

To Our Clients

Going Private

A recent Canadian case, Carlton Realty Co. v. Maple Leaf Mills Ltd., Sup. Ct. Ontario, Oral Decision, Oct. 13, 1978, reflects a continuing acceptance of the "condemnation" argument against squeezeouts. The following quotation from the opinion gives the essence of the opinion:

". . . The effect of the amalgamation would deprive the applicants of their common shares in a company and replace them with preference shares that could be redeemed at the will of the corporation. There is no power for this Corporation to redeem its common shares directly, and there is no section of The Business Corporations Act (Ontario) that specifically provides for the squeezing-out of minority shareholders. There is power under certain circumstances for a corporation to buy its own shares in the open market, but this denotes a voluntariness on the part of the shareholder to be willing to sell. Again, if the Corporation were not offering its shares to the public, the Ontario Act provides for a dissenting shareholder to force the company to buy his shares under certain circumstances, but there is nothing to permit the company to force him to sell. A person is entitled to retain his property if he so wishes, except where there is a right held by another to forceably take it. It matters not for this purpose what price the taker is willing to pay. I see no clear right under the Act to permit the taking of the applicants' common shares by the means proposed. It may be that there is such a right by implication under other sections, but that is not for me to decide on this application. I find that the applicants have presented enough of a case to be weighed by me with the other factors in determining whether the relief should be granted. Even if this factor of taking of shares without consent were not sufficient, I am convinced that other issues have been raised that would be equally sufficient to be weighed along with the other factors that I have mentioned. I list only some of them: first, is the Corporation doing indirectly what it cannot do directly?; secondly, the issue of whether the Act permits the treatment of one group of

November 2, 1978

shareholders differently from another group when both are in the same class and whether or not this amalgamation purports so to do; thirdly, whether or not the minority shareholders are entitled to a separate vote on the special resolution providing for the amalgamation; fourthly, whether or not the Corporation is in effect repurchasing its own shares without authority under the Act; and fifthly, whether or not the directors have breached a fiduciary responsibility to the applicants. I hasten to say that I certainly find no indication of fraud or any indication of any malevolent interest on the part of the directors, and my comment with respect to the fiduciary relationship is strictly whether such exists in law or not."

M. Lipton