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Repap British Columbia Inc., Re

In The Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

In The Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44

In The Matter of the Company Act, R.S.B.C. 1979, c. 59

In The Matter of Repap British Columbia Inc., Buffalo Head Forest Products Ltd., Orenda Forest Products Ltd. and Orenda Logging Ltd., Petitioners

British Columbia Supreme Court

Thackray J.

Heard: January 9, 1998
Judgment: January 9, 1998
Docket: Vancouver A970588



Counsel: *W.C. Kaplan* and *S.A. Turner*, Counsel for Skeena Cellulose Inc.

*C.S. Bird*, Counsel for Her Majesty the Queen in the Right of the Province of British Columbia.

*W. Skelly*, Counsel for the Pulp & Paper Workers of Canada, Local 4.

*M.A. Fitch*, Counsel for Coopers & Lybrand, the Monitor.

*R.J. Kearns*, Counsel for the Toronto-Dominion Bank.

*A.J. Adamic*, Counsel for the Department of Employment Standards.

*G.H. Dabbs*, Counsel for Finning International Inc.

Subject: Insolvency; Corporate and Commercial

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Provincial government had become involved with logging and pulp company — Plan of compromise or arrangement was voted on by unsecured creditors when company was on verge of insolvency — Company petitioned for court sanction of plan pursuant to Companies' Creditors Arrangement Act — Plan developed pursuant to Act was not used merely to defeat creditors — Provincial government and banks took inappropriate steps outside court process while developing plan — Government would have majority interest in company if plan was sanctioned — Fairness of plan had had to be determined without clear picture of government's intent — Determination of whether plan was fair and reasonable could not be made on evidence — In light of possible viability of company, lack of better alternative and considerable majority vote of creditors in favour of plan, plan was sanctioned — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

**Cases considered by *Thackray J.*:**

*Associated Investors of Canada Ltd., Re* (1987), 56 Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, 67 C.B.R. (N.S.) 237, (sub nom. *First Investors Corp. Ltd. (Re))* 46 D.L.R. (4th) 669 (Alta. Q.B.) — considered

*Carruth v. Imperial Chemical Industries Ltd.*, [1937] A.C. 707, [1937] 2 All E.R. 422 (U.K. H.L.) — considered

*Gold Texas Resources Ltd., Re* (February 10, 1989), Doc. Vancouver A883238 (B.C. S.C.) — referred to

*Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — considered

*Langley's Ltd., Re*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (Ont. C.A.) — referred to

*Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) — referred to

*Quintette Coal Ltd., Re* (1991), (sub nom. *Quintette Coal Ltd. v. Nippon Steel Corp.)* 56 B.C.L.R. (2d) 80, 7 C.B.R. (3d) 165 (B.C. S.C.) — considered

*Quintette Coal Ltd., Re* (1992), 13 C.B.R. (3d) 146, 68 B.C.L.R. (2d) 219 (B.C. S.C.) — considered

**Statutes considered:**

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 6 — referred to

PETITION by company for court sanction of plan of arrangement.

***Thackray J.*:**

1 A Plan of Compromise or Arrangement has been voted upon by the unsecured creditors of Skeena Cellulose Inc. That vote supported the Plan in accordance with the provisions of the *Companies' Creditors Arrangement Act*. Pursuant to the *Act* it is now the responsibility of the Court to determine if the Plan should be "sanctioned."

2 The "fairness" of the Plan must be measured against the overall economic and business environment and against the interests of the citizens of British Columbia who are affected as "shareholders" of the company, creditors of the company, suppliers and employees of the company, and competitors of the company. These reasons are designed to explain how the Court came to its decision that the Plan is one that should be sanctioned by the Court.

**Background**

3

> In 1910 (or 1911) Prince Rupert was incorporated as a city, with Fred Stork as first mayor, and soon began its long history of boom and depression of hope and gloom, until today at long last its prosperity is based solidly upon its shipping facilities, its fishery resources, and the large scale industrial operations of the Celanese Corporation of America. (Extract from **Solomon Mussallem,** a biography by Herbert Baxter King published in 1955.)

4 The solid foundation seen by Mr. King has not come to pass. The *C.C.A.A.* proceedings have been played out against a background of industrial economic downturn having a particular effect in the Prince Rupert and Terrace areas. Tourism, fishing and lumber have been subjected to depletion; provincial, national and international political controversies; and union/company differences. It is not possible for the Court to make its determination in this case isolated from that background. The background, as taken from various articles, monitor's reports and affidavits is, in short form, as follows.

5 In 1973 the Government of British Columbia took over Celanese Corporation's provincial assets after assuming its debts. In 1979 the mill became part of the publicly traded British Columbia Resources Investment Corporation (BRIC). In 1986 BRIC, which was in financial difficulty, sold the Skeena assets to Repap British Columbia Inc. ("Repap B.C.") for $69 million. Repap B.C. was a wholly owned subsidiary of Repap Enterprises Inc. ("Repap").

6 By a proxy circular dated January 27, 1997, an amalgamation between Repap and a subsidiary of Avenor Inc. was proposed to the shareholders of Repap and Avenor. The proposal contemplated that Repap B.C. would remain an asset of the amalgamated company. However, Repap and Avenor subsequently agreed that Repap B.C. would not be included in the amalgamated company.

7 On March 3, 1997, Repap B.C. and its affiliates, Buffalo Head Forest Products Ltd., Orenda Forest Products Ltd. and Orenda Logging Ltd. were granted protection under the *Companies' Creditors Arrangement Act.* Coopers & Lybrand was appointed monitor of the company. At that time Repap B.C. was experiencing significant operating losses. It owed the banks approximately $480 million, including approximately $381 million in term debt as at January 31, 1997, and a further approximately $99 million in operating debt. In addition it had current payables and accrued liabilities of approximately $140 million.

8 In June, 1997, Repap Enterprises severed its interest in Repap B.C. The major creditors, being the Toronto-Dominion Bank and the Royal Bank, through corporate reorganization, took over the assets of the company. In the fall of 1987 an agreement was reached between the banks and the Provincial Government whereby the banks would write off some $300 million in debt and would invest a further $96 million in the company. The Government agreed to invest some $200 million by way of cash, loan guarantees, wage guarantees and reduced stumpage fees.

9 In turn the employees agreed to a 10% wage rollback, greater job flexibility and, possibly, more contracting out. However, because of various factors the amount of money to be infused proved to be insufficient. The Royal Bank refused further loans and as a consequence the Government bought out the Royal Bank's interest of $213,948,144.60 for $31,348,637.64. If the Plan of Arrangement is sanctioned the Government will have a 52.5% interest in Skeena Cellulose Inc. (formerly Repap B.C.).

10 The monitor's first report dated April 4, 1997, gives the following outline of the company's operations:

> The Company operates a pulp mill, three sawmills and related forestry tenure in north-west British Columbia. The

pulp mill has an annual capacity of 450,000 tons and is the seventh largest softwood kraft pulp mill in North America and markets its pulp in Asia, North America and Europe. Its sawmills have capacity to produce 393 million MBF of softwood lumber a year. These products have similar markets.

The Company and its affiliates have approximately 2.4 million $M^3$ of annual allowable cut and conducts operations in Terrace, Smithers, Hazelton and Prince Rupert. Its head office is located in Vancouver and it has approximately 1,320 employees.

**Discussion**

11 The court hearing following a favourable vote is governed by section 6 of the *Companies' Creditors Arrangement Act.* It provides that where a Plan of Arrangement has received the required vote of creditors the "compromise or arrangement *may* be sanctioned by the court." [my emphasis] This approval is sought at what has come to be called a "fairness hearing."

12 What should be considered at a fairness hearing? There are threshold matters to consider in every case and some specific matters in the case at bar. This consideration should never, in my opinion, lose sight of the purpose of the *Act.* The most quoted definition of "purpose" is to be found in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (B.C. C.A.) wherein Mr. Justice Gibbs said at page 88 B.C.L.R.:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business.

13 In a series of judgments in which Quintette Coal Limited was the debtor company, this Court commented upon the purpose of the Act. In unreported reasons of July 23, 1990, it said as follows:

In considering this submission [that the base pay-out figure to creditors was arbitrary] it is worthwhile to refresh our minds as to the overall purpose of the C.C.A.A. Stanley E. Edwards, Canadian Bar Review, Vol. XXV, notes that:

> Its object, as one Ontario judge has stated in a number of cases, is to keep a company going despite insolvency. He notes that when the bill was introduced into the House of Commons it was indicated that the design was to permit a corporation, through reorganization, to continue its business.
>
> In **Meridian** [***Meridian Developments Inc. v. Toronto Dominion Bank*** (1954), 5 W.W.R. 215] Mr. Justice Wachowich said the C.C.A.A. "envisages the protection of creditors and the orderly administration of the debtor's affairs or assets."
>
> .....
>
> While it is a compelling argument to suggest that the status quo should be maintained between classes of creditors, I do not believe that I should be blinkered by such a narrow view. The overall design of the C.C.A.A. is to preserve the debtor as a viable operation and to reorganize its affairs to the benefit of not only the debtor but also its creditors....
>
> What is meant by maintaining the status quo is that the debtor will be able to stay in business, and that they will have breathing space in which to develop a proposal...

14 In a subsequent hearing, the reasons for which are cited as *Quintette Coal Ltd., Re* (1991), 56 B.C.L.R. (2d) 80 (B.C. S.C.), the Court, in dealing with the purpose of the Act, said at page 82:

> The paramount interest of all parties and the court must be to successfully conclude a reorganization wherein Quintette survives and wherein the various creditors lose as little as possible and retain the potential benefit of continuing to be suppliers and lenders to Quintette and thereby somewhat mitigate their losses.

15 It will be seen that the purpose of the Act is to allow the debtor company to survive thus minimizing the loss to the creditors. The fairness hearing is therefore expected to produce evidence as to whether or not the purpose of the Act was fulfilled. It is upon such evidence and submissions arising therefrom that the court will make its decision.

16 One matter to consider in deciding whether the purpose of the Act has been met is the motivation for invoking the stay provisions of the Act. That is, was the motivation a sincere desire to reach a fair arrangement or was it to relieve the company of its unsecured debt? That question must be considered in the case at bar in that the proposed Plan releases the company from up to 90% of its unsecured debt.

17 Dissatisfaction with the Plan has been voiced by creditors, some of it within this courtroom. Much more criticism has been vented through the media. However, as stated by Mr. Kaplan, none of us involved in this procedure can isolate ourselves from what is happening outside of the courtroom. For instance, the contention of creditors that they were not given the same consideration as employees.

18 Another matter raised in court was that the unsecured creditors, at the second vote, would be fettered by the first vote. It has not been determined whether or not the first vote was legal. Regardless, was it fair for the Government and the Toronto-Dominion Bank to keep that vote as ammunition in their arsenal to use in the event of an unfavourable second vote?

19 This takes me to what might be defined to be not only the threshold question but the ultimate question, i.e., has the purpose of the *Companies' Creditors Arrangement Act* been achieved?

20 In *Associated Investors of Canada Ltd., Re* (1987), 67 C.B.R. (N.S.) 237, [1988] 2 W.W.R. 211 (Alta. Q.B.) at 245 Berger J. said:

> A plan of arrangement should not receive judicial sanction until the court has in its possession all of the evidence necessary to allow the court to properly exercise its discretion according to the standards of fairness and reasonableness, absent any finding of illegality.

21 The Court must therefore consider whether it has sufficient evidence that the Plan will save the company and result in the best long-run benefit to a broad range of parties, including the public who will be investing hundreds of millions of dollars into the company.

22 However, even if the Court is not satisfied that the Plan satisfies the subjective criteria for sanctioning, should the Court refuse that sanction in the face of the determination of the company to carry on, the promised infusion of funds and the vote by the creditors? McLachlin C.J.S.C. in *Gold Texas Resources Ltd., Re* (February 10, 1989), Doc. Vancouver A883238 (B.C. S.C.) said:

> The Court will ... be strongly influenced by a big majority vote, for, provided that the scheme is fair and equitable, the Court will not itself judge upon the commercial merits, which is the function of the class itself. The Court will be slow to differ from the majority.

23 Nevertheless, McLachlin C.J.S.C. said that directors and shareholders of a company are not necessarily "in a better position to judge as to what is to the commercial advantage of the company than the Court can be." This suggestion that a court armed with evidence might be the body to make the decision can be seen in the following excerpt from *Carruth v. Imperial Chemical Industries Ltd.*, [1937] A.C. 707, [1937] 2 All E.R. 422 (U.K. H.L.) wherein Lord Maugham said at 770:

> ...I think the fairness or unfairness of the scheme as a whole ... is not a matter for the discretion of the learned judge in a technical sense, but is a matter to be decided on the evidence. The question in this case depends on the view which should be taken as to the future commercial success of the Company. We are not entitled to substitute our own views for those of the directors and experts who have given evidence.

24 In *Quintette Coal Ltd., Re* (1992), 68 B.C.L.R. (2d) 219 (B.C. S.C.) the Court discussed the "fair and reasonable" issue commencing at page 237:

The concepts of fairness and reasonableness have been a foundation for "schemes of arrangement" since at least 1890 when they were pronounced in ***Re Alabama***, supra. [Alabama, New Orleans, Texas & Pacific Junction Railway Co., Re (1890), 60 L.J. Ch. 221 (C.A.)] These concepts do not suggest the scheme must attain perfection. This would be an unrealistic standard in that the reorganization has been dictated by the imperfect condition of the petitioning company. What must be strived for in the reorganization is to strike a compromise and present a feasible plan.

I adopt the words of Mr. Justice Hogg in ***Re Western Canada Flour Mills Ltd.***, [1945] O.W.N. 152, [1945] 1 D.L.R. 589 [p 154 O.W.N.]:

> ...it is obvious that any arrangement contemplated by the statute must be in the nature of a compromise. It is not required that the arrangement be as perfect as might possibly be devised. It is sufficient if it is a reasonable compromise, that is to say, it must be, in the words of Bowen L.J. quoted by Maugham J. in ... ***Dorman, Long [Re Dorman, Long & Co.***, [1934] Ch. 635] ... "a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it."

25 The Court then referred to *Langley's Ltd., Re*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (Ont. C.A.) and noted as follows at page 238:

> Henderson J. went on in the same paragraph to say that where the required majority have voted in favour of the arrangement "the Court is not ... to substitute its view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the shareholders themselves.

26 The reasons in *Quintette Coal Ltd.* continue at page 239 as follows:

In the appeal reasons in ***Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada***, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363, 73 C.B.R. (N.S.) 195, Chief Justice McEachern neatly summarized the authorities [p. 205 C.R.R.]:

> Lastly, it remains to be considered whether the plan is fair and reasonable. I wish to refer to three matters.
>
> First, the authorities warn us against second-guessing businessmen (see ***Re Alabama***, supra, at p.244). In this case, the companies and their advisors, the bank and its advisors, and all the creditors except the two appellants, voted for the plan. As the authorities say, we should not be astute in finding technical arguments to overcome the decision of such a majority...

> With respect, negotiations between businessmen are much to be desired and I would not wish to say anything that would impede that salutary process. If negotiations lead to unfairness, then other considerations, of course, arise. But that, in my view, is not this case.
>
> The matter of a judicial judgment versus a business judgment has concerned me through the latter part of these proceedings. Lengthy periods of time often passed between court hearings. During those periods negotiations were taking place. They involved sophisticated business people and their advisors. Their expertise extended to all corners of finance and into the special areas of banking and mortgaging. As well, expertise in the various industries involved in this matter was utilized. These areas included railroads, ports and mines.
>
> The negotiation process has required the best part of two years. I am of the opinion that little time was wasted. Now the awesome responsibility of sanctioning the result falls to the court. This is no doubt a necessary step in order to give all parties access to an objective body. However, it is sobering to consider that this final step is to be taken by a judicial body which may not have any expertise in business or finance. Or, of significance in this case, in mining.

**Conclusions**

27 I have not found the process to have been entirely satisfactory. It should always be recognized that proceedings under the *C.C.A.A.* are court directed. In *Hongkong Bank of Canada*, supra, Mr. Justice Gibbs at page 88 said:

> When a company has recourse to the C.C.A.A. the court is called upon to play **a kind of supervisory role** to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

28 I am not satisfied that this concept was either recognized or acted upon at all times. I find it difficult to accept that the Government and the Toronto-Dominion Bank acted appropriately in proceeding to the first vote without first obtaining a Court ruling as to the legality of the process. While to have done so would not necessarily have settled the question as to the "fairness" of an owner/secured/unsecured creditor voting as an unsecured creditor, it would have settled the legality issue. Furthermore, it would have "aired" the issue and given notice to the unsecured creditors of the proposed move.

29 The process that was followed after the invocation of the *C.C.A.A.* was almost entirely without Court direction. A review of other proceedings under the *Act*, in particular those involving Quintette Coal, Woodwards' Stores, Philip's Manufacturing Ltd. and Northland Properties Ltd. show that there were many references to the Court throughout the proceedings. In the case at bar, but for the well prepared and timely reports of the monitor, the Court would have been no better informed than any other bystander.

30 Experience from this case suggests that in future *C.C.A.A.* proceedings consideration should be given, early on, as to the purpose of the *Act* in the circumstances of the case, the role the Court is expected to play, and the mandate of the monitor. An agenda of Court hearings might be established to review progress, to publicly discuss the monitor's reports and to give notice of any impending legal or procedural issues.

31 This takes me to the matters that I raised earlier in these reasons. I am satisfied on the evidence that the *Act* was not used merely to defeat creditors. This can be seen through the monitor's reports, the negotiations, the infusion of public money, the agreement of the Government and the bank to modify their reliance on the first vote and by the amendment to the Plan which added to the amount payable to unsecured creditors.

32 The unsecured creditors complained that they were not treated in the same manner as union employees. The suggestion was that employees, being union people, were given an advantage because of their traditional support of the New Democratic Party. However, as was noted by the Court in *Quintette Coal Ltd.*: "It will be the exceptional compromise that does not alter the respective interests of various parties."

33 As to the circumstances surrounding the first vote, I am sympathetic to the outcry of the unsecured creditors. Mr. Bird, on behalf of the Government, submitted that his client's position was that what it did was right. When it was suggested to him by the Court that what he meant was that it was legal, he countered with "legal *and* right." I do not agree that the Government and the Toronto-Dominion Bank acted appropriately. They must have recognized, and indeed been advised, that voting as they did without first having raised the matter with the Court, would be questioned.

34 If the Government is going to go into business, and especially when it is entering into an enterprise that was formerly private, it must act in a totally open manner. The Government is in a particularly vulnerable position in that its business creditors are also its constituents. Its acts must therefore reach the level that is prescribed for the courts, i.e. they must not only be justifiable but seen to be justifiable.

35 The fact that the Government and the Toronto-Dominion Bank intended to declare part of the company's indebtedness to be unsecured and thereby vote it as unsecured was not only not approved by the Court but was not revealed until the last moment. This caused extreme irritation in the unsecured creditor class and adverse public comment. In the face of concern expressed by the Court the Government and the Toronto-Dominion Bank reluctantly agreed to a second vote.

36 The agreement was offered only on the condition that the first vote be kept "in reserve" in the event that the Plan of Arrangement did not receive a positive vote. Thereupon, according to counsel for the company, the issue of the legality of the first vote would be brought before the Court. Furthermore, a second vote was only agreed to on the condition that the Court order provide that no changes could be made to the Plan before the vote.

37 It would have been better if they had totally abandoned the first vote. This could have been done without compromise to their position that the first vote was legally conducted.

38 What I find to be a most troubling step was taken by the Government on January 2, 1997, in appointing what it described as a "special commissioner." The Vancouver Sun carried the headline on January 3: "Premier orders Skeena probe.". The Government was reported to have appointed a Mr. Ralph Torney "to review the impact that the Skeena Cellulose bailout is having on small and medium-sized businesses in northwestern B.C."

39 Concurrent with the announcement of the "probe", a Government representative, identified as Ms. Jean Wolff, was reported to have said, with respect to whether or not financial help would be available to creditors, that "The government is looking at what is needed and what is necessary." Not surprisingly one "organizer of the unsecured creditors" saw this as "a positive sign." This oblique hint at funding in conjunction with the news release must have left many creditors thinking that they should vote for the Plan because some further compensation was in the offing.

40 It must be kept in mind that the vote was scheduled for January 6. On that day Employment Minister, Mr. D. Miller, is reported to have said as follows:

> ...the government will do what it can to help creditors avoid bankruptcy, by providing bridge financing, for example.
>
> To those contracting companies we're saying, We'll work with you like we worked with Skeena.

On January 8, 1997, Mr. Miller is quoted as saying that the Government would not abandon contractors whose businesses are threatened because of the Plan.

41 I am of the opinion that the Provincial Government in appointing a "special commissioner" and in making the announcements which it did, *when it did*, intruded into the court process. The Government is, of course, entitled to undertake any programs which, in its wisdom, it sees fit to undertake. However, when it is the owner of an enterprise involved in a court directed proceeding its acts must be judged using the same criteria as would be applicable to a private owner.

42 On that basis I can see no reason for launching this probe before the conclusion of the court process other than to "sweeten" the Plan. This step was taken by the Government outside of the Court process and without revealing its intentions in open Court. Rather, it used the media to broadcast its intentions. The Vancouver Sun, in an editorial on January 3, 1998, saw the move in the very manner that I have suggested it would be taken by many creditors:

> Yesterday, though, the premier offered the unsecured creditors a sweetener, by asking Ralph Torney, past president of the Truck Loggers Association, to find answers for smaller businesses by talking to the companies and communities that may live or die along with Skeena Cellulose.

43 All of this points up the difficulty in analyzing the situation when the Government is involved in several capacities. For instance, what was the mandate of the special commissioner? Was he to investigate the "owners" role, that being the Government and the Toronto-Dominion Bank? As to the suggestion that the probe might benefit creditors, does that suggest that additional funding is to come from Skeena Cellulose or is it to come from the Government through other resources? Further, are all creditors to be treated equally or are there to be selected creditors eligible for relief?

44 In trying to determine whether the Plan is fair the Court is left without a clear picture of the Government's intent. That is why, in my opinion, *all* offers that were to be made to the creditors should have been included in the Plan which could then have been voted upon without either clubs being held over their heads or carrots being dangled in front of their noses.

45 I am satisfied that the process that has been followed was seriously flawed. I lay this primarily at the feet of the Government in its capacity as majority owner of Skeena Cellulose Inc.

46 That leaves the fairness of the Plan to be determined. The first difficult issue is whether there is evidence that the company has a commercially viable future. To quote again from *Carruth, supra*:

> [the issue of fairness] is a matter to be decided on the evidence. The question in this case depends on the view which should be taken as to the future commercial success of the Company.

47 I will therefore turn to the evidence. Annexed to these reasons is a summary of the company's "consolidated historical operating results." Mr. Rudolf Schwartz, vice president finance and business operations for Skeena Cellulose Inc., deposed in an affidavit filed March 3, 1997, that this document "accurately states the operating results of the companies since 1991."

48 It will be seen from the summary that the companies suffered net income losses in all years other than 1995. The loss in 1994 was $23.5 million, the profit in 1995 was $5.3 million and the loss in 1996 was $128.4 million. Yet Mr. Schwartz is reported in the Vancouver Sun of January 6, 1997, to have stated that analysts who say that the company has not been profitable and that the company cannot make a profit are wrong.

49 In an affidavit filed November 26, 1997, Mr. Schwartz deposed that notwithstanding the proposed agreement for infusion of funds, "the current low world price for pulp renders the Petitioners economically fragile." In the same affidavit

he said that determining the value of the forest licence "is made difficult because of present economic circumstances, particularly because one cannot predict whether Skeena remains a viable customer for the wood products produced from the Buffalo Head forest licence."

50 The monitor reported on November 4, 1997 that the companies' business plan for the years 1998 to 2004 inclusive anticipates "cash of $603 million after debt servicing, but before any capital expenditures or debt repayment. Total capital expenditures in this period are estimated at approximately $420 million. Term loans of up to $170 million for capital expenditures have been arranged..."

51 Mr. David Bowra, the person who carried out the monitor's role, deposed in an affidavit sworn January 8, 1998, as follows:

> The Reorganization Plan now approved by the creditors of the Skeena Companies is based upon the Business Plan and Economic Plan which both SCI and the TD Bank have agreed to finance in respect to operating and capital expense requirements. On that basis, the Plan offers the Skeena Companies their best chance for a return to profitability.

52 Mr. Kaplan, in his written submission, submitted that "there is no requirement placed upon them [the companies] ... to establish that upon reorganization the applicant company will be profitable or necessarily viable in the long run." I think he is correct. However, the infusion of capital is so massive that it can only be concluded that for *some* future period the company will survive. It will almost certainly survive the present crisis. A prognosis as to the length of that survival is not to be found in the evidence.

53 The evidence that Skeena Cellulose can survive is far short of overwhelming. It comes only to a level of "chance." That is the very word used by Mr. Bowra in his recent affidavit. In *Quintette Coal Ltd., Re* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.) I said as follows at page 174:

> I am of the opinion that the Plan is feasible. Counsel for Sumitomo Corporation submitted that the Plan will 'allow at least a chance for the continued existence of the mine'. Counsel for Quintette conceded that the Plan might not be perfect but that it is the best that an honest effort has been able to come up with.

I went on to sanction the Plan. In the case at bar I accept that there is a chance for survival. This chance can only be exercised by a Court sanction of the Plan.

54 Another compelling reason for sanctioning the Plan is that bankruptcy, the only other apparent alternative, would result in no return for the unsecured creditors. Mr. Bowra deposed in his recent affidavit that this is the case.

55 As to whether or not the Plan is fair and reasonable, I cannot say. This is the third criteria to sanctioning pursuant to the reasons of Mr. Justice Trainor of this Court in *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.). Having come to the decision that I cannot decide that issue, I am faced with the question as to whether or not a court should override the expressed wishes of the company, the secured creditors and the majority of the unsecured creditors. In this case the unsecured creditors voted 85.3% in number and 87.7% in value in favour of the Plan.

56 Earlier in these reasons I set out the various cases reflecting upon this issue. My summary of these cases is as follows:

> 1. The Court will "be strongly influenced by a big majority vote."

2. The Court "may be in a better position to judge" than the interested parties, but that "is a matter to be decided on the evidence."

3. "The concepts of fairness and reasonableness ... do not suggest the scheme must attain perfection."

4. The Court will not without substantial cause substitute its judgment for that of the immediately involved parties.

57 On the basis of the chance of viability of the company for at least a short term, the lack of a better alternative and in that there is a "big majority vote" in favour of the Plan, the Plan is sanctioned.

**Historical Operating Results - Summary**

| | $000's | | | | | |
|---|---|---|---|---|---|---|
| | Fiscal Year Ended December 31 | | | | | |
| | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 |
| Revenues | $289.6 | $288.7 | $339.4 | $455.2 | $475.1 | $460.5 |
| Net Sales | 252.1 | 249.9 | 294.5 | 401.9 | 417.8 | 391.3 |
| Cost of Sales | (242.3) | (248.1) | (290.7) | (363.6) | (335.6) | (410.5) |
| Depreciation & amortization | (29.7) | (26.6) | (30.2) | (29.6) | (29.0) | (35.9) |
| Gross Profit (Loss) | (19.9) | (24.8) | (26.4) | 8.7 | 53.2 | (55.1) |
| General and administrative expenses | (10.7) | (11.1) | (11.7) | (11.6) | (16.6) | (16.4) |
| Operating Profit (Loss) | (30.6) | (35.9) | (38.1) | (2.9) | 36.6 | (71.5) |
| Interest expense | (27.9) | (21.8) | (25.7) | (32.9) | (44.0) | (50.2) |
| Other (expenses)/income | 4.0 | 2.8 | 8.3 | 6.2 | (0.1) | (0.1) |
| Unusual Items | - | - | - | - | 18.9 | (8.0) |
| Income (Loss) before taxes and other items | (54.5) | (54.9) | (55.5) | (29.6) | 11.4 | 129.8 |
| (Provision for) recovery of income taxes | 24.6 | 26.5 | 18.8 | 6.1 | (6.1) | 1.4 |
| Income (Loss) before undernoted | (29.9) | (28.4) | (36.7) | (23.5) | 5.3 | (128.4) |
| Provision for dividends to non-controlling interest Equity gains | (13.8) | (18.1) | (0.3) | | | |
| Net Income (Loss) after taxes | (43.7) | (46.5) | (37.0) | (23.5) | 5.3 | (128.4) |

Rudolf Schwartz

3 March 97

[Signature]

**Appendix — Repap BC**

*Petition granted.*

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