1953

*May 12, 13,14
*Oct. 6

W. G. RATHIE (*Plaintiff*) ..... APPELLANT;

AND

MONTREAL TRUST COMPANY and BRITISH COLUMBIA PULP and PAPER CO. LTD. (*Defendants*) .... } RESPONDENTS.

AND

THE ATTORNEY GENERAL OF CANADA, CHARTERED TRUST COMPANY, and W. H. POWELL ... } INTERVENANTS.

ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL

Companies—Offer by company to buy shares of another—Period offer to be open for acceptance under The Companies Act (Can.)—Compliance with terms of s. 124 (1) prerequisite to obtaining court order compelling acceptance—The Companies Act, 1934 (Can.) c. 33, s. 124 (1).

S. 124 (1) of *The Companies Act, 1934* (Can.) c. 33, provides that where when any contract involving the transfer of shares in one company has within four months after the making of the offer been approved by the holders of not less than nine-tenths of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months give notice in such manner as may be prescribed by the court, to any dissenting shareholder that it desires to acquire his shares, and where such notice is given the transferee shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the contract, the shares of the approving shareholders are to be transferred to the company.

The respondent Trust company, acting on behalf of an undisclosed principal, on Dec. 1, 1950, made an offer to the shareholder of the common stock of the respondent pulp and paper company to purchase their shares at $200 per share, subject to the offer being accepted by Dec. 15, 1950 by the holders of not less than 90 per cent of the shares. It further provided that it should not be bound to accept or pay for any shares not deposited with it by that date. The holders of more than the required percentage accepted and complied with the terms of the offer, but the appellant did not, nor did the intervenants. On April 15, 1951 upon application of the respondents, Coady J. made an order under s. 124 (1) of the Act authorizing the Trust company to notify the shareholders who had not accepted the offer that it desired to acquire their shares under its terms and that, unless upon an application made by any of them within one month from the date upon which notice was given them the court should otherwise order, the Trust company would be entitled to acquire their shares on such terms. The appellant then brought action naming the respondents

*PRESENT: Kerwin, Taschereau, Rand, Kellock, Locke, Cartwright and Fauteux JJ.

as defendants, claiming a declaration that the Trust company was neither entitled nor bound to purchase his shares, nor the plaintiff bound to sell or transfer them to it, and that s. 124 was *ultra vires*, and alternatively that its provisions did not apply to the plaintiffs' shares. He also moved for an order setting aside the *ex parte* order made by Coady J. The latter dismissed the action and the motion. An appeal to the Court of Appeal for British Columbia was also dismissed.

Held: That the language of s. 124 (1) of *The Companies Act* contemplates that the offer shall be open for acceptance for a period of four months after its making by those to whom it is made. Where the offer, as in this case, does not comply with the terms of the subsection, the offeror is not entitled to invoke the assistance of the court to compel the dissentients to transfer their shares.

Judgment of the Court of Appeal for British Columbia (1952) 6 W.W.R. (N.S.) 652, reversed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Coady J. (2), who dismissed the appellant's (plaintiff's) action. By orders of various judges in chamber, the Attorney General for Canada, Chartered Trust Co., and W. W. Powell were permitted to intervene.

M. M. Grosman, Q.C. and *C. F. Scott* for appellant.

A. S. Gregory for the respondents.

F. P. Varcoe, Q.C. and *K. E. Eaton* for the Attorney General of Canada, intervenant.

Terence Sheard, Q.C. for the Chartered Trust Co., intervenant.

W. H. Powell, intervenant, in person.

The judgment of Kerwin, Kellock, Locke, Cartwright and Fauteux, JJ. was delivered by:

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal of British Columbia, by which the appeal of the present appellant from a judgment of Coady, J. in the action brought by the appellant under the provisions of s. 124 of the Dominion Companies Act was dismissed. As it was contended both in the action and upon the motion that the section was *ultra vires* the Parliament of Canada, the Attorney-General of Canada intervened in the proceedings in this Court. Mr. W. H. Powell, a holder of common

(1) 1952) 5 W.W.R. (N.S.) 675: [1952] 3 D.L.R. 61.
(2) (1952) 6 W.W.R. (N.S.) 652.

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shares in the British Columbia Pulp and Paper Company Limited, and the Chartered Trust Company as trustee of the property of W. F. Bald, deceased, were by orders of this Court permitted to intervene.

The British Columbia Pulp and Paper Company Limited was incorporated by letters patent under the Companies Act of Canada on December 24, 1925, and has since that time carried on extensive operations in the production of pulp and and allied products in the Province of British Columbia. Its head office is at the City of Vancouver.

On December 1, 1950, the authorised capital of the company was 150,000 shares of common stock without nominal par value and 10,000 shares of redeemable preference stock of the par value of $100 each. Prior to December 1, 1950, 100,000 of the common shares had been issued and were in the hands of 243 shareholders. On that date, Montreal Trust Company addressed to each of these shareholders an offer to purchase their shares which read as follows:—

MONTREAL TRUST COMPANY
Executors and Trustees
15 King Street West,
Toronto 1, Ont.

December 1, 1950.

TO THE HOLDERS OF COMMON SHARES OF
BRITISH COLUMBIA PULP & PAPER COMPANY,
LIMITED:

Montreal Trust Company (hereinafter called the "Trust Company") hereby offers to purchase at $200 cash per share flat, Canadian funds, less transfer taxes, all the outstanding common shares (hereinafter called the "shares") in the capital stock of British Columbia Pulp & Paper Company, Limited, a company incorporated under the laws of Canada (hereinafter called the "company").

This offer is subject to the following conditions:

1. That it shall have been accepted on or before December 15, 1950 in the manner hereinafter provided by the holders of not less than ninety per cent (90%) of the shares.

2. That acceptance of this offer can be made by you only by depositing with any office of the Trust Company in Canada your certificate or certificates for shares duly endorsed in blank for transfer with signature guaranteed by a bank or trust company or a member of a recognized stock exchange together with a letter of transmittal in the form enclosed duly completed and signed. The conditions of this paragraph 2 may be waived in whole or in part by the Trust Company.

Upon acceptance of this offer within the time aforesaid by the holders of not less than ninety per cent (90%) of the shares, the Trust Company will forthwith make payment for such shares. Failing acceptance of this

offer within the time aforesaid by the holders of not less than ninety per cent (90%) of the shares, the share certificates deposited will thereupon be returned by the Trust Company to the persons depositing the same. The Trust Company may, but shall not be bound to accept deposit of or to pay for any shares not deposited on or before December 15, 1950. All payments for the shares shall be made by cheque negotiable without charge at all Canadian Branches of The Royal Bank of Canada.

Shareholders who wish to forward their certificates by mail are advised to use registered post for their protection.

The Canadian Foreign Exchange Control Board has approved of the making of this offer. It is understood, however, that shareholders who are resident in the United States dollar area countries and who wish to accept this offer by depositing their shares in accordance with its terms will be required to re-invest the purchase price payable hereunder in appropriate Canadian domestic securities.

Yours very truly,
MONTREAL TRUST COMPANY.

It was found as a fact by the learned trial Judge that on or before December 15, 1950, the holders of more than 90 per cent of these shares accepted the offer.

S. 124 of *The Companies Act, 1934,* reads as follows:—

124. (1) Where any contract involving the transfer of shares or any class of shares in a company (in this section referred to as "the transferor company") to any other company (in this section referred to as "the transferee company") has, within four months after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths of the shares affected, or not less than nine-tenths of each class of shares affected if more than one class of shares is affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice, in such manner as may be prescribed by the court in the province in which the head office of the transferor company is situate, to any dissenting shareholder that it desires to acquire his shares, and where such notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the contract, the shares of the approving shareholders are to be transferred to the transferee company.

Provided that, where any contract has been so approved at any time before the coming into force of this Act, the court may by order, on an application made to it by the transferee company within two months after the coming into force of this Act, authorize notice to be given under this section at any time within fourteen days after the making of the order, and this section shall apply accordingly, except that the terms on which the shares of the dissenting shareholder are to be acquired shall be on such terms as the court may by order direct, instead of the terms provided by the contract. The terms substituted by order of the court as aforesaid shall not be such as to deprive the dissenting shareholder, without his consent, of the right to receive any dividends declared and unpaid on his shares or any unpaid cumulative preferential dividend on those shares whether declared or not accrued or accruing up to the date of the

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acquisition of those shares by the transferee company, but any provision made for the preservation of such right shall be taken into account in determining such substituted terms.

(2) Where a notice has been so given and the court has not ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice was given, or, if an application to the court by the dissenting shareholder is then pending, after the application has been disposed of transmit a copy of the notice to the transferor company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section it is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares.

(3) Any sums so received by the transferor company shall be paid into a separate bank account in a chartered bank in Canada and such sums and any other consideration so received shall be held by the transferor company in trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

(4) In this section the expression "contract" includes an offer of exchange and any plan or arrangement, whether contained in or evidenced by one or more documents, whereby or pursuant to which the transferee company has become or may become entitled or bound absolutely or conditionally to acquire all the shares in the transferor company of any one or more classes of shareholders who accept or have accepted the offer or who assent to or have assented to the plan or arrangement; and the expression "dissenting shareholder" includes a shareholder who has not accepted the offer or assented to the plan or arrangement and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the contract.

The appellant had become the registered owner of 25 of the common shares on November 30, 1950, and did not accept the offer and it was not accepted by the intervenants Powell and the Chartered Trust Company. On April 5, 1951, upon the application of Montreal Trust Company and British Columbia Pulp and Paper Company Limited, Coady, J., acting under the provisions of s-s. 1 of s. 124, made an order authorising the Trust Company to give notice to such of the holders of the common shares who had not accepted the offer, advising them that it desired to acquire the shares on the terms of the offer and settling the form of the written notice to be given. It was a term of the order that unless, upon an application made to the Court by any of these shareholders within one month from the date upon which notice was given to him as directed, the Court should otherwise order, the Montreal Trust Company should be entitled and bound to acquire the said shares on the terms of the offer and should pay to the

British Columbia Pulp and Paper Company Limited, or the several persons entitled thereto, the money representing the price payable for the shares in accordance with those terms.

On May 2, 1951, the appellant issued a writ in which the Trust Company and the Paper Company were named as defendants, the endorsement claiming, *inter alia,* a declaration that the Trust Company was neither entitled nor bound to purchase the shares of the appellant and that the plaintiff was not bound to sell or transfer them to the Trust Company, for a declaration that s. 124 of the Companies Act was *ultra vires* the Parliament of Canada, and alternatively, a declaration that the provisions of the section did not apply to the shares owned by the plaintiff. The appellant obtained special leave to serve with the writ a notice of a motion to be made on June 5, 1951, for judgment in the terms of the endorsement. Notice of this motion was given to the Attorneys-General of Canada and of the Province of British Columbia. In addition, the appellant gave notice of a further motion in the original proceedings for an order setting aside the *ex parte* order made by Coady, J. on April 5 on the grounds, *inter alia,* that s. 124 was ultra vires and that there had been no jurisdiction to make the order and notice of this application was also given to the Attorneys-General. These applications came on for hearing together. Neither of the Attorneys-General were represented. Coady, J. dismissed the action and the motion.

The first matter to be considered is as to whether the proceedings taken by the Montreal Trust Company were in accordance with the provisions of s. 124. In a matter involving what amounts to a forced sale of the shares of the dissentients, there must clearly be strict compliance with the terms of the section. S. 124 first appeared in the Dominion Companies Act 1934. Other than that part of s-s. 4 which defines certain of the meanings to be attributed to the word "contract" in s-s. 1, the section was taken almost verbatim from s. 50 of the Companies Act 1928 (Imp.) which amended in this respect the Companies (Consolidation) Act 1908. That section was carried into the Companies Act of 1929 as s. 155 and, with certain amendments and additions, is now s. 209 of the Companies Act, 1948.

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The offer of the Montreal Trust Company, it is to be noted, was made subject to the condition that it should be accepted in the manner specified on or before a date fourteen days after the date of the offer by the holders of not less than 90 per cent of the shares. As to those who did not accept within that time, the offer read:—

> The Trust Company may, but shall not be bound, to accept deposit of or to pay for any shares not deposited on or before December 15, 1950.

The appellant contends that such an offer is not within the terms of the section. For the respondents it is said that, since it was shown that within two weeks it was accepted by the holders of more than 90 per cent of the shares, they are entitled to invoke the provisions of the first paragraph of s-s. 1 for the compulsory acquisition of the shares of those who did not accept the offer. The point was carefully considered by Mr. Justice Coady, who was of the opinion that an offer open only for this limited period complied with the requirements of the section. With great respect, I am unable to agree. The Trust Company's offer was open for acceptance for a period of two weeks only: for the remainder of the four month period after the making of the offer the company might, at its option, decline to purchase the shares of any of those who had not accepted on or before December 15, 1950. In my opinion, the language of s-s. 1:—

> Where any contract involving the transfer of shares or any class of shares in a company . . . to any other company . . . has, within four months after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths of the shares affected . . .

contemplates that the offer shall be open for acceptance for the period of four months by those to whom it has been made. The procedure authorised by the first paragraph of s-s. 1 enables the transferee company, if the offer is not accepted, to apply to the Court for an order that the dissenting shareholders transfer the shares on the terms of the offer. The intention of Parliament in providing that such an application could not be made until four months after the making of the offer was, in my opinion, to enable the shareholders to make such investigation as they might think advisable to enable them to determine whether the offer was fair and one that they wished to accept. I cannot think

that it was contemplated that the offeror might limit the period within which the offeree might make these inquiries in such manner as might suit his own convenience. If the time for acceptance might be limited to two weeks, it might, of course, be limited to a much shorter period and afford the shareholders a wholly inadequate opportunity to make such inquiries as they saw fit to make before deciding upon the acceptance or rejection of the offer.

As, in my opinion, the offer made did not comply with the terms of the subsection, the respondents were not entitled to invoke the assistance of the Court to compel the dissentients to transfer their shares.

I express no opinion as to any of the other questions which were so fully argued before us.

I would allow this appeal with costs throughout and set aside the judgments of the Court of Appeal and of the learned trial Judge and direct that judgment be entered in the action granting the relief claimed in Paragraph (*e*) of the endorsement on the writ. No order upon the substantive motion should be made.

I would make no order as to the costs of the intervenants.

The judgment of Taschereau and Rand, JJ. was delivered by:—

RAND J.:—In this appeal both the interpretation and the constitutional validity of s. 124 of the Dominion Companies Act have been raised: but the view at which I have arrived on the former dispenses with a consideration of the latter.

The section reads:—

> Where any contract involving the transfer of shares or any class of shares in a company . . . to any other company . . . has within four months after the making of the offer in that behalf . . . been approved by the holders of not less than nine-tenths of the shares affected . . . the transferee company may, at any time within two months after the expiration of the four months, give notice . . . to any dissenting shareholder that it desires to acquire his shares, and where such notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the contract, the shares of the approving shareholders are to be transferred to the transferee company.

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If no application is made by the dissenting shareholder, the transferee company, on transmitting to the transferor company a copy of the notice and paying or transferring the amount of money or other consideration to be given for the shares, is entitled to have them registered in its name. Provision is made for placing sums so received into a separate bank account to be held in trust for the persons entitled. The word "contract" is defined to include an

> offer of exchange and any plan or arrangement . . . pursuant to which the transferee company has become or may become entitled or bound absolutely or conditionally to acquire all the shares in the transferor company of any one or more classes of shareholders who accept or have accepted the offer or who assent or have assented to the plan or arrangement; and "dissenting shareholder" includes one who has not accepted the offer or assented to the plan or arrangement as well as one who has failed or refused to transfer his shares to the transferee company in accordance with the contract.

The language of this section, which appears within a fasciculus headed, "Arrangements and Compromises", may have been clear to the draftsman, but I confess that it presents to me many difficulties of construction. What, for instance, does the word "contract", even including an "offer of exchange and any plan or arrangement", mean? With whom is the contract made? Certainly not with the shareholders; both the singular number and the fact that their individual acceptances would be necessary exclude that; and I doubt that the word "exchange", although in one sense including purchase, is an exemplary use of language. Then the contract, within four months after the "making of the offer", is to be "approved". If the offer is to be made direct to the shareholders, it is quite impossible to say that in the ordinary case it could be made on a particular day from which the four months would be computed; and the word "approved" is quite out of place if used in relation to such an offer. By s-s. (2), the transferor company is to change the register upon receipt of a copy of a notice sent out to the dissenting shareholder, which would be an extraordinary mode of dealing with registered titles were that copy the only matter of record before the transferor company.

In view of these difficulties, I am bound to interpret the section as contemplating, in the practical working out of a business scheme, an offer or plan or arrangement submitted by the proposed transferee to the transferor company and

by the latter to its shareholders for approval. That was the course pursued in *In re Evertite Locknuts Ld.* (1); and *In re Press Caps Ld.* (2), the proposal was accompanied by a letter from the directors to the shareholders recommending acceptance. In that way the date of the "making of the offer" is fixed by its delivery to the transferor company; meaning is given to the word "approved"; and the notice to the dissenting shareholder as received by the transferor takes its place in the records of that company as arising out of the proposal already received.

The proposal must also remain open for approval by any shareholder for the four months mentioned, otherwise the postponement of the right to proceed by notice against the dissenting shareholder until after the expiration of that period would scarcely make sense. I should say, too, that every shareholder who approved the proposal would be entitled to compel the transferee to purchase his shares, but there seems to be no obligation to acquire shares of dissenting shareholders.

This comparatively new power by which a majority may coerce a minority is one to be exercised in good faith and with the controlling facts available to shareholders to enable them to come to a decision one way or the other. In most, at least, of the cases which have reached the courts in England, the circumstances showed a straightforward transaction with its business considerations made evident to the shareholders. The analogy which obviously suggests itself is that of the sale of a company's undertaking. Such a power has long been accorded companies, and the equivalent transfer by way of share acquisition presents no greater objection in principle except in relation to individual shareholders. One can easily imagine resort to s. 124 for a purely arbitrary acquisition of shares of a small interest by a larger one, but I cannot think the provision was introduced for any such a purpose; and it is significant that it is to a company and not an individual that the power is given.

The proposal here was made without reference either to s. 124 or to the Act or to the transferor company: it was made direct by the transferee to the shareholders; there

(1) [1945] 1 Ch. 220. (2) [1949] 1 Ch. 434.

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was therefore nothing to indicate that those who disregarded the offer might be exposed to a compulsory divesting of their property. Its offer to buy was one that could have been made at any time regardless of the statute. Dated December 1, 1950, instead of being open to the shareholders for approval for the period of four months, it was to be accepted on or before December 15, 1950 by the holders of not less than 90 per cent of the shares or it would lapse; and to put that beyond doubt, the proposal added that in relation to any acceptances received after December 15 the company reserved the right to reject them. The date of the offer is assumed to be December 1, but obviously that cannot be the time of its receipt by those to whom it was addressed: the list of shareholders shows that three were residents of the sterling area, nine of the United States, and the remainder of Canada, and certainly the mailing date cannot be taken to be the date of an offer to all. The applicant has, rather, proceeded on the view that all that was necessary for the giving of notice was the ownership of the required percentage of the shares.

There is also the point raised by Mr. Sheard that the proposal was made by a trust company and we are asked, in view of the nature of the company, to draw the inference that it was acting for an undisclosed principal. It was pointed out that of the 100,000 shares issued, 79,161 were owned by five of a total of 244 shareholders. Nothing is indicated of the interest of these persons in the trust or other purchasing company, and it is difficult to say that that fact could not, in the situation here, be a material consideration. That the shareholders are entitled to know the company which in reality is proposing to buy or exchange appears to me to be undoubted. In the present circumstances, however, I do not treat this feature as material to the determination of the appeal and it is unnecessary to examine it further.

The question, then, is whether the failure to conform with the procedure envisaged by the section, notwithstanding that the trust company has acquired over 90 per cent of the shares, is fatal to its claim to the benefit of the coercive effect of the section. Is the mere fact of possessing the required percentage sufficient to justify, in this case, such a departure from the procedural requirements?

In my opinion, that procedure cannot be disregarded or modified because of the special circumstances of a proposal. The language contemplates various forms of schemes or arrangements, and we have before us the simplest of them; but I can see no reason why a departure in this case would not justify a like departure in any case. Here is the exercise of a power by which an individual's property may be taken from him, possibly by a fellow shareholder and a more complete negation of the terms upon which originally, at least, individuals entered into the association of company membership can hardly be imagined. Since the applicant specifically intimated that the acquisition of all the shares was not vital to its proposal, it cannot be taken that shares now outstanding can, in the slightest manner, affect the exercise of the substantial control that was sought. If the property of the minority shareholder is to be taken from him without his consent, then on a principle as old as the common law, the steps prescribed must be strictly followed. As that has not been done here, the applicant has not brought itself within the conditions necessary to the exercise of the compulsory power of acquisition.

I would, therefore, allow the appeal and direct an order that the applicant is not entitled to acquire the shares of the appellant. The latter will have his costs throughout. There will be no costs to the intervenants.

Appeal allowed with costs to appellant throughout. No costs to or against the intervenants.

Solicitors for the appellant: *Grossman & Sharp.*

Solicitor for the respondents: *A. S. Gregory.*

Solicitor for the intervenant, Chartered Trust Co: *Johnston, Sheard & Johnston.*

Solicitor for the intervenant, W. H. Powell: *W. H. Powell* in person.