1993 CarswellAlta 80, 12 Alta. L.R. (3d) 46, [1993] 8 W.W.R. 413, 143 A.R. 81

Brandley v. Hinman

JOHN THEODORE BRANDLEY, NOEL BRANDLEY and KATHLEEN BRANDLEY v. EDGAR W. HINMAN, NOLAN E. HINMAN, HINMAN HOLDINGS LTD. and TWO ARROWS RANCHES LTD.

Alberta Court of Queen's Bench

Lomas J.

Judgment: August 10, 1993
Docket: Doc. Lethbridge 8206-0887

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Counsel: *Bruce Hill*, for plaintiffs.

Richard A. ***Low***, for defendants.

Subject: Corporate and Commercial; Civil Practice and Procedure

Corporations --- Directors and officers — Fiduciary duties — Self-dealing transactions — General

Corporations --- Shareholders — Shareholders' remedies — Derivative actions — At common law — Fraudulent transactions

Corporations --- Shareholders — Shareholders' remedies — Derivative actions — At common law — Ultra vires transactions

Corporations --- Shareholders — Shareholders' remedies

Limitation of Actions --- Laches and acquiescence — General

Corporations — Actions by and against corporations — Derivative actions — Company being incorporated in 1964 and not being continued under Business Corporations Act — Former minority shareholders bringing action alleging fraud in respect to land transfers and declaration of dividend against former majority shareholders — Plaintiffs not having benefits of Business Corporations Act provisions protecting minority shareholders — Alleged wrongdoers being at all material times in control of company — Common law allowing plaintiffs to bring derivative action regarding land transfers in combination with personal actions regarding dividend issue.

Corporations — Actions by and against corporations — Fraud or oppression — Directors and majority shareholders of first company also being directors of second company — First company being heavily in debt and transferring land to

second company — Directors not obtaining independent appraisals of land — Minority shareholders not being advised of transfer — Duality of directorships requiring exercise of considerable caution in transfer of assets between companies — Such caution not being exercised — No evidence of intent to deceive or recklessness existing, but evidence of discrimination between majority and minority shareholders so as to constitute fraud on minority.

Limitation of actions — Postponement or extension of limitation period — Ignorance of facts — Directors and majority shareholders of first company also being directors of second company — First company being heavily in debt and transferring land to second company — Directors not obtaining independent appraisals of land — Minority shareholders not being advised of transfer — Directors' actions in transferring lands without advising minority shareholders, failing to call annual general meetings and failing to forward financial statements concealing knowledge of transfers from minority shareholders — Action by minority shareholders for fraud not being prohibited as brought within six years of discovery of transfer.

In 1964, when the plaintiffs' family farm experienced financial difficulties, the plaintiffs approached the defendant E., seeking financial assistance. The plaintiffs agreed to transfer farmlands and assets to a company, the defendant T. Co., whose shares were held equally by the individual plaintiffs and individual defendants. The company then arranged financing. The plaintiffs' shares in T. Co. were to be paid on call; the defendants' were paid up. The stated value of the lands transferred was $120,000. A mortgage for $115,000 was placed on the lands. As additional security, E. and his wife mortgaged other lands they owned themselves, as well as giving personal guarantees of the indebtedness. The mortgagee required E. and his wife to have majority control of T. Co.; therefore extra shares were issued and transferred to them. The plaintiffs were given the right to purchase some of these shares if the mortgage was ever retired. The individual defendants later incorporated a separate company, the defendant H. Co., to run the farm business. The farm operation struggled for a number of years. The defendants eventually desired to purchase the plaintiffs' shares in T. Co., but negotiations fell through. The mortgagee foreclosed and brought an action on the personal guarantees. As no sale could be realized upon the sale by tender, the mortgagee held further action in abeyance. T. Co. decided to call the plaintiffs' shares. None of the calls were paid, and the plaintiffs' shares were declared by the company to be forfeited, although the plaintiff B. later obtained an order of reinstatement. Prior to the reinstatement, and due to the urgency of T. Co.'s debts, H. Co. agreed to advance $70,000 to T. Co. in return for the issuance to it of 11,500 new shares of T. Co. In a further attempt to draw down T. Co.'s debt, H. Co. then purchased some of the land held by T. Co. In return for the land, H. Co. agreed to reduce T. Co.'s indebtedness to it, which was substantial. The plaintiff B., meanwhile, attempted unsuccessfully to obtain T. Co.'s finance statements and minute book. He obtained some financial information, and tried to have T. Co. investigated by the securities commission, but was unsuccessful. B. took no further action for seven years. In the ensuing time, further lands were transferred from T. Co. to H. Co. in return for a cash injection, assumption of mortgages and a mortgage back from T. Co. B. did not become aware of this or the earlier land transfer until seven years after the first transfer. Around that time, T. Co. declared a dividend out of the capital dividend account. Only the defendants received those dividends due to the earlier supposed forfeiture of the plaintiffs' shares. T. Co. subsequently repurchased all but one each of the defendants' shares, effectively making B. the majority shareholder. B. later reinstated the other plaintiffs' shares. Upon discovery of the land transfers, issuance of extra shares and the declaration of dividends, the plaintiffs sued H. Co. and the individual defendants for fraud on the minority shareholders. They sought damages and a retransfer of the lands.

Held:

Action allowed.

The plaintiffs' rights and remedies were governed by the *Companies Act*, since T. Co. was incorporated in 1964 and not continued under the *Business Corporations Act*. The plaintiffs therefore did not have the benefits of the latter Act con-

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cerning minority shareholders' rights. The common law rule states that when a wrong is committed against a corporation the only person who can sue in respect of that wrong is the corporation itself. Exceptions to that rule include ultra vires acts or fraud on the minority shareholders where the wrongdoers are in control of the corporation. Under the *Companies Act*, the plaintiffs were not required to obtain leave before commencing a derivative action. At all material times the alleged wrongdoers were in control of T. Co. The plaintiffs were entitled to bring a derivative action regarding the wrongful transfer of assets and personal actions regarding, among other things, the wrongful dilution of the plaintiffs' shareholdings and failure to pay dividends. Combination of the derivative and personal actions was justified since all of the plaintiffs' allegations were dependent on the history of the involvement of the parties. The extra 11,500 shares were issued in consideration for an advance from H. Co. of $70,000. The issuance of the shares was within the directors' powers and did not require ratification at a general meeting. There was ample consideration: T. Co. was deeply in debt, foreclosure proceedings had been brought and T. Co. was unable to meet its obligations. There was therefore no evidence of fraud in the issuance of the shares. In the absence of fraud, the receipt of the benefit of the issuance of the shares by the individual defendants was not sufficient to void the transaction. At the time of the first land sale to H. Co., T. Co. was still heavily in debt. However, the fact that T. Co.'s directors were also H. Co.'s directors required the exercise of considerable caution in any transfer of assets between the companies. Such caution was not exercised, and no independent appraisals of the land were obtained. Therefore, while there was no evidence of an intent to deceive or of blatant recklessness, there was evidence of discrimination between the majority and minority shareholders so as to constitute a fraud on the minority. In the circumstances, the actual value was higher than the price at which the lands were transferred. The second land transaction could be impugned for the same reason. T. Co. was entitled to the difference between actual value and sale price in each case. There was no allegation of illegality in the statement of claim in regard to the declaration of capital dividend; therefore it could not be alleged in argument. T. Co.'s articles of association authorized the payment of dividends in accordance with the amount paid up on the shares. The plaintiffs' shares were not paid up; the defendants' were. The payment of the dividend was in accordance with T. Co.'s articles; the plaintiffs were not entitled to participate. There was therefore no fraud. As a shareholder, B. was entitled to receive notices of annual general meetings and copies of the financial statements of T. Co. While the directors did not comply with those requirements, B. himself did not exercise his right to compel compliance or have the company wound up. B.'s failure to take action, however, when balanced against the default of the directors, did not justify the application of the doctrine of laches or delay to deprive the plaintiffs of their remedy.

Where fraud has concealed the cause of action, the limitation period begins to run when knowledge of the cause of action arises. The defendants' actions in fraudulently transferring the lands and not advising the plaintiffs, failing to call annual general meetings and failing to forward financial statements, concealed knowledge of the transfers from the plaintiffs. The onus was on the directors to comply, not on the plaintiffs to compel compliance. The plaintiffs' action was therefore not prohibited as it was brought within six years of the discovery of the transfers.

The plaintiffs were entitled, as damages, to the difference between the best appraisals of the lands and the value for which they were transferred. The remaining debt owed to H. Co. should be deducted from that amount. The actual distribution between the shareholders should be determined later.

Cases considered:

Burland v. Earle, [1902] A.C. 83 (P.C.) — *referred to*

Carlson v. Trans-Pac Industries Corp. (1990), 2 B.L.R. (2d) 70 (B.C.C.A.) — *considered*

Chapman v. Warren, [1936] O.R. 145, [1936] 2 D.L.R. 157 (H.C.) — *distinguished*

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Cook v. Deeks, [1916] 1 A.C. 554 (P.C.) — *considered*

Derry v. Peek (1889), 14 App. Cas. 337, [1886-90] All E.R. Rep. 1 (H.L.) — *distinguished*

Dunn v. Darbyson (1960), 31 W.W.R. 422 (B.C.S.C.) — *distinguished*

Edwards v. Halliwell, [1950] 2 All E.R. 1064 (C.A.) — *applied*

Erlanger v. New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218 (H.L.) — *referred to*

Foss v. Harbottle (1843), 2 Hare 461, 67 E.R. 189 — *considered*

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

Gray v. Yellowknife Gold Mines Ltd., [1947] O.R. 928, [1948] 1 D.L.R. 473 (C.A.) — *referred to*

J.L.O. Ranch Ltd. v. Logan (1987), 54 Alta. L.R. (2d) 130, 27 E.T.R. 1, (sub nom. *J.L.O. Ranch Ltd. v. Logan's Estate)* 81 A.R. 261 (Q.B.) — *applied*

Lindsay Petroleum Co. v. Hurd (1874), L.R. 5 P.C. 221 (P.C.) — *referred to*

Menier v. Hooper's Telegraph Works (1874), 9 Ch. App. 350 — *considered*

Metropolitan Commercial Carpet Centre Ltd. v. Donovan (1989), 42 B.L.R. 306, 91 N.S.R. (2d) 99, 233 A.P.R. 99 (T.D.) — *considered*

Nathu v. Imbrook Properties Ltd., 2 Alta. L.R. (3d) 48, [1992] 4 W.W.R. 373, 23 R.P.R. (2d) 188, 89 D.L.R. (4th) 751, 41 C.P.R. (3d) 458, 125 A.R. 34 (C.A.) [additional reasons 4 Alta. L.R. (3d) 149, [1992] 6 W.W.R. 373, 96 D.L.R. (4th) 223, 45 C.P.R. (3d) 419, 131 A.R. 186 (C.A.)] — *referred to*

Prudential Assurance Co. v. Newman Industries Ltd., [1982] Ch. 204, [1982] 1 All E.R. 354 (C.A.) — *considered*

Winchell v. Del Zotto (1976), 1 C.P.C. 338 (Ont. H.C.) — *distinguished*

Statutes considered:

Business Corporations Act, S.A. 1981, c. B-15

Pt. 19*referred to*

s. 187*referred to*

s. 232*referred to*

Business Corporations Act, R.S.O. 1970, c. 53

s. 99*referred to*

Companies Act, R.S.A. 1955, c. 53 — *referred to*

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Companies Act, R.S.A. 1970, c. 60

s. 29(1)*considered*

s. 68(4)*considered*

s. 120(1)(a)*considered*

s. 133(1)*considered*

s. 133(6)*considered*

s. 197(b)*considered*

s. 197(e)*considered*

Companies Act, R.S.A. 1980, c. C-20

s. 80(c)*considered*

Land Titles Act, R.S.A. 1980, c. L-5

s. 146 [re-en. 1985, c. 48, s. 2(36)]*considered*

s. 146.1 [en. 1985, c. 48, s. 2(37); am. 1988, c. 27, s. 55]*considered*

Limitation of Actions Act, R.S.A. 1980, c. L-15

s. 4(1)(c)*considered*

s. 6*considered*

s. 18*considered*

s. 31(1)*considered*

Rules considered:

Alberta Rules of Court

R. 230*referred to*

Action by shareholders of company against former majority shareholders for fraud on minority.

***Lomas J.*:**

1 In 1964 the Plaintiffs, or some of them, transferred lands and related assets into a newly incorporated Company, Two Arrows Ranches Ltd. ("Two Arrows"), in which each of the Plaintiffs and each of Edgar W. Hinman ("E.W. Hinman"), his wife (Della Hinman) and their son Nolan E. Hinman ("Nolan Hinman") had 1,000 shares, and E.W. Hinman arranged financing for that Company. Through a series of subsequent events the controlling interest in Two Arrows be-

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came owned by the Hinman family and Hinman Holdings Ltd. ("Hinman Holdings", a company wholly owned by the Hinman family, or by some of them) and the assets of Two Arrows became owned by Hinman Holdings.

2 In their Statement of Claim (which was amended several times) the Plaintiffs alleged that E.W. Hinman and Nolan Hinman perpetrated a fraud on the Plaintiffs, who were minority shareholders of Two Arrows, or, in the alternative, that Two Arrows acted ultra vires. They claimed the following relief:

3 a) Damages in the amount of Five Million Dollars ($5,000,000).

4 b) i) In the alternative, an Order transferring the lands back from Hinman Holdings Ltd. to Two Arrows Ranches Ltd. in consideration of the sum paid by Hinman Holdings Ltd. to Two Arrows Ranches Ltd. for the said lands.

5 ii) An Order directing the sale of the assets of Two Arrows Ranches Ltd. and winding up the Company.

6 c) i) In the alternative, a declaration that Hinman Holdings Ltd. holds the lands in trust for Two Arrows Ranches Ltd.

7 ii) An Order directing that the lands held in trust be sold and the trust funds disbursed to the shareholders of Two Arrows Ranches Ltd.

8 d) i) An Order directing the transfer of One Thousand Two Hundred and Fifty (1,250) Shares of Two Arrows Ranches Ltd. from Edgar W. Hinman to Noel Brandley upon the payment by Noel Brandley to Edgar W. Hinman of One Thousand Two Hundred and Fifty Dollars ($1,250) with interest from April 18, 1964 at Six Percent (6%) per annum compounded annually.

9 ii) An Order directing the cancellation of Eleven Thousand Five Hundred (11,500) Shares of Two Arrows Ranches Ltd. issued to Hinman Holdings Ltd.

10 iii) In the alternative, an Order directing that Five Thousand Seven Hundred Fifty (5,750) Shares of Two Arrows Ranches Ltd. be transferred from Hinman Holdings Ltd. to the Plaintiffs equally.

11 e) An Order directing the Defendant Two Arrows Ranches Ltd. to account for profits.

12 f) An Order directing the Defendant Two Arrows Ranches Ltd. to reissue One Thousand (1,000) Shares in the name of Noel Brandley and One Thousand (1,000) shares in the name of Kathleen Brandley.

13 In their Statement of Defence the Defendants allege, inter alia, that:

1) Two Arrows was incorporated for the purpose of saving the Plaintiffs from bankruptcy.

2) E.W. Hinman and Nolan Hinman subscribed and paid for shares of Two Arrows but the Plaintiffs never paid for shares issued to them.

3) E.W. Hinman arranged for a mortgage with Prudential Insurance Company of America, as mortgagee, in an effort to obtain operating monies for Two Arrows.

4) The mortgage required that E.W. Hinman would be the controlling shareholder of Two Arrows and that lands of E.W. Hinman would be pledged as security for the loan in addition to the lands of Two Arrows.

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5) Two Arrows defaulted in payment of the said mortgage and the mortgagee commenced foreclosure proceedings against Two Arrows as well as E.W. Hinman and Hinman Holdings.

6) The Defendants were required to sell land and other assets in an effort to save the lands of Two Arrows from final foreclosure.

7) Hinman Holdings took shares in Two Arrows to secure advances made by it to Two Arrows.

8) Two Arrows was unable to repay from its farming operation the advances made to it by Hinman Holdings and Two Arrows became insolvent and unable to carry on its farming enterprise.

9) Hinman Holdings purchased the land of Two Arrows at fair market value in partial settlement of the debt due to it.

10) Two Arrows is still indebted to Hinman Holdings.

The Defendants deny they were fraudulent and plead laches and delay on the part of the Plaintiffs in bringing the action.

14 The Plaintiffs originally filed their Statement of Claim in April 1982. The Statement of Defence was filed in August 1982, but the trial was not held until 1992. John Theodore Brandley ("Theo Brandley") was the son of Noel Brandley and stepson of Kathleen Brandley (who were husband and wife). Prior to the trial (1) Noel Brandley died and Theo Brandley became his administrator ad litem for the purposes of these proceedings; and (2) Nolan Hinman died and his widow, Marlys Hinman, became his administrator ad litem for the purposes of these proceedings. E.W. Hinman did not testify at the trial. Counsel for the Defendants referred the Court to a letter, purportedly from E.W. Hinman's doctor, in which the author concurred in Counsel's opinion not to call E.W. Hinman to testify at the trial because his advanced years and illness had resulted in him becoming easily confused. Although Defence Counsel offered to call the doctor, if Plaintiffs' Counsel so requested, to permit Plaintiffs' Counsel to examine him on that opinion, no such request was made. Examinations for discovery were, however, held of Noel Brandley, Nolan Hinman and E.W. Hinman and were referred to extensively by Counsel.

15 Pursuant to R. 230 of the *Rules of Court* of Alberta the Plaintiffs are deemed to have admitted for the purposes of these proceedings that "None of the lands referred to in the Agreement for Sale dated June 17, 1974 between Hinman Holdings Ltd. as purchaser and Two Arrows Ranches Ltd. as vendor were licensed for irrigation as at the date of the said Agreement".

Pertinent Facts

16 The lands involved in this action comprised the family farm and ranch of Noel Brandley. They contained approximately 2,500 acres. Theo Brandley testified that he was raised on the lands and was involved in the farming operation until the fall of 1967.

17 In 1962 and 1963 the farm was in financial difficulties. Noel Brandley could not obtain money from conventional sources and he approached E.W. Hinman for financial assistance. As a result of negotiations between Noel Brandley and E.W. Hinman, to which Theo Brandley was not privy, Two Arrows was incorporated on February 12, 1964 under the then *Companies Act* of Alberta with an authorized capital of $20,000 divided into 20,000 common shares without nominal or par value. Noel Brandley agreed to transfer the farm lands, machinery, equipment, tools and livestock into Two Arrows and E.W. Hinman agreed to arrange financing for the Company. On discovery E.W. Hinman stated Two Arrows was set up because he thought it was necessary to operate as a company and Nolan Hinman stated Two Arrows was set up to facilitate the financing of the Brandley operation.

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18 The minutes of the organizational meeting of the Company held on March 14, 1964, signed by Noel BrandIey and E.W. Hinman, state:

Mr. E.W. Hinman acted as Chairman.

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Present were:     E.W. Hinman, Nolan E. Hinman,
                    Noel Brandley, Theodore Brandley
                    and Kathleen Brandley.
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It was agreed that 6,000 shares of stock should be issued as follows:

1,000 shares to E.W. Hinman of 7812-119 Street, Edmonton for the sum of $1,000 to be fully paid up.

1,000 shares to Della Hinman of 7812-119 Street, Edmonton, for the sum of $1,000 to be fully paid up.

1,000 shares to Nolan Hinman of 8407-7th Street, South West. [sic] Calgary, for the sum of $1,000 to be fully paid up.

1,000 shares to Noel Brandley of Monarch, Alberta, for the sum of $1,000 to be paid on call.

1,000 shares to Kathleen Brandley of Monarch, Alberta, for the sum of $1,000 to be paid on call.

1,000 shares to Theodore Brandley of Monarch, Alberta, for the sum of $1,000 to be paid on all [sic].

The following officers of the Company were duly elected:

President ...... E.W. Hinman

Vice-President ...... Noel Brandley

Secretary ...... W.H. Thomson

The following directors were elected:

E.W. Hinman

Noel Brandley

Theodore Brandley

Nolan Hinman

Banking resolutions are required by the Treasury Branch were duly passed. Copies to form part of these minutes.

It was agreed that Noel Brandley and E.W. Hinman would be a management committee to direct the operations of the ranches.

The shareholders agreed that E.W. HINMAN would arrange for finances to operate the farm and bring mortgage payments of taxes and interest up to date and that finances so provided are to become a first charge on the assets of

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the Company after mortgage.

Mr. Noel Brandley agreed to provide proper transfers to all titles of land presently in his name to TWO ARROWS RANCHES LTD. in consideration for the taking over by the Company of all encumbranches [sic] against the said lands and that all his equities in machinery, equipment, tools and livestock presently on the ranch shall become the property of TWO ARROWS RANCHES LTD.

The meeting agreed that Mr. Calvin Brandley shall be appointed as the Company's solicitor.

Meeting adjourned on motion of Nolan Hinman.

Calvin Brandley was the nephew of Noel Brandley. Subsequent balance sheets of Two Arrows noted that $3,000 of the issued share capital was unpaid.

19 By Transfer of Land dated April 23, 1964 and registered in the Land Titles Office for the South Alberta Land Registration District on May 7, 1964 Noel Brandley transferred to Two Arrows some 2,412.55 acres of land in Sections 17, 20, 21, 27, 28, 29, 31, 32 and 33, all in Township 9, Range 23, West of the Fourth Meridian in the Province of Alberta in consideration of a stated sum of $120,000. The Affidavit of Transferee to that Transfer was sworn by Calvin S. Brandley and states in part, "The present value of the land, in my opinion is $120,000." The lands in that Transfer are all located south of the Oldman River about two miles west of the Village of Monarch in Southern Alberta (some 15 miles east of the City of Lethbridge).

20 Counsel for the Plaintiffs noted that the organizational minutes state that Noel Brandley agreed to transfer his land in consideration for the Company taking over all encumbrances against the land and submitted that those minutes do not state the land was to be transferred at fair market value nor that the debts equalled the fair market value of Noel Brandley's total assets. However, the transfer signed by Noel Brandley does transfer the lands for a stated consideration of $120,000 and the Affidavit of Calvin Brandley states that, in his opinion, that was the then value of the lands.

21 The balance sheet of Two Arrows as at February 15, 1965 records the following Fixed Assets at Cost:

Land $98,794.74

Buildings and Equipment (acquired from Brandleys) $71,310.00

That balance sheet also records other equipment acquired from E.W. Hinman and Nolan Hinman. The items listed in the buildings and equipment acquired from Brandleys include fixtures which may have been included in the $120,000 transfer value (no evidence was submitted on this point). None of the financial statements of Two Arrows, including statements for periods when Noel Brandley was a vice-president of the Company and both Noel Brandley and Theo Brandley were directors, shows any surplus equity of, or indebtedness to, Noel Brandley in respect of any of the lands or other assets transferred to Two Arrows by Noel Brandley. Noel Brandley stated on Examination for Discovery that he agreed with the $120,000 value in the transfer. Both Mr. Card (the Two Arrows outside accountant) and Mr. Harker (an accountant who testified as an expert witness for the Plaintiffs) confirmed that there was no equity shown to the credit of the Brandleys in the initial transaction.

22 E.W. Hinman arranged for mortgage financing to Two Arrows of $115,000 with The Prudential Insurance Company of America ("Prudential"). By Memorandum of Mortgage dated June 4, 1964 Two Arrows mortgaged to Prudential the lands transferred to it by Noel Brandley, and by a separate Memorandum of Mortgage dated June 4, 1964 E.W. Hinman and Della Hinman mortgaged to Prudential lands they owned in Sections 4 and 9 of Township 5, Range 27, West of

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the Fourth Meridian in the Province of Alberta totalling some 545.02 acres (herein called the "Glenwood property"), all as security for the said $115,000 mortgage financing. In addition E.W. Hinman and Della Hinman personally guaranteed to Prudential the payment by Two Arrows of monies to become due and payable under its mortgage.

23 Prudential required, as a condition of such mortgage financing, that E.W. Hinman have majority control of Two Arrows. The minutes of a meeting of directors of Two Arrows held April 18, 1964, signed by E.W. Hinman and Noel Brandley, state in part:

> **Present — All directors.**
>
> Mr. E.W. Hinman reported that a mortgage in the amount of $115,000.00 covering the land at Two Arrows Ranch and his personal farm at Glenwood had been approved by the Prudential Insurance Company. The conditions specify that suitable guarantees be supplied by Mr. and Mrs. E.W. Hinman and that E.W. and Della Hinman hold not less than 51% of the shares of the Company during the life of the mortgage.
>
> It was accordingly agreed that an additional 2,500 shares be issued to E.W. Hinman for subscribed capital in the amount of $2500.00 on the understanding that at such time as the Mortgage Company might agree or upon the mortgage being retired Noel Brandley or his nominee shall have the right to purchase from Mr. E.W. Hinman 1,250 of the said 2,500 shares at a price of $1.00 per share plus interest from April 18, 1964, at 6% per annum compounded annually.

Pursuant to that minute an additional 2,500 common shares of Two Arrows were issued to E.W. Hinman as fully paid. The balance sheet of Two Arrows as of February 15, 1965 discloses under "Capital":

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Issued

8500 No Par Value Shares                      $8500.00
Less Amount Unpaid                              3000.00
                                              --------
                                              $5500.00
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24 On discovery Noel Brandley was referred to his right to purchase from E.W. Hinman 1,250 of the said 2,500 shares and was asked if he had ever tendered any monies to Mr. Hinman to buy that number of shares. He replied, "No, I never have not". He was then asked, "Do you ever intend to?" and he replied, "No I don't and I didn't then". The right to purchase 1,250 shares was given to Noel Brandley or his nominee, but no evidence was adduced of anyone else attempting to exercise that right.

25 Hinman Holdings was incorporated on January 14, 1966. The annual reports of Hinman Holdings indicate that from incorporation through January 1980 E.W. Hinman, Della Hinman and Nolan Hinman were the sole shareholders and directors of the Company (owning one share each), E.W. Hinman was its president and Nolan Hinman was its secretary. In 1980 or early 1981 Nolan Hinman and Marlys Hinman became the sole shareholders, officers and directors of the Company with Nolan Hinman becoming president.

26 Theo Brandley was raised on the farm. He stated that between 1956 and 1963 he went to school when he was not needed at the farm. He also worked in Edmonton and Red Deer, Alberta, during the winter of 1962 and the spring of 1963. In the spring of 1964 he agreed with his father to work on the farm full-time and his father arranged for him to be

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issued 1,000 shares in Two Arrows. He was foreman of the farm until August 1967. At that time he ceased being foreman, agreed to sell his shares in Two Arrows to Noel Brandley for $3,000 (to be paid $500 per month) and left the farm to attend university in Utah. He said Noel Brandley only made two payments on the shares and could not pay any more. The shares were not transferred to Noel Brandley. E.W. Hinman supported Theo Brandley in his decision to return to university and lent him $1,500. Later, when Noel Brandley did not pay Theo Brandley for the shares, Theo Brandley phoned E.W. Hinman who lent him a further $500 (U.S.).

27 Theo Brandley never returned to the farming operation and did not return to the lands until 1981. He said when he left, the farming operation was going well financially, having showed a $58,159 net income for its financial year ended February 15, 1967. He also stated that when he left in 1967 he felt all was well and the crops looked promising. However, the financial statement for the financial year ended February 15, 1968 (which included the 1967 crop year) show a $145,570.19 net operating loss for the year (on an accrual basis), mainly because of a $137,472 reduction in year end inventories, or a loss of $8,090, if that inventory reduction is not taken into account. Further, the statement of farm income and expenses for the nine months ended November 15, 1967 shows a net income of only $2,349, compared with a net income of $87,469 for the same nine months of the previous year. Counsel for the Defendant submits that Theo Brandley knew the farming operation was not going well and that was why he elected to leave and never return, but Counsel for the Plaintiffs points out that Theo Brandley did not see the November 15, 1967 statements before leaving for university. Kathleen Brandley agreed that the departure of Theo Brandley was hard on Noel Brandley and contributed to the farm beginning to fail financially.

28 The financial statements of Two Arrows from February 15, 1965 to February 15, 1982, both inclusive, were submitted in evidence by consent of both Counsel. The financial statements for the year ended February 15, 1965 were prepared on a cash basis and show an expense for livestock purchases of $144,723.92 and a loss for the year of $102,743.46. Subsequent financial statements were prepared on an accrual basis and show the following net income or net loss:

February 15, 1966	Combined net income for preceding two years, after inventory adjustment	$17,551.54
February 15, 1967	Net income for year	$58,159.00
February 15, 1968	Net loss for year	($145,570.19)

All financial statements subsequent to February 15, 1968 to and including February 15, 1978 show a net loss for the preceding year's operations. On February 15, 1978 the accumulated net loss from operations was ($407,910.40) and the accumulated deficit, after adding capital gains on disposals, was ($279,657). The financial statements dated February 15, 1979 indicate that Two Arrows had a net loss from operations during the preceding year of $57,675 but also had capital gains of $266,071, resulting in net income for the year of $208,396. The financial statements for the years ended February 15, 1980, February 15, 1981 and February 15, 1982 show no income for Two Arrows and indicate that the Company did not carry on any active business.

29 Theo Brandley testified he acquired SE1/4 of Section 36, Township 9, Range 24, West of the Fourth Meridian in 1962, but admitted he did not make any of the payments for that land. He also stated that Two Arrows acquired the SW1/4 of Section 31, Township 9, Range 23, and W1/2 of Section 36, Township 9, Range 24, both West of the Fourth Meridian, so that by August 1967 just over 3,000 acres were being operated by Two Arrows. He stated that 1,500 to 1,600 acres of that 3,000 acres were irrigated, a further 640 acres were farmed and the rest was pasture, treed or hilly

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land. He submitted a sketch showing his recollection that lands in Sections 20, 21, 28, 29, 31, 32 and 33 were irrigated as of 1967. However, on cross-examination, he acknowledged that it was impossible to adequately irrigate 1,500 acres with the equipment he had at that time. Paul Hinman (Nolan Hinman's son, who has been on the lands since 1972, farming them firstly with his father and now in charge) testified that the electrical and pump equipment which Theo Brandley advised he used in that irrigation is still on the farm and is capable of effectively irrigating only 300 to 400 acres. Paul Hinman further testified that the lands in Sections 31 and 32 were not developed as irrigated parcels until 1975 or later and that when he arrived in 1972 they were not being irrigated and did not show any evidence of having been irrigated. The irrigation records show that the first interim licence for these sections was not granted until 1975.

30 Counsel for the Plaintiffs referred to an undated memorandum signed by E.W. Hinman entitled "Projected Operation Two Arrows Ranches Ltd., Ft. Macleod, Alta." which contains the statement:

> Fifteen hundred acres are now developed for sprinkler irrigation with electric power units which are singularly trouble free and economic,

and forecasts 1968 land use of 2,100 acres for alfalfa, brome, corn and grain crops and the balance for pasture and salvage and projects an operating surplus after all costs including $30,000 debt retirement. This document supports Theo Brandley's estimate of 1,500 acres of irrigatable land, but it does not say that 1,500 acres were then being irrigated. There is no indication of the date of the document or of the purpose for which it was prepared. E.W. Hinman was not questioned about it on discovery. Further, the February 15, 1969 statement of Two Arrows, which includes the 1968 crop year, shows an operating loss exceeding $35,000, without any debt retirement, rather than the projected surplus after debt retirement projected in the document. There is no indication that actual operations were as projected in that document.

31 On April 16, 1969 E.W. Hinman wrote Theo Brandley in Utah enclosing two copies of a proposed agreement, by which E.W. Hinman would purchase the outstanding shares of Two Arrows, and a minute to be signed by the directors authorizing the transfer of the shares and asking Theo Brandley to sign and return the documents. The proposed agreement was between Theo Brandley, Kathleen Brandley and Noel Brandley, as Vendors, E.W. Hinman, as Purchaser, and Two Arrows. It provided for the purchase of the Vendors' shares in Two Arrows for $77,500, allocated $3,000 to Theo Brandley, $40,000 to Kathleen Brandley and $34,500 to Noel Brandley, which was to be paid $300 upon execution of the agreement and $77,200 within one month of the date of the sale of the real property of Two Arrows, or on or before August 1, 1969, whichever first occurred. All debts of Two Arrows to the Vendors (which according to the February 15, 1969 balance sheet of Two Arrows then amounted to $2,912.58) were to be assigned by the Vendors to the Purchaser, the Purchaser was to indemnify and save harmless the Vendors with respect to all past transactions of Two Arrows, Two Arrows was to assume certain liabilities of Noel Brandley (amounting to more than $18,600) and Noel Brandley was to have the right to occupy his then residence on Two Arrows' lands until August 1, 1969 and to continue as Ranch Manager of Two Arrows at a salary of $500 per month until Two Arrows ceased carrying on the ranching business on the property it then owned, or until August 1, 1969, whichever event occurred sooner. The proposed agreement was signed by Noel Brandley and by Kathleen Brandley, as two of the Vendors, and by E.W. Hinman, both as Purchaser and on behalf of Two Arrows. Theo Brandley felt his shares were worth more than $3,000 and wrote E.W. Hinman refusing to sign either document. Theo Brandley testified that shortly thereafter he received another letter from E.W. Hinman offering him $10,000 for his shares. That letter was not submitted in evidence. Counsel for the Defendants submitted that these offers were clearly related to attempts to sell the Two Arrows lands.

32 The February 15, 1969 balance sheet of Two Arrows showed current liabilities totalling $162,192 (against current assets of $13,176), long-term liabilities totalling $113,259 (including $100,000 owing on the Prudential Insurance Company mortgage), shareholders' loans payable totalling $45,591 (of which $42,678 was owing to E.W. Hinman and Nolan

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Hinman) and an accumulated deficit farm operations of $105,789. Noel Brandley admitted on discovery that there was no question about the ranch being in serious financial difficulty about 1970. He recalled discussions with E.W. Hinman about between 1970 and 1974 for the pur pose of trying to sell the ranch. He said he was willing to sell if they could get a customer at a fair price and that there were several customers but nothing culminated. He also stated that he never put any more money into Two Arrows, that he was aware the ranch needed money but he couldn't give it any and that he was not aware of any of his family putting any money into it.

33 Ross Wilde was the solicitor for Two Arrows and Hinman Holdings since the late 1960's or early 1970's. He believed he started acting for Two Arrows in 1969. He referred to attempts to sell the Two Arrows property, stating it was listed for sale with a realtor and referred to three negotiations to sell during 1969 to 1972 period, but nothing came of these negotiations.

34 On July 10, 1969 Prudential commenced foreclosure proceedings against E.W. Hinman, Della Hinman and Two Arrows and proceedings against E.W. Hinman and Della Hinman on their guarantees. Prudential claimed there was owing to it, as at July 1, 1969, by virtue of the mortgages $108,254.85 with interest thereon at the rate of 7% from July 1, 1969. By notice dated December 1, 1970 Prudential gave notice to the Defendants of its intention to advertise the Glenwood property and the Two Arrows property for sale. By Notice of Motion dated September 20, 1971 an application was made for an order directing a judicial sale of the subject property by tender. Mr. Wilde recalled that the property was put up for sale by tender, but the only offer made was one of $71,000 for the Glenwood property. There was no tender on the Two Arrows property. Prudential applied for an order confirming the sale of the Glenwood property pursuant to that tender, but on April 5, 1972 the Master in Chambers rejected the tender and ordered that upon payment to Prudential of the sum of $5,000 by May 15, 1972 the action be stayed to August 15, 1972. He further ordered that Prudential could readvertise the subject properties for sale, without further Order or Notice, after August 15, 1972 or immediately if there was a default in payment of the $5,000. There is no evidence of Prudential taking further legal proceedings on the mortgages or the guarantees.

35 On October 22, 1971 Two Arrows commenced legal proceedings to recover possession of the dwelling house on the Two Arrows lands occupied by Noel Brandley. On May 11, 1972 Judge Yanosik (as he then was) allowed the application and ordered possession of the dwelling house to be delivered up to Two Arrows on June 30, 1972. Judge Yanosik made the following findings of fact in his oral judgment:

1. On incorporation of Two Arrows Noel Brandley was appointed managing director of Two Arrows at a salary of $350 per month, plus the use of a residence on the Two Arrows lands.

2. Noel Brandley occupied that residence and acted as managing director of Two Arrows from then until April 14, 1970. On that date, at an extraordinary meeting of the shareholders of Two Arrows attended by Noel Brandley, Noel Brandley was dismissed from his employment as managing director of Two Arrows and E.W. Hinman was appointed managing director.

3. Subsequently E.W. Hinman hired Noel Brandley as ranch foreman. Noel Brandley continued in that employ, at the same salary, until November 30, 1970 and continued to occupy the residence.

4. On November 30, 1970 Noel Brandley was discharged by E.W. Hinman and had not been employed by Two Arrows since that date, but he continued to occupy the residence.

5. Noel Brandley admitted that his employment was terminated.

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> 6. In the spring of 1971 the Two Arrows lands were leased and a demand for possession of the residence was made on him.

At pp. 6 and 7 of his judgment Judge Yanosik stated:

> It was also argued that I should find on the facts that by reason of the pre-existing agreement made between Hinman and Brandley, there was to be equal control in the company by reason, and by reason of equal control, there was no authority for his dismissal in April, 1970. I find as a fact that prior to the incorporation of the company an agreement was in fact made between Brandley and Hinman whereby it was agreed or understood that a company would be incorporated, and in fact this is the company, the applicant, and that this company would acquire the lands and holdings of Brandley, with a share structure that would provide equal control, in that shares would be issued to the Brandley and Hinman family in equal numbers, and that both Brandley and Hinman would have the say in the operation of the company. It is clear, however, from the evidence that very shortly after the company was incorporated by reason of the financial situation of the applicant, it was necessary to re-finance and borrow additional funds, as a result of which the company gave a mortgage to the Prudential Insurance Company on the lands in question, and in addition by reason of the request of Prudential, Hinman was compelled to give a mortgage on other lands in which he alone was interested, and executed a personal guarantee in favour of Prudential. It is, therefore, not unreasonable, as Hinman has testified, that at this point, as Prudential insisted that control in the company be given to Hinman, and particularly where Hinman as a result of negotiating the loan and giving security placed himself in that position as far as the Prudential loan was concerned, that from that point on, Hinman was to have control of the company, at least until the debts were retired and the mortgage discharged. Accordingly at that stage, ad ditional shares were issued by the applicant company to Hinman for consideration.
>
> Where there are inconsistencies in the evidence of Brandley in this regard, and that of Hinman, I accept Hinman's evidence over that of Brandley.

36 Judge Yanosik had the benefit of hearing testimony from both Noel Brandley and E.W. Hinman, a benefit I did not have at this trial. He also heard evidence when the events were still relatively fresh in the witnesses' minds. Much of the evidence at this trial is based on recollection of events which occurred over 20 years ago. Judge Yanosik's judgment was not appealed. His findings of fact confirm much of the evidence submitted to me and I accept them for the purposes of this trial.

37 By lease dated April 8, 1971 Two Arrows leased its lands, buildings, improvements, machines and equipment to Douglas Wayne Steed for a term of one year from April 1, 1971 to March 31, 1972 for $20,000. One provision of that lease was that, should the residence occupied by Noel Brandley not be vacated by Noel Brandley, the lessee could deduct from the lease payments $125 per month for each month Noel Brandley occupied that residence. This appears to be the lease Judge Yanosik referred to in his judgment.

38 In the spring of 1972 Nolan Hinman took over the operation of Two Arrows. Marlys Hinman testified that when she and her husband and their three children arrived in 1972 they found the farm and buildings in a state of disrepair. She referred to photographs taken in 1973 showing the severe neglect the buildings had suffered. She stated that no residence was suitable for them to move into and much renovating was done by them. She referred to specific alterations and renovations made by them after 1972, which the Plaintiffs' appraisers apparently did not consider in their evaluations. Kathleen Brandley, however, testified that when she and Noel Brandley moved out the residences were by and large in good shape.

39 According to minutes of Two Arrows filed as an exhibit, notices were mailed by registered mail to each of the

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Brandleys of the Annual General Meeting of Two Arrows to be held March 11, 1972 but none of the Brandleys attended that meeting. Resolutions passed at that meeting established the number of directors as two and E.W. Hinman and Nolan Hinman were elected the sole directors of the Company, with E.W. Hinman as president. The minutes refer, inter alia, to loans by Hinman Holdings to Two Arrows, to Prudential's foreclosure proceedings and to other proceedings pending against Two Arrows on overdue accounts. The minutes state the following proceedings were approved: (1) proceedings in process to evict Noel Brandley from the Company's property; (2) pro ceedings to obtain registered title to the W1/2 of Section 36, Township 9, Range 24, West of the Fourth Meridian and (3) proceedings to obtain registered title to the SE1/4 of the said Section 36 (registered in the name of Theo Brandley), because Two Arrows had paid the balance owing on a mortgage secured by that quarter section and Theo Brandley had agreed to transfer the land to the Company in consideration of the Company clearing the title.

40 At a subsequent directors' meeting the same day, the directors of Two Arrows, noting that Noel Brandley, Theo Brandley and Kathleen Brandley had not paid for their shares in Two Arrows, agreed to place a call upon those shares. The minutes of a directors' meeting on January 25, 1973 recite that the calls were made by notices dated October 24, 1972 and had not been paid. The directors then approved the serving of a further notice on each of such shareholders, pursuant to ss. 21 and 22 of the Articles of Two Arrows, requiring the calls to be paid and approved the forfeiture of such shares if the calls were not paid. Each such call was for payment of $1,000, being the total amount unpaid on the 1,000 shares of Two Arrows issued to the recipient of the call.

41 On discovery Noel Brandley was referred to the above issuance of shares to him and was asked, "All right well now when those shares were issued did you pay anything for these shares". He replied, "no". He was also asked, "Okay, in respect of your son John Theodore, did he ever pay for any shares in the Company," and he replied, "No he didn't". Kathleen Brandley admitted at the trial that she never paid for her shares.

42 Theo Brandley acknowledged he received the notices of the call on his shares when he was in Israel and he did not pay the amount owing. He submitted, however, that the directors should have applied the debt owing him by Two Arrows against the amount of the call. The financial statements indicate that Two Arrows was indebted to Noel Brandley and Theo Brandley at various times during 1968 to 1973. The amounts of that indebtedness, as shown on the year end balance sheets of Two Arrows, was:

$ 332.58 as at February 15, 1968,

$2,912.58 as at February 15, 1969 and 1970,

$3,912.58 as at February 15, 1971 and

$3,112.58 as at February 15, 1972 and 1973.

No evidence was adduced as to how that indebtedness was incurred, nor as to the amount owed to each Brandley. No indebtedness of Two Arrows to any Brandley is noted on the Company's balance sheets before 1968 nor after February 15, 1973 and the evidence was that all of the above indebtedness was paid by the Company. It is clear that neither Noel Brandley, Kathleen Brandley nor Theo Brandley ever paid for the shares issued to them pursuant to the organizational minutes.

43 The minutes of a directors' meeting on March 1, 1973 recite that none of the calls were paid. The directors then forfeited the shares of Two Arrows in the names of Noel Brandley, Kathleen Brandley and Theo Brandley and approved

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the issuance of 1,000 shares of Two Arrows to each of E.W. Hinman, Nolan Hinman and Della Hinman, in consideration of $1,000 from each of them.

44 Theo Brandley testified that after the forfeiture of his shares he did not receive any further notices of shareholders' or directors' meetings of Two Arrows. Kathleen Brandley testified that Noel Brandley did receive some notices and did go to some meetings after their eviction in 1972, but she was not sure what they concerned.

45 On June 27, 1972 Mr. Wilde, acting for Two Arrows, wrote Noel and Kathleen Brandley demanding a conveyance from them of the W1/2 of Section 36, Township 9, Range 24, West of the Fourth Meridian. Noel and Kathleen Brandley made that conveyance after delivery of the demand. The demand letter indicated that Noel and Kathleen Brandley had paid a balance owing on the purchase of that land and had obtained a transfer in favour of themselves. Counsel for the Plaintiffs submitted the conveyance was made because of the unhappy differences at that time and to avoid litigation.

46 On November 23, 1972 Two Arrows commenced proceedings against Theo Brandley for an order directing that title to the NE1/4 of Section 36, Township 9, Range 24, West of the Fourth Meridian be transferred from Theo Brandley to Two Arrows. By Statement of Defence and Counterclaim issued March 8, 1973 Theo Brandley disputed Two Arrows' claim to the said lands and claimed a declaratory order that he is the registered owner of 1,000 shares of Two Arrows. On March 12, 1974 Cavanagh J. ordered that Theo Brandley is the beneficial owner of 1,000 no par value shares in the capital stock of Two Arrows and that Two Arrows is the beneficial owner of the NE1/4 of the said Section 36 and he directed that a certificate of title for those lands be issued in the name of Two Arrows. The judgment recites "And Upon it appearing that Counsel have agreed that the Defendant is the beneficial owner of One Thousand Shares (1,000) in the capital stock of the Plaintiff". The evidence was that such agreement was reached shortly before the trial upon Theo Brandley's counsel referring Two Arrows' counsel to s. 68(4) of the *Companies Act*. As only Theo Brandley was a party to that action, the shares of Noel Brandley and Kathleen Brandley were not then reinstated. Theo Brandley testified he did not actually receive his share certificate until 1978 and, at that time, he told his parents his shares had been reinstated and they should take steps to have their shares reinstated also. They did not do so until these proceedings were commenced in 1982.

47 The minutes of a directors' meeting of Two Arrows on September 29, 1973, at which only E.W. Hinman and Nolan Hinman were present, refer to E.W. Hinman advising that the Company was being pressured by creditors and payments must be made to forestall foreclosure on mortgages and execution of judgments. E.W. Hinman further advised the Company did not have the resources to make the payments required and that personal guarantees of E.W. Hinman and Della Hinman and lands of Hinman Holdings were involved. It was agreed that Two Arrows accept from Hinman Holdings advances of approximately $70,000 to liquidate urgent debts of Two Arrows and, as partial compensation for loss of appreciation on property to be sold by Hinman Holdings and its shareholders to make such advances, that 11,500 shares of Two Arrows be issued to Hinman Holdings at a price of $1 per share to be charged against the advances. It was further agreed that Two Arrows pay its shareholders interest on past and future shareholders' loans at 10 1/2% compounded annually.

48 The balance sheet of Two Arrows as at February 15, 1974 shows current liabilities totalling $391,741.72 (of which $66,588.67 represented accounts payable to Hinman Holdings and $104,475.04 represented loans payable to Hinman Holdings), current assets of only $21,976.28 and issued capital of 11,500 shares, issued for $11,500 of which $3,000 was unpaid. It appears from the balance sheet that the Company then had a substantial current accounts deficit, that about 44% of the current liabilities were owed to Hinman Holdings (the balance being owed on bank loans, current expenses and loans from persons other than the Hinmans or the Brandleys) and that not all of the shares authorized to be issued to

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Hinman Holdings had been issued. The balance sheet of Two Arrows as at February 15, 1975 shows current liabilities of $347,781.74 (of which $104,177.82 represented accounts payable to Hinman Holdings), current assets of only $99,625.19 and issued capital of 20,000 shares (being the total authorized capital) for $20,000 of which $1,000 was unpaid. It appears from that balance sheet, and the annual reports referred to below, that all 11,500 shares had been issued to Hinman Holdings, that Noel Brandley's and Kathleen Brandley's shares in the Com pany had been cancelled and reissued and that Theo Brandley's 1,000 shares had been reinstated but were still shown on the books as unpaid.

49 The annual report of Two Arrows as of the end of February 1974, however, shows only 8,500 shares issued, which were held E.W. Hinman 4,500 shares, Della Hinman 2,000 shares and Nolan Hinman 2,000 shares. That annual report appears to show the forfeiture and reissue of the Brandleys' shares and does not show any issuance of shares to Hinman Holdings. The annual report as of the end of February 1975 shows 21,000 shares issued (which exceeded the authorized capital of the Company) and lists the shareholders and their shareholdings as Noel Brandley 1,000 shares, Kathleen Brandley 1,000 shares, Theo Brandley 1,000 shares, Nolan Hinman 2,000 shares, Della Hinman 1,000 shares, E.W. Hinman 3,500 shares and Hinman Holdings 11,500 shares. The annual report of Two Arrows as of the end of February 1976 shows 20,000 shares issued and lists the shareholders and their shareholdings as Theo Brandley 1,000 shares, Della Hinman 2,000 shares, Nolan Hinman 2,000 shares, E.W. Hinman 3,500 shares and Hinman Holdings 11,500 shares. It appears that both the 1974 and 1975 annual reports contain errors and conflict with the financial statements.

50 By Agreement for Sale dated June 17, 1974, executed by E.W. Hinman on behalf of Two Arrows and by Nolan Hinman on behalf of Hinman Holdings, Two Arrows agreed to sell to Hinman Holdings 1,233.93 acres in Sections 31 and 32, Township 9, Range 23 and Section 36, Township 9, Range 24, all West of the Fourth Meridian for $154,241.25, payable $60,000 on execution of the Agreement and the balance of $94,241.25, plus interest at 10 1/2% per annum from October 31, 1974, in nine equal annual payments of $15,600 each plus a final payment of $14,344.85. Hinman Holdings was granted possession of the lands on October 1, 1974. By an addendum to the Agreement Hinman Holdings was given the right to make larger payments on the due dates and to prepay the balance owing at any time without notice or bonus and Two Arrows agreed to transfer to Hinman Holdings lands referred to in the Agreement on a quarter section by quarter section basis, in the order therein set out, when payment in full for the quarter sections had been received. The lands were valued at $125 per acre for the purpose of determining when payment in full had been received.

51 By transfer dated June 16, 1974, signed by E.W. Hinman as President and Nolan Hinman as Secretary, Two Arrows transferred to Hinman Holdings the lands referred to in the Agreement for Sale in Section 36, Township 9, Range 24 in consideration of the sum of $59,710. The Affidavit of Transfer, signed by E.W. Hinman on April 27, 1975, valued the transferred land at $59,710. The new title for the lands in the name of Hinman Holdings was issued on August 14, 1975, more than one year after the date of the transfer. It appears from these documents and the financial statements that this transfer resulted from the initial payment of $60,000 to be paid by Hinman Holdings pursuant to the Agreement for Sale, and that Two Arrows' indebtedness to Hinman Holdings was reduced as a result of the payment. The total indebtedness of Two Arrows to Hinman Holdings shown on its February 15, 1975 balance sheet is $66,885.89 less than that shown on its February 15, 1974 balance sheet. However, even with such reduction the total current liabilities of Two Arrows shown in the balance sheet were $347,761.74 (with $104,177.82 being owed to Hinman Holdings) and total long-term liability was $83,173.18. The February 15, 1975 balance sheet also shows capital gains on disposals of $118,133.34 (up substantially from the $2,632 capital gains on equipment disposals shown on the February 15, 1974 balance sheet).

52 On August 6, 1974, following the March 12, 1974 judgment of Cavanagh J. reinstating his 1,000 shares of Two Arrows, Theo Brandley wrote E.W. Hinman requesting "copies of the complete financial statements for the past three years of the Company, including income statement, balance sheets and copies of all directors meetings (sic) held during the past three years", and "written authorization to examine the Company books at any time, which I believe are at Mr.

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Card's office in Cardston" and that "a shareholders meeting [be] called within the next 30 days to discuss the present standing of the Company and to plot its future operations". E.W. Hinman replied on August 26, 1974 that "until we can get the harvesting done it is most inconvenient to set a date for a meeting with any hope of getting a quorum present" and expressed the hope that it could be postponed until later in the fall. He stated he had "instructed Mr. Wilde to get the minute book up to date" so copies could be made for Theo Brandley, which he hoped could be done within a couple of weeks, and advised that the accounts for the year ending February 15, 1974 had not been prepared largely due to pressure which had prevented him getting together with Mr. Card to go over the figures. He suggested that Theo Brandley drop into Mr. Card's office to peruse the records. Theo Brandley did get some financial information from Mr. Card.

53 On September 27, 1974 Theo Brandley again wrote E.W. Hinman suggesting a date for a shareholders' meeting be set as soon as possible since "to my knowledge there has been no annual general meeting for over three years and since there are many vital items to be discussed". The first reason appears to be an error because, as noted above, according to the Company's records an annual general meeting was held March 11, 1972 of which notice was sent to each of the Brandleys but none of them attended. In his letter Theo Brandley also asked E.W. Hinman to "please forward to myself, Noel and Kathleen, renewed stock certificates which have not been defaced with the word 'cancelled', and have been signed by the proper officers of the Company". Theo Brandley also enquired "who the current directors of the Company are" and requested "copies of the minutes of any meeting which may have removed Noel Brandley and myself from directorship". On October 15, 1974 Theo Brandley again wrote E.W. Hinman noting he had not received a reply to his September 27, 1974 letter and again requested that an annual general meeting of Two Arrows be held. He requested certain documents including copies of "all meetings (sic) of the Company in the past 3 1/2 yrs" and "Renewed stock certificates to be sent to Noel Brandley, Kathleen Brandley and myself". He advised that if the requests were not forthcoming consideration would be given to reporting the officers to the Alberta Securities Commission and to making an application for winding up the Company. E.W. Hinman replied on October 24, 1974 that he had been unable to go over with Mr. Card a lot of specifics which need explanation before he could properly set out true standing of the Company, that his time had been absorbed at the Legislature which had been called back into session after harvest had been completed, that it was not his purpose to withhold any information or to abdicate any responsibility in connection with the Company, and that if Theo Brandley insisted E.W. Hinman could call a meeting of shareholders some Saturday in the near future.

54 On October 31, 1974 Theo Brandley wrote the then Chairman of the Alberta Securities Commission, sending him copies of his correspondence with E.W. Hinman and enquiring if it would be possible to have a thorough investigation of the affairs of Two Arrows. A reply to that letter was sent on November 15, 1974 by Mr. Hnatiuk, a solicitor in the civil law section of the Attorney General, advising Theo Brandley to consult a solicitor as the proper recourse should be through the courts. Theo Brandley testified that he did consult a lawyer who advised him a winding up of the company for failing to hold its shareholders' meetings would be difficult to obtain through the courts. He said he was not aware at that time of any transfer of assets from Two Arrows to Hinman Holdings.

55 No further action was taken by Theo Brandley in this regard until 1981. Counsel for the Defendants submitted that Theo Brandley's decision to take no further steps resulted from his reviewing the financial statements for 1970, 1971 and 1972 which showed huge deficits and no shareholders' equity. On cross-examination Theo Brandley admitted knowing of his right to compel a shareholders' meeting or to apply to wind up the Company, but he did not do so. He also admitted he could have determined land ownership by searching the records at the Land Titles Office and of the Municipal District, but he did neither.

56 The minutes of a meeting of directors of Two Arrows held February 15, 1976 refer to "the problem of record keeping and assigning costs of operation when the same personnel and equipment are used on Two Arrows and Hinman Holdings". It was therefore resolved that Two Arrows lease its lands and equipment to Hinman Holdings for a term of

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five years beginning February 15, 1976 at an annual rental of $30,000 payable on or before December 1 of each year. The lease was to be renewable at the end of five years at a rental to be determined at that time. The minutes are signed by E.W. Hinman and Nolan Hinman.

57 The lease resulting from that resolution is dated February 15, 1976 and covers lands in Sections 17, 20, 21, 27, 28, 29 and 33 of Township 9, Range 23, West of the Fourth Meridian totalling 1,800.66 acres. The annual lease rental is $20,000 (rather than the $30,000 set out in the resolution). The lease rental is payable on February 15 (rather than December 1) of each year, but with the first payment to be made on April 1, 1976. The lessee is given the option of renewing the lease for a further term of five years (with no reference to renegotiating the rental). No evidence was adduced concerning the reasons or authority for these changes, nor as to whether the lease terms were similar to what could be negotiated between parties at arm's length to each other. The lease is signed by E.W. Hinman on behalf of Two Arrows and by Nolan Hinman on behalf of Hinman Holdings.

58 On March 18, 1977 Noel Brandley's then solicitor wrote E.W. Hinman demanding a complete report on the Company affairs, including a balance sheet and statement of income and expenses, for the past five years. The writer opined in the letter that the Brandley family owns 49% of the shares of the Company and that, at such time as the Prudential Mortgage is paid out, the Brandley family owns 50% of the shares. Mr. Wilde replied to that letter stating:

> We are instructed to advise that the Company does not recognize Noel Brandley as a shareholder of the company and as such refuses to provide him wity [sic] a balance sheet and a statement of income and expenses for the years as requested.

No evidence was adduced of anything further being done as a result of that response.

59 The February 15, 1976 financial statements of Two Arrows (being the date of the lease to Hinman Holdings) show total current and long-term liabilities of $469,914.91, of which $104,177.82 was owing to Hinman Holdings. Net Operating Losses from February 15, 1976 to February 15, 1978 totalled $84,665.43, even though all of the Company's remaining lands were leased to Hinman Holdings during that period. The February 15, 1978 financial statements of Two Arrows show current liabilities of $5,000 and long-term debt of $528,314, of which $325,522 represented accounts payable to Hinman Holdings, a further $110,148 represented loan payable to Hinman Holdings and $66,551 represented the Prudential Mortgage. Total indebtedness to Hinman Holdings represented approximately 82.5% of the total long-term debt. By transfer dated May 31, 1978 Two Arrows transferred all of its remaining lands, being the 1,800.66 acres referred to in the February 15, 1976 lease, to Hinman Holdings for $431,746. E.W. Hinman signed the affidavit of transferee in which he swore that the true consideration for the transfer was $431,746 cash and that amount was the then present value of the land. The transfer was executed by E.W. Hinman and Nolan Hinman. The new titles issued in the name of Hinman Holdings on June 23, 1978. The solicitor's reporting letter to Hinman Holdings states that the purchase price of $431,746 was accounted for as follows:

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Down Payment paid to Two Arrows                     $100,000.00
Assumption of Prudential Mortgage
       as at June 1, 1978                              68,915.48
Assumption of Canadian Imperial Bank
       of Commerce mortgage                            20,000.00
Credit for Vendors' share of 1978 taxes                   393.90
Mortgage back to Two Arrows                            42,536.62
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$431,746.00
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Hinman Holdings erroneously executed a mortgage in favour of Two Arrows on May 31, 1978 for $262,536.62 plus interest at 10 1/2% per annum computed from April 1, 1978 but that mortgage was discharged on September 5, 1978. A new mortgage dated September 5, 1978 was executed by Hinman Holdings in favour of Two Arrows for $242,536.62 plus interest at the rate of 10 1/2% per annum from April 1, 1978, to be paid by annual payment of $30,010.95 each on April 1 of each year, commencing April 1, 1979, until April 1, 1998, at which time the total principal and interest were to be fully paid. Hinman Holdings had the right to prepay the balance owing, or any portion thereof, without notice or bonus. That mortgage was signed by E.W. Hinman, on behalf of Hinman Holdings.

60 By transfer dated March 28, 1980 and signed by Nolan Hinman on behalf of Two Arrows, Two Arrows transferred to Hinman Holdings registered title to the lands contained in the June 17, 1974 Agreement for Sale, excepting the lands in Section 36 which had previously been transferred. Mr. Balderston and Mr. Jackson also appraised the lands contained in the March 28, 1980 transfer as of April or March 1980. These appraisals do not appear to be relevant as the sale of the lands was effective with the June 17, 1974 Agreement for Sale.

61 Theo Brandley testified that he was not aware of any of the transfers of lands and improvements to Hinman Holdings until his brother-in-law notified him in 1981 that the county map showed the lands in the name of Hinman Holdings. He stated he contacted legal counsel and on March 6, 1981 he attempted to contact Nolan or E.W. Hinman by phone. He subsequently learned that E.W. Hinman was at the Two Arrows farm. He went there with a Mr. Baugh and met E.W. Hinman and Nolan Hinman. He testified that in reply to his questions he was told there was no minute book for Two Arrows, that any minutes they had were in Mr. Wilde's office, that the Company was defunct, and that there were no financial statements because accountants were too costly and they could not afford financial statements. He also testified that Nolan Hinman refused to sign an authorization to permit him to view the Company records at Mr. Wilde's office. Mr. Baugh testified that both Hinmans refused to sign the aforesaid authorization but Nolan Hinman offered to find specific documents if Theo Brandley specified what documents he wanted. Theo Brandley admitted he did not go back to Mr. Card's office to examine financial records of the Company after 1974 until after legal proceedings were commenced. He stated that after Nolan Hinman said there were no financial records he didn't see any sense in going to Mr. Card. Counsel for the Defendants submitted that Theo Brandley, as a shareholder, had no right to a blanket disclosure but he did have rights to certain things which Nolan Hinman offered to get for him if he identified what he wanted.

62 The minutes of a meeting of directors of Two Arrows on September 30, 1981, at which only E.W. Hinman and Nolan Hinman were present, note that the Company wished to make a special election to distribute all of its Capital Dividend account and state it was resolved:

> As a Special Resolution of the Directors of Two Arrows Ranches Ltd. the Company made (sic) a Special Election under the Income Tax Act to pay a Tax free dividend to the Shareholders of Two Arrows Ranches Ltd. out of the Capital dividend account the amount of $176,156.26, such dividend to be paid on 31st. [sic] December, 1981.

The minutes of another meeting of directors of Two Arrows on January 31, 1982, at which only E.W. Hinman and Nolan Hinman were present, state:

> Motion was made as follows:
>
> That since the company was preparing to dispose of all of its assets, that the company elect under Section 41.3 of the Companies Act to buy back 18,996 of its outstanding common shares as follows:

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	Total Shares Held	Purchase Back	Balance
Edgar W. Hinman	3,500	3,499	1
Nolan Hinman	2,000	1,999	1
Della Hinman	2,000	1,999	1
Hinman Holdings Ltd	11,500	11,499	1
	19,000	18,996	4

None of the Brandleys received any portion of the tax free dividend and none of their shares were repurchased.

63 Although Theo Brandley was not aware at the time of this repurchase of shares its effect was to make him the majority shareholder of Two Arrows. In 1988 Theo Brandley reinstated to his parents the 1,000 shares each of them had previously owned in Two Arrows.

64 An amendment of the Plaintiffs' Statement of Claim was allowed at trial to permit the allegation, as a further particular of fraud on the minority shareholder Plaintiffs, of a payment of the tax free dividend out of Two Arrows' Capital dividend account in the amount of $176,156.26, the distribution of which, if any, the Plaintiffs did not receive. No amendment was requested or made with respect to the repurchase of a portion of the Company's outstanding shares, and the Plaintiffs' Counsel did not object to this repurchase.

Issues

65 Counsel for the Plaintiffs referred in argument to the following issues:

1. Do any of the following actions of the Defendants constitute fraud on the minority Shareholders of Two Arrows Ranches?

a) The issuance to Hinman Holdings Ltd. 11,500 shares;

b) The transfer of Two Arrows Ranches lands to Hinman Holdings Ltd.;

c) The transfer of Two Arrows Ranches Ltd. lands to Hinman Holding Ltd. (allegedly) at less than fair market value;

d) The transfer of Two Arrows Ranches Ltd. lands to Hinman Holdings Ltd. at a time when the Defendants (allegedly) knew or ought to have known that the value of land was appreciating rapidly;

e) The causing of Two Arrows Ranches Ltd. to make a special election under the *Income Tax Act* to pay a tax free dividend to its Shareholders out of its capital dividend account in the amount of $176,156.26 without any distribution to the Plaintiffs.

2. Were Noel Brandley and Kathleen Brandley's shares improperly cancelled?

3. Did the Defendants improperly fail to hold Annual meetings and provide financial information?

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4. Are the actions of the Plaintiffs statute barred as a result of any delay on the part of the Plaintiffs?

5. Does the Statute of Frauds disentitle the Plaintiffs to their (alleged) original agreement regarding the equal ownership of shares between the Hinmans and Brandleys?

(Words in parenthesis added.)

66 According to Counsel for the Defendants, the pleadings disclose three allegations against the Hinmans, namely:

a) fraud in selling land at undervalue, issuing shares, and not allowing Theo Brandley to share in a dividend;

b) Two Arrows acted "ultra vires" in selling land and issuing shares; and

c) the Plaintiffs' shares in Two Arrows were cancelled without cause.

67 The issues raised by each Counsel are similar, but the Plaintiffs' Counsel particularizes more and discusses two further issues, 4 and 5, which were not raised by the Defendants' Counsel in argument. I note, however, that Theo Brandley stated in cross-examination that the Plaintiffs were seeking damages and were not seeking a retransfer of the lands. That position by the instigator of these proceedings and principal spokesman for the Plaintiff makes it unnecessary for me to consider many of the alternative claims for relief claimed in the Statement of Claim, should I find for the Plaintiffs.

Nature of the Action

68 Two Arrows was incorporated under the *Companies Act*, R.S.A. 1955, c. 53, as amended. In 1981 the Province enacted a new Act, the *Business Corporations Act*, S.A. 1981, c. B-15, which was proclaimed in force February 1, 1982. The *Business Corporations Act* governs corporations incorporated or continued under that Act, but, until such continuation, corporations incorporated under the *Companies Act* continued to be governed by that Act. No evidence was adduced concerning the continuation of Two Arrows under the *Business Corporations Act*, but I am satisfied that Two Arrows was not so continued prior to the Plaintiffs filing their Statement of Claim in April 1982.

69 The *Business Corporations Act*, and specifically s. 187 and Pt. 19 thereof, gives minority shareholders rights and remedies which were not contained in the *Companies Act*. The Plaintiffs have not amended their pleadings to claim any of these rights and benefits. The Plaintiffs' rights and remedies in this action are therefore governed by provisions of the *Companies Act* and the common law without the benefit of the subsequent enactments concerning minority shareholders' rights.

70 The common law rule laid down in *Foss v. Harbottle* (1843), 67 E.R. 189, is that when a wrong is done to a corporation the only person who may sue in respect of that wrong is the corporation itself. Minority shareholders do not have standing to bring such an action. Exceptions to that rule which were listed by Jenkins L.J. in *Edwards v. Halliwell*, [1950] 2 All E.R. 1064, at p. 1067 are:

1. Ultra Vires Acts:

71 "... in cases where the act complained of is wholly *ultra vires* the company or association the rule has no application because there is no question of the transaction being confirmed by any majority."

2. Fraud on the Minority:

72 "... where what has been done amounts to what is generally called in these cases a fraud on the minority *and the*

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wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others." (Emphasis added)

3. Special Majorities:

73 An individual member is not prevented from suing if the matter is "one which could be validly done or sanctioned, not by a simple majority of the members ... but only by some special majority ..."

4. Personal Rights:

74 Where "the personal and individual rights of membership of [the plaintiff] have been invaded", the rule "has no application at all".

75 See *Canadian Company Law*, by Jacob S. Ziegel, pp. 560 and 561. Professor Ziegel states a fifth exception "where the interests of justice require the rule to be dispensed with" has been suggested by the courts from time to time.

76 Two Arrows is not the Plaintiff in this action. The Plaintiffs are relying on exceptions 1 and 2 (ultra vires acts and fraud on the minority) listed above as authority for their right to bring this action as a derivative action. The Defendants' Counsel recognizes these exceptions to the rule in *Foss v. Harbottle* and the Plaintiffs' right to bring a derivative action, but submits that as the pleadings also allege wrongs done to the Plaintiffs in their personal capacity (i.e., the improper cancellation of their shares and the payment of a tax free dividend in which the Plaintiffs did not share) the action should be struck, citing as authority the decision of Cory J. in *Winchell v. Del Zotto* (1976), 1 C.P.C. 338 (Ont. H.C.). In that case Cory J. considered a statement of claim where corporate claims were inextricably interwoven with claims on behalf of the company's shareholders for loss in the value of the company's shares and loss of the use of the shares as collateral security. No leave to commence a derivative action was obtained as required by s. 99 of the *Business Corporations Act* of Ontario. Cory J. decided that the statement of claim should be struck out with leave granted to the plaintiff to file a fresh pleading. The basis of that decision was that the necessary leave to commence the derivative action had not been obtained and while the facts set out in the statement of claim could support an endorsement making some claim for relief that was personal and not derivative, such a claim had not been properly set forth as the personal claims were inextricably woven into the derivative claims. Cory J. at p. 345 referred with approval to *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. (2d) 216, 54 D.L.R. (3d) 672 (C.A.), where that court stated at p. 226:

> In addition, the plaintiff may decide to apply for leave under s. 99, and if it obtains leave, it can add to the derivative claims thus permitted such personal claims as it sees fit (subject, of course, to the Rules).

It is clear that in a proper case personal claims can be added to derivative claims. I see no reason why personal claims could not be added to derivative claims in the present case.

77 There was no provision in the *Companies Act* concerning obtaining leave of the court before commencing a derivative action. Shareholders of companies incorporated under the laws of Alberta first become subject to that requirement by s. 232 of the *Business Corporations Act*, but, as I have noted, Two Arrows was not continued under the *Business Corporations Act* when the Statement of Claim in this action was filed. There was no statutory requirement for the Plaintiffs to obtain leave of the court before commencing the derivative proceedings in this action.

78 At pp. 562-63 of his text Professor Ziegel discusses personal actions and derivative actions as follows:

> **(a) Personal Action**

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A personal action which may be brought when the right asserted is personal to the shareholder. Usually the right asserted will be one common to other shareholders and a representative form of action will also be permissible. In a representative action all the parties must have the same interest in the matter. Where all the interests are not identical a personal action will be necessary.[FN1] If the complaint is against the company, it will be joined as a defendant. If the wrong is a personal one by the directors, the company need not be a party. This form of action is possibly appropriate in all exceptions to the rule except where a derivative action is required ...

(c) Derivative Action

A derivative action is one where a minority shareholder is allowed to sue in representative form to seek redress for a wrong done *to* the company. The company is the only proper plaintiff in such an action but a shareholder's representative action is allowed *where the wrongdoers are in control of the company* (or in Ontario, in control of the board) to prevent the wrong from going unremedied. The use of the representative form is misleading. The plaintiff does not represent a group of shareholders with a common interest; he represents the company. Hence the American phrase "derivative action" because the plaintiff is suing to enforce rights derived from the company. *Because the rights being enforced belong to the company, the company must be joined in the action and normally appears as the nominal defendant along with the actual wrongdoers. "So long as the company is a party, judgment can be given in its favour* , and any decision in the case becomes *res judicata* so far as the company is concerned, precluding it from bringing subsequent action on the same cause if there is a later change in control." The courts also insist that the plaintiff always sue in a representative form in a true derivative action. This ensures that all the shareholders will be bound by the judgment and will prevent a second derivative action by another group. The derivative action is used when the "fraud on the minority" exception is invoked.[FN2] (Emphasis added)

79 Counsel for the Defendants argued that at the date of commencement of this action (April 28, 1982) Theo Brandley was in total control of Two Arrows and could have commenced the derivative portion of the action in the name of Two Arrows. He noted the words "and the wrongdoers are themselves in control of the company" in the above quotation from *Edwards v. Halliwell* (similar wording in the above quotation from Professor Ziegel's text) and submitted that as Theo Brandley, and not the Hinmans, was in control of Two Arrows the Plaintiffs could not proceed by way of derivative action. Counsel for the Defendants further noted that in 1988, during the course of this lawsuit, Theo Brandley used his majority position to reinstate his parents' shares in Two Arrows.

80 Counsel for the Plaintiffs responded that Theo Brandley was not aware of the repurchase of the Hinmans' shares in Two Arrows until after commencement of the action and the production of further documentation by the Defendants pursuant to a court order. He argued that Theo Brandley had been unable to cause Hinman Holdings to reconvey the lands back to Two Arrows, which was the initial basis for bringing the derivative action.

81 The motion to repurchase the shares of E.W. Hinman, Nolan Hinman, Della Hinman and Hinman Holdings was passed January 31, 1982. It appears from the February 15, 1982 financial statement of Two Arrows that this repurchase of shares was effected on or before February 15, 1982, but no direct evidence was adduced on the point. Certified copies of documents relating to Two Arrows on file in the office of the Registrar of Corporations of Alberta were filed in evidence. These documents include copies of annual returns of Two Arrows filed from 1965 to January 29, 1980, inclusive, but include no annual returns after that date. They indicate that Two Arrows was struck from the register on August 1, 1983, was restored to the register on August 11, 1988 and was continued under the *Business Corporations Act* on November 24, 1988. One reason for striking a company from the register under the *Companies Act* was the failure to file annual returns for at least two years. There is no indication that annual returns for Two Arrows were filed for its years ending in 1981, 1982 and 1983. It appears these annual returns were not filed and therefore there would be no reasonable

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way for Theo Brandley to be aware of the repurchase of the Hinman shares or that the Hinmans were no longer in control of Two Arrows when the Statement of Claim was filed in April 1982.

82 *Palmer's Company Law* (1982), vol. 1, by C.M. Schmitthoff, para. 58-20 at pp. 772-73, in referring to wrongdoers in control of the company states:

> Until recently, the orthodox view was that for a minority shareholder to establish "fraud on the minority" he had to show that the wrongdoers were in control of the company. The main significance of the decision of Vinelott J. in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)* was that his lordship decided that the exception to *Foss v. Harbottle* is not confined to cases where the wrongdoers have voting control of the company but extends to the situation where, though not holding the majority of the shares in the company, the wrongdoers are able by manipulating their position in the company to ensure that the majority will not allow a claim to be brought by the company for the alleged wrong, in brief, where the wrongdoers are in factual though not necessarily legal control.[FN3] This conclusion arose from a blurring of the concepts of "wrongdoer control" and the "interests of justice" ... It is now clear that the Court of Appeal[FN4] disapproved of this approach and has separated the "wrongdoer control" requirement. However, it is not wholly clear from the judgment what the criteria are. The learned Lords Justices observed (p. 364) that "control" —
>
> > embraces a broad spectrum extending from an overall absolute majority of votes at one end to a majority of votes at the other end made up of those likely to be cast by the delinquent himself plus those voting with him as a result of influence or apathy,
>
> The procedural approach of the Court of Appeal is to require a prima facie case of "wrongdoer control" to be established and not merely alleged.

83 As noted by the Lord Justices, "control embraces a broad spectrum". Here the Hinman family were clearly in de facto control of the company and E.W. Hinman and Nolan Hinman were its only directors. Even though after the repurchase of the Hinman shares they did not hold a majority of the issued shares, they were in a position to cause the company to issue additional shares to reestablish their voting control. They had not filed any public documentation showing the reduction in their shareholdings and did not advise the Plaintiffs of that reduction. The Statement of Claim alleges in para. 9 thereof, "The Plaintiffs are and were at all times material hereto minority Shareholders in Two Arrows Ranches Ltd." The Defendants did not take exception to that allegation. In my opinion, considering the facts of this case "control" by the alleged wrongdoers has been established sufficiently to meet the requirements of the exception.

84 The procedures governing derivative actions at common law are raised by other submissions of counsel. Professor Ziegel sets out some procedural points in the paragraph "Derivative Actions" quoted above. Procedure is also discussed in *Palmer's Company Law*, para. 58-24, pp. 775 and 776, where the following are noted:

85 1.

> The minority shareholders sue as plaintiffs on behalf of themselves and the other shareholders (except those constituting the majority); the company will normally be a defendant, and the directors or majority shareholders are likewise often made defendants. [Footnotes omitted.]

86 The authors state that the company must be a party to the suit, either as plaintiff or as defendant. In this case Two Arrows is named as a defendant to the suit. Counsel for the Defendants alleged that Two Arrows is the proper Plaintiff. It is not necessary in a derivative action where fraud on the minority is alleged for the Company to be named as Plaintiff.

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87 2.

> The statement of claim in the minority shareholders' action founded on fraud on the minority is defective unless it contains an allegation that, owing to the wrongdoers being in control of the company, they cannot sue in the name of the company. [Footnotes omitted.]

88 The Statement of Claim alleges that the Plaintiffs are and were at all material times minority shareholders in Two Arrows. It further alleges that E.W. Hinman and Nolan Hinman perpetrated a fraud on the minority shareholder Plaintiffs, and alleges particulars of that alleged fraud. In my opinion this requirement has been met.

89 3. The authors refer to the decision of the Court of Appeal in *Prudential Assurance Co. v. Newman Industries Ltd.*, [1982] 1 All E.R. 354, stating:

> Its chief proposition is that when a minority shareholder commences a derivative action, the question whether in fact the company is controlled by the alleged wrongdoers should first be determined before the derivative action itself is allowed to proceed. Moreover, the right to bring a derivative action should not be decided as a preliminary issue on the hypothesis that all allegations in the statement of claim of "fraud" and "control" are facts, as in the trial of a preliminary point of law. The plaintiff should at least be required to establish a prima facie case that (i) the company is entitled to the relief claimed and (ii) the action falls within the proper boundaries of the rule restricting members' actions on behalf of the company.

90 In my opinion the Plaintiffs have met this requirement.

91 4. The authors also note, in referring to *Prudential v. Newman Industries*:

> The case is also a salutary warning against expressing what is in reality a corporate matter as an individual wrong merely because the member is indirectly prejudiced by a reduction in the company's profits. However, there is no objection to combining a derivative action with a personal action where the reality justifies such a course.

92 As noted a derivative action may be combined with a personal action in a proper case. Here the Statement of Claim alleges fraud on the minority shareholder Plaintiffs perpetuated by E.W. Hinman and Nolan Hinman in the following particulars:

> (a) causing the issuance to Hinman Holdings of 11,500 additional shares;
>
> (b) causing the transfer of Two Arrows lands to Hinman Holdings;
>
> (c) causing the transfer of Two Arrows lands to Hinman Holdings at less than face market value;
>
> (d) causing the transfer of Two Arrows lands to Hinman Holdings at a time when E.W. Hinman and Nolan Hinman knew or should have known that the value of the lands was appreciating rapidly;
>
> (e) causing Two Arrows to make a Special Election under the *Income Tax Act* to pay a tax free dividend out of its Capital dividend account, the distribution of which, if any, the Plaintiffs did not receive.

Allegations (b), (c) and (d) involve the alleged wrongful transfer of assets of Two Arrows and involve a derivative action. Allegations (a) and (e) allege a wrongful dilution of the Plaintiffs' shareholdings or a failure to pay to the Plaintiffs their proportionate share of a dividend and involve a personal action. The Statement of Claim also alleges the cancella-

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tion of the shares of Noel and Kathleen Brandley in Two Arrows without cause or consideration. That also is a personal action. All of these allegations are dependent on the history of the involvement of the parties summarized herein. In my opinion this case justifies the combining of these derivative and personal claims.

93 The Statement of Claim also alleges that Two Arrows acted ultra vires in:

(a) issuing additional shares

(b) transferring assets.

These alleged ultra vires acts are not subject to the rule in *Foss v. Harbottle*. However, the action involving them is derivative in nature because if shares are invalidly issued or assets invalidly transferred the transactions are void and the shares or assets, as the case may be, return to become an asset of the Company.

94 In my opinion the action is properly brought. The procedural objections of the Defendants are dismissed.

Fraud on the Minority

95 Counsel for the Defendants argued that to prove fraud, one must show an intent to deceive, that the onus of proof in establishing fraud is a high degree of probability and that mere carelessness or negligence on the part of directors of a company is not fraud. He relied upon *Derry v. Peek*, [1886-90] All E.R. Rep. 1 (H.L.), *Dunn v. Darbyson* (1960), 31 W.W.R. 422 (B.C.S.C.), and *Chapman v. Warren*, [1936] 2 D.L.R. 157 (Ont. H.C.). While these cases support the principles that in civil cases "Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, not caring whether it be true or false" (*Derry v. Peek* headnote) and that "carelessness, however gross, is not fraud" and "The element of moral turpitude must be present ... to constitute fraud" (*Chapman v. Warren*, pp. 162 and 163), these principles have not always been followed when the concept of fraud on the minority shareholders of a corporation is considered. Both *Derry v. Peek* and *Chapman v. Warren* were cases involving misstatements in prospectuses of companies. *Dunn v. Darbyson* concerned misrepresentations during negotiations for the sale and exchange of property. None of the cases involved allegations of fraud on minority shareholders of a corporation by those allegedly in control.

96 In *Palmer's Company Law*, paras. 58-13 to 58-20, pp. 768 to 773, the following statements are made:

> It is not easy to state when an act qualifies as fraud on the minority and it would be unprofitable to attempt a definition of that term. In *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)* [[1980] 2 All E.R. 841 at 862] Vinelott J. pointed out that fraud on the minority lies in the use of the controllers' voting power rather than in the character of the act or transaction giving rise to the claim. The following are indications of the meaning attached to it:
>
> *"Bona fide for the benefit of the company as a whole."* A resolution constitutes a fraud on the minority if it is not passed "bona fide for the benefit of the company as a whole," [Lindsay M.R. in *Allen v. Gold Reefs of West Africa*, [1900] 1 Ch. 656 at 671] or its effect is "to discriminate between the majority shareholders and the minority shareholders so as to give to the former an advantage of which the latter was deprived." [Evershed M.R. in *Greenhalgh v. Arderne Cinemas Ltd.*, [1950] 2 All E.R. 1120 at 1126] ...
>
> Until recently, the tendency was to confine "fraud on the minority" to cases where there was an element of dishonesty or, at least, impropriety. It now appears that the courts will have regard to advantageous consequences to the wrongdoer as much as to his improper intentions. In *Pavlides v. Jensen* [[1956] Ch. 656] it was held that a negligent

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sale at an undervalue could not, without more, amount to fraud on the minority. However, in *Daniels v. Daniels* [[1978] Ch. 406], Templeman J. held that there might be circumstances in which, exceptionally, minority shareholders could bring an action founded on the gross negligence of the controlling directors, at least where the directors themselves benefited from their own negligence (*e.g.* by the sale of corporate assets to one of their number at an undervalue). Moreover, the *Daniels* case receives support from the decision of Sir Robert Megarry V.-C. in *Estmanco (Kilner House) Ltd. v. Greater London Council* [[1982] 1 All E.R. 437 at 445] where the learned Vice-Chancellor stated:

> 'Fraud' in the phrase 'fraud on a minority' seems to be being used as comprising not only fraud at common law but also fraud in the wider equitable sense of that term, as in the equitable concept of a fraud on a power. ...

Directors are bound to exercise their powers in the interests of the company as a whole and not in the interests of individual members, even though this may be inconsistent with the observance of natural justice [*Gaiman v. National Association for Mental Health*, [1971] Ch. 317]. Megarry J. observed in this case [*Gaiman v. National Association for Mental Health* at p. 335]:

> Where there is corporate personality, the directors or others exercising the powers in question are bound not merely by their duties towards the other members, but also by their duties towards the corporation. These duties may be inconsistent with the observance of natural justice, and accordingly the implication of any term that natural justice should be observed may be excluded.

97 Professor Ziegel states at p. 569 of his text:

> It is not possible to state with any certainty what constitutes the element of fraud in a fraud on the minority. The term does not bear the meaning it has in the law of torts. The minority need not prove the element of deceit. Generally the term is used to cover a variety of cases in which the exercise of the majority power or the breach of a fiduciary duty has been so abusive that the intervention of the courts is demanded. The courts have not been guided by any clear principle, but have preferred to consider the nature of the transaction in each case.

98 As noted by Professor Ziegel the nature of the transaction must be considered when considering cases where the courts have found a fraud on the minority. With that qualification it is useful to consider the principles enumerated in cases referred to by counsel.

99 At p. 569 of his text Professor Ziegel refers to *Burland v. Earle*, [1902] A.C. 83 (P.C.), stating:

> The Privy Council in *Burland v. Earle* cited as the most familiar example of a fraud on the minority the case "where the majority are endeavouring directly or indirectly to appropriate to themselves money, property or advantages which belong to the company" [at p. 87].

100 In *Menier v. Hooper's Telegraph Works* (1874), 9 Ch. App. 350, the defendants used their controlling interest in the company to compromise a pending action and put the company into litigation and obtained for themselves the benefit of a contract in which the company was interested. At p. 354 Sir G. Mellish L.J. stated:

> I am of opinion that although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet that the majority of shareholders cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share of any consideration which may come to them.

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Counsel for the Defendants submits that the facts in *Menier* are substantially different than the present case, arguing that in the present case Two Arrows did receive value for the lands conveyed to Hinman Holdings.

101 In *Cook v. Deeks*, [1916] 1 A.C. 554 (P.C.), two of three directors of a company negotiated for themselves a contract with another company which they had a duty to obtain for their company. They then used their controlling votes at a shareholders' meeting to pass a resolution that the company had no interest in the contract. In holding for the minority shareholders Lord Buckmaster L.C., in delivering the judgment of their Lordships, found at pp. 564 and 565:

> If, as their Lordships find on the facts, the contract in question was entered into under such circumstances that the directors could not retain the benefit of it for themselves, then it belonged in equity to the company and ought to have been dealt with as an asset of the company. Even supposing it be not ultra vires of a company to make a present to its directors, it appears quite certain that directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority. To such circumstances the cases of *North-West Transportation Co. v. Beatty* [12 App. Cas. 589] and *Burland v. Earle* have no application. In the same way, if directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the company, a resolution that the rights of the company should be disregarded in the matter would amount to forfeiting the interest and property of the minority of shareholders in favour of the majority, and that by the votes of those who are interested in securing the property for themselves. Such use of voting power has never been sanctioned by the Courts, and, indeed, was expressly disapproved in the case of *Menier v. Hooper's Telegraph Works* [(1874) L.R. 9 Ch. 350].

102 Counsel for the Defendants submits that the facts of *Cook v. Deeks* also are substantially different from the present case, arguing that in the present case valuable consideration was paid and reasonable efforts were taken to determine fair value.

103 The British Columbia Court of Appeal decision in *Carlson v. Trans-Pac Industries Corp.*, [1990] B.C.J. No. 671 [reported 2 B.L.R. (2d) 70], illustrates the importance of considering the facts of the case in regard to the above legal principles. There the plaintiff claimed, in part, that he had been improperly deprived of a share of management fees paid to others, which he claimed was a method of directing profits to the shareholders. Seaton J.A., in giving the decision of the court, referred to *Metropolitan Commercial Carpet Centre Ltd. v. Donovan* (1989), 42 B.L.R. 306 (N.S.T.D.), where the court found an oppressive action against a minority shareholder and held the minority shareholder was entitled to share in the profits paid to other shareholders as a bonus. He then stated:

> > I refer to *Rowe v. Nat. Wholesales Ltd.* (1978), 22 Nfld. & P.E.I.R. 26, 58 A.P.R. 26 (Nfld. T.D.) in which the directors paid themselves directors' fees totalling three times the normal fees paid. The Court held that these payments were void as a *fraud* on the *minority* and stated [at 43 Nfld. & P.E.I.R.]:
> >
> > > ... familiar examples are when the majority are endeavouring directly or indirectly to appropriate to themselves money, property or advantages which belong to the *company* or in which the other shareholders are entitled to participate.
>
> There is nothing in the plaintiff's employment contract entitling him to a proportionate share in the profits.
>
> The *Metropolitan Commercial Carpet*, supra, case and the *Rowe*, supra, case isolate the decisive issue: were the payments an attempt to reduce the entitlement of a shareholder to share in the profits by a means which illustrates a lack of good faith, or, to put it another way, were they an attempt to appropriate money in which a shareholder was en-

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> titled to participate?

The Court of Appeal upheld the trial court's decision, which dismissed the plaintiff's claim and found there was no attempt to appropriate money in which the plaintiff was entitled to participate.

104 Plaintiff's Counsel also referred to *Gray v. Yellowknife Gold Mines Ltd.*, [1947] O.R. 928 (C.A.), a decision also referred to by Professor Ziegel at pp. 571 and 572. Professor Ziegel states at p. 572:

> Nonetheless the case is important as indicating that the courts will stop the milking of a subsidy by a parent company where there are minority shareholders in the subsidiary and the subsidiary does not have an independent board of directors.

When Hinman Holdings acquired the majority of the shares of Two Arrows, Two Arrows became a subsidiary of Hinman Holdings and the two companies did not thereafter have independent boards of directors. Counsel for the Defendants distinguishes the case arguing that Two Arrows had attempted to sell the lands without success for several years, and then sold the lands to Hinman Holdings to reduce debts and as a last resort and at what was honestly believed to be fair value.

105 I will consider the challenged transactions in light of the above principles.

Issuance of 11,500 Shares

106 The Plaintiffs did not dispute that notices were properly mailed to each of the Brandleys of the Annual General Meeting of Two Arrows to be held March 11, 1972. None of the Brandleys attended that meeting and E.W. Hinman and Nolan Hinman were elected the sole directors of the Company. The minutes of the meeting refer, inter alia, to Prudential's foreclosure proceedings and other proceedings against Two Arrows in overdue accounts and to loans by Hinman Holdings to Two Arrows. At the directors' meeting on September 29, 1973, after discussing creditors' actions, the foreclosure proceedings on the Company's mortgage and the inability of the Company to make the payments required, it was resolved that Two Arrows accept advances of approximately $70,000 from Hinman Holdings. It appears from the minutes of that meeting that Hinman Holdings had to sell property in order to make those advances (although no other evidence was called to substantiate that matter) because it was agreed that, as partial compensation to Hinman Holdings for loss of appreciation on such property to be sold, 11,500 shares of Two Arrows be issued to Hinman Holdings at $1 per share to be charged against the advances. It is not clear from that wording whether Hinman Holdings actually paid $11,500 cash for those shares with that amount being deducted from the $70,000 of advances, or whether Hinman Holdings received the 11,500 shares as consideration for it making the advance and to compensate it for loss of appreciation on property it was required to sell. The accounting reports are not detailed enough to determine how this was handled and no other evidence was called concerning it. In any event, the 11,500 shares were issued to Hinman Holdings as fully paid and non-assessable.

107 Article 55 of the Articles of Association of Two Arrows provides, in part, that the business of the Company shall be managed by the Directors who:

> ... may *exercise all such powers of the Company as are not, by "The Companies Act", or any amendment thereof for the time being in force, or by these articles required to be exercised by the Company in general meeting*, subject nevertheless to any regulations of these articles, to the provisions of the said Act and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by ordinary resolution, whether previous notice thereof has been given or not ... [emphasis added]

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108 Further, art. 10 of the Articles of Association states:

> No shares other than those subscribed for by the incorporators of the Company shall be issued or allotted without the unanimous consent of all the directors for the time being.

The issuance of shares was not required, either by the *Companies Act* or by the Articles, to be exercised by the Company in general meeting. The issuance of the 11,500 shares to Hinman Holdings was within the powers of the directors and did not require ratification at a general meeting. The Minutes clearly set out ample consideration for the issuance of these shares to Hinman Holdings. The indebtedness of Two Arrows, the foreclosure proceedings on the mortgage and inability of Two Arrows to otherwise meet its obligations is shown by the evidence. There is no evidence of fraud in the issuance of these shares to Hinman Holdings.

109 It is evident that the Hinman family are indirect recipients of these shares. In the absence of fraud, as discussed above, that receipt is not sufficient, in itself, to void the transaction. Article 61 of the Articles of Association of Two Arrows provides:

> No director or intending director shall be disqualified by his office from contracting with the Company either as vendor, purchaser or otherwise nor shall any contract or arrangement entered into by or on behalf of the Company in which any director shall be in any way interested be voided, nor shall any director so contracting or being so interested by liable to account to the Company for any profits realized by any such contract or arrangement by reason of such director holding office or of the fiduciary relations thereby established.

110 Counsel for the Plaintiffs argued that the issuance of these 11,500 shares to Hinman Holdings was contrary to the initial agreement between the Brandleys and the Hinmans that there was to be equal control of the Company. The existence or non-existence of such an agreement after the re-financing and borrowing of additional funds was considered by Judge Yanosik (as he then was), in his judgment referred to above, who found that from the point of the Prudential financing on, E.W. Hinman was to have control of the Company, at least until the debts were retired and the mortgage discharged. As Judge Yanosik had the benefit of hearing testimony from persons from whom I did not hear when that evidence was still relatively fresh in the witnesses' minds, and as his findings of fact confirm much of the evidence before me, I accept Judge Yanosik's finding in this regard. At the time of the issuance of these shares to Hinman Holdings and of many of the subsequent transactions questioned by the Plaintiffs, Two Arrows was heavily in debt and the Prudential mortgage remained undischarged.

111 There is no evidence of anything improper in the issuance of these 11,500 shares of Two Arrows to Hinman Holdings. The Plaintiffs' claim based on the allegations of fraud and ultra vires in this transaction is dismissed.

Sale of Lands

112 The Agreement for Sale of Lands in Sections 31 and 32, Township 9, Range 23 and Section 36, Township 9, Range 24 from Two Arrows to Hinman Holdings was dated June 17, 1974. The Balance Sheet of Two Arrows as of February 15, 1974 discloses the following indebtedness of the Company:

```
Current Liabilities

Bank loans payable                    $ 79,953.90
Accounts Payable:
```

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```
          -- Expenses                 116,424.11
          -- Hinman Holdings           66,588.67
   Loans Payable:
          Lynn Svenson                 10,000.00
          W.H. Thompson                 4,300.00
          Doug Steed                   10,000.00
          Hinman Holdings             104,475.04
                                      ----------
   Total Current Liabilities                             391,741.72

   Long Term Liabilities
   Mortgage-Prudential Insurance       86,591.18
   Park Lake R.E.A.                     1,621.90
                                       ---------
   Total Long Term Liabilities                            88,213.08
                                                          ---------
   Total Current and Long Term
         Liabilities                                    $479,954.80
                                                         ----------
```

Its total current assets were only $21,976.28 and its total assets (fixed assets valued at cost) were only $210,926.11. Clearly the Company was heavily in debt.

113 Noel Brandley admitted during his examination for discovery that the ranch was in serious financial difficulty about 1970 and recalled discussions with E.W. Hinman between about 1970 and 1974 concerning attempts to sell the ranch. Noel Brandley and Kathleen Brandley signed the proposed agreement which E.W. Hinman sent Theo Brandley on April 16, 1969 whereby Kathleen Brandley would sell her shares in Two Arrows for $40,000 and Noel Brandley would sell his shares for $34,500. Theo Brandley was not satisfied with the $3,000 offered for his shares so that agreement was never effective. Counsel submitted that the proposed agreement was clearly related to an attempt to sell the lands. I agree with that submission.

114 Mr. Wilde testified to attempts to sell the Two Arrows property and referred to three negotiations to sell in the 1969 to 1972 period, none of which were successful. In July 1969 Prudential commenced foreclosure proceedings on the Two Arrows mortgage, on the mortgage by E.W. Hinman of their Glenwood property and proceedings on the personal guarantees by E.W. Hinman and Della Hinman. The properties were posted for sale by tender but the only offer received was on the Glenwood property. No offer was received to purchase the Two Arrows property. It appears that at this stage Hinman Holdings started making advances to Two Arrows to assist it in its substantial indebtedness.

115 With this background the June 17, 1974 Agreement for Sale between Two Arrows and Hinman Holdings was executed. The selling price of $154,241.25 for the lands was determined by Nolan Hinman.

116 Mr. Card and Mr. Wilde each recalled discussing the proposed sale with Nolan Hinman and advising him of the necessity to sell the lands at fair market value. No independent appraisal was obtained but Mr. Card recalled Nolan Hinman advising him that he was aware of land sales in the area and that he would determine fair market value on the basis of those sales. Mr. Wilde recalled Nolan Hinman presenting him with a written breakdown of the acreages to be sold and stipulating the fair market figure to be used of $125 per acre. Mr. Groves, in giving expert appraisal evidence for the De-

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fendants, referred to a compilation made by Nolan Hinman of various sales in the area of the farm of which he was aware (many of which were used by Mr. Groves as comparables in his appraisals). That compilation is not dated, but it does list many sales of lands in 1971 and 1973 as well as sales at later dates to and including 1979. Obviously it was prepared in or after 1979.

117 Mr. Card reported the 1974 land sale to Revenue Canada. By letter dated September 29, 1977 Revenue Canada advised Mr. Card as follows:

> A Real Estate appraisal done by this office on the 1233.93 acres of land sold by Two Arrows Ranches Ltd. to Hinman Holdings Ltd. has established the V-Day value to be $68,000.00. The resulting proposed changes in Capital Gains are as follows:

```
Proceeds of disposition                                $ 154,241.25
Appraised V-Day value                                     68,000.00
                                                         ----------
Capital Gain                                              86,241.25
Less: Capital Gain Reported                               30,848.25
                                                         ----------
Additional Capital Gain                                 $ 55,393.00
                                                         ----------
```

The real estate appraisal referred to in the letter was not produced and no one from Revenue Canada testified. That appraisal apparently concerned the V-day (December 31, 1971) value of the land and not the June 14, 1974 value.

118 Mr. Card testified that one reason for only transferring part of the lands in 1974, rather than transferring land sufficient to eliminate the entire debt to Hinman Holdings, was because capital gains tax was relatively new in 1974 and Mr. Card wanted to establish a proper V-day value for the lands in order to minimize the risk of reassessment and a resulting unexpected tax bill to Two Arrows before proceeding with a further sale. Counsel for the Defendants submitted that decision worked to the advantage of Two Arrows because land values increased between 1974 and 1978, resulting in a much higher selling price in 1978. Counsel for the Plaintiffs responded that the increase in land values did not benefit Two Arrows because its alleged debt to Hinman Holdings carried interest which accumulated between 1974 and 1978, that any capital gains tax due by Two Arrows would be offset by huge operating losses in prior years and that the reason expressed by Mr. Card showed an intention as early as 1974 to transfer all Two Arrows' lands to Hinman Holdings.

119 Mr. Card also testified that the decision to not offset all of the land sale price against the indebtedness of Two Arrows to Hinman Holdings at the date of the Agreement for Sale was of no consequence because the interest rate charged on the unpaid portion of the purchase price of the land was the same as that charged on the debt to Hinman Holdings. Mr. Harker, who gave expert accounting testimony for the Plaintiffs, submitted that this deferral was detrimental to Two Arrows because the amount of the alleged indebtedness of Two Arrows to Hinman Holdings exceeded the amount owing on the Agreement for Sale and the total debt owing to Hinman Holdings continued to grow by the interest charged on that debt. I note that the $104,177.82 debt to Hinman Holdings shown on the February 15, 1975 financial statements exceeded the $97,142.07 account receivable — land agreement in those financial statements by only $7,035.75 and the interest rate on Two Arrows' indebtedness to Hinman Holdings was the same as the interest rate on the account receivable. I find no prejudice to Two Arrows by the deferral or by the sale of only part of the lands in 1974.

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120 The Plaintiffs questioned the accuracy of the accounting records of Two Arrows and the accuracy of the amount of the debt allegedly owed by Two Arrows to Hinman Holdings. Mr. Card did not perform an audit in preparing the statements but relied upon information and documen tation supplied him by the Hinmans. Mr. Harker testified that when he examined the books of Two Arrows and Hinman Holdings Mr. Card did not produce sufficient documentation to verify the statements. Mr. Card testified that he was supplied with synoptic journals and necessary documentation to support the statements he prepared and there were no discrepancies in the material he received. He never had any suspicion of errors in the records he was given and he never questioned that those records were not factual. He stated he never had any concerns that the books were not being kept for the benefit of Two Arrows. Apart from the minutes of the Annual General Meeting on March 11, 1972 (which states that errors in the financial statements were noted resulting in the statements being referred back for correction) and the minutes of a directors' meeting on February 15, 1976 (which states that problems of record keeping and of assigning costs between Two Arrows and Hinman Holdings were discussed), no evidence was adduced of errors in the financial statements of Two Arrows nor, particularly, of errors in the amounts of Two Arrows' indebtedness from time to time to Hinman Holdings. Further, the financial statements of Two Arrows prepared by Mr. Card were submitted in evidence by agreement of both Counsel. Speculations by the Plaintiffs that such statements and the amounts of such indebtedness are in error are not supported by evidence and are not proven.

121 The Plaintiffs further allege that the selling price of the land was too low. While the Defendants asserted, supported by the evidence of Paul Hinman, that the land which was sold was dryland and should be valued as such, Theo Brandley testified that portions of SE1/4 of Section 31 and of Section 32 were irrigated land (referring to his sketch showing his recollection of the irrigated parcels as of 1967). The Plaintiffs noted an Alberta Department of Agriculture report dated April 23, 1974 (apparently prepared as a result of Nolan Hinman's application to irrigate the S1/2 of Section 32 and the S1/2 of Section 33 with a centre pivot system using waters from the Oldman River) which stated in part "Installation of pads and buried mainline is under construction for servicing these four quarters". The report recommended a water licence be given to proceed with the project. An amendment dated May 14, 1974 to that report changed the land locations to SE1/4 Section 36, Township 9, Range 24, plus S1/2 Section 31 and S1/2 and portion NW1/4 Section 32, Township 9, Range 23, containing 838 acres. The amendment noted "proper irrigation by any other method than a centre pivot would be difficult. The soil of the area is a sandy loam" and "Irrigation will be accomplished by a Rain Cat centre pivot sprinkler but may be substituted for a side roll sprinkler system". I also note an Agricultural Feasibility Report dated August 22, 1983 which refers to "Pumpsite: NE 31-9-23-W4" and "Area Irrigated SW 36-9-24-W4" and states "Mr. Hinman wishes to enlarge on his irrigable acreage to increase production for his farming operation. The area consists of 37.95 ha. (93.7 acres)." The report refers to the Oldman River as the water supply, that the soil is sandy loam and that the topography is rough and would adapt to sprinkler irrigation only. It states "The area will be irrigated with a side wheel roll system" and recommends "that Mr. Hinman's application for a water licence be given favorable consideration".

122 Mr. Beler, of the Department of Environment Water Resources Division, testified that the lands sold to Hinman Holdings in 1974 were not licensed for irrigation until July 21, 1975 and that Nolan Hinman's application for a licence to irrigate 785 acres in Sections 31, 32 and 36 was initiated on April 23, 1974. Mr. Beler was not aware of any moratorium on the granting of water licences in the area of the Two Arrows lands. As noted before, the parties are deemed to have admitted that none of the lands referred to in the June 17, 1974 Agreement for Sale were licensed for irrigation as at the date of that Agreement.

123 Two expert witnesses, Mr. Balderston and Mr. Jackson, gave appraisal evidence for the Plaintiffs. Mr. Balderston calculated the total acreage involved in the Agreement for Sale to be 1,236.17 acres, of which he calculated 1,154 acres to be cultivated and, of those, 835.2 acres to be irrigated. He valued the irrigated cultivated lands at $325 to $350 per acre, for a total of $287,910, the dryland cultivated lands at $250 per acre, for a total of $79,700, and the uncultivated lands at $125 per acre, for a total of $10,280. On that basis he valued, as at June 16, 1974, the total lands involved in the

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Agreement for Sale at $378,000, after rounding. Mr. Balderston stated he relied on advice from Theo Brandley as to the amount of cultivation and irrigation of the lands and the crops grown in making his appraisal. He was not aware of the admission that the lands were not licensed for irrigation. He stated that if the lands were not authorized to be irrigated the values for irrigated parcels in his report would have to be valued as dryland. On that basis he would reduce his valuation, as at June 16, 1974, of the lands involved in the Agreement for Sale to $299,000, after rounding. I note that the 6.63 acres in Section 36, which had been taken for highways, were not excepted in Mr. Balderston's acreage calculations. If these were treated as dryland cultivated lands, Mr. Balderston's value of $299,000 should be reduced by a further $1,657.50 ($1,660 after rounding).

124 Mr. Jackson valued the lands involved in the Agreement for Sale, as at June 16, 1974, at $509,000, after rounding. He calculated there were 473.37 acres involved in Section 36, Township 9, Range 24, West of the Fourth Meridian, of which 458 acres were cultivated and irrigated and 15.37 acres were mature pasture, and 756.25 acres involved in Sections 31 and 32, Township 9, Range 23, West of the Fourth Meridian, of which 593 acres were cultivated and irrigated and 163 acres were mature pasture. He valued the cultivated irrigated lands at $450 per acre, for a total of $472,950, and the mature pasture lands at $200 per acre, for a total of $35,675. Mr. Jackson stated that had he known the lands were not licensed for irrigation in June 1974 he would have reduced his value for the cultivated lands from $450 per acre to $200 per acre, which would reduce his total valuation to $298,000, after rounding.

125 Mr. Groves, testifying as an expert in appraisals for the Defendants, valued the lands involved in the Agreement for Sale, as at June 17, 1974, at $170,500. In his appraisal Mr. Groves used the gross acreages only, and did not subtract from those gross figures, the exceptions noted on the titles. He therefore overstated the total acreage by 22.58 acres. He considered that in June 1974 there were 424 acres under cultivation and 56 acres of marginal pasture or waste in Section 36, Township 9, Range 24, West of the Fourth Meridian. He valued 284 acres of the cultivated lands at $120 per acre, the remaining 140 acres of cultivated lands at $140 per acre and the pasture or waste lands at $90 per acre. He considered that in June 1974 there were 568 acres under cultivation, 175.92 acres in yard or pasture and 28.2 acres of marginal pasture or waste in Sections 31 and 32, Township 9, Range 23, West of the Fourth Meridian. He valued the cultivated lands at between $130 and $180 per acre, the yard or pasture lands at between $90 and $120 per acre and the marginal pasture or waste lands at between $50 and $90 per acre. Mr. Groves did not give any of the lands additional value for potential irrigation. On cross-examination he said if lands have a potential for irrigation and are actually being irrigated but no licence has been issued he would normally increase the value of those lands 40% to 45%, but added he had only increased land value for potential future irrigation in one circumstance. That was where water licences were granted after the offer was signed but before the sale closed. He stated he understood none of the lands involved in the Agreement for Sale were being irrigated in June 1974.

126 The June 1974 values of the expert witnesses for the lands involved in the June 17, 1974 Agreement for Sale therefor ranged from approximately $298,000 by Mr. Balderston and Mr. Jackson (after reduction in values because the lands were not licensed for irrigation) to approximately $170,500 by Mr. Groves (with the possibility of an increase in value for potential irrigation of the lands which actually had been irrigated where no licence had been issued). All of these values exceed the $154,241.25 selling price under the Agreement for Sale.

127 Two Arrows did not have any independent directors. Its only directors were E.W. Hinman and Nolan Hinman, both of whom were also directors of Hinman Holdings. The Hinman family were the sole shareholders of Hinman Holdings while at least Theo Brandley (and potentially Noel Brandley and Kathleen Brandley — if the forfeiture of their share was improper) had minority interests in Two Arrows. This arrangement demanded that E.W. Hinman and Nolan Hinman exercise considerable caution in any transfer of assets from Two Arrows to Hinman Holdings. But considerable caution was not used. Nolan Hinman was cautioned by both Mr. Card and Mr. Wilde to ensure the sale of the lands was made at

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fair market value. Nolan Hinman did not obtain an independent appraisal to support his values and relied on his own knowledge of land sales in the area. There is no independent evidence to support Nolan Hinman's values.

128 Nolan Hinman and E.W. Hinman were not disinterested persons. If the land were transferred at less than fair market value they would benefit. There is no evidence of an intent to deceive or of blatant recklessness on the part of Nolan Hinman, but there is evidence of discrimination between the majority and minority shareholders, of advantageous consequences to the Hinmans and of the Hinmans benefiting from the transfer at a value which was below that determined by their own expert in these proceedings. Based on the authorities I have referred to above, I am of the opinion that this constituted a fraud on the minority shareholder (or shareholders).

129 The evidence of Theo Brandley and of Paul Hinman clearly conflicts as to whether sections of the lands sold under the Agreement for Sale were actually irrigated before June 1974. It appears from the Alberta Department of Agriculture reports and the Department of Environment report that at least some of these lands had been irrigated, that applications for licences to irrigate much of the land had been made and the granting of the licences had been recommended. The lands were not actually licensed for irrigation until July 1975.

130 After reviewing the appraisers' reports, considering their knowledge of the topography and soil conditions of the transferred lands as detailed in their reports and the opportunity each appraiser had to personally inspect the lands and to interview members of the Hinman family, and also the unsuccessful attempts to sell the Two Arrows properties and the absence of tenders for such property on the foreclosure proceedings, I am of the opinion that the appraisal of Mr. Groves is to be preferred over those of Mr. Balderston and Mr. Jackson.

131 The values in Mr. Groves' report, however, should be increased to reflect the actual irrigation conducted, the applications made and the likelihood of the applications being granted. Not all of the transferred lands had been irrigated, nor were all subject to applications to irrigate. It is apparent from the appraisal reports concerning lands transferred in 1978 that the benefits of irrigation vary with the characteristics of the lands being irrigated. I am of the opinion, therefore, that the total value of $170,500 in Mr. Groves' report should be increased by 10%, resulting in a June 1974 value of the lands then sold of $187,550. This value is $33,508.75 higher than that price at which the lands were sold to Hinman Holdings. Interest should accrue on this figure at 10 1/2% per annum from October 31, 1974, being the interest rate and commencement date for interest set out in the Agreement for Sale, to December 31, 1978.

132 No issue is taken with the lease by Two Arrows of the rest of its lands and equipment to Hinman Holdings in February 1976, and no evidence was called as to whether the terms of that lease were fair to both parties and reflected what would be expected in a lease between arm's length parties. Therefore, no decision is rendered concerning this lease arrangement.

133 No minutes of a meeting of directors or shareholders were produced in evidence supporting the transfer dated May 31, 1978 by Two Arrows of all of its remaining lands to Hinman Holdings for $431,746, payable $100,000 down payment, $89,209.38 by way of assumption of mortgages and tax adjustment and the remaining $242,536.62 by way of a mortgage back to Two Arrows. I assume this transaction was authorized at a directors' meeting, as apparently no shareholders' meetings were called. E.W. Hinman and Nolan Hinman were the sole directors of Two Arrows at that time.

134 Mr. Wilde testified that he was the solicitor for both companies involved in the sale. He stated he again advised Nolan Hinman of the need to make the sale at fair market value. Nolan Hinman gave him a list of the properties to be transferred and of values attributed to those properties broken down between pasture (to which a value of $140 per acre was ascribed), irrigated lands (to which a value of $350 per acre was ascribed) and improvements (to which a value of $42,000 was ascribed). That list indicates that a total of 1,799.36 acres was to be transferred which included 656.36 acres

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of irrigated land having a total value of $229,726 and 1,143 acres of pasture having a total value of $160,020. Those values plus the $42,000 value attributed to improvements resulted in the transfer price of the properties of $431,746. Mr. Card testified that he advised Nolan Hinman the transfer had to be at fair market value and that Nolan Hinman advised him he was aware of sales in the area upon which he would establish the price. No independent appraisal was obtained at that time to support the transfer price.

135 Mr. Groves in his appraisal of these properties as of June 1978 noted that 785 acres of the lands were covered by irrigation permit, but he considered the then irrigation of only 419 of these acres to be good, of 212 acres to be fair and of the remaining 143 acres to be marginal. The remaining lands he considered to be dryland, pasture or waste. Mr. Groves valued the irrigated lands at between $450 and $575 per acre and the balance of the lands at between $80 and $200 per acre for a total value of the transferred lands as of June 1978 of $580,501. He valued the improvements, including the fixed irrigation system, as at June 1978 at $78,500.

136 Mr. Balderston appraised the fair market value as at May 31, 1978, of the lands and improvements involved in the 1978 sale as follows:

```
Lands                   $807,000
Improvements            $135,500
                        --------
                        $942,500
```

He rounded that figure to $943,000. Mr. Balderston considered 775.9 acres of the lands to be irrigated cultivated lands, which he valued at $650 per acre. He considered 232.1 of the remaining lands to be dryland cultivation, which he valued at $450 per acre, and the remaining 792.66 acres transferred to be uncultivated land, which he valued at $250 per acre.

137 Mr. Jackson appraised the fair market value as at May 31, 1978 of the property involved in the 1978 sale at $1,060,000. The written appraisal does not clearly divide this figure between land and improvements, but it appears that $935,000 of the appraised value was allocated to land and the balance to improvements or to a slight rounding up of both land and improvement values. In calculating the $935,000 figure for land, Mr. Jackson estimated that 717 acres were cultivated and fully arable and mainly irrigated, which he valued at $850 per acre, and the remaining 1,083.66 acres were native pasture and bush lands, which he valued at $300 per acre.

138 The valuations of the land and improvements transferred in May 1978 vary from a high of $1,060,000 by Mr. Jackson and $942,500 by Mr. Balderston to a low of $659,001 by Mr. Groves. All valuations exceed the $431,746 value determined by Nolan Hinman which was used for the transfer. Further, the valuations of the improvements, varying from $135,500 by Mr. Balderston and approximately $125,000 by Mr. Jackson, to $78,500 by Mr. Groves, also exceed the $42,000 value determined by Nolan Hinman which was used for the transfer.

139 The only clear evidence of the condition of the improvements in 1978 came from the Defendants' witnesses. Marlys Hinman produced photographs of the improvements on the property and testified to their condition in 1972, when she and Nolan first started residing on the property, and in 1978. She stated that some of the improvements referred to in the valuations of Mr. Balderston and Mr. Jackson were not on the property in 1978 and that some of the additions to buildings and other improvements referred to by these appraisers were made after 1978. Paul Hinman supported his mother's testimony in this regard. Mr. Groves had the benefit of interviews with Marlys Hinman and of a personal inspection of the improvements. The Plaintiffs' appraisers also inspected the improvements but did not have the benefit of the detailed explanations given Mr. Groves. Kathleen Brandley testified that the improvements were in good condition

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when she and Noel Brandley vacated the lands. That evidence was strongly disputed by Marlys Hinman, whose evidence is supported by the photographs she referred to. I prefer the evidence of Marlys Hinman and that of Mr. Groves as he had the benefit of information from Marlys Hinman. I prefer Mr. Groves' valuation of the improvements as of June 1978 over those of Mr. Balderston and Mr. Jackson.

140 As I stated with respect to the evaluations of the lands involved in the June 1974 sale, in my opinion the valuations of land by Mr. Groves is to be preferred over those of Mr. Balderston and Mr. Jackson. The valuations by Mr. Groves go into greater detail concerning the topography and soil conditions and he differentiates between good, fair and marginal irrigated land. Mr. Groves has had more experience evaluating lands in the vicinity of the Two Arrows lands than have either Mr. Balderston or Mr. Jackson.

141 I accept the valuations by Mr. Groves of the lands and improvements involved in the May 31, 1978 transfer. His valuation of $659,001 is $227,255 higher than the $431,746 value at which the lands and improvements were transferred.

142 The Hinman family benefited from the transfer of those lands and improvements at a value of $227,255 less than their own expert's valuation of such lands and improvements as of the date of the transfer. E.W. Hinman and Nolan Hinman were the sole directors of Two Arrows at the time and did not exercise the considerable caution in transferring those assets which was required of them in those circumstances. Two Arrows has been deprived of the benefit of the additional $227,255 it should have received which indirectly affected the minority shareholder (or shareholders) of Two Arrows. Interest should accrue on this figure of $227,255 at 10 1/2% per annum from April 1, 1978, being the interest rate and commencement date for interest set out in the mortgage back by Hinman Holdings as part of the consideration for the transfer, to December 31, 1978.

143 Interest was not paid by Hinman Holdings after 1978 on its indebtedness to Two Arrows under either the 1974 or 1978 transactions. Similarly, no interest was charged by Hinman Holdings after 1978 on Two Arrows' indebtedness to it.

144 The February 15, 1979 financial statements of Two Arrows indicate that, after an extraordinary capital gain of $266,071, the current portion of land agreement remained at $45,611 and the Company had investments of $208,735 and long-term debt of $270,202 at the year end. It appears that the capital gain and the changes in investments and debt relate to the sales of property to Hinman Holdings. Also, as Hinman Holdings assumed the Prudential mortgage of $68,915.48 and a Canadian Imperial Bank of Commerce mortgage of $20,000 as part of its payment for the 1978 transfer, it appears that most, if not all, of the long-term debt shown on the February 15, 1979 statement would be owed to Hinman Holdings. No evidence was adduced, however, on this point. The February 15, 1980 financial statements of Two Arrows show no income for the year and at year end the current portion of land agreements remained at $45,611, the Company's investments were reduced to $168,735 and its long-term debt was reduced to $231,779. The February 15, 1981 balance sheet of Two Arrows indicates that the Company then had total assets of $196,408 (including current portion of land agreements of $45,611 and investments of $149,535), liabilities (all described as long-term debt) of $211,702 and a deficit of $34,294. The February 15, 1982 financial state ments of Two Arrows indicate that during the prior year the Company's investments of $149,535 and current portion of land agreements of $45,611 (both as at February 15, 1981) were eliminated, its long-term debt remained the same at $211,702 and its deficit increased to $210,450. No details concerning these changes were adduced but apparently the reductions during the years ended February 15, 1980 and February 15, 1981 reflect a setting off of debt owing to Hinman Holdings against the mortgage back by Hinman Holdings and the changes for the year ended February 15, 1982 reflect the tax free dividend and the repurchase of shares approved at the meetings of September 30, 1981 and January 31, 1982.

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145 The additional sum of $33,308.75 owing with respect to the 1974 Agreement for Sale plus interest thereon at 10 1/2% per annum from October 31, 1974 to December 31, 1978, would result in an amount owing on December 31, 1978 of $50,532.62 (assuming compounding of interest on October 31 of each of 1975, 1976, 1977 and 1978). No evidence was presented concerning the manner in which interest was calculated on the Hinman Holdings' indebtedness to Two Arrows, but as it was calculated at the same rate and in the same manner as interest on the Two Arrows' indebtedness to Hinman Holdings which was 10 1/2% per annum compounded annually, I assume it was compounded annually.

146 The additional sum of $227,255 owing with respect to the 1978 transfer plus interest thereon at 10 1/2% per annum from April 1, 1978 to December 31, 1978, would result in an amount owing on December 31, 1978 of $245,233.04.

147 These two amounts, $50,532.62 plus $245,233.04, amount to $295,765.66. This amount, when added to the total of $45,611 plus $208,735 for current portion of land agreement and investments on the February 15, 1979 financial statements, results in a total of $550,111.66. This exceeds the long-term debt of Two Arrows shown on those statements by $279,909.66.

Declaration of Capital Dividend

148 As noted in the statement of facts, on September 30, 1981 the directors of Two Arrows, being E.W. Hinman and Nolan Hinman, passed a special resolution electing to pay a tax free dividend to the shareholders of Two Arrows out of the capital dividend amount in the amount of $176,156.26. The effect of this was to distribute tax free to the shareholders the capital gains realized by Two Arrows on the sale to Hinman Holdings. None of the Brandleys received any portion of the tax free dividend.

149 As part of his argument, Counsel for the Plaintiff submitted that the payment of this dividend contravened art. 79 of Two Arrows' Articles of Association, which states:

> No dividend shall be paid otherwise than out of profits, and no unpaid dividend shall bear interest as against the Company.

Counsel noted that the dividend was paid when Two Arrows had no profit, in fact it had a retained earnings deficit, and this dividend increased that deficit from $35,000 to $211,000. Counsel for the Defendants, quite rightly in my opinion, submitted that this possible illegality of the dividend was not raised in the pleadings and could not be raised in argument by counsel. The amendment to the Statement of Claim permitted at trial only alleged, as a further particular of fraud, the payment of the tax free dividend out of Two Arrows' Capital dividend amount, the distribution of which, if any, the Plaintiffs did not receive. No allegation was made that the dividend contravened the Company's Articles of Association nor that it was in any other way illegal.

150 Section 80(*c*) of the *Companies Act* which was in force at the time of payment of this dividend, stated:

> 80 *A company, if so authorized by its articles, may do any one or more of the following things*:
>
> (*c*) *pay dividends in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others*. [emphasis added]

151 Without this provision, and the necessary provisions in a company's articles of association, each share of the company would be entitled to participate equally with every other in the distribution of dividends, regardless of differences in the amounts paid up thereon. See Ziegel, *Canadian Company Law*, pp. 271 and 272 and the cases referred to therein.

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152 Article 80 of Two Arrows' Articles of Association authorizes the Company to pay dividends according to the amount paid on the shares. It states in part:

> Subject to the rights of persons (if any) entitled to shares with special rights as to dividends, all dividends shall be declared and paid *according to the amount paid on the shares; but if and so long as nothing is paid up on any of the shares* in the Company, dividends, may be declared and paid according to the amounts of the shares, or in case of shares without nominal or par value, the number of shares held. [emphasis added]

153 Here nothing had been paid up on the shares issued to the Brandleys, but the shares issued to E.W. Hinman, Delia Hinman, Nolan Hinman and Hinman Holdings were fully paid for. Therefore, this article authorized and contemplated that the dividend would be paid according to the amount paid on the shares. The payment of this dividend solely on the shares held by members of the Hinman family and by Hinman Holdings was in accordance with the Article and members of the Brandley family were not entitled to participate therein.

154 Counsel for the Plaintiffs referred to s. 68(4) of the *Companies Act*, R.S.A. 1970, c. 60, and submitted that the section deemed no par value shares to be paid up. The section, which read the same through the periods involved in this trial, although the section number changed, read:

> (4) Any and all shares without nominal or par value and issued as authorized by this section shall be deemed fully paid and non-assessable and the holder of any such shares is not liable to the company or to its creditors in respect thereof.

155 This section does not provide that the shares shall be deemed for all purposes to be fully paid, but provides for the holder of no par value shares not to be liable to the company or to its creditors in respect thereof.

156 Section 29(1) of the *Companies Act*, R.S.A. 1970, c. 60, which also read the same throughout the periods involved in this trial, read:

> 29.(1) The memorandum and articles, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member, his heirs, executors, and administrators, and in the case of a corporation, its successors, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

157 The Articles of Association of Two Arrows clearly provided for the payment of dividends according to the amount paid on the shares. The minutes of the organizational meeting of Two Arrows refer to the issuance of 1,000 shares to each of Noel Brandley, Kathleen Brandley and Theodore Brandley, and state in the case of each issue, "for the sum of $1000 to be paid on call". These minutes were signed by Noel Brandley and by E.W. Hinman. Clearly they, being the principal parties involved in the organization of Two Arrows, were of the opinion that the shares issued to members of the Brandley family were not paid, and the amount to be paid for those shares was to be paid on call.

158 The financial statements of Two Arrows for the periods February 15, 1965 to February 15, 1974, inclusive, all contained a notation under issued share capital "less amount unpaid $3000.00". The Brandleys were aware of these notations and never objected to them. Even after the reinstatement of his 1,000 shares in 1974, Theo Brandley never paid any thing on his shares. Commencing with the February 15, 1975 statement on the financial statements of Two Arrows noted under issued shares capital, "Less amount unpaid $1000.00".

159 The payment of the dividend was made in accordance with the Articles of Association of Two Arrows. The

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Brandley family shares were unpaid. There was no fraud in the payment of the dividend. The Plaintiffs' claim based on the allegation of fraud in the payment of the dividend is dismissed.

Cancellation of Shares

160 There is no allegation in the statement of claim of fraud in the cancellation of shares of Noel Brandley, Kathleen Brandley and Theo Brandley. The allegation is that Two Arrows acted ultra vires in cancelling those shares. This is a personal action by Noel Brandley and Kathleen Brandley, not a derivative action on behalf of Two Arrows. Theo Brandley's shares were reinstated following the March 12, 1974 judgment of Cavanagh J. As stated above, in that judgment Cavanagh J. noted that it appeared counsel had agreed that Theo Brandley was the beneficent owner of One Thousand Shares (1,000) in the capital stock of the Plaintiff. That agreement was reached after Theo Brandley's counsel referred Two Arrows' counsel to s. 68(4) of the *Companies Act*. Theo Brandley told his parents his shares had been reinstated and they should take steps to have their shares reinstated also, but they did not do so until these proceedings were commenced in 1982. The prayer for relief merely asks for reinstatement of the shares held by Noel Brandley and Kathleen Brandley. These shares were reinstated by Theo Brandley in 1988 by virtue of his majority control of the Company. The matter is therefore now moot and there is no need to consider the matter further.

Failure to Hold Annual Meetings and Provide Financial Information.

161 There is no evidence of any Annual General Meeting of Two Arrows being held after March 11, 1972. As noted above, after reinstatement of his shares in 1974, Theo Brandley wrote E.W. Hinman on several occasions requesting copies of the financial statements of the Company for the past three years, that a shareholders' meeting be called and that he be provided with copies of minutes. Theo Brandley did not receive copies of any minutes, nor was he notified of any shareholders' meeting, even though E.W. Hinman advised that he would call a meeting of shareholders if Theo Brandley insisted. E.W. Hinman, however, did arrange for Theo Brandley to meet with Mr. Card and review the financial statements of the Company. That review, however, only related to the state ments for 1970, 1971 and 1972 as the statements for subsequent years had not yet been prepared. Specifically, Theo Brandley did not review the financial statements which would have reflected the Agreement for Sale of Two Arrows' lands in June 1974, nor was he advised of that agreement or resulting transfers until he made inquiries in 1981. Theo Brandley did not meet with Mr. Card after that to review subsequent financial statements of Two Arrows until after these proceedings were commenced.

162 Theo Brandley complained to the Chairman of the Alberta Securities Commission, requesting an investigation into the affairs of Two Arrows and was advised by letter from Mr. Hnatiuk in November 1974 to consult a solicitor as the proper recourse should be through the courts. Theo Brandley testified he did consult a lawyer and was advised that a winding up of the Company for failing to hold shareholders' meetings would be difficult to obtain. Theo Brandley took no further action in this regard until the commencement of these proceedings.

163 Section 133(1) and (6) of the *Companies Act*, R.S.A. 1970, c. 60, stated:

> 133.(1) Subject to the provisions of this section, the first annual general meeting of every company shall be held within 16 months from the date on which the company is entitled to commence business, and thereafter a general meeting of the company shall be held once at least in every calendar year and not more than 16 months after the holding of the last preceding general meeting.
>
> (6) When default has been made in holding a meeting of the company in accordance with the provisions of this section, the court may, on the application of any member of the company, call or direct the calling of a general meeting of the company.

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164 Further art. 30 of Two Arrows' Articles of Association provides that after the first annual general meeting "an annual general meeting shall be held once in every calendar year" and that "in default of the meeting being so held, the meeting shall be held in the month next following, and may be convened by any two members in the same manner as nearly as possible as that in which meetings are to be convened by the Directors".

165 Section 120(1)(*a*) of the *Companies Act*, R.S.A. 1970, c. 60, stated:

120.(1) The directors shall lay before each annual meeting of the shareholders,

(*a*) in the case of a private company, a financial statement for the period that commenced on the date of incorporation and ended not more than six months before such annual meeting or, if the company has completed a financial year, that commenced immediately after the end of the last com pleted financial year and ended not more than six months before such annual meeting, as the case may be, made up of

(i) a statement of profit and loss for such period,

(ii) a statement of surplus for such period, and

(iii) a balance sheet as at the end of such period.

166 A similar provision, but with slightly more restrictive time constraints, is contained in arts. 91 and 92 of the Company's Articles of Association. Article 93 requires that a copy of the balance sheet and auditors' report shall, not less than 7 days before the meeting, be sent to all persons entitled to receive notices of general meetings.

167 Section 197(*b*) and (*e*) of the *Companies Act*, R.S.A. 1970, c. 60, stated:

197. A company may be wound up by the court,

(*b*) if default is made in filing an annual report or in holding an annual meeting, or

(*e*) if the court is of the opinion that it is just and equitable that the company should be wound up.

168 Theo Brandley was a shareholder of Two Arrows and was entitled to receive notices of annual general meetings and copies of financial statements in accordance with these requirements. The directors of Two Arrows did not comply with these requirements, but Theo Brandley did not exercise any of his right to compel compliance or to have the Company wound up.

169 No relief is requested in the Statement of Claim for the failure of the Directors to comply with these requirements. However, such failure is, in my opinion, a proper matter to consider with respect to the Defendants' allegations of laches and delay in the proceedings.

Laches and Delay

170 In *J.L.O. Ranch Ltd. v. Logan* (1987), 54 Alta. L.R. (2d) 130 (Q.B.), at p. 141, Trussler J. referred with approval to principles enunciated in *Lindsay Petroleum Co. v. Hurd and Erlanger v. New Sombrero Phosphate Co.* as follows:

Section 3 of the Limitation of Actions Act provides that "Nothing in this Act interferes with a rule of equity that refuses relief, on the ground of acquiescence or otherwise, to a person whose right to bring an action is not barred by virtue of the Act." This section preserves the ability to rely on the equitable doctrine of laches. Where there is no

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limitation period such as with an express trustee, the doctrine assumes considerable importance, although it still is relevant in proper cases even before any statutory bar has run. The doctrine is described in *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221 at 239-40:

> ... the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

Lord Blackburn in commenting on this passage in *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas 1218 at 1279-80, stated:

> I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of inquiry.

171 In considering whether the doctrine of laches is to apply, the court must consider the principles enunciated in these decisions.

172 Laches could apply in this case if any relief had been considered in respect of the cancellation of the shares of Noel and Kathleen Brandley in 1973 and the refusal or inaction of the directors of Two Arrows to reinstate such shares after Theo Brandley's shares were reinstated in 1974. Neither Noel Brandley nor Kathleen Brandley took any action to have these shares reinstated, notwithstanding advice they received from Theo Brandley, until this action was commenced in 1982. Noel Brandley stated on discovery that the only reason he was pursuing this action was because Theo Brandley pushed it.

173 But in considering the relief of damages for the transference of the land from Two Arrows to Hinman Holdings, I am of the opinion that the doctrine of laches does not apply. In not holding annual general meetings (or at least not giving Theo Brandley notices thereof if such meetings were held) and in not providing him with copies of the financial statements as required by the *Companies Act* and the Company's Articles, the directors of Two Arrows deprived Theo Brandley of information to which he was entitled. Counsel for the Defendants argues that Theo Brandley could have exercised his rights under the *Companies Act* to obtain that information and could have learned of the transfer of land by searching at the Land Titles Office and at the offices of the Municipal District. The information may have been obtained in that manner, but in my opinion Theo Brandley's failure to take that action, when balanced against the defaults by Two Arrows' directors, does not justify the court applying the doctrine of laches or delay to deprive the Plaintiffs of their remedy.

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Statute of Limitations

174 Although it was not pleaded in the statement of defence, Counsel for the Plaintiffs commented on the *Limitation of Actions Act*, R.S.A. 1980, c. L-15, in argument and Counsel for the Defendants commented on the Plaintiffs' Counsel's submissions in reply. Counsel for the Defendants did not raise the issue in his initial submissions.

175 Section 4(1)(*c*) of the Act states:

> 4(1) The following actions shall be commenced within and not after the time respectively hereinafter mentioned:
>
> (*c*) actions
>
> (i) for the recovery of money, other than a debt charged on land, whether recoverable as a debt or damages or otherwise, and whether on a recognizance, bond, covenant or other specialty or on a simple contract, express or implied, or
>
> (ii) for an account or for not accounting,
>
> within 6 years after the cause of action arose.

That subsection is contained in Pt. 1 of the Act. Section 6 of the Act is also contained in Pt. 1. It states:

> 6 When the existence of a cause of action has been concealed by the fraud of the person setting up this Part or Part 2 as a defence, the cause of action shall be deemed to have arisen when the fraud was first known or discovered.

176 Section 18 of the Act refers to proceedings for the recovery of land. It is contained in Pt. 3 of the Act and states:

> 18 No person shall take proceedings to recover land except
>
> (*a*) within 10 years next after the right to do so first accrued to that person (hereinafter called the "claimant"), or
>
> (*b*) if the right to recover first accrued to a predecessor in title, then within 10 years next after the right accrued to that predecessor.

177 Section 31(1) of the Act is also contained in Pt. 3 and it states:

> 31(1) In each case of concealed fraud on the part of
>
> (*a*) the person setting up this Part as a defence, or
>
> (*b*) some other person through whom that first mentioned person claims,
>
> the right of a person to bring an action for the recovery of land which he, or a person through whom he claims, may have been deprived by that fraud, shall be deemed to have first accrued at, and not before, the time at which the fraud was or with reasonable diligence might have been first known or discovered.

178 The Plaintiffs claimed damages or, on the alternative, an order transferring the lands back from Hinman Holdings to Two Arrows. The claim for an order retransferring the lands is not prohibited under s. 18, without consideration of s. 31, because the action was commenced within 10 years after the first transfer of lands in 1974. However, as noted

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above, Theo Brandley stated in cross-examination at the trial that the Plaintiffs were seeking damages and were not seeking a retransfer of the land. Counsel for the Defendants submitted in reply to the Plaintiffs' Counsel's submissions that the claim for damages is subject to the limitation set out in s. 4(1)(*c*)(i) of the Act and, as the action which had been commenced was then 6 years after the Agreement for Sale dated June 17, 1974, the court could not award damages in respect of that sale of lands. I note that the initial transfer of lands pursuant to that Agreement was not submitted to the Land Titles Office for registration for a considerable time after the date of the Agreement for Sale and the title in the name of Hinman Holdings did not issue until August 25, 1975.

179 No evidence was adduced as to when the Municipal District was advised of the Agreement for Sale or of transfers thereunder. Also, no evidence was adduced as to the date of transfers of other lands under the Agreement for Sale. The first Theo Brandley was aware of the transfer of the Two Arrows lands was in 1981 when his relative advised him the Municipal District records showed the Two Arrows lands in the name of Hinman Holdings. No evidence was adduced as to when the first published Municipal District map showed portions of the Two Arrows lands in the name of Hinman Holdings. If Theo Brandley had inspected the lands between 1974 and 1981, it is reasonable to assume he would see the lands being operated by the same people who operated them before 1974, namely Nolan Hinman and persons working with him. There is no evidence that such an inspection would have disclosed the existence of the Agreement for Sale or of the transfers.

180 Counsel for the Defendants submits that the Plaintiffs with reasonable diligence could have known everything. Reasonable diligence is not referred to in s. 6 of the Act (as it is in s. 31) but even if it is implied, I am of the opinion that reasonable diligence did not require the Plaintiffs to perform Land Titles searches or searches of the Municipal District records, especially when they had no indication of any transfers of lands. Further, there was an absence of evidence as to what such searches would have disclosed.

181 I have held that the transfer of the lands to Hinman Holdings at less than face market value, as evidenced by the appraisal evidence, constituted a fraud on the minority. The directors of Two Arrows failed to advise the Plaintiffs of these transfers, failed to call annual general meetings as required by the *Companies Act* and the Company's Articles of Association, and failed to forward to Theo Brandley copies of the financial statements of the Company as required by the *Companies Act* and the Articles. In that way, knowledge of the transfers was concealed from the Plaintiffs. The onus was not on Theo Brandley to take proceedings to compel compliance with the Articles and the *Companies Act*. The onus was on the directors to comply with those obligations.

182 I am satisfied that the existence of the cause of action for damages for the transfer of the lands was concealed from the Plaintiff contrary to s. 6 of the *Limitations of Actions Act*. The action is not prohibited by s. 4(1)(*c*) of that Act.

Damages

183 The prayer for damages for transference of Two Arrows' properties at less than fair market value is based on a derivative action brought by the Plaintiff on behalf of Two Arrows.

184 The additional amount owing with respect to the 1974 Agreement for Sale and the 1978 transfer, plus interest thereon to December 31, 1978, is $295,765.66. Interest is calculated to December 31, 1978 because interest was calculated on the amounts owing Hinman Holdings by Two Arrows to that date and it would be inequitable to have interest accruing on the Two Arrows' indebtedness to Hinman Holdings but not on the Hinman Holdings' indebtedness to Two Arrows. No interest is calculated on the additional amount owing after December 31, 1978 because no interest was calculated on the Two Arrows' indebtedness to Hinman Holdings after 1978. No claim for interest was made by the Plaintiffs in the Statement of Claim. In the absence of such a claim, the Court is not in a position to award interest. See *Nathu v.*

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Imbrook Properties Ltd., [1992] 4 W.W.R. 373 [2 Alta. L.R. (3d) 48], a unanimous decision of the Alberta Court of Appeal.

185 Counsel for the Defendants submitted that the costs of sale, realtor's concessions, etc., would have easily made up the difference between Mr. Groves' assessment of the properties involved in the 1974 transaction and the actual selling price. I assume he would add to that capital gains tax, if any was payable. He therefore argued that no damages had been established to Two Arrows, or its shareholders, with respect to the 1974 land disposition. He also submitted that no damages had been proven with respect to the 1978 transaction because:

186 (1) Following that sale over $200,000 in debt remained owing by Two Arrows to Hinman Holdings (the February 15, 1979 balance sheet actually indicates that $270,202 of long-term debt was then owed by Two Arrows. I assume most, if not all, of that was owed to Hinman Holdings). He also noted that as at 1982 the total debt owed Hinman Holdings by Two Arrows was $211,000 (the February 15, 1982 balance sheet actually shows $211,708). He argues that any equity of Two Arrows on the lands would have been eaten up by this additional debt.

187 (2) Any increase in selling price of the lands would have resulted in more capital gain and more taxes owing by Two Arrows, thereby reducing the net equity available for its shareholders.

188 (3) The Hinman family owned 95% of the issued and outstanding shares of Two Arrows at the time of both the 1974 and 1978 sales and the return to Theo Brandley would be minimal. The Hinman family never charged management fees, carrying charges or lenders fees as compensation for saving the property from foreclosure sale, which he stated are typically 15-20% lower than fair market value.

189 No evidence was adduced concerning the capital gains tax, if any, that would have been payable if the 1974 and 1978 transactions had been conducted at fair market values. In the absence of such evidence, and as the damages to be awarded are to Two Arrows, and not to its shareholders, and as the Company was in a significant loss position, I am not in a position to assume that capital gains tax would be payable, nor to reduce the damages in any degree as a result of such possibility.

190 The remaining debt owing to Hinman Holdings by Two Arrows should be, and is, deducted from any award of damages to Two Arrows.

191 The award is to Two Arrows, not to its shareholders. On January 31, 1982, with knowledge of the interest and dissatisfaction of Theo Brandley, E.W. Hinman and Nolan Hinman arranged for Two Arrows to buy back 18,996 of the outstanding shares of the Company owned by members of the Hinman family and Hinman Holdings, thereby leaving Theo Brandley in control of the Company. Later, Theo Brandley reinstated his parents' shares of the Company. The award of damages is to Two Arrows, and I am not in a position to order how those damages should be distributed to the present and prior shareholders of the Company. Further argument may be made to the Court on this matter, if it remains unresolved between the parties.

192 On April 3, 1985, the Plaintiffs filed a certificate of lis pendens against the subject land on the grounds that an action had been commenced for an order directing Hinman Holdings to transfer the title to Two Arrows of the subject lands and premises. That certificate was filed pursuant to s. 146 of the *Land Titles Act*, R.S.A. 1980, c. L-5:

> 146(1) A person claiming an interest in any land, mortgage or encumbrance may, in lieu of filing a caveat or after filing a caveat, proceed by way of action to enforce his claim and register a certificate of lis pendens in the prescribed form.

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> (2) A person who has proceeded by way of action to call into question some title or interest in any land may register a certificate of lis pendens in the prescribed form.

193 Part of the relief requested in the statement of claim was for an order transferring the lands back from Hinman Holdings to Two Arrows. It would appear the certificate was properly filed pursuant to s. 146(1). That relief is not granted in this judgment and Counsel for the Defendants, in his argument, submitted that the certificate of lis pendens be discharged.

194 No such claim is advanced in the Statement of Defence, nor in any Notice of Motion or other pleading filed with this Court. Paul Hinman testified that the Defendants had suffered damages as a result of the filing of the certificate of lis pendens, but no details of those alleged damages were given, and no claim for damages was advanced. I note s. 146.1 of the *Land Titles Act* states:

> 146.1 A person filing or continuing a certificate of lis pendens without reasonable cause is liable to make compensation to any person who may have sustained damage thereby.

195 No claim for compensation has been filed. Therefore, I make no order with respect to the certificate of lis pendens.

196 Damages are awarded to Two Arrows in the sum of $84,057.66 ($295,765.66 minus $211,708).

197 Counsel for the Defendants requested the right to make representations to the Court with respect to costs. The long delay, from 1982 to 1992, in getting this action to trial, the intervening deaths of Noel Brandley and Nolan Hinman and the inability of E.W. Hinman to give meaningful testimony, have undoubtedly added to the complexity of the trial and of this judgment. I am therefore in agreement with Counsel's request.

198 Costs may be spoken to.

Action allowed.

FN1 *Shack v. Matthews Construction Co. Ltd.*, [1962] O.R. 556 (Ont. C.A.), enforcing rule 75 of the Ontario Rules of Practice.

FN2 As will be noted, the fraud is in truth on the company and not on the minority shareholders personally. If it were, a personal, not a derivative, action would be the appropriate remedy.

FN3 [1980] 2 All E.R. 841, 869 *et seq.*

FN4 [1982] 1 All E.R. 354.

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