed the basis for discussion at a meeting he attended on October 24, 1986. The memorandum is entitled "BID STRATEGIES: SALE OF BILLES INTEREST IN CANADIAN TIRE CORPORATION, LIMITED". Under the heading "BILLES OBJECTIVES" appears the sentence "sell all common shares at maximum price obtainable". In his testimony, Matthews stated that "... their [the Brothers] objective throughout was to sell all of their shares at the maximum price obtainable."

78 The thinking behind the formula, and the necessity for flexibility, was put clearly by Matthews in his examination-in-chief:

We wanted to structure a formula which would permit the Billeses to sell any number of shares, which would result in them

> receiving a total of $140 million for all their common shares, and it is a complicated formula, because you have to assume that any shares that are not sold to a bidder ... would then be sold on the market and you have to decide what sort of price you would get for those shares, and it was assumed somewhat arbitrarily that you might get $12.00 for those shares on the market. The assumption being that the price would be similar to the A's at that time. So that is what the formula is designed to ensure.

A total of $140 million for all the Brothers' common shares values each share at $100.

79 With respect to the necessity for flexibility in the formula and as to whether it was anticipated that Martha would be a purchaser for all the Brothers' shares, and what the formula was intended to accomplish regardless of who the purchaser was, the following dialogue with Matthews during his examination-in-chief is instructive:

> Q. Now, the flexibility that you have mentioned, Mr. Matthews, you said would apply to either Martha or to any other purchaser and you mentioned I think, as another purchaser, the dealers?
>
> A. Yes, sir.
>
> Q. Was it the expectation at the time that the notice was given that Martha would want to take up less than all of the shareholdings of her brothers, if she exercised her rights under the notice?
>
> A. I don't believe there was.
>
> Q. So that to the extent there was flexibility, you were focussing on flexibility vis-a-vis the dealers?
>
> A. Or any other purchaser.
>
> Q. Or any other purchaser?
>
> A. Yes, sir.
>
> Q. Was the question of flexibility under the formula somehow related to the question of the coat-tail provisions?
>
> A. It certainly would be if the dealers were the purchaser.
>
> Q. How would that be?
>
> A. Well as we have already discussed, we believed that the dealers could purchase 49 per cent of the common shares under a pro rata offer without triggering the coat-tail.
>
> Q. Yes, and in those circumstances, Fred and David wanted to be paid for all of these shares on the residual value basis?
>
> A. Could you restate the question?
>
> Q. At the time you gave the notice, if the dealers only wanted to follow what we have called the Sorell scenario and take up 49 per cent of the shares, this notice appears to me to operate in a way that results in Fred and David receiving $70 million, based on an assumption of $100 per share for their entire holdings?
>
> A. In effect, that is correct.

Q. What I would like to know is whether or not the formula was structured in that way in recognition of the possibility or the likelihood or at least some consideration that the dealers might want to follow the Sorell scenario?

A. Well, it was certainly a possibility and the reason the flexibility was required was that we did not know to whom at that point we would be selling, and if we were selling to bidder A, bidder A may want 100 per cent and bidder B may want 100 per cent, and the formula allows us to sell any number of shares to any bidder, and that is the reason for the flexibility.

Q. And still receive the same amount of money?

A. That's correct.

Q. As I understand it, this same formula is the formula which ultimately appears in the agreement between the brothers and the dealers?

A. That's correct.

Q. It also appears in the lock-up agreement between the brothers and the dealers?

A. I'm sorry, What was your question immediately before the last one?

Q. The formula that we are looking at here under the Aldamar notice is the same formula that becomes part of the deal between the brothers and the dealers?

A. That is the lock-up agreement?

Q. Yes.

A. Okay. Yes, sir.

80 On November 21, there was a meeting at Gordon's offices to discuss the purchase by the Dealers of the Brothers' shares. It was Matthews' testimony that at that meeting there was an agreement in principle to work towards a lock-up agreement ith respect to an irrevocable deposit of the Brothers' shares and a pro rata take-over bid for 49 per cent of the common shares. With respect to how a pro rata bid for 49 per cent of the common shares came to be the preferred route for the Dealers' bid for control, Matthews testified that it was his understanding that "... one of the advisors to the Dealers had come up with it [a 49 per cent pro-rata bid] quite independently of Mr. Sorrel; so it was on the minds of both parties some days prior to this meeting."

81 On November 22, 1986, the Brothers entered into a lock-up agreement (the "Lock-up") with Dealers. Under the terms of the Lock-up, Dealers agreed to make a take-over bid for 49 per cent of the common shares of Tire. The consideration for each purchased share under the take-over bid is stated to be an amount determined in accordance with a prescribed formula. The formula used is identical to the formula used in the notice given to Martha under the Aldamar agreement, varied only to take account of the realities of the take-over bid. The formula is as follows:

$$\text{The price per share} = \frac{140{,}000{,}000 - 12\,(1{,}400{,}767 - x)}{x}$$

$$x = 1{,}400{,}767 \text{ times } \frac{1{,}690{,}500}{\text{Number of common shares of the Corporation tendered in response to the Bid}}$$

In this formula, x represents the number of common shares to be sold. Since the offer proposed to be made by Dealers was for 49 per cent of the outstanding common shares, it was not possible to know in advance exactly how many of the Brothers' common shares would actually be taken up and paid for under the offer. That number would vary with the required pro rating which in turn would be dependent on the total number of shares tendered. In the formula, 1,690,500 is 49 per cent of the issued and outstanding common shares of Tire. The effect of defining x in that way is simply to determine the number of common shares held by the Brothers which would be purchased pursuant to the Offer. That number then plugs in to the original formula contained in the notice to Martha and has the same effect as that described above, that is, providing an aggregate consideration to the Brothers of $140 million.

82 Pursuant to the terms of the Lock-up, the Brothers agreed to irrevocably deposit their shares under the take-over bid to be made and not to withdraw their shares form the bid. The Dealers, for their part, agreed to a deposit of $15 million, such deposit to be applied to the purchase price payable for the shares under the takeover bid. The deposit is divided into two portions, one of which is in the amount of $7,500,000 and is non-refundable, and one in the amount of $7,500,000 which is refundable. If the bid is not made, or the shares tendered are not taken up and paid for, the refundable part becomes non-refundable. There are two exceptions to the refundable deposit becoming non-refundable because of the bid not being made or the tendered shares not being taken up and paid for.

83 The first exception is any undisclosed action resulting in a material change in the affairs of Tire. The second is any ruling or other action by a Court or a regulatory authority being issued which has the effect of restraining the making of a take-over bid or the taking up and paying for tendered shares. An exception to the second proviso with respect to a ruling of a Court or a regulatory agency is a ruling or order issued "as a result of the pricing mechanism and/or the manner of calculating the number of common shares to be taken up and paid for under the bid". In other words, the parties clearly recognized that the structure of the bid, that is, the very high price of being offered for 49 per cent of the common shares, was going to be controversial and the risk of a restraining order was placed on the Dealers.

84 On December 2, 1986, Martha entered into a lock-up agreement with Dealers similar to that entered into by the Brothers, with one important exception. The exception was as to the deposit. Under her lock-up agreement, the deposit was $15 million and was non-refundable. On December 8, 1986, the Lock-up agreement with the Brothers was amended so that the deposit paid to them became one $15 million sum, all of which was made non-refundable.

85 On December 9, 1986, Dealers made their Offer for 49 per cent of the outstanding common shares of Tire at $160.24 per common share. It is clear that the price of $160.24 was set on the assumption that all holders of common shares (other than Dealers) would tender all their shares to the Offer. That is the only reasonable assumption, given the fact that the price being paid under the Offer for the common shares was some 400 per cent greater than the price the common shares were trading at just prior to the announcement that the Dealers would make a take-over bid. The assumption is also reasonable on the basis that the Lock-up agreements, which were disclosed in the offering circular, assured the success of the Offer through the tendering of the Billeses' 60.9 per cent control block.

86 If one assumes that all holders of common shares (other than Dealers) would tender their shares to the Offer, one can then calculate what the Billeses will receive under the Offer and what the total received by them will be on the complete disposition of their holdings, that is, including the conversion of their remaining common shares to Class A shares and their sale. The total number of common shares held by the Billeses which would be purchased under the Offer is 1,245,981, or approximately 59.3 per cent of their holdings (since Dealers already own 600,650 common shares, or approximately 17.4 per cent of the common shares outstanding, the total number of shares available for tendering to the Offer is correspondingly reduced, resulting in a pro rata take-up of 59.3 per cent. The result is as follows (figures are rounded off):

No. of shares taken up under the Offer: 1,245,981

Price paid per share: $160.24

Total consideration received under the Offer: $200,000,000

No. of shares remaining: 855,169

Assumed conversion to Class A and sale: $12.00

Total market consideration: $10,000,000

Total consideration for all shares: $210,000,000

Accordingly, the Billeses would receive approximately $100 for each of their common shares. If less than all the common shares of Tire were tendered under the Offer, the total consideration payable to the Billeses would increase proportionately.

87 The relationship of the price per share under the Offer and the formula in the notice given by the Brothers to Martha under the Aldamar agreement, which formula, to repeat, was structured to produce a sales value to the Brothers of $100 per share for all their shares, is set out on p. 7 of the offering circular. In explaining the terms of the Lock-up agreement with the Brothers, and the formula set out in the notice given by the Brothers to Martha, the offering circular notes that, pursuant to the Brothers' Lock-up agreement, Dealers "agreed to pay a purchase price under the bid at least equal to the price determined by the Formula".

88 As noted, the Lock-up agreement entered into on November 27, 1986 between Dealers and the Brothers clearly recognized that the structure of the bid, particularly the pricing mechanism, would be controversial. Hence, although the original $7,500,000 refundable deposit was made refundable if a Court or a regulatory agency restrained the Offer, an exception was built in if a restraining order was based on the pricing mechanism that is, the extremely high premium for 49 per cent of the common shares. Matthews, in cross-examination, agreed that "the lawyers", "the advisors to both the vendors and prospective purchasers", "the vendors themselves", and "the Dealers" went into the transaction, as it was put to Matthews by Mr. Fisher, "with their eyes wide open as to the risk of controversy". And Matthews agreed that the controversy was "... with respect to the allegation of unfairness to the Class A shareholders".

89 In his testimony, Fred agreed, on cross examination, that his lawyers and advisors told him that there would likely be some controversy with respect to the Dealers' Offer.

90 Two other matters raised in the evidence require to be dealt with. The first is as to the trading price of the common shares relative to the Class A shares from the time of the reorganization in 1983 until control of Tire was in play early in the summer of 1986. The second matter relates to the effect on the marketplace that a decision to issue a cease-trade order would have. The evidence on these matters is better dealt with in the sections that follow on "Argument" and "Reasons for Decision".

V. Argument

A. Commission Staff

91 The essential argument of Commission staff was that the Offer, when seen in light of the Billeses' desire to sell their control block from the late spring of 1986 onwards, and in the context of the share capital reorganization of Tire in 1983, and the reasons for providing take-over bid protection to the Class A shareholders, was contrary to the public interest as that term is used in s. 123 of the Act. Counsel submitted that the Commission has jurisdiction under s. 123, notwithstanding that there has not been a specific breach of the Act, the regulations or a policy statement, and that the nature of this transaction is contrary to the public interest. The jurisdiction of the Commission to act in this case was said to be based on the principles set out by the Commission in its decision in *Re Cablecasting Ltd.*, [1978] O.S.C.B. 37.

92 As to the transaction itself, it was argued that the Offer, and the Billeses' agreement to tender to it pursuant to the Lock-up agreements, was clearly abusive of the public trading markets and ought to be restrained. Counsel put the proposition that the agreements between the Billeses and Dealers under which the Dealers would bid $160.24 per share for 49 per cent of the common shares, constituted an artificial transaction cleverly constructed to circumvent the take-over protection granted to the Class A shareholders in 1983. The bid for 49 per cent ensures that "... a majority of the common shares then issued and outstanding" will not be tendered and taken up pursuant to the Offer and the coattail therefore will not be triggered. At the same time, the extraordinarily high premium being paid for the 49 per cent will ensure that the Billeses, once they have converted their remaining common shares to Class A and sold them, will receive what they wanted for the sale of their entire control block of 60.9 per cent that is, $100 per share.

93 Counsel argued that the Commission has jurisdiction to intervene on the sole ground that the transaction, as structured, is contrary to the public interest as it denied to the Class A shareholders the rights that were granted to them in 1983 in order to induce them to approve the terms of the reorganization. Moreover, take-over bid protection was an important element in the subsequent sale of Class A shares by the Billeses to finance their purchase of control and important to the institutional investors who purchased Tire's sale of Class A shares to finance its internal operations. The coattails were added in 1983 to induce the Class A shareholders to support a reorganization that saw the Class A shares split 5-for-1 and saw the common shares split into one common share and four Class A shares. The result of that split was to vest voting control in 8 per cent of the equity, with the Billeses controlling 4 per cent, and with the remaining 92 per cent of the equity placed in the non-voting Class A shares. In those circumstances, management considered take-over bid protection for the Class A shareholders to be essential. Moreover, Tire's financial advisors, Burns, considered such protections important for the sale of Class A shares into the marketplace. A sale of their Class A shares was essential to the Billeses' plan, as they wished to raise some $56 million through such a sale to pay a substantial part of the $73 million purchase price for J.W.'s shares from the estate.

94 Seen in light of the reasons for the take-over bid protections being put in place in 1983, the Offer and the Billeses tendering their shares to it was contrary to the public interest, in the sense of being contrary to the fair operation of this province's capital markets. To permit the controlling shareholders some three years later to enter into a transaction that is patently designed to allow them to sell their control block for the entire consideration that they want, but to structure it in such a way as to avoid engaging the operation of the take-over bid protection provided to the Class A shares, would be to permit an abusive transaction. That, it was argued, is contrary to the public interest and the cease-trade power under s. 123 should be exercised.

95 As to the Dealers, they could not separate themselves from the Billeses by reason of their desire to purchase control in the most efficient and least costly manner possible, which they attempted to do through the Lock-up agreements entered into with the Billeses and their subsequent Offer. In those circumstances, it was argued, the Dealers could not separate themselves from the Billeses and the duty of fairness that the Billeses, as controlling shareholders of Tire, owed to all the Tire shareholders.

96 Counsel also argued that the Billeses were in breach of their fiduciary duty owed to the minority shareholders of Tire by virtue of their position as majority shareholders, insiders and directors of Tire. As such, they are held to a high standard of integrity and good faith, as those standards have been articulated in recent years by the Ontario courts and by the Supreme Court of Canada. The Billeses control the corporate mechanism, and they were involved in setting the terms of the coattail in 1983. Indeed, the coattail was, in a real sense, put in place to advance them in terms of securing the approval of the Class A shareholders to the reorganization and in providing a receptive market for the sale of their shares. For the Billeses to engage knowingly in 1986 in a transaction which is specifically designed to circumvent the coattail while, at the same time, providing them the total consideration that they want for sale of their control block, is a breach of their duty as controlling shareholders and directors. That breach of duty is further grounds to support the case for a cease-trading order being in the public interest.

97 Mr. Campion, on behalf of Tire's deferred profit-sharing plans, supported counsel for the Commission in his call for a cease-trade order, as did Mr. Shay for the TSE and Messrs. Fisher, Geller and Riva for the Class A shareholders.

B. The Respondents

98 Fred, Martha and David were each represented by separate counsel, as were the Dealers. Mr. Wright argued on behalf of David that the coattail was clear and unambiguous. The evidence was that it was represented accurately, not only in corporate documents over the past three years, but also in market reports and press reports dealing with Tire. Whenever the coattail protection that was provided to the Class A shareholders was referred to, it was always referred to in the context of a majority of the outstanding common shares having to be tendered and taken up before the coattail would be triggered. What was wanted in 1983 was protection from the sale of the Billeses' 60 per cent control block, and that is exactly what was given. No one ever thought of a sale of less than a majority of the shares, and no one could complain at this date.

99 With respect to the argument about the public interest, as that term is used in s. 123 of the Act, Mr. Wright argued that the Class A shareholders are not in any way the public. Theirs is a private interest, he argued, and if they feel they have a legitimate complaint against the controlling shareholders, they should litigate that matter in the Courts. This was not an appropriate case for the exercise of the Commission's jurisdiction. Moreover, Commission staff counsel did not point to any contravention of the Act, the regulations or published policy statements. Nor was there any allegation of fraud. On what basis then would the Commission move to intervene?

100 In Mr. Wright's submission, the Commission's decision in *Cablecasting*, supra, required the finding of a breach of the Act, or the regulations or a policy statement. The Commission staff simply had not provided an adequate foundation for intervention. Mr. Wright also argued that for the Commission to intervene in this case would be injurious to the public markets in that it would create uncertainty as to the effect of public documents. It is crucial, he submitted, that documents must be taken to mean what they say. A decision to intervene here would be in the face of the clear words of a document that has been in the public marketplace for some three years and speaks of the requirement of "a majority ... being tendered and taken up".

101 With respect to non-voting shares and coattails, Mr. Wright made the point, as did Mr. Heintzman on behalf of Fred, that the Commission has twice reviewed the use of non-voting shares in the marketplace, the latest review taking place in 1984. On each occasion, the Commission has declined to interfere with their use, although it has put in place requirements of approval by a majority of the minority and greater disclosure in the case of a corporate reorganization that sees a company move to a voting/non-voting structure. Moreover, and most importantly, the Commission has declined to mandate coattails, although in an interim policy statement in 1984, it did so. The Commission resiled from that position after receiving comment from issuers and investors. Accordingly, the position today is that non-voting shares are allowed and coattails are not required. Many issues of non-voting shares have coattails, many do not, and within those that do, there are many different types of clauses. For the Commission to interfere in this case would be for it to say, in effect, that coattails are required. Moreover, it would be saying that, with respect to coattails that are in place, the Commission will scrutinize them all in the face of a take-over bid to see that the control premium is shared with the non-voting shareholders.

102 With respect to the allegation that the Offer is an artificial transaction to allow the Billeses to sell their entire block at the price they wanted, Mr. Wright argued that the evidence was clear that the formula was created by Biggar in November 1986 to allow the Brothers to give the required notice to Martha under the Aldamar agreement so that they would thereafter be free to sell if Martha did not purchase. The formula was constructed so as to give to the Brothers the maximum flexibility in seeking a purchaser for their shares. That was perfectly appropriate conduct, he argued, and it was not the least artificial when it was carried forward into the Lock-up agreement with the Dealers. He also strongly emphasized that the formula is not contained in the Offer; the Offer is for a fixed price. The Dealers were never a purchaser for all; their financial situation did not allow them to purchase all of the outstanding common shares and their Offer is perfectly legal in an attempt to secure a control position.

103 Mr. Heintzman, on behalf of Fred, made five basic submissions. The first echoed Mr. Wright's submission that what the complainants, that is, the Class A shareholders, were really seeking was a private remedy more appropriate to the Courts than to a hearing before the Commission. He characterized it as the Class A shareholders wanting a declaration of a right that they were never entitled to — that is, to participate in a take-over bid.

104 The second submission was that to invoke the holding in *Cablecasting* it was necessary to show a breach of the Act or

of a policy statement issued thereunder. Commission staff counsel have not shown any such breach, other than that the allegation that the Lock-up agreement itself constituted a take-over bid and a follow-up offer was therefore required.

105 Third, it was argued that the Commission has stated, after public hearings, that non-voting shares are permissible, and may be issued and sold in Ontario. Moreover, the Commission has not mandated coattails. The only requirement under the Act is that a take-over bid must be made for the voting securities of a company in circumstances outlined in the Act. There is no statutory obligation to make a take-over bid for non-voting shares. The Commission has spoken in Policy 1.3 with respect to non-voting shares and it ought not, through the medium of the hearing and the decision asked for, amend that policy statement. If it wishes to do that, the appropriate way is through public hearings and amendment to the statute or to Policy 1.3.

106 With respect to the events of 1986, Mr. Heintzman argued that the Billeses breached no duty to the Class A shareholders. They acted on the advice of their professional advisors and what they did was perfectly legal and within the terms of what was permitted by the Act and under the share attributes. With respect to the coattail here, and all other coattails, the controlling shareholder would always control the triggering mechanism. There is nothing unique in that, and the Billeses were perfectly within their rights to participate in a transaction structured so as to not trigger the coattail.

107 With respect to the transaction itself, Mr. Heintzman argued that is not the least artificial and represents real value. The Dealers were offering $160.24 for 49 per cent of the outstanding common shares. That is not an artificial transaction, nor does it represent a skimming of any value from the Class A shares. The economic value of what the Billeses had to sell was $160.24 and the economic value of what they would have left would be $12. The Dealers are offering one price for a certain percentage of the shares. The remaining shares would have an estimated value in the market. There is nothing artificial about that transaction and the value under the Offer and the value of what remains in the market are both real values.

108 Mr. Heintzman also stressed the certainty point and the critical necessity in the marketplace for legal documents to mean and be interpreted according to the plain words used. There are a great variety of coattails attached to non-voting shares in the marketplace. Is the Commission to engage in the business of interpreting each coattail to ensure fairness to non-voting shareholders whenever there is a take-over bid at a premium in which the non-voting shareholders do not participate? The Commission's decision in *Cablecasting* only allows for intervention in the most serious of cases. If there is a major public policy issue, then the Commission should hold a public hearing and publish a draft policy statement for comment.

109 Mr. Lederman, on behalf of Martha, submitted that she must be considered in light of her own conduct apart from her brothers. In 1983, her intention was the same as that of her brothers, that is, to remain in control of Tire for the foreseeable future. A sale was never contemplated, particularly at the time that control had at last been secured by A.J.'s family. In late 1985, Fred and David began to consider the possibility of selling, and in June 1986 Martha joined with them in talking with Merrill, but only to obtain a valuation for her shares. She wanted to know the value of her shares as, under the Aldamar agreement, she could possibly be a buyer of her Brothers' shares. On October 3, 1986, one day after having heard from Biggar his estimate of the range of value for the common shares, Martha wrote to the Brothers indicating that she did not wish to sell and did not wish to be associated with them in any negotiations for sale. Subsequent to that date, the Brothers then retained Merrill to seek purchasers. On October 15, 1986, they issued a press release indicating that their shares were for sale.

110 Martha's reluctance to sell caused the Brothers a problem in terms of a potential buyer wishing to obtain control. Accordingly, the Brothers gave notice under the Aldamar agreement with the price at which they offered to sell being set under the formula constructed by Biggar. Of course, the Brothers were also caused a problem by the Aldamar agreement in that Martha had a first right to buy their shares if they wished to sell, and the price, therefore, had to be one that was acceptable to them if Martha should decide to buy.

111 Mr. Lederman argued that Martha, faced with the Lock-up, had to make the best deal she could for herself. In the circumstances, Martha became an isolated 20 per cent holder of the common stock. As such, she was in an exposed position. It would be unrealistic to expect her to do anything else other than to make the best possible bargain she could. Nothing she did, it was argued, has caused the Class A shares any prejudice, nor did any of her actions constitute a breach of duty owed by her, as

a 20 per cent shareholder, to her fellow shareholders.

112 The economic reality was that Martha would have had to tender into the Dealers' bid in any event, and therefore she is like any other common shareholder. Moreover, Tire's directors have recommended acceptance by the common shareholders and Martha's agreement to enter into a Lock-up with the Dealers ought to be seen in that light. Accordingly, it was argued, Martha ought not to be made part of any cease-trade order if such an order were to be issued. The power to issue a cease-trade order under s. 123 is a very broad power, and ought not to be imposed on individuals indiscriminately. Martha, Mr. Lederman contended, ought to be looked at separately and her position analyzed separately. If that is done, there is no basis for her shares being cease-traded.

113 Mr. O'Connor, for the Dealers, echoed Messrs. Wright and Heintzman's arguments that the Commission was not the appropriate forum to settle the issue between the Class A shareholders and the Billeses and the Dealers. He argued that the cease-trade power under s. 123 is too blunt an instrument and its imposition in this case would prevent Dealers from completing a legal take-over bid. Such an action by the Commission would put the Dealers in substantial financial jeopardy as a result of entering into a take-over bid that complies with the law in this province.

114 Mr. O'Connor also stressed the argument with respect to the necessity for certainty in the interpretaton of documents that form the basis for investor decisions. He noted the new types of securities that are constantly being created in today's marketplace. Is the Commission to be put in the position of rewriting deals each time a shareholder comes before it and says, in effect, "tell me what the documents mean and construe them in a way that is fairest to me."? The Commission ought not to go down that road by interfering in this transaction which is within the clear wording of the Class A share attributes and complies fully with the terms of the Act, the regulations and policy statements.

115 Mr. O'Connor stressed that there was no evidence of any cooperation or collusion or facilitation by the Dealers in any scheme to sell their shares by the Billeses. The uncontradicted evidence was that the Dealers' primary concern was to provide stability with respect to the future ownership of Tire. No other group had anything like the same concern in the future stability and prosperity of Tire as did the Dealers. Accordingly, they decided that their best interests lay in purchasing the Billeses' control block. The medium to accomplish that purpose was a take-over bid that complied with the Act. To now impose a cease-trade on that bid would be unfair to the Dealers and would cause them substantial financial injury.

116 Mr. O'Connor also stressed that the Billeses' desire to sell, and the price they wanted for their shares, which price was initially set in the formula included in the notice to Martha under the Aldamar agreement, were all matters that were decided independently of the Dealers. The Dealers did not enter the picture until late October 1986. All negotiations between the Billeses and the Dealers were at arms-length. The Dealers themselves, and this is confirmed by Matthews' evidence, had arrived at at least two ways of bidding for control of Tire without triggering the coattail, one of which was the 49 per cent scenario that had also been arrived at independently by the Billeses' advisers.

117 Mr. O'Connor noted that the price in the bid is a fixed price, and in no way depends upon the formula. It is important to remember that the Dealers initially made their agreement with the Brothers, and Martha had to be dealt with in terms of the Aldamar agreement and the fact that the Brothers had given notice to Martha under the Aldamar agreement with the formula price included. Accordingly, the Dealers were, in effect, given a minimum price insofar as their deal was initially with the Brothers. From the Dealers' perspective, it was submitted, there is no artificiality whatsoever in the price. They are offering to pay $160.24 per common share and, if the bid is allowed to proceed, that is the price they will pay for up to 49 per cent of the common shares tendered and taken up. That is the Offer, and that will be the factual and economic reality if it is allowed to proceed.

118 Mr. Dey, also for the Dealers, emphasized the wide variety of coattail provisions that are attached to outstanding non-voting shares. Moreover, each take-over protection is designed to deal with the particular circumstances of each company. Here, the Class A shares do have some protection and they were designed to deal with the specific circumstance of the Billeses' 60 per cent control block. Accordingly, the protection granted here speaks of "a majority" of the then outstanding shares being

tendered and taken up. The coattail provision does not purport to offer take-over bid protection in all circumstances and ought not to be so interpreted.

119 With respect to the argument of artificiality in the transaction, Mr. Dey submitted that the Dealers assumed that the variable in the formula, the number of shares tendered, would be substantially all of the common shares bid for. If the Billeses are receiving the consideration that they hoped to receive upon the disposition of their entire block of shares, it is because they were "offered a price" which the Dealers knew would be accepted by the Brothers in the circumstances. That price was originally set with the Aldamar agreement in mind and later served as the basis for the price included in the bid. With respect to the Offer itself, however, the price does not vary with the number of shares tendered; it is a fixed price bid. The Dealers will acquire 49 per cent of the outstanding common shares if the Offer is successful. The price that will be paid for those shares is $160.24 per share. Those shares not taken up and paid for will remain the property of the owners. In no sense can it be argued that Dealers have really acquired 100 per cent of the Billeses' holdings, and from the Dealers' perspective, the Offer is not in the least artificial.

120 With respect to the public interest, Mr. Dey submitted that it is contrary to the long term interests of the marketplace for the Commission to intervene in this case. He echoed the point made by his colleagues that it is critical that investors in capital markets be able to rely upon the provisions and attributes attached to publicly traded securities. The Commission cannot be placed in the position of being expected to redress grievances every time there is a group of disappointed investors. There would be pressure to intervene in many situations other than those concerning take-over bid protection.

121 With respect to the issuance of a cease-trade order, Mr. Dey emphasized that the cease-trade power is an extraordinary one, and ought to be utilized in only the most appropriate cases where the needs of the capital markets demand such intervention. This is not that type of case, as no-one has suggested that the Class A shareholders would in any way be blocked from pursuing an appropriate remedy in the Courts. For the Commission to issue a cease trade order here would be, in effect, to amend the Act to require a follow-up for non-voting shares.

122 Mr. Dey also submitted that the real problem in this case is that 4 per cent of the equity controls the Corporation and, in that sense, the allocation of the equity between the voting and non-voting shares in Tire is unusual. It is that unusual capital structure which magnifies the problem and which makes a "conventional, pro-rata take-over bid for up to 49% of the common shares of the company appear to be unfair". Dealers was not responsible for the capital reorganization of Tire and the skewed allocation of equity and its lawful bid should not be blocked because of that share structure.

VI. Reasons for Decision

123 The Commission announced on January 14, 1987 that upon considering the evidence and arguments in this matter that it had decided to issue a cease-trade order pursuant to the authority granted under s. 123 of the Act against the Offer and against the common shares of Tire held by the Billeses to the extent that, pursuant to the terms of the Lock-up agreements, such shares would be tendered to the Offer. A. The Basis for a Section 123 Order

A. The Basis for a Section 123 Order

124 It was argued by counsel for the Billeses and for the Dealers that the power to issue a cease-trade order under s. 123 ought not to be made unless a breach of the Act, the regulations or a policy statement clearly has been demonstrated. We do not agree. Section 123, in its terms, is not so limited. Moreover, in past decisions, particularly in *Cablecasting*, the Commission has indicated that it would be prepared to use its power under s. 123 to deal with situations that are inconsistent with the best interests of investors or where a transaction constitutes a flagrant abuse of the marketplace.

125 The point raised by counsel with respect to demonstrating a breach of the Act, regulations or a policy statement was specifically raised in *Cablecasting*. In that case, the Commission noted that under s. 123, as well as a number of other sections, the Commission is vested with discretion that must be exercised in the public interest. For the most part, the Commission

attempts to publish policy statements indicating the circumstances in which discretion will be exercised. But such policy statements cannot possibly cover every situtaion that can arise in a dynamic public market. In rejecting counsel's contention that an actual breach of a policy statement had to be demonstrated, the Commission made the following comment:

> The obvious conclusion, that the individual with an imagination sufficiently fertile to invent an unethical scheme which skirts the words of all published pronouncements may carry out that scheme with impunity, demonstrates the difficulties of the position.

126 We would adopt that holding of *Cablecasting* in this case. The Legislature deliberately has given the Commission a broad and unfettered power to move quickly to intervene in the capital markets to stop a trade or a transaction which it deems to be contrary to the public interest. The ambit of the Commission's power under s. 123 is not hedged or confined by particular examples or by particular criteria, as is true elsewhere in the Act. Rather, the Legislature has vested in the Commission the power to intervene where it has been demonstrated that such intervention is necessary to fulfil the Commission's mandate to regulate the capital markets in the public interest.

127 To accede to counsel's contention that a specific breach of the legislation or of a policy statement must be shown before s. 123 can be invoked would not only be contrary to the plain wording of s. 123, but also would be a failure by the Commission to exercise the mandate vested in it by the Legislature. There are few areas in our public life that are as dynamic and as innovative as our capital markets. For the most part, that dynamism and innovation enure to the benefit of the economy at large and individual investors in particular. But that same dynamism and innovation can, and does, lead to abuse. A regulatory agency charged with oversight of the capital markets must have the capacity to move quickly to stop transactions which it considers to be injurious to the capital markets. Regardless of its rate of production, the Commission cannot possibly issue policy statements that cover, much less keep up with, the types of transactions that are conceived in the marketplace. It is in that sense that we adopt and reaffirm the statement quoted above from *Cablecasting*.

128 We would also adopt the statement in *Cablecasting* that this is an area in which we "must move with caution". In the great majority of cases, the use of the cease-trade power will be invoked where there is in fact a demonstrated breach of the Act, the regulations or a policy statement. If there is a situation which the Commission believes should be regulated, the appropriate way to proceed is to publish a policy statement in draft form for public comment. In that way, the concerns of the Commission are made known and the policy statement is subject to critique by interested parties. When a final version is published, it should reflect the best thinking of all the participants in the capital markets, including the Commission.

129 There are, however, situations which call for regulatory intervention to prevent an abusive transaction that will have a deleterious effect on a class of investors in particular, or on the capital markets in general. In those cases, the Commission would not be acting in accordance with the power and responsibility vested in it by the Legislature if it did not use its cease-trade power under s. 123. Indeed, even as to a new policy statement, the decision in *Cablecasting* recognized that a new policy could be created and applied in the heat of a contested application, although that should only be done on the basis of facts that demand some relief. To quote from *Cablecasting*:

> To create a new Policy applied in the heat of a contested application without being subject to these disciplines [publish an exposure draft for comment] would be a bold act. Clearly, in our view, the Commission has authority to do this; equally clearly, it should refrain from exercising this authority except on facts that demand some relief.

130 Equally clearly in our view, the Commission should act to restrain a transaction that is clearly abusive of investors and of the capital markets, whether or not that transaction constitutes a breach of the Act, the regulations or a policy statement. Such occasions may be rare, but the power is there in s. 123 and it ought to be used in appropriate circumstances. That the Commission is well aware of the necessity to proceed with caution where a breach of the Act or a policy statement has not been shown, is evidenced by the fact that this is only the second case since 1978 under s. 123 where the Commission has had to deal with this particular point. The other case is *Re Lindzon*, [1982] 42 O.S.C.B. 43(c). In that case, the Commission made the following comment about its earlier decision in *Cablecasting*:

> In *Cablecasting*, the Commission considered whether the transactions proposed 'detracted from the credibility of the capital markets or [were] otherwise inconsistent with the best interests of investors'. This theme has occupied the Com-

mission in other connections and, in dealings where there is diverging interest between insiders and other shareholders, the Commission has been concerned about fair or even handed dealings as between these classes of shareholders.

131 To much the same effect is the decision of the Commission in *Re Fed. Commerce & Navigation Ltd.*, [1981] 1 O.S.C.B. 20(c). *Federal Navigation* did not involve a cease-trade order. Rather, it was concerned with competing take-over bids that were taking place on the floor of the TSE. The issue in question was whether one of the offers could be open for six clear days, rather than the eleven clear days that applied to the competing offer. The TSE had ruled that it was only required to be open for six days. In overturning the decision of the TSE, the Commission made the following statement:

> In conclusion, the decision of the Commission has been based upon an interpretation of the provisions of the By-law arrived at in the light of the Commission's understanding of the philosophy and the intent behind the rules established by those provisions. In restating the basic tenets or general principles discussed in the Kimber Report, the Commission wishes forceably to draw to the attention of the public that, although technical interpretation is necessary, it is the expectation of the Commission that the participants in the capital markets of this province will be guided by the basic philosophy and rationale from which the securities laws of this province were developed. The sophisticated gloss of technicality must not be used to obscure the true intent and import of the basic philosophies that underlie the securities laws of the province. Technical interpretations that run contrary to these basic philosophies and principles will not be acceptable to the Commission.

132 That statement is important as outlining the basic approach that the Commission is prepared to take to a transaction in an appropriate case, particularly when a take-over bid is concerned. That is not to say that the terms of the Act or policy statements or the by-laws of the self-regulatory organizations cannot be relied upon as they are written. It is to say, however, that transactions that are clearly designed to avoid the animating principles behind such legislation and rules will be scrutinized closely by the Commission and intervention will be ordered in appropriate cases.

B. The Evidence

133 A review of the evidence in this case demonstrates why the public interest required that the offer and the tendering to it of their common shares by the Billeses required to be cease-traded. The Billeses acquired control by buying J.W.'s shares from his estate in 1983 for some $73 million. To pay for those shares, they proposed a reorganization that would allow for a 5-for-1 split of the Class A shares and a split of the common shares into one common and four Class A shares. The Billeses would then sell the majority of their resultant Class A shares to the public to pay for their purchase of the estate's common shares.

134 Senior executives of Tire realized that a reorganization would be forthcoming to pay for the Billeses' purchase of control. Accordingly, they were concerned to ensure three objectives: first, a reasonable share split ratio; second, an independent board of directors; third, take-over protection for the Class A shareholders. The Billeses agreed with all three objectives and the reorganization proceeded. With respect to the objective of a take-over provision for the Class A shareholders, Tire's fiscal agent, Burns, advised them that such protection was also important in terms of any sale of the Class A shares into the marketplace.

135 As to the form of the take-over protection, the concern of the Billeses was that they not lose their long-desired and hard-won control position through any accidental circumstance. Accordingly, what was considered a simply worded, relatively straightforward clause that required a majority of the shares to be tendered and taken up before the Class A coattail would be triggered, was adopted. This was acceptable to everyone concerned: the Billeses, Tire's senior management, Tire's counsel, the Billeses' counsel, and their fiscal agents, for the simple reason that the Billeses constituted a 60 per cent control block and had no intention of selling. If they were to sell their control position, then the coattail would be triggered, as a majority of the shares would be tendered to any bid. The coattail would also be triggered if the Billeses decided to sell through a private agreement at a premium greater than 15 per cent, which agreement would require a follow-up bid under the terms of the Act.

136 The evidence of all the parties is clear that the Billeses' control was equated with the term "majority". The understanding among the parties most closely involved was the protection given to the Class A shareholders was exactly the pro-

tection required in the circumstances; the Billeses had control, and if they sold that control, a majority of the shares would pass and the coattail would be triggered. The evidence is clear that Fred, who was the spokesman for the Billeses, understood that that was the case. Indeed, that was the critical circumstance that he was at pains to secure — that is, no trigger unless they decided to sell. When asked what his understanding was of the circumstances that would trigger the coattail, Fred replied as follows:

> More than 50% of the shares would be sold and taken up, so it couldn't be accidental, because we own more than 51% of the shares.
>
> So, it had to be us selling those shares that would trigger this clause.

137 Consequent upon the reorganization, the Billeses sold to the public 5 million Class A shares for a total consideration of some $58 million. In short, the Billeses had purchased control of Tire and the public had largely paid for it through its purchase of their Class A shares. At the same time, Tire privately placed some 4.5 million Class A shares to institutional investors to raise some $50 million.

138 In late 1985, family disagreements made Fred realize that they could no longer act as a control group. In the late spring of 1986, Carling made an approach with respect to buying the Billeses' control block and Fred began seriously to consider a sale. The matter was discussed with his counsel, Matthews, in early June, and one of Matthews' partners came up with a scheme that would allow the Billeses to maximize the return to them on the sale of their shares without triggering the coattail by selling only 49 per cent at a very high premium.

139 Matthews said that he was "surprised" when that scheme was suggested to him, and testified that he had never considered it. In that, his evidence was consistent with that of Muncaster, Barron, Law and Will, that is, with every major actor in the 1983 reorganization. None of them conceived of this type of transaction when the coattail was drafted and implemented. None of them conceived of this type of transaction when the coattail was drafted and implemented. None of them considered that the Billeses could sell their control position and realize the price they wanted for that position, without triggering the coattail.

140 On the advice of Matthews, the Billeses consulted an investment dealer, Merrill, to discuss the value of their shares and prospective purchasers. From the very first meeting that Fred had with Merrill, as evidenced by Biggar's notes, the talk was of maximizing the value to the Billeses and the 49 per cent premium price scenario was one of the scenarios that was on the table throughout.

141 As for a consideration of the Class A Shareholders and the equity of passing control and obtaining the desired consideration without triggering the coattail, the only matter discussed was that such a transaction would be controversial. The position of the Class A shareholders was recognized through such terms as "skimming the value from the Class A's" and similar expressions. At no time did any one of the Billeses, as far as the documentary and oral evidence before this hearing indicated, express any concern for the positon of the Class A shareholders or for the equity of the type of transaction that was being proposed. The sole concern of all those involved, the Billeses and their professional advisors, was to structure a transaction that would maximize the return to the Billeses without triggering the coattail.

142 The formula that Biggar devised for the notice to be given to Martha under the Aldamar agreement was set so that the Brothers would realize the $100 per share that they wanted for all of their shares. It was recognized that there might be a remaining share position to be sold in the market and a conservative valuation, for the purposes of detemining the total consideration that the Brothers would receive, was set at $12, which was below the then trading price of the Class A shares. The price of $100 per share was set by Fred after Biggar had advised that a range of value for the common shares was between $67 and $91 per share.

143 The desired consideration of $100 per share for their entire holdings is carried forward into the Lock-up agreement with the Dealers. As noted in the outline of the evidence above, the formula used in the Lock-up agreement with the Brothers is

the same formula used in the notice by the Brothers to Martha under the Aldamar agreement. The Offer itself is at a fixed price for 49 per cent of the outstanding common shares, but the economic effect for the Billeses remained the same. That is, the extremely high premium they would receive for their tendered shares, plus the sale of their remaining shares at an estimated price of $12, would realize them $210 million for 2,100,00 shares, or $100 per share.

144 It was not contended that the Billeses intended to remain as shareholders of Tire or that they intended to do anything but sell their tag-end holdings into the market at the assumed $12 price. The Billeses were sellers of their entire position, but they could not sell all of their shares without triggering the coattail. Hence, the structure of the bid for 49 per cent at an extremely high premium and a follow-on sale in the market at $12. That is the substance of the transaction and it was admittedly designed to have the economic effect, if not the legal effect, of the Billeses receiving $100 per share for all of their shares. Matthews admitted that in his cross-examination by Mr. Geller, as follows:

> Matthews: Mr. Geller, if the question is if the Billeses sold 100% of their shares under a general offer and at that time they had 60% of the outstanding common shares, so that the 60% were tendered and taken up under the offer, I would say yes, it is clear that the coattail was intended to cover that.
>
> Geller: Isn't the economic effect of the deal you are doing now, exactly the same, not the words, but the economic effect?
>
> Matthews: If the question is, are the Billeses getting as much money as they would otherwise, I suppose you can argue that.

145 In his cross-examination by Mr. Kazanjian, Biggar, the designer of the formula, was asked about the memorandum prepared by Sorell and he indicated that it formed the topic of a discussion at a meeting with Sorell and Matthews on October 24, 1986. When asked whether it was his understanding at that date that the Billeses' objective was to sell all their common shares at the maximum price obtainable, Biggar replied "yes". In further questioning by Mr. Kazanjian, there was a reference to paragraph 2.4 of the Sorell memorandum which reads as follows:

> The common share bid would accordingly be for 49% of the shares but at a price that would give the common shares the same gross proceeds as in a bid for all the common shares.

146 Mr. Biggar was then asked if that was not, in effect, what the formula was all about. His evidence, at vol. 5, p. 1386-87, is to the effect that that was indeed the case, allowing for the fact that the shares not taken up were to be sold at the assumed price of $12.

147 Counsel for the Billeses argued that there is nothing artificial about bidding $160.24 for 49 per cent of the outstanding common shares of Tire. The offer is at a fixed price for a maximum number of shares. It in no way depends on a formula. There is real value of $160.24 for the shares that will be tendered and taken up under the offer, and an assumed value, according to the best advice of the Billeses' financial advisors, of $12 for their remaining common shares. Those are both real economic values, and there is no artificiality in the transaction.

148 Looked at in isolation, the contention of counsel for the Billeses is perfectly true. But looked at in the context of the evidence, of what the Billeses wanted to accomplish, of how the formula was arrived at and the transference of the formula from the notice under the Aldamar agreement into the Billeses' Lock-up agreements and then the movement from there to a fixed price under the Offer that would accomplish exactly the same economic goal, their argument takes on a completely different colouration. Biggar valued the common shares at between $67 and $91 per common share. The market price of the common shares was in the $25 area in mid-summer of 1986, even after it began to be rumoured that the Billeses were looking to sell their control block. After the announcement of their intention to sell, the price of the common moved to the low $40s and after the announcement of the Offer, moved up to $71. In the face of that, we have an offer of $160.24 per share. Moreover, and most importantly, some $200 million is being paid for 49 per cent of the Billeses' common shares with the remainder, 51 per cent, having an assumed value of $10 million in the market.

149 What is being sold and what is being purchased through the Offer is the control position in Tire. That being the case,

those who had control, the Billeses, had to be paid what they considered their control was worth. The Dealers and the Billeses had a common interest in not triggering the coattail so as to maximize the premium for control to the Billeses and to minimize the amount that the Dealers would have to pay for control. Accordingly, one arrives at the device of the extremely high premium for 49 per cent of the outstanding common shares.

150 The evidence, and it is clearly the reality, is irrefutable that the transaction was structured to accommodate the desire of the Billeses to sell their entire control position without triggering the coattail. The Offer is so structured to accomplish that and, in that sense, may fairly be characterized as artificial, in that it appears on its face to be a bid for only 49 per cent of the outstanding common shares at a fixed price. That is simply not the reality of the situation, and the Billeses recognized it, their professional advisors recognized it, their fiscal agents recognized it, the Dealers recognized it, their professional advisors recognized it, and their fiscal agents recognized it. And perhaps most importantly, the marketplace recognized it, and hence, the intervention of the Class A shareholders in this case.

C. The Public Interest

151 In these circumstances, we have no hesitation in saying that this transaction is contrary to the public interest, as that term is used in s. 123 of the Act. When the public market is sold some $100 million of Class A non-voting shares consequent upon a reorganization that, among other things, provides take-over protection to those shares and the controlling shareholders, some three years later, devise a scheme in conjunction with those who wish to obtain control of the corporation, to circumvent the coattail while, in effect, receiving the full price for their shares, regulatory intervention to stop an abusive transaction is called for. A transaction such as is proposed here is bound to have an effect on public confidence in the integrity of our capital markets and on public confidence in those who are the controllers of our major corporations. If abusive transactions such as the one in issue here, and this is as grossly abusive a transaction as the Commission has had before it in recent years, are allowed to proceed, confidence in our capital markets will inevitably suffer and individuals will be less willing to place funds in the equity markets. That can only have a deleterious effect on our capital markets and, in that sense, it is in the public interest that this Offer be cease-traded along with the Billeses' tendering of their common shares to the Offer.

D. The Integrity of Documents

152 Counsel for the Billeses and the Dealers raised the matter of the uncertainty that would be created in the capital markets if a cease-trade order were issued in this case. The point was that actors in the capital markets must be able to rely on the clear words of documents — in this case, share attributes. The coattail here refers to a "majority" of the common shares being tendered and taken up and that has not happened. The transaction is legal, breaches no provision of the Act, and is structured with the clear wording of the Class A share attributes in mind. What message would the Commission be sending to the capital markets if it were to intervene in this case? How would actors know when their transactions which, on their face, appear to be within the terms of corporate documents, would be subject to challenge by the Commission? The capital markets cannot operate in that atmosphere, it was argued, and for that reason alone, the Commission ought not to interfere in this case. If it wishes to send a message to the marketplace with respect to non-voting shares or with respect to coattails and their operation, it should do so through the tried and tested medium of a draft policy statement or an interim policy statement that has immediate effect, if the Commission considers that it is necessary to act immediately.

153 Counsel relied heavily on the testimony of Biggar that to interfere in this case "would wreak havoc in the capital markets", in the sense of putting into question the clear wording of documents.

154 There is unquestioned force in the point. Participants in the capital markets must be able to rely on the terms of the documents that form the basis of daily transactions. And it would wreak havoc in the capital markets if the Commission took to itself a jurisdiction to interfere in a wide range of transactions on the basis of its view of fairness through the use of the cease-trade power under s. 123. That, however, is not what we purport to do in this case, nor is it the stated basis upon which the Commission will exercise its s. 123 jurisdiction, as indicated in its decisions in *Cablecasting* and *Lindzon*, supra. The Commission's mandate under s. 123 is not to interfere in market transactions under some presumed rubric of insuring fairness.

155 The Commission was cautious in its wording in *Cablecasting* and we repeat that caution here. To invoke the public interest test of s. 123, particularly in the absence of a demonstrated breach of the Act, the regulations or a policy statement, the conduct or transaction must clearly be demonstrated to be abusive of shareholders in particular, and of the capital markets in general. A showing of abuse is something different from, and goes beyond, a complaint of unfairness. A complaint of unfairness may well be involved in a transaction that is said to be abusive, but they are different tests. Moreover, the abuse must be such that it can be shown to the Commission's satisfaction that a question of the public interest is involved. That almost invariably will mean some showing of a broader impact on the capital markets and their operation.

156 The facts of this case demonstrate the line that moves a transaction into the public interest category. Tire is one of Canada's best known public corporations and is the leader in its field. There are some 83 million Class A shares outstanding and they are widely held by both large institutional investors and small shareholders. The severe skew between the percentage of equity that controlled the Company — 4 per cent — and the 92 per cent of the equity that had no say in management was well known. Accordingly, the take-over bid protection accorded to the A's at the time of the reorganization in 1983 was well known and an important factor in marketing the Class A shares. A transaction that is so patently designed to avoid the rights granted to holders of the Class A shares is, in the circumstances and for the reasons noted, so abusive of the Class A shareholders in particular, and of the capital markets in general, that the public interest test of s. 123 is properly invoked.

157 With respect to the argument of certainty and that the Billeses and the Dealers are entitled to take the documents as written and insist on their legal rights, an analogue to the jurisdiction that the Commission is asserting under s. 123 here, albeit in the completely different circumstances of a private company, is the judgment of Lord Wilberforce in the seminal case of *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360, [1972] 2 All E.R. 492 (H.L.). *Ebrahimi* was the case of a petition for a winding up order by one of three shareholders in a private company. The petition was brought under the "just and equitable" provision of the U.K. Companies Act 1948. The argument of the respondents was that the partnership analogy that had been pressed ought not to be adopted. A company was not a partnership and the rights of the company's members were governed by its by-laws which have contractual force and the Court neither has the power nor ought to relieve parties from observing their contracts. In rejecting that proposition, particularly on the facts of the case which showed that the petitioner had been excluded from the directorate and management of the company and had been effectively squeezed out, Lord Wilberforce held as follows [at p. 379 A.C.]:

> The words ['just and equitable'] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals ... submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumed by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and other, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

158 In exercising our jurisdiction under s. 123 in this case, we are, in one sense, subjecting "the exercise of legal rights to equitable considerations". Of course, the consideration here is the 'public interest' of s. 123 and the Commission is mandated by law to exercise that jurisdiction. For the Commission to act, there must be a clear showing that the interests of the public marketplace are involved. But allowing for that, the thought and the spirit behind Lord Wilberforce's statement is important. Whether it is a court of equity, or the Commission exercising its regulatory jurisdiction pursuant to the legal authority vested in it, there always will be occasions where the exercise of private legal rights must give way to broader considerations — in this case, considerations of the equitable operation of this province's capital markets.

E. The Proper Forum

159 Counsel for the Billeses and the Dealers also argued that the Commission is not the proper forum for this case. The contention was that this is a private matter between the Class A shareholders and the controlling shareholders. Accordingly, the Class A shareholders should pursue their remedies in the Courts where the issues can more properly be sorted out through the trial process. This contention is supported by the fact that the notice of hearing in para. 14 alleges breaches of fiduciary duty, and such breaches are properly matters to be tried in the Courts, either under the oppression remedy or in a derivative action.

160 The contention that the issue here is a private one between two classes of shareholders is far wide of the mark. A purported sale of control in the circumstances set out above, where the rights of the holders of some 83 million Class A shares are concerned, is not a private matter, although individual rights in terms of a particular shareholding are involved. This is demonstrably a public matter involving a major public company and one that concerns and impacts [sic] on the public marketplace. In the sense in which counsel were using the idea of a private lis, any takeover bid would, according to their analysis, be a private matter between shareholders. Yet it is well known that take-over bids, the rules applying to them and how they are conducted, are very much a public matter in the sense of their concern to, and impact on the marketplace and its perceived integrity. The Commission, accordingly, has always played a major role in overseeing such transactions.

161 Moreover, the argument that this matter more properly belongs before the Courts, mistakes the respective roles of the Courts and the Commission in overseeing the management and actions of public companies and protecting shareholders' interests. The Commission is vested with the power to regulate the capital markets in the public interest and is given broad powers to do so. The power to intervene includes the power to cease trade and to do so, at least initially, without a public hearing if satisfied of the necessity. In carrying out its regulatory function, the Commission necessarily impacts on the rights and obligations of companies, directors and shareholders. But it does so from the perspective of the regulation of the public markets and their fair and efficient operation. The subjecting of take-over bids to an elaborate code of rules and regulations, backed by the power to issue a cease-trade order, if conduct during the course of a bid calls for it, is perhaps the best known example of this regulatory function.

162 The Courts, on the other hand, adjudicate rights between shareholders and their companies. In so doing, the judicial process has the advantage of the refinement of issues provided by pleadings, examinations for discovery and the trial process. Moreoever, the Courts are able to provide remedies appropriate to the individual case. What the Courts are not structured to do, is to move quickly to regulate public markets through regulating shareholder and/or corporate conduct. To be sure, the injunction remedy is available in the proper case, but it is not a remedy designed to be used as a regulatory tool.

163 The line between when Commission action or judicial process is appropriate in shareholder and corporate matters is, of course, not so clearly marked as the foregoing comments would indicate. There is bound to be overlap as there is no clear line between securities and corporate matters and many issues before the Commission involve the conduct of fiduciaries. But the role of the Commission is not to determine breaches of fiduciary duty, or to deal with a breach of a corporate statute, in order to provide a private remedy. Rather, it is to regulate shareholder and corporate conduct in the context of, and for the purpose of, regulating the public securities markets. Again, the line will not always be clear as intervention in matters that from one aspect are of a private nature will, from another aspect, be seen to have public market implications. If the Commission should mistake its role in a particular case, or act beyond the jurisdiction granted, the Courts can rectify the matter and set out a new balance through the appeal procedure granted under s. 9 of the Act.

F. Breach of Fiduciary Duty

164 As to the allegations of breach of fiduciary duty here, we agree that, in most cases, that is a matter best left to the Courts to determine. Indeed, we declined to hear evidence on the allegation in paragraph 14(v) of the notice of hearing on just that basis. Our decision to impose a cease-trading order does not depend on a finding of breach of fiduciary duty. However, an allegation of breach of fiduciary duty, and evidence which clearly concerns the conduct of those who are fiduciaries, can be important in supporting facts which otherwise would support a s. 123 order. That is the case here. The Billeses are in a fiduciary position in at least two categories — as directors of Tire and as Tire's controlling shareholders.

165 While the law in Canada is still developing with respect to the fiduciary duty that controlling shareholders owe to the minority, the Courts in Ontario have clearly signalled that a duty of fairness to the minority is imposed upon those who are in a controlling shareholder position. The judgment of the Ontario Court of Appeal in *Goldex Mines Ltd. v. Revill; Probe Mines Ltd. v. Goldex Mines Ltd.* (1974), 7 O.R. (2d) 216, 54 D.L.R. (3d) 672 (Ont. C.A.) is much in point. In dealing with the developing jurisprudence with respect to fiduciary duties, the Court made the following statement [at p. 680 D.L.R.]:

> The principle that the majority governs in corporate affairs is fundamental to corporation law, but its corollary is also important — that the majority must act fairly and honestly. Fairness is the touchstone of equitable justice, and when the test of fairness is not met, the equitable jurisdiction of the Court can be invoked to prevent or remedy the injustice which misrepresentation or other dishonesty has caused. The cateogry of cases in which fiduciary duties and obligations arise is not a closed one: *Laskin v. Bache & Co. Inc.*, [1972] 1 O.R. 465 at p. 472, 23 D.L.R. (3d) 385 at p. 392.

166 That statement by the Court of Appeal provides guidance to the Commission with respect to the conduct of controlling shareholders when that conduct is in question in a case where Commission staff seeks a cease-trade order. To repeat, the Commission is not the proper forum, particularly in a s. 123 proceeding, to determine the question of whether or not there has been a breach of fiduciary duty. But an allegation and a prima facie showing of such a breach can be useful evidence to support facts which otherwise call for intervention by the Commission under s. 123.

167 Here, the relationship of the Billeses as controlling shareholders to the minority is clear. And it is equally clear that their conduct, particularly seen in light of the events of 1983, in seeking now to avoid the take-over bid protection that was inserted for the protection of the Class A shareholders is a failure on their part to act fairly and honestly. In that sense, their conduct supports the facts here which otherwise call for the invocation of a cease-trade under s. 123.

G. The Dealers

168 As to the Dealers, it was argued that they in no way acted in concert with or colluded with the Billeses in the sale of the Billeses' shares. They, for their own sound economic reasons, were desirous of purchasing the Billeses' shares. Indeed, that was not even their primary goal at the time they began discussions with the Billeses' representatives in October 1986.

169 It was clear to the Dealers that the control block was for sale. Given that fact, the Dealers were concerned to bring stability to Tire's future, and wished to enter into an arrangement with the Billeses that would secure that stability; a voting trust was suggested. When the Billeses rejected that possibility, the Dealers then indicated that they were interested in buying the Billeses' shares. The Dealers had limited financial resources and only wished to buy that number of shares that would give them control. Accordingly, they structured their bid to provide the Billeses with the price they wanted and to enable them to secure a control position. That, it was argued, is a perfectly legal, straightforward transaction and one that ought not to be interfered with.

170 While it is true that the Dealers were justifiably concerned about the future control of Tire and wanted to enter into an arrangement with the Billeses that would bring the stability to the situation that they wished, they cannot separate themselves from the Billeses in the Offer they are making for the common shares. It well suited the Dealers' purposes to purchase only 49 per cent of the common shares at a very high premium in order to avoid triggering the coattail. As the Dealers' counsel acknowledged, they had limited capital and wished only to secure a control position.

171 The evidence is that the Dealers thought of the 49 per cent bid at a high premium independently of the Billeses advisors. Who actually suggested that form of structuring the Offer at the November 5 meeting is not clear. In any event, it is not a relevant fact. The fact is that the Dealers used the formula conceived by Biggar for the purposes of notice under the Aldamar agreement in the Lock-up agreement with the Brothers, and then proceeded to make a take-over bid that, in effect, allowed the Brothers to get the total price they wanted for their control position.

172 The evidence is clear that the Dealers and their advisors were well aware of the controversial nature of the transaction

in that it was structured to avoid the triggering mechanism. In those circumstances, the Dealers cannot separate themselves from the Billeses. They are the group that wants control, it is their Offer and it is structured to suit their purposes as well as those of the Billeses. It is their Offer that gives life to the conception of this abusive transaction. Accordingly, it is appropriate that the Offer be cease-traded.

H. Martha

173 With respect to Martha, her counsel sought to portray her as an innocent party. It was said on her behalf that when she went along with her brothers to one of the initial meetings with Merrill in June, that she was primarily interested in obtaining a valuation of her shares. The evidence is not perfectly clear on that point, as Fred's evidence was that they talked to Merrill not only about obtaining a price, but also about seeking possible purchasers. The evidence is clear, however, that after Biggar did suggest a range of value on October 2, 1986, Martha wrote to her brothers on October 3, indicating that her shares were not for sale. That, presumably, remained her position until she was contacted by Fung on behalf of Gordon in early November. There is evidence that Fung did have conversations with Martha prior to the date of the Lock-up with the Brothers, separate and apart from any meetings he held with the Brothers, although there was no evidence as to the nature of those conversations.

174 In the event, after the Brothers entered into their Lock-up with the Dealers, the Dealers were obligated to make the same offer to Martha. Negotiations with Martha resulted in her entering into a Lock-up agreement for a non-refundable deposit of $15 million. Once Martha had negotiated for a $15 million non-refundable deposit, the Brothers then renegotiated their two-part deposit of $7,500,000 each, one part of which was refundable, into a single, non-refundable deposit of $15 million.

175 Counsel for Martha argued that her hand was forced by the Brothers entering into their Lock-up agreement. At that point, she was faced with the economic reality she could no longer act as part of a control block and was left with an exposed 20 per cent holding. She would have tendered to the Offer in any event, as that was the only sensible economic decision, and there was, therefore, no reason why she should not make the best deal she could with the Dealers.

176 While there is some merit in the position taken by counsel for Martha, she cannot separate herself from her brothers' actions. Whether or not she intended to be a seller in October 1986, she decided to sell after the Brothers entered into their Lock-up. Martha knew about the 49 per cent scheme in early June 1986. There is no evidence whatsoever that she objected to that form of transaction, or made any statement with respect to the rights of the Class A shareholders. When faced with a transaction that was advantageous to her, and a buyer that wished to lock-up her important 20 per cent position, she negotiated the best deal she could — indeed, a better deal than her brothers had. She was willing to go along with the structure of the Offer, and in effect, to sell her entire position for the maximum price available. That being the case, the cease-trade ought to apply equally to her shares as to those of her brothers.

I. Other Matters

177 There were a number of other arguments raised that require some comment. One of the arguments related to the price of the common shares relative to the price of the Class A shares from the time the reorganization took place in 1983 until the Brothers' press release announcing their intention to sell in 1986. The common stock moved to an immediate premium over the Class A stock and continued to trade at a 25 per cent to 30 per cent premium through mid-summer of 1986, until rumour began to circulate that control of Tire might be sold.

178 The evidence was that a premium of 25 per cent to 30 per cent for common stock over non-voting stock is considerably higher than the norm for shares listed on the TSE. There was a great deal of discussion as to the reasons for the price spread. Biggar's evidence was that the only explanation he could give was that the market recognized that there might be a "loophole" in the coattail and that therefore investors were willing to pay more for the common shares on the prospect that they would receive a significant premium in a take-over bid.

179 The evidence of Thomas Kierans ("Kierans"), the president of McLeod Young Weir ("McLeod") was a good deal more

thoughtful on the point and, in our view, more consonant with what the market realities were. Kierans stressed that the Dealers were purchasers of the common stock immediately that the shares were posted for trading after the reorganization. In the first five trading days, the Dealers purchased almost 50 per cent of the volume of the shares. The common went to an immediate premium over the Class A and, in effect, remained at that premium right through until the summer of 1986.

180 Including private transactions, between December 1983 and September 1985, the Dealers purchased over one-third of the shares traded. Moreover, between October 1985 and April 1986, the Dealers purchased 43.1 per cent of the total volume. Such Dealer purchases, particularly the purchases in the first five days after the reorganization which set the premium, were bound to have an effect on the value of the common shares.

181 Apart from that, Kierans testified that he did not, and does not, believe that an examination of the coattail at any time between 1983 and mid-1986 would have led market participants to conclude that it was flawed and that that was a reason to purchase the shares.

182 Overriding all these considerations, but also linked to the Dealers' purchases, is the extremely thin market for the common stock. There are some 83 million Class A non-voting shares issued and outstanding. That is to be compared with some 3.5 million common shares, 60 per cent of which were off the market in the Billeses' hands. In short, the market for the common shares was so extremely thin that one could not come to any definite conclusion about its price differential over the Class A shares. Obviously, very little trading can have an impact on the price of the common stock. With respect to the widening price differential between May and October 1986, that obviously was related to the fact that the control block was rumoured to be for sale, and the Carling offer, and rumour of it, began observers in the market considering whether control could be purchased without triggering the coattail or, at least, without dealing with all of the A shares.

183 It is also somewhat hard to credit that market purchasers, between 1983 and mid-1986, were purchasing on the basis of a perception of a flawed coattail when those most closely involved with drafting the coattail, including experienced lawyers like Matthews and Law, to say nothing of concerned parties such as Muncaster and Fred, and a sophisticated investment dealer such as Will, did not recognize the so-called flaw, and were surprised by it when it was brought to their attention in the early summer of 1986.

184 It was never made quite clear what point counsel for the Billeses and the Dealers were seeking to establish by evidence with respect to the price spread. Obviously, one point might have been that the market was well aware of the flaw, that purchases were made on the perception of it and that the market is therefore in no way disadvantaged by a transaction which recognizes something that the market itself has recognized for the past three years.

185 In our opinion, the evidence was inconclusive as to the reason for the price spread, but the Dealers' purchases and the very thin trading market were clearly the two most relevant factors. The better evidence was that the spread was not attributable to any recognized flaw in the coattail attaching to the Class A non-voting shares. In the context of the evidence in this case, the argument that the market has been trading since 1983 on the basis that the type of transaction contemplated by the Offer might occur is, to say the least, strained.

186 Another point argued was with respect to the granting of the s. 73 order in 1983 by the Commission, which allowed the Billeses to sell their Class A shares without filing a prospectus. The point made was that Commission staff were informed of the terms of the reorganization and the fact of the coattail and on the basis of that information, recommended approval of the s. 73 order to the Commission. As the Commission approved the reorganization, it was argued, it ought not now to be in a position of cease-trading a transaction that is based on compliance with one of its terms.

187 The granting of the s. 73 order in 1983 can in no way be said to have been an approval of the terms of the coattail. The documentary evidence is that Commission staff were informed of the terms of the reorganization, including the fact of separate approval being required by the Class A shareholders and take-over bid provisions being provided to the Class A shareholders. The Commission does not vet documents that are supplied to shareholders on a reorganization, nor does it parse the terms upon

which a reorganization is based to ascertain whether they are satisfactory to the Commission. The material supplied as background to requesting a s. 73 order is not scrutinized in the way a prospectus must be pursuant to s. 60 of the Act. Commission staff were satisfied as to the general terms of the reorganization and recommended the granting of the order. The staff recommendation and the Commission order in 1983 can in no way be used at this date as indicating staff or Commission approval of the terms of the coattail, to say nothing of this transaction.

188 Finally, it was argued that for the Commission to intervene in this transaction would be, in effect, for it to set a new policy with respect to non-voting shares and with respect to a requirement of coattails. It was noted that the Commission held hearings with respect to the matter of non-voting shares and a requirement of coattails in 1984, and decided both to allow the continuance of non-voting shares (albeit with more stringent conditions) and not to mandate coattails. Indeed, it was pointed out that interim Policy 1.3 did mandate coattails and the Commission subsequently backed away from that position after receiving public comment. If the Commission now wishes to set a new policy with respect non-voting shares or coattails, it should either hold hearings or publish a draft policy statement for comment. What it ought not to do is to set a new policy through the medium of cease-trading a particular transaction.

189 We wish to make it clear that there is nothing in our decision in this case, or in these reasons, that indicates any change in Policy 1.3 and in the Commission's views with respect to non-voting shares or coattails. Non-voting shares are permitted in accordance with the terms of Policy 1.3 and coattails are not required. Some non-voting shares have coattail provisions, many do not. As to those that do have coattails, the provisions vary greatly. Unless and until the Commission announces a hearing on the matter, or publishes a new policy statement, that will continue to be the law in this province with respect to non-voting shares and coattails.

190 We would also note that our decision and these reasons do not constitute an interpretation of the coattail attaching to the Class A shares of Tire or how a take-over bid for the common shares must be structured or what participation must be offered to the Class A shares. All that we decide is that this particular transaction is abusive of the Class A shareholders and of the capital markets in this province and a cease-trade order is called for.

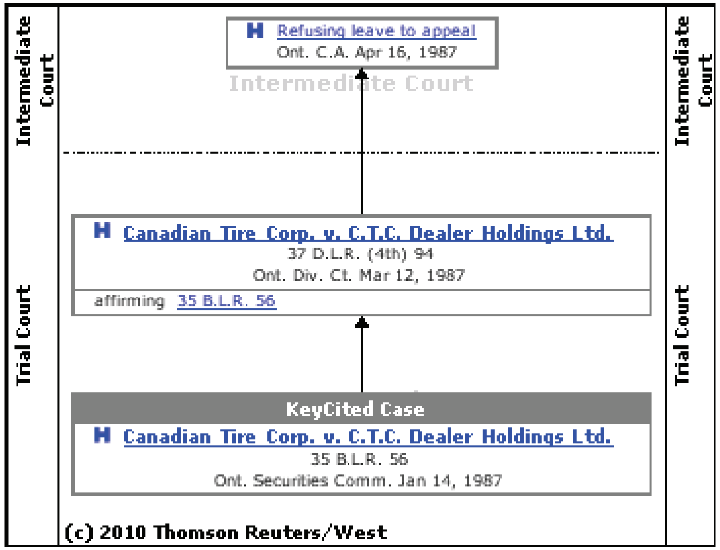
Application allowed.

END OF DOCUMENT

Date of Printing: May 26, 2010

KEYCITE

Canadian Tire Corp. v. C.T.C. Dealer Holdings Ltd., 35 B.L.R. 56, 1987 CarswellOnt 128, 10 O.S.C.B. 857 (Ont. Securities Comm., Jan 14, 1987)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affirming 35 B.L.R. 56
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35 B.L.R. 56
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Canadian Tire Corp. v. C.T.C. Dealer Holdings Ltd.

C.T.C. Dealer Holdings Ltd. v. Ontario Securities Commission

Ontario Court of Justice (General Division) [Divisional Court]

Reid J.

Judgment: March 12, 1987
Docket: 62/87, 73/87, 67/87, 79/87

Proceedings: Affirmed 10 O.S.C.B. 857, 35 B.L.R. 56, 1987 CarswellOnt 128 (Ont. Securities Comm.)

Counsel: *W.L.N. Somerville, Q.C.*, *D.R. O'Connor* and *B.H. Bresner*, for C.T.C. Dealer Holdings Ltd.

Thomas G. Heintzman, Q.C. and *W.G. Hopkins*, for Alfred W. Billes.

Donald J. Wright, Q.C. and *R. Nairn Waterman*, for David G. Billes.

S.N. Lederman, Q.C., for Martha Gardiner-Billes.

Subject: Securities; Corporate and Commercial; Public; Corporate and Commercial; Public

Reid J.:

1 This is an appeal from an order made by the Ontario Securities Commission (the "Commission") on January 14, 1987, reported at (1987), 35 B.L.R. 56, 10 O.S.C.B. 857. Because of the urgency involved the appeal was given precedence on our list. To accommodate counsel in the daunting task of preparing factums and the quite remarkable amount of material that they have filed, we gave leave for respondent factums to be delivered to us and other counsel on the weekend.

2 The hearing from which the order resulted was a joint hearing of the Ontario and Quebec Securities Commissions. It was initiated by a notice given by the staff of the Commission on December 10, 1986. The notice is now set out, notwithstanding its length, for the assistance it affords in comprehending the issues that have come to be raised and discussed with a vigour verging sometimes on vehemence before us. This notice was directed to Canadian Tire Corporation Limited ("Tire" or "Canadian Tire"), C.T.C. Dealer Holdings Limited (sometimes "Dealers" or "Dealer Holdings Limited (sometimes "Dealers" or "Dealer Holdings"), Alfred W. Billes ("Fred"), Martha Gardiner-Billes ("Martha") and David G. Billes ("David").

TAKE NOTICE that the Ontario Securities Commission (the 'Commission') will hold a hearing at its offices on the 18th floor, 20 Queen Street West, Toronto, Ontario, commencing on Thursday, the 18th day of December 1986, at 9:30 o'clock in the forenoon or so soon thereafter as the hearing can be held:

i. To consider, pursuant to s. 123(1) of the Securities Act, R.S.O. 1980, c. 466 as amended (the 'Act'), whether it is in the public interest to order, on such terms and conditions as the Commission may impose, the cease trade of the common shares of Canadian Tire Corporation Limited ('Canadian Tire') held directly or indirectly by each of Alfred W. Billes, David G. Billes, Martha Gardiner-Billes (collectively the 'Billes') and C.T.C. Dealer Holdings Limited ('C.T.C. Dealer Holdings');

ii. To consider pursuant to s. 123(1) of the Act, whether it is in the public interest to order, on such terms and conditions as the Commission may impose, the cease trade of a takeover bid dated December 9, 1986 (the 'bid') made by C.T.C. Dealer Holdings for 49% of the Common shares of Canadian Tire at a price of $160.24 per share, and all trading in common shares of Canadian Tire in respect thereof;

iii. To consider such further and other order as may be appropriate and necessary in the circumstances.

By reason of the following allegations:

1. Canadian Tire is a reporting issuer whose shares are listed for trading on The Toronto Stock Exchange and the Montreal Exchange.

2. C.T.C. Dealer Holdings is a corporation duly incorporated under the laws of the Province of Ontario. The only business of C.T.C. Dealer Holdings is to hold shares of Canadian Tire.

3. Canadian Tire's share capital consists of 3,450,000 common shares, all of which are issued and outstanding and 100,000,000 Class A Shares of which 81,801,322 are issued and outstanding.

4. Under the Articles of Canadian Tire, the common shares are entitled to one vote for each share at all meetings of holders of common shares. The Class A shares are not entitled to vote at meetings of the shareholders of Canadian Tire. However, in order to provide the Class A shares with protection in the event a take-over bid was made for the common shares, the Class A shares are entitled to the benefit of a provision contained in the Articles of Canadian Tire (hereinafter referred to as the 'coattail') which provides as follows:

Change of Class A Non-Voting Shares into Voting Class A Shares

(1) For the purpose of this paragraph 6, "Offer" means an offer to purchase Common Shares which is made to all or substantially all of the holders of Common Shares or which must, by reason of then applicable securities legislation or the by-laws, regulations or policies of a stock exchange on which the Common Shares are then listed, be made to all holders of Common Shares whose last address on the records of the Corporation is in Ontario and "Expiry Date" means the last date upon which holders of Common Shares may accept an Offer.

(2) Subject to subparagraph (3) of this paragraph 6, in the event an Offer is made and a majority of the Common Shares then issued and outstanding have been tendered and taken up pursuant to the Offer, each Class A Non-Voting Share shall thereupon and thereafter be entitled to notice of, and one vote for each Class A Non-Voting Share held at, all meetings of the shareholders of the Corporation and the Class A Non-Voting Shares shall thereupon and thereafter be designated as "Class A Shares".

(3) The entitlement to receive notice and to vote provided for in subparagraph (2) of this paragraph 6 shall not come into effect in the event that the Offer is an offer to purchase both Common Share and Class A Non-Voting Shares at the same price per share and on the same terms and conditions, without distinction between the two classes of shares.

(4) If the entitlement to receive notice and to vote provided for in subparagraph (2) of this paragraph 6 becomes effective, the Secretary of the Corporation shall, within five days after the Expiry Date, forward to each holder of Class A Shares a notice of such entitlement.

5. At the time the coattail was inserted into the Articles of Canadian Tire, the Billes were the controlling shareholders of Canadian Tire and directors of the corporation. The coattail was proposed in order to obtain the approval of the holders of Class A shares to a subdivision of the outstanding shares of Canadian Tire. One of the principal purposes of the subdivision was to directly benefit the Billes.

6. The outstanding common shares of Canadian Tire are presently held as follows:

	Number of Shares	Percent
Alfred W. Billes	700,384	20.3%
David G. Billes	700,383	20.3%
Martha Gardiner-Billes	700,383	20.3%
Trustees of Canadian Tire Deferred Profit Sharing Plan established January 1, 1968	419,280	12.2%
C.T.C. Dealer Holdings	600,650	17.4%
Public	328,928	9.5%

7. The Billes continue as directors and the controlling shareholders of the Corporation.

8. All of the shares of C.T.C. Dealer Holdings are held by the Canadian Tire Dealers Association. Canadian Tire Dealers independently operate the retail outlets through which Canadian Tire products are sold to the public. All but 16 of the 361 Canadian Tire Dealers have an interest in C.T.C. Dealer Holdings.

9. On October 15, 1986, Alfred W. Billes and David G. Billes announced their intention to sell their common shares of Canadian Tire. On October 14, 1986, the closing price for common shares of Canadian Tire on the TSE was $35.75.

10. On November 27, 1986, Alfred W. Billes and David G. Billes made an offer to sell their common shares of Canadian Tire to C.T.C. Dealer Holdings. The offer was accepted by C.T.C. Dealer Holdings on November 28, 1986. C.T.C. Dealer Holdings agreed to make a public take-over bid on or prior to December 22, 1986 for approximately 49% of the common shares of Canadian Tire. Alfred W. Billes and David G. Billes agreed to irrevocably tender their shares to the proposed bid. They received a non-refundable deposit of $15,000,000.

11. By agreement made December 3, 1986, Martha Gardiner-Billes agreed to irrevocably tender her common shares to the proposed bid. She received a non-refundable deposit of $15,000,000.

12. On December 3, 1986, C.T.C. Dealer Holdings confirmed by press release that it did not propose to make the same offer for the Class A shares. On December 4, 1986, C.T.C. Dealer holdings announced that the price it proposed to pay for the common shares would range between $121.31 and $160.23 per share. The price per share would be based either on a fixed price or on a formula whereby the larger the number of shares tendered to the offer, the higher the price per share that would be paid.

13. By offer dated December 9, 1986, (the 'Bid') C.T.C. Dealer Holdings made the previously announced offer for

49% of the Common shares of Canadian Tire.

14. The Bid is contrary to the public interest and ought to be restrained because, inter alia;

i) the making of the Bid and/or the tendering thereto of the Billes common shares is in breach of the duties owed by C.T.C. Dealer Holdings and/or the Billes to the Class A shareholders of Canadian Tire;

ii) the holders of the Class A shares have been misled as to the efficacy of the coattail;

iii) the bid is, in substance, a purchase of all of the common shares of Canadian Tire but has been structured as a purchase of only 49% of the common shares, to circumvent the operation of the coattail;

iv) the Bid as structured may contravene s. 91 of the Act and is, in any event, inconsistent with the principles which underly the provisions of Section 91 and Commission Policy 1.3; and

v) if the Bid is successful, the principal customers of Canadian Tire will have acquired control of the company through the acquisition of only approximately 2% of the participating shares. The Dealers will thereby have created a fundamental conflict of interest which is contrary to the interests of the holders of the Class A shares and the public at large.

15. Such further and other allegations as Counsel may advise and the Commission permit.

AND FURTHER TAKE NOTICE that any party to the proceedings may be represented by counsel of its choice at the hearing.

AND FURTHER TAKE NOTICE that upon failure of any party to attend at the time and place aforesaid the hearing may proceed in the absence of that party and such party is not entitled to any further notice of the proceedings.

DATED at Toronto, this 10th day of December, 1986.

3 The hearing commenced on December 18, 1986 and continued during the days and, we are told, sometimes into the evenings, on the 19th, 20th and 22nd of that month. It was continued on January 5th, 6th, 7th and 8th, concluding on the 9th. Stanley M. Beck, Q.C., Chairman of the Commission presided. With him sat Frances N. Carmichael, Seymour L. Wigle and Paul L. Waitzer, Commissioners. M. Roland Coté and M. Maurice Cusson, both vice-presidents of the Commission es valeurs mobilieres du Quebec, sat with the Ontario Commissioners to constitute a joint hearing of the Ontario and the Quebec Securities Commissions, provision for which is made in the Ontario and Quebec Securities Acts.

4 In addition to those who were made parties by virtue of the notice, four others were granted standing at the hearing. The Commission referred to them in its reasons at p. 8 as follows:

At the commencement of the Hearing, standing was requested on behalf of a number of parties apart from the Billeses and the Dealers. Those who asked for standing were:

(i) members of the Canadian Tire Class A Shareholders Action Committee, being eighteen institutional investors who owned or managed 19,682,865 Class A non-voting shares of Tire;

(ii) Confederation Life Insurance Company, Confederation Investment Counselling Ltd. and Bolton Tremblay Inc., holders or managers of significant blocks of Class A shares;

(iii) the Trustees of the Canadian Tire Corporation Limited Employees Profit Sharing Plans, which Plans hold some

10,000,000 Class A non-voting shares of Tire and some 419,000 common shares;

(iv) the Bell Canada Pension Plan, which is a substantial holder of Class A non-voting shares.

The four parties who requested standing were, collectively, holders of some 30,000,000 Class A shares.

5 On the final day of the hearing, the Commission announced its decision. It is now set out:

The Ontario Securities Commission (the 'Commission') has ordered a Cease Trade pursuant to s. 123 of the Securities Act on the take-over bid by C.T.C. Dealer Holdings Limited ('Dealer Holdings') to purchase 49% of the issued and outstanding common shares of Canadian Tire Corporation, Limited ('Canadian Tire') at a price of $160.24 per common share dated December 9, 1986 (the 'take-overbid'). The Commission has also ordered a Cease Trade on the common shares of Canadian Tire held by Alfred W. Billes, David G. Billes and Martha Gardiner-Billes (the 'Billeses') to the extent that such shares may be tendered to the take-over bid.

The decision of the Commission was made following a hearing requested by the Commission staff into the terms of the take-over bid. The Cease Trades were ordered on the basis that the take-over bid is, in economic reality, a purchase of all of the common shares in Canadian Tire held by the Billeses, although structured as a bid for only 49% of their shares, such structure being created by Dealer Holdings in concert with the Billeses in their capacity as controlling shareholders of Canadian Tire for the purpose of circumventing the operation of the take-over bid protection provision applicable to the Class A non-voting shares of Canadian Tire. Accordingly, the Commission has found that the take-over bid and the tendering to it by the Billeses are contrary to the public interest as that term is used in section 123 of the Securities Act and the Cease Trades have been ordered.

This announcement does not constitute the Commission's reasons for the decision in this matter. Full reasons will follow.

6 On January 14th the Commission issued a formal order, now set out, and 109 pages of reasons.

UPON application made to the Ontario Securities Commission (the 'Commission') pursuant to section 123(1) of the Securities Act, R.S.O. 1980, c. 466, as amended (the 'Act') that:

i. It is in the public interest to order, on such terms and conditions as the Commission may impose the cease trade of the common shares of Canadian Tire Corporation Limited ('Canadian Tire') held directly or indirectly by each of Alfred W. Billes, David G. Billes, Martha Gardiner-Billes and CTC Dealer Holdings Limited ('CTC Dealer Holdings'); and

ii. It is in the public interest to order, on such terms and conditions as the Commission may impose, the cease trade of a take-over bid dated December 9, 1986 as extended from time to time (the 'Bid') made by CTC Dealer Holdings for 49% of the common shares of Canadian Tire at a price of $160.24 per share, and all trading in the common shares of Canadian Tire in respect thereof;

AND UPON convening a hearing, hearing the evidence and counsel on behalf of staff of the Commission, staff of the Commission des valeurs mobilieres du Quebec, CTC Dealer Holdings Limited, Canadian Tire Corporation, Limited, Alfred W. Billes, David G. Billes and Martha Gardiner-Billes, certain Class A minority shareholders of Canadian Tire and the Trustees of the Canadian Tire Employees Profit Sharing Plan;

AND UPON being satisfied that the making of this Order is in the public interest;

THE COMMISSION HEREBY ORDERS, pursuant to section 123 of the Act, the cease trade of the common shares of Canadian Tire held, directly or indirectly, by each of Alfred W. Billes, David G. Billes and Martha Gardiner-Billes or by companies controlled by them, such that such shares may not be tendered to, or taken up, or paid for under, the Bid;

AND THE COMMISSION HEREBY FURTHER ORDERS, pursuant to section 123 of the Act, the cease trade of the Bid and, in particular, the tendering to or the taking up or the payment for any shares of Canadian Tire tendered to the Bid.

January 14th, 1987

7 By notice dated January 15th an appeal to this Court was launched on behalf of David. This was followed by appeals on behalf of Fred on January 16th, the Dealers on January 20th and Martha on January 21st. In addition, a notice of constitutional question was given on behalf of Fred on February 12th. I shall deal with it in more detail later.

8 In the light of these appeals further orders were made by the Commission, which, among other things, permitted the offer to be extended to midnight March 31, 1987.

9 The appeals, and the constitutional question, were argued before us concurrently during the five days commencing Monday, February 23rd.

10 At the hearing, the Commission staff called the following witnesses:

1. Alex Barron. Mr. Barron has been involved in the investment industry for some 50 years, for much of that time president of Fry & Co. (later Burns, Fry). He was responsible for the first public financing for Canadian Tire in 1946. In 1948, at the request of Canadian Tire's founders, J.W. and A.J. Billes, he joined them as one of the three directors of the board. He continued as a director until 1984, apart from a brief period of some three years in the 1960's, when he did not stand for re-election. In 1966 he became chairman. He was chairman at the time of his leaving in 1984.

2. John Kron. Mr. Kron has a degree in business administration from the University of Western Ontario. He was employed by Canadian Tire from 1966 to 1985. In 1967, he became director of distribution and in 1968, vice-president of distribution. He was made executive vice-president in 1978 and was elected to the board of directors. At present he is employed by Stevenson Kellogg.

3. Robin Law. Mr. Law was called to the Bar in 1956. He practices tax, corporate and securities law and has acted for Canadian Tire since 1956. In 1959 he became secretary of the company, and served as a director from 1960 to 1984. He was involved in the 1983 reorganization and drafted the coattail.

4. Dean Muncaster. Mr. Muncaster began working at Canadian Tire part-time in 1945 and fulltime in 1957. He became vice-president in 1963 and president and chief executive officer from 1966 to 1985. He was a director from 1960 to 1985, and was involved in the 1983 reorganization. In 1983 he became a trustee of the Canadian Tire Employees' profit sharing plan.

5. Wilmot Matthews. He has been an investment dealer with Burns, Fry since 1963 and is vice-chairman and a member of its executive and management committee. His work is in the area of corporate underwriting. He was involved in the underwriting of Canadian Tire's first share issue, and was in the 1983 reorganization (but not in the drafting of the coattail).

6. Glorianne Stromberg. She has practised for 22 years in the field of corporate and securities law. She assisted Robin Law in the 1983 reorganization and the drafting of the coattail.

7. R.B. Matthews. Mr. Matthews practices corporate and securities law. He advised Fred on the 1983 reorganization and the 1986 dealer's offer.

8. Fred Billes.

9. William Biggar. He is senior vice-president and a director of Merrill Lynch, Canada, where he has worked for 3 $^{1}/_{2}$ years. In the investment business for 8 years he specializes in mergers and acquisitions. Previously employed as vice-president of

Coopers and Lybrand, he first met the Billeses in 1985 to provide them with financial advice regarding a possible share sale. He assisted in the valuation of all the Billeses' shares and in the sale of Fred's and David's shares under the Dealers' offer.

10. Thomas Kierans. In the investment business since 1962, Mr. Kierans has been president of McLeod, Young, Weir since 1979.

11 No other witnesses were called by the Commission. One was, however called by Mr. Fisher, counsel for the A Shareholders Action Committee. He was James F. Cole, vice-chairman of Guardian Ruggles Crysdale. He holds a bachelor of commerce degree from the University of Toronto, and has been involved in the management of money and investments for 30 years.

Relevant provisions of the Securities Act

12 The Commission's order was made on the authority of s. 123 of the Securities Act, R.S.O. 1980, c. 466, as amended (the "Act"). That section reads:

123. (1) The Commission may, where in its opinion such action is in the public interest, order, subject to such terms and conditions as it may impose, that trading shall cease in respect of any securities for such period as is specified in the order.

(2) The Commission may issue a cease trading order under subsection (1) notwithstanding the delivery of a report to it pursuant to subsection 74(3).

(3) No order shall be made under subsection (1) or (2) without a hearing unless in the opinion of the Commission the length of time required for a hearing could be prejudicial to the public interest, in which event the Commission may make a temporary order, which shall not be for longer than fifteen days from the date of the making thereof, but the order may be extended for such period as the Commission considers necessary where satisfactory information is not provided to the Commission within the fifteen day period.

13 The jurisdiction of this Court on this appeal is set out in s. 9 of the Act. The relevant subsections are as follows:

9. (1) Any person or company directly affected by a decision of the Commission, other than a decision under section 73, may appeal to the Divisional Court.

. . . . .

(5) Where an appeal is taken under this section, the court may by its order direct the Commission to make such decision or to do such other act as the Commission is authorized and empowered to do under this Act or the regulations and as the court considers proper, having regard to the material and submissions before it and to this Act and the regulations, and the Commission shall make such decision or do such act accordingly.

14 The breadth of the powers conferred on this Court has been subject of earlier comment by the Court: see *Royal Trustco Ltd. v. O.S.C.* (1983), 42 O.R. (2d) 147 at 153, 21 B.L.R. 236, 148 D.L.R. (3d) 301 (Ont. Div. Ct.); see also the decision of the Supreme Court of Canada in *Hretcha v. A.G. B.C.*, [1972] S.C.R. 119, 130, [1972] 1 W.W.R. 561, 19 D.L.R. (3d) 1). However broad they may be, they are not a warrant for us to re-try the case. I reject any suggestion that we should do so. For reasons that have been expressed many times by many Courts, the exercise of appeal powers such as these neither calls for nor justifies a trial de novo. We sit to consider if error occurred in the hearing of the Commission or in its reasons or orders, and if so, if it is of such a nature as to require our intervention. Should we see fit to intervene, our powers would permit us to do so in a small way or in a large, and direct the Commission "to do such act as it is authorized and empowered to do under the Act" as we "consider proper". These are wide powers indeed.

15 Such powers have, however, always been used with caution. Out of respect for the expertise of the Commission, for the

weight of the responsibility it bears, and for the stature it has achieved in the industry it is called upon to regulate, the Courts have repeatedly expressed the view that its actions should not lightly be interfered with.

16 These views are reflected in the words of Robins J., speaking for the Divisional Court in *Re Denison Mines Ltd. and O.S.C.* (1981), 32 O.R. (2d) 469 at pp. 479-80, 122 D.L.R. (3d) 98:

> The Act confides responsibility to the Commission in a specialized area of expertise and, it is well-established, that *unless it is demonstrated that the Commission has made a 'plain and vital mistake*' as to the evidence it had to consider, the Court ought not to interfere with its decision.... The Commission gave careful consideration to all of the issues before it and was entitled to arrive at the conclusion it did. (Emphasis added.)

Similarly, the divisional Court said, in *Re Western Ont. Credit Corp. and O.S.C.* (1975), 9 O.R. (2d) 93 at 103, 59 D.L.R. (3d) 501:

> ...where a regulatory tribunal, acting within its jurisdiction, makes an order in the public interest with the experience and understanding of what that interest consists of in a specialized field accumulated over many years, *the Court will be loath to interfere*. (Emphasis added.)

17 Aylesworth J.A. speaking for the Court of Appeal in *Re Southern Brokerage & Holding Co.*, [1967] O.S.C.B. 4 said (at pp. 4-5):

> In order to succeed upon an appeal brought under the relevant provisions of the statute (equivalent to s. 9), the appellant must demonstrate error in principle by the Commission in the decision it has made or perhaps as a facet of the same obligation, demonstrate a clear misapprehension by the Commission of the facts with which it had to deal upon its review. Further than that and assuming that in such an appeal to us, the appellant has demonstrated *error in principle or misapprehension of the facts*, it remains for the appellant to satisfy this Court upon this Court's view of the facts before the Commission that the order made by the Commission should not have been made. (Emphasis added.)

18 Our jurisprudence is replete with observations to the same effect. See *Re Securities Comm. and Mitchell*, [1957] O.W.N. 595, *(*sub nom. *Re Mitchell and O.S.C.)* 12 D.L.R. (2d) 221 (Ont. C.A.); *Re Maher Shoes Ltd. and O.S.C.*, [1971] 2 O.R. 267, 17 D.L.R. (3d) 519 (Ont. C.A.) and *First City Financial Corp. v. Genstar Corp.* (1981), 33 O.R. (2d) 631 at 643, 15 B.L.R. 60, 125 D.L.R. (3d) 303 (Ont. H.C.).

19 In *Royal Trustco Ltd. v. O.S.C.*, supra, the Divisional Court held, at p. 153 [O.R.]:

> ...the regulation of the securities industry is the function of the Commission, not of the court, and unless the Commission can be shown to have been *seriously in error in law or fact* this court should be slow to intervene. (Emphasis added).

The attack on findings of fact:

20 All this is pertinent to the first issue raised before us. Simply put, it was that the Commission misinterpreted the evidence and that its findings of fact were not supported by the evidence. That is an appropriate challenge to be made on an appeal of this type. If "a plain and vital mistake" has been made, we have the power to correct it and the consequences that flow from it. I need not, however, go into this challenge in detail for, in my opinion, it was not made out.

21 The Commission made many findings. All of its major findings, i.e. those critical to its conclusion were challenged. Mr. O'Connor alone listed seven "key findings" which he submitted were "unsupported by any relevant admissible evidence".

22 It is not to detract from the skill and force with which this attack was carried forward by counsel for appellants to say that I think we need not stay long with it. The Commission listened to the evidence of many experienced and expert persons. Some of the evidence was conflicting, but there was ample to support its conclusions.

23 A critical finding was that the "transaction was artificial", and hence abusive. By that was meant that in appearance the

offer was for 49 per cent of the common shareholdings of Canadian Tire but, in reality it was structured to accommodate the desire of the Billeses to sell their entire control position (60.9 per cent of the common shares issued and outstanding), without triggering the coattail. The Commission said in its reasons at p. 86:

> What is being sold and what is being purchased through the Offer is the control position in Tire. That being the case, those who had control, the Billeses, had to be paid what they considered their control was worth. The Dealers and the Billeses had a common interest in not triggering the coattail so as to maximize the premium for control to the Billeses and to minimize the amount that the Dealers would have to pay for control. Accordingly, one arrives at the device of the extremely high premium for 49% of the outstanding common shares.
>
> The evidence, and it is clearly the reality, is irrefutable that the transaction was structured to accommodate the desire of the Billeses to sell their entire control position without triggering the coattail. The Offer is so structured to accomplish that and, in that sense, may fairly be characterized as artificial, in that it appears on its face to be a bid for only 49% of the outstanding common shares at a fixed price. That is simply not the reality of the situation, and the Billeses recognized it, their professional advisors recognized it, their fiscal agents recognized it, the Dealers recognized it, their professional advisors recognized it, and their fiscal agents recognized it. And perhaps most importantly, the marketplace recognized it and hence, the intervention of the Class A shareholders in this case.

24 It is worth noting that the directors of Canadian Tire, other than the Billeses, recognized the artificiality of the transaction. In pursuance of their statutory duty to do so, those directors issued a circular to the shareholders with reference to the offer. In it they recommended its acceptance in the following term:

> The Board of Directors concluded that the Offer is extremely favourable from a financial point of view to the holders of Common Shares. In addition, if the Offer is allowed to proceed it is assured of success by reason of the irrevocable commitment of the Billeses Family to tender their Common Shares. Accordingly, the Directors have no alternative but to recommend acceptance of the Offer by the holders of Common Shares.

25 However, they expressed their grave concern in the following (among other) language.

. . . . .

> (iii) The Offer is, in substance, a purchase of all the Common Shares of Canadian Tire but has been structured as a purchase of only 49% of the Common Shares, to circumvent the operation of the 'coattail' provisions.
>
> (iv) The Offer as structured may contravene Section 91 of the Securities Act (Ontario) and is, in any event, inconsistent with the principles which underly the provisions of Section 91 and Commission Policy 1.3, both of which relate to follow-up offer obligations under the Act.
>
> (v) If the Offer is successful, the principal customers of Canadian Tire will have acquired control of the Corporation through the acquisition of only approximately 2% of the participating shares. Dealer Holdings will thereby have created a fundamental conflict of interest which is contrary to the interests of the holders of the Class A Non-Voting Shares and the public at large.
>
> The Directors (both those elected by the holders of the Class A Non-Voting Shares and those elected by the holders of Common Shares) have expressed their grave concern that the Offer, if successful, will have a continuing adverse effect on the market value of the Class A Non-Voting Shares and further that the rights and interests of the holders of these shares have not been dealt with in a fair and equitable manner. The Board of Directors has noted that its concerns will be dealt with at the hearing to be held by the Ontario Securities Commission.

26 In reaching its conclusion that the offer was artificial and abusive, the Commission considered submissions made by counsel for the Billeses. It observed, at p. 85:

> Counsel for the Billeses argued that there is nothing artificial about bidding $160.24 for 49% of the outstanding common

> shares of Tire. The offer is at a fixed price for a maximum number of shares. It is no way depends on a formula. There is real value of $160.24 for the shares that will be tendered and taken up under the offer, and an assumed value, according to the best advice of the Billeses' financial advisors, of $12.00 for their remaining common shares. Those are both real economic values, and there is no artificiality in the transaction.
>
> Looked at in isolation, the contention of counsel for the Billeses is perfectly true. But looked at in the context of the evidence, of what the Billeses wanted to accomplish, of how the formula was arrived at and the transference of the formula from the Notice under the Aldamar agreement into the Billeses' Lock-up agreements and then the movement from there to a fixed price under the Offer that would accomplish exactly the same economic goal, their argument takes on a completely different colouration. Biggar valued the common shares at between $67.00 and $91.00 per common share. The market price of the common shares was in the $25.00 area in mid-summer of 1986, even after it began to be rumoured that the Billeses were looking to sell their control block. After the announcement of their intention to sell, the price of the common moved to the low $40's and after the announcement of the offer, moved up to $71.00. In the face of that, we have an offer of $160.24 per share. Moreover, and most importantly, some $200 million is being paid for 49% of the Billeses' common shares with the remainder, 51% having an assumed value of $10 million in the market.

27 The Commission considered the offer against the background of events that occurred in 1983 and concluded that the offer is "as grossly abusive a transaction as the Commission has had before it in recent years". At pp. 84 and 88 the Commission observed, under the heading "The Public Interest":

> In these circumstances, we have no hesitation in saying that this transaction is contrary to the public interest as that term is used in section 123 of the Act. When the public market is sold some $100 million of Class A nonvoting shares consequent upon a reorganization that, among other things, provides takeover protection to those shares and the controlling shareholders, some three years later, devise a scheme in conjunction with those who wish to obtain control of the Corporation, to circumvent the coattail while, in effect, receiving the full price for their shares, regulatory intervention to stop an abusive transaction is called for. A transaction such as is proposed here is bound to have an effect on public confidence in the integrity of our capital markets and on public confidence in those who are the controllers of our major corporations. If abusive transactions such as the one in issue here, and this is as grossly abusive a transaction as the Commission has had before it in recent years, are allowed to proceed, confidence in our capital markets will inevitably suffer and individuals will be less willing to place funds in the equity markets. That can only have a deleterious effect on our capital markets and, in that sence, it is in the public interest that this Offer be cease traded along with the Billeses' tendering of their common shares to the Offer.

28 The Commission made it clear that the abuse it perceived was of two kinds: abuse of the Class A shareholders and of the marketplace itself. There was much evidence before it to support its conclusion that the offer was an abuse of the Class A shareholders. Among those who testified to that effect were directors of Tire who had participated in the 1983 reorganization. To the same effect was the evidence of Mr. Muncaster, Mr. Law, and Mr. Kierans.

29 The Commission was concerned that the Billeses had participated in the offer in order to serve their sole object, i.e. to get the maximum amount possible for their control position, and wholly ignored the interests of the Class A shareholders. The evidence was that the employee pension fund trusts, which held funds arising out of employee profit-sharing plans, were heavy investors in the A shares, holding almost 10 million.

30 The Commission, according to Mr. Campion, accepted that when benefits from the trusts or plans became payable to the employees (as on retirement), the shares could be and often were transferred in specie. It is also evident that Tire was a unique company with a close, almost family relationship between its founders and its employees. Yet the Commission heard evidence from Fred, the son of one of the founders, that neither he nor his brother or sister were concerned over the A's being left out of the enormous premium they were to receive under the offer. The following evidence was considered important enough for the Commission to repeat in its reasons at p. 82 (Transcript, pp. 1258-59):

> Q. Am I correct in assuming that you, David and Martha wanted to maximize the control proceeds which you realized, if you were going to sell your shares of Canadian Tire.

A. I believe that is correct.

Q. Your concern for the well-being of the holders of the A shares did not extend to permitting them to participate in the control premium?

A. That's correct.

31 As for the finding that the transaction was an abuse of the market, again there was evidence to that effect given by persons of experience and standing in the securities industry, particularly that of Mr. Kierans. There was also evidence to a contrary effect. It is obvious that the Commission carefully considered all the evidence. It reviewed much of the evidence at length. In the result, having weighed the evidence, the Commission reached its conclusions. In order to do so it had perforce to prefer some testimony over other.

32 Appellants do not contend that there was no evidence to support the Commission's findings of fact. Some, they say, was inadmissible and I shall come to that, but that aside, it is clear there was evidence.

33 It is trite that an appeal Court will not intervene when there was evidence before a trial Court that would support its findings of fact, albeit that there was evidence to support a different finding. It is peculiarly the task of trial Judges to weigh such evidence. The mere fact that it leads to one conclusion rather than another is not a basis for interference on appeal.

34 There is authority to the effect that a different standard governs us on this appeal. It is said that the review on appeal of the Commission's findings should not be made on the same basis as the review of findings of fact by a trial Judge. A more confining standard has been held to apply in *Re Securities Commission and Mitchell*, [1957] O.W.N. 595, 599, following *Re Securities Act and Gardiner*, [1948] O.R. 71, 80, [1948] 1 D.L.R. 611 (*sub nom. Re Gardiner*) (Ont. H.C.). I accept the authority of that statement, but in my opinion it is not necessary for us to resort to it. The application of either the standard appropriate to the review of a trial Court's findings or the narrower one said to apply to the findings of the Commission requires the conclusion that the impugned findings were supported by the evidence and there is no warrant for our intervention.

35 One finding in particular illustrates the situation before the Commission. There was testimony by Mr. Biggar on behalf of appellants that if the Commission were to stop this offer from proceeding, it would create "chaos in the market place". That was directly contrary to the evidence of Mr. Kierans. His opinion was that stopping the transaction would be salutary and promote confidence in the securities market. The Commission preferred Mr. Kierans' testimony over Mr. Biggar's. While that conclusion is not to appellants liking, their disagreement is not a basis for reversal in this Court.

36 In my view the attack based on the sufficiency of evidence and the Commission's interpretation of it must fail.

The jurisdictional issue:

37 That brings me to the next major attack. It was on the jurisdiction of the Commission under s. 123. Appellants contend that the discretion that section confers on the Commission was not intended to be exercised in the absence of a concurrent breach of the Act, or regulations made under the Act, or of policies declared by the Commission in the form of policy statements. Thus, the Commission cannot lawfully make an order in the absence of such a breach. Since no such breach exists here, it was submitted that the order is made without jurisdiction. To interpret the section differently would, in appellants' submission, confer an unprecedented, unjustified, unintended and unreviewable discretion on the Commission. It would place the Commission "above the law". Simply by labelling something as being contrary to the public interest, the Commission could invoke a jurisdiction beyond effective review by any Court. Thus the Commission, by this bootstrapping device, could create a jurisdiction for itself it was never intended to have.

38 In respect of this argument it is worth first noting that s. 123 on its face makes no reference to any breach of the Act, regulations or policy statements being required. The discretion granted to the Commission is not, by anything found in s. 123,

confined to circumstances in which a breach occurs.

39 Secondly, there are many provisions in the Act conferring discretion on the Commission. An examination of such sections discloses that some are expressly confined to breaches of the Act or regulations. Section 11(1) is an example. The Commission may appoint a person to make an investigation where a sworn statement has been made that a breach of the Act or regulations (or of the Criminal Code) appears probably to have occurred.

40 There are, as well, other provisions in which, like s. 123, no such requirement is stipulated. Section 26(1) is an example. It reads:

> 26 (1) The Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration or reprimand the registrant where in its opinion such action is in the public interest.

41 I accept the difference in wording as intentional. It is too obvious to ignore. When the Legislature intended a discretion to be exercised only where a breach had occurred it has said so. When it has not said so, the inference appears compelling, that no such limitation is implied, and none should be inferred.

42 There is authority of long-standing that would support the view that s. 123 is not to be read as implying any such restriction. In *Re Securities Act and Gardiner*, supra, Robertson C.J.O. heard an appeal from the cancellation of registration as a salesman. The Commissioner's action was based on s. 10 of the Act [S.O. 1945, c. 22], (a predecessor to s. 26(1) above). It read:

> The Commission shall suspend or cancel any registration where in its opinion such action is in the public interest.

Robertson C.J.O. observed, at p. 72 [O.R.]:

> The statute does not make any stipulations as to the manner in which the Commission shall exercise the powers given it under ss. 9 and 10.

At p. 80 he observed:

> It was contended for the appellants that unless there had been a breach by the salesmen of some provision of The Securities Act, no order cancelling their registrations could be supported. I am quite unable to accept that view. Section 10 makes it the duty of the Commission to suspend or cancel any registration where, in their opinion, such action is in the public interest.

43 In the later case of *Re Securities Comm. and Mitchell*, supra, Laidlaw J.A. heard on appeal against the cancellation of registration as a "securities advisor". Laidlaw J.A. said, at p. 595 [O.W.N.]:

> The Commission has the right to suspend or cancel registration of any person, notwithstanding the fact that there has been no breach of any provision of The Securities Act or any regulation made thereunder: *Re The Securities Act and Gardiner*, et al., [1948] O.R. 71 at p. 80, [1948] 1 D.L.R. 611.

44 It was also submitted that there was no evidence that anyone had in fact been misled. In *Mitchell*, Laidlaw J.A. said (at p. 599):

> Finally, the Commission may properly form its opinion to suspend or cancel any registration in the public interest without proof of actual injury to the public.

45 I appreciate that appellants draw a distinction between the cancellation of registration and interfering with the private arrangements of non-registrants, but I do not think that distinction, even if valid, diminishes the relevance of that observation to the task of construing a grant of a power to be used "in the public interest". Such power, it seems to me from *Mitchell*, may be exercised without proof of injury to the public, or to any particular member of the public.

46 I would have thought those pronouncements closed the door years ago on these contentions.

47 Appellants raise the spectre of an "unfettered" discretion in the Commission. They say, rightly, that an unfettered dis-

cretion would place the Commission above the law. Yet to suggest that the discretion conferred by s. 123 is "unfettered" in that sense is unjustified. The fetter consists in a finding that something proposed or done is contrary to the public interest. True, the Commission referred in its reasons to its "unfettered" power and to that extent, armed appellants with this dart. Yet a fair reading of its reasons makes it clear that the Commission was acutely aware of the necessity for something contrary to the public interest to exist before its powers could be used. It is throughout those reasons acknowledged that the public interest was an overriding fetter on its exercise of discretion. I think it is beyond question that the Commission meant unfettered by the necessity for a concurrent breach of the Act, regulations or policy statements to exist. The reference to a "broad and unfettered power" is made crystal clear by the context in which those words were used. The Commission was discussing the contention that it could not exercise its powers under s. 123 in the absence of a concurrent breach of the Act, regulations or policy statements. In that context it referred to its rejection of that same contention in *Re Cablecasting Ltd.*, [1978] O.S.C.B. 37. It then referred to its "broad and unfettered power" under s. 123, and went on immediately to say, (reasons p. 74):

> To accede to counsel's contention that a specific breach of the legislation or of a policy statement must be shown before s. 123 can be invoked would not only be contrary to the plain wording of s. 123, but also would be a failure by the Commission to exercise the mandate vested in it by the legislature.

48 In my opinion, a fair reading of the Commission's words in context disposes of appellants' contention.

49 Were the Commission ever to use its discretion in the irresponsible fashion suggested by appellants, it would be subject to prompt correction in this Court. Thus, if the Commission were to label something as contrary to the public interest in the absence of any evidence to support that view, it would have misused its jurisdiction. Similarly, if the Commission were to act mala fide, perversely, maliciously, arbitrarily or capriciously it would have misused its powers, and be open to correction in this Court. But when the Commission has acted bona fide, with an obvious and honest concern for the public interest, and with evidence to support its opinion, the prospect that the breadth of its discretion might some day tempt it to place itself above the law by misusing that discretion is not something that makes the existence of the discretion bad per se, and requires the decision to be struck down.

50 Here, of course, there is no question of the Commission's bona fides. While appellants are unhappy with the Commission's findings and its conclusions, they can hardly argue that the Commission was not acting in good faith in an attempt to carry out its mandate as protector of the public interest under s. 123.

51 It has been observed by this Court that the Commission, not the Court, is responsible for regulating the securities industry (see *Royal Trustco*). Its mandate is the protection of the public. Appellants prefer to see the transaction as a purely private transaction. The Commission focussed on its public effect. I would have thought it beyond argument that the transaction must be seen to have a significant impact on large sections of the public. There are some 80 million A shares outstanding. The employees' interest is obvious, particularly by way of the pension trusts. The prospect of a change of control of this major public company, the largest retail hardware and automotive supplies company in Canada is so obviously of interest and concern to many investors in both the common and the A shares, that to suggest it is not, appears to me fanciful.

52 There was ample evidence to justify a finding that the public interest was involved and that what had occurred was contrary to the public interest. In my opinion, the Commission neither had nor sought to exercise an unfettered discretion. I find no error on this ground.

The 1983 Re-organization

53 In 1983 the Billeses purchased the 1.05 million common shares held by the estate of their uncle, J.W. Billes. As a result Fred held 700,384, and David and Martha each held 700,383 common shares. That amounted to 60.9 per cent of those outstanding. The purchase price was $76.7 million. In order to finance the purchase they entered into negotiations with the directors to split the A shares 6 for 1 and the common into 1 common and 5 Class A. The Billeses proposed in a letter to President Muncaster that, among other things, "Takeover protection (not presently enjoyed) will be granted to the A shareholders *in the*

event of a sale by our family *of a controlling interest* in the Corporation resulting in a follow-up obligation to all common shareholders". (Emphasis added). The letter continued, "We believe this is an extremely valuable addition to the rights of the Class A shareholders and will be well received by the market".

54 The directors proposed some conditions of their own, including a majority of directors independent of the Billeses and of the company. Out of these negotiations grew the coattail. It provided protection in the event of a sale of a majority of the outstanding common. Everyone who participated in the reorganization, the directors, the Billeses and the legal and financial advisors to both, equated "majority" with "control", and the sale of the Billeses shares. No one at the time thought of a change in control through purchase of less than a majority. Barron and Muncaster testified that they would not have approved the coattail if the had realized it would allow the type of transaction contemplated in the Dealer's offer. Law said that if he had realized a pro-rata bid for less than a majority would not trigger the coattail he would have "sent people back to the drawing board".

55 Similar testimony was given by Wilmot Matthews. He would not have supported the reorganization and Burns would not have participated in the later sale of Tire's shares had he been aware that the coattail would not be effective on a transfer of control by the Billeses at a premium in the type of transaction contemplated by the Dealers' offer.

56 Fred Billes testified to a similar understanding. (See Commission's reasons at p. 28)

57 The reorganization was approved by Tire's shareholders. Thereupon, the Billeses sold 5 million Class A shares to the public for some $56 million, to go toward the $76 million cost of purchasing the uncle's estate's shares.

58 It was not until events arose some time after the reorganization leading to the brothers desiring to sell their shares, that the plan of selling 49 per cent of their common shares at a price set as if all the common were sold was devised.

59 Appellants contend that evidence of the intention to provide protection on a sale of control was both irrelevant and inadmissible. The law governing the interpretation of written instruments, they submit, particularly contracts, requires that the words of the coattail be the only proper source of evidence of intention, given that they are plain and unambiguous, and for the Commission to look behind them is "illegal".

The first consideration here is s. 15 of the Statutory Powers Procedure Act, R.S.O. 1980, c. 484. It provides:

> 15 (1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (*a*) any oral testimony; and
>
> (*b*) any document or other thing,
> relevant to the subject matter of the proceedings and may act on such evidence, but the tribunal may exclude anything unduly repetitious.
>
> (2) Nothing is admissible in evidence at a hearing,
>
> (*a*) that would be inadmissible in a court by reason of any privilege under the law of evidence; or
>
> (*b*) that is inadmissible by the statute under which the proceedings arise or any other statute.
>
> (3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings.

> The impugned evidence would not, if relevant, be excluded by virtue of that section.
>
> Second, the evidence was not admitted for the purpose of construing the coattail. It did not, and could not, transmute "majority" into "control". The Commission accepted that the coattail term "majority" did not mean control, and did not look at the evidence of the framers of the coattail in an attempt to so interpret it.

60 Rather, they looked at that evidence to see whether the later circumvention of the intention of the creators of the coattail by some of them - the Billeses - was contrary to the public interest.

61 This has nothing at all to do with the inadmissibility of evidence of intention for the purpose of construing the coattail. The Commission had the power, and the duty, to examine this transaction from the point of view of the public interest. In my view the contrast between the 1983 intention of the Billeses, the directors and their advisors to give protection to the A shareholders on a change of control and the 1985 plan of the Billeses, the Dealers, and their advisors to frustrate that intention is highly relevant to the question whether it is in the public interest to allow such a plan to be carried out. Thus, in my opinion, the evidence of intention was both relevant and admissible.

62 Its relevance is confirmed by the evidence of Kierans. He testified to the perception of the coattail in the marketplace. It was his opinion that, having in mind the way the market really works, the coattail would have been perceived by investors and others in the marketplace as granting the kind of protection its framers intended. The Commission accepted that view (as they did his opinion of the reason for the price spread between the common and the 'A' shares). They were entitled to do so.

63 I find no error on this ground.

Other issues

64 There were other points raised. They were, in my opinion, of less substance than the foregoing. It was, for instance, submitted that the Commission sought to exercise powers made exclusive to superior Courts by s. 96 of the Constitution Act, 1867 (U.K.), c. 3. In my opinion the powers granted to the Commission by s. 123 easily meet the tests laid down by the Supreme Court of Canada in *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 158 and *Massey-Ferguson Industries Ltd. v. Saskatchewan*, [1981] 2 S.C.R. 413, [1981] 6 W.W.R. 596, 127 D.L.R. (3d) 513, 39 N.R. 308. Thus, neither the grant of power in s. 123 to the Commission nor its construction of that grant raises any question of constitutionality.

65 It was submitted that the Commission's failure to stipulate the time period for which the cease trading order is imposed, and for that reason alone the order is fatally flawed. In my opinion the order is plainly extended to last for the duration of the bid. That is plain on its face. To my mind, specifying that in the order would be superfluous.

66 The contention was made that the order was bad (and, impliedly, the entire hearing was embarked upon without jurisdiction) because no "trade" was involved, the transaction having been completed before the Commission took action. Yet the transaction remains incomplete while the offer remains outstanding, and the Commission's order prevents its completion. I see nothing in that argument.

67 It was argued that the order was a "blunt instrument" striking the innocent as well as the culpable. It was suggested that the Dealers were the victims of the Billeses and vice versa and that, in any event, Martha should be regarded as separate from her brothers. The answer to that, in my opinion, is that the Commission's overriding concern was to protect the interests of the public over the interests of the immediate parties to the transaction. It is difficult to see how any other action than what it took would be appropriate. No one suggested any that would, in my opinion, have been adequate.

68 Martha could not, by any imaginative stretch, be considered separate from her brothers. She participated with her brothers in the arrangement and sought to gain the same benefit. The Dealers had shown in their agreement with her brothers their concern that the transaction might founder because a "regulatory authority", i.e. the Commission, might intervene. They

had, however, accepted that if the intervention was a "result of the pricing mechanism and/or the manner of calculating the number of shares to be taken up and paid for under the bid" they would bear the risk. They would thus lose the otherwise refundable half of their $15 million deposit. They were obliged by that agreement to make the same offer to Martha.

69 Martha, however, shifted the entire risk of the Dealers by requiring the entire $15 million deposit to be non-refundable for any reason. This example was later followed by her brothers, whose agreement with the Dealers was amended to reflect it.

70 Thus, all the Billeses showed themselves to be alive to the risk that the offer would fail for the very reason that caused it to fail, and they protected themselves against it. It was the Billeses demand for the highest price possible for their shares that produced the pricing mechanism and caused the transaction to be stopped. I can find no basis for accounting one less responsible than the others.

71 It may be that the Dealers had no viable option, given their limited means, but for the Commission to refuse to stop a transaction it considered contrary to the public interest and permit the dealers to proceed with a clearly abusive transaction would be to ignore its duty and to favour private interests over public good.

72 I do not accept appellant's contention that the Commission assumed the powers of a Court in finding that the Billeses breached fiduciary duties, or by "exercising an equity jurisdiction". Again, I think it is unfair and unreasonable to take the Commission's words out of context. In my view, the Commission was simply describing a scheme that it had found to be unethical and dishonest from other points of view and in other terms. It was the appearance of inequity and injustice, and the apparent failure of the Billeses, as controlling shareholders, to show any regard for the well-being of the A shareholders, that gave rise to the Commission's concern, and led to the initiation of the s. 123 proceedings. I think the Commission made that quite clear. If the Commission's references, which form the basis for this contention, are given a fair reading in the context of the reasons in their entirety, no reasonable person, in my opinion, could entertain the view appellants propose.

73 Last, it is complained that the Commission is inventing policy "on the spot" and if it is permitted to do so no one in the marketplace will know where he stands. The Commission is accused of "changing the rules". I think that both that fear and that contention are groundless. The Commission has observed that not all eventualities can be covered by published policy statements. That is too self-evident a proposition to be gainsaid. The situation here is proof of its truth.

74 As for suddenly changing the rules, the parties to this transaction were surrounded by sophisticated legal and financial advisors. If anyone should know the rules, it is surely they. As far back as 1978, the Commission made known its concern over transactions that constituted "flagrant abuse" of the marketplace apart from any overt breach of policy, and by implication the Act and regulations. By its decision in *Re Cablecasting Ltd.*, supra, the Commission served a warning that could hardly be ignored. In rejecting the contention that a breach of the Act, regulations, or a policy statement had to be demonstrated in order for the Commission to exercise its jurisdiction under the predecessor section to s. 123, the Commission said:

> Dealing with the second point, Mr. Atkinson contended that the Commission may not issue a cease trading order unless it has found a contravention of the Act, regulations or a policy statement. This contention seems to the Commission to miscast the role of policy statements. Under the Act - not only section 144, but also a number of other sections the Commission is vested with discretions that must be exercised in the public interest. The Commission has followed the practice of publishing policy statements indicating the circumstances in which these discretions will be exercised. This is appropriate, to provide advance indication of applicable rules and a chance to comment thereon. But Mr. Atkinson's contention seems to us to view the situation from a wrong perspective. The obvious conclusion, that the individual with an imagination sufficiently fertile to invent an unethical scheme which skirts the words of all published pronouncements may carry out that scheme with impunity, demonstrates the difficulties of the position.

75 The Commission repeated its concern over unethical practices in *Re Lindzon*, [1982] 42 O.S.C.B. 43(c). It emphasized its earlier decision in the following terms:

> In *Cablecasting*, the Commission considered whether the transactions proposed 'detracted from the credibility of the

> capital markets or [were] otherwise inconsistent with the best interests of investors'. This theme has occupied the Commission in other connections and, in dealings where there is diverging interest between insiders and other shareholders, the Commission has been concerned about fair or even handed dealings as between these classes of shareholders.

76 In *Re Fed. Commerce & Navigation Ltd.*, [1981] 1 O.S.C.B. 20(c) the Commission re-emphasized its determination not to allow "the sophisticated gloss of technicality" to frustrate the "basic philosophies that underline the securities laws of the province". It said:

> In conclusion, the decision of the Commission has been based upon an interpretation of the provisions of the By-law arrived at in the light of the Commission's understanding of the philosophy and the intent behind the rules established by those provisions. In restating the basic tenets or general principles discussed in the Kimber Report, the Commission wishes forcibly to draw to the attention of the public that, although technical interpretation is necessary, *it is the expectation of the Commission that the participants in the capital markets of this province will be guided by the basic philosophy and rationale from which the securities laws of this province were developed*. The sophisticated gloss of technicality must not be used to obscure the true intent and import of the basic philosophies that underlie the securities laws of the province. *Technical interpretations that run contrary to these basic philosophies and principles will not be acceptable to the Commission*. (Emphasis added)

77 In my opinion that was fair warning and clear. In the light of it no one was justified in thinking that the Commission would sit by with its hands folded until there had occurred a breach of the Act, the regulations, or a policy statement. To complain now that the Commission has changed the rules without warning is to pretend to an ignorance of the Commission's policy that is itself artificial. No player in the game in 1985 could fairly claim that the umpire had not set out the rules.

78 As I read the Commission's decision, it is that the transaction is abusive in two ways. First, it is artificial. Second, it was contrived to circumvent the coattail, and thus frustrate the intention of its well-intentioned proponents, and confound the justifiable expectations, or, in Mr. Kieran's words, the "reasonable assumptions" of investors and others in the marketplace.

79 In my view the appeals should be dismissed. Mr. Justice Saunders, who is on circuit, has read these reasons and informed me of his concurrence. As to costs, it was agreed during the hearing that counsel would make written representations.

80 *Appeal dismissed*.

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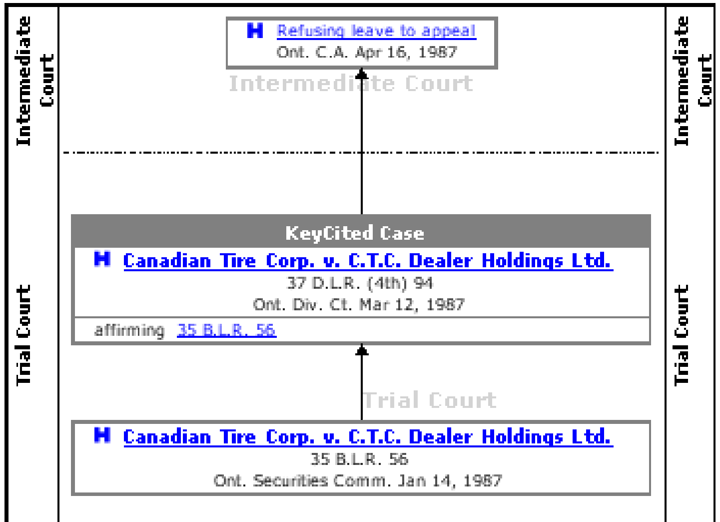
KEYCITE

H Canadian Tire Corp. v. C.T.C. Dealer Holdings Ltd., 37 D.L.R. (4th) 94, 35 B.L.R. 117, 21 O.A.C. 216, 1987 CarswellOnt 1733, 23 Admin. L.R. 285, 59 O.R. (2d) 79, [1987] O.J. No. 221, 10 O.S.C.B. 1771 (Ont. Div. Ct., Mar 12, 1987)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