THE LIMITS OF VISION

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"Businessmen are doomed to have their most interesting exploits reported and measured by accountants."

Jack Seabrook, the chairman of IU International, was between planes at La Guardia Airport, and between deals. I was returning from the Midwest, my bag filled with papers for a corporate takeover, intent on getting back to the office. Jack was headed for the Air Canada gate on his way to Toronto when our paths crossed by chance. Always elegantly dressed, he wore a striking black cashmere coat, lined in purple silk and topped with a rich black velvet collar. His white hair and tall figure set off the finery. He looked regal. Greeting him, I admired the coat.

"It's Bishop Fulton Sheen's coat," he told me. Setting his feet carefully in place as he faced me, he was as poised as a dancer about to begin a demanding turn. From such equilibrium comes deftness. And with his next words he drew me into his circle. "The bishop and I had the same tailor," he said, and grinned. "The very day the bishop died, I saw the coat chalk-marked for cutting on the tailor's bench. No ordinary coat, it was tasteful and decidedly

worldly. And the proportions were right. What a waste!" He paused to let me see his dilemma and appreciate the delicate decision point. "I told the tailor to erase the bishop's chalk marks and fit me up. What else could I do?" Jack smiled broadly at me, pleased with his audacity.

I hadn't known him in his younger days, but at sixty-two his acumen and guile were married to engaging charm, all at the service of his business interests. The company he headed, IU International, was a huge conglomerate, traded on the New York Stock Exchange, with over $2.5 billion in revenues. Twenty years before, in 1959, when Jack became the chief executive, the company had less than $100 million in revenues and owned utilities in Canada that the Canadian government would be seeking to repatriate, giving control back to Canadians. In the 1960s, Jack had enlarged and diversified the company through numerous acquisitions, preparing for the eventual loss of the utility business in Canada. He'd followed the economic credo of the period that the whole was worth more than the sum of the parts. His entrepreneurial spirit was that of the generation following Tom Evans.

The company's range of businesses was stunning: land transportation, through trucking companies serving most principal U.S. markets; utilities, providing gas and electric utility services in Canada, and water and sewerage services in the United States; manufacturing, involving the fabrication of valves and flow-control systems; mining, extracting silver and gold; distribution services, supplying paper products and institutional food products; and an agribusiness, producing sugar and macadamia nuts. The company was diversified, not only in terms of its investments in various industries but also with respect to its labor-intensive and capital-intensive segments. Financial architecture enabled the labor-intensive sector to provide capital to the manufacturing units, allowing the company to act in part as its own bank. The company's headquarters were in Philadelphia, and Jack had a farm, Seabrook Farms, in nearby New Jersey. His ownership position, while large in dollar value, was small in percentage terms.

It was January 1980, and Jack had begun to change the company, for conglomerate companies had gone out of economic fashion. In

the previous decade large conglomerate companies had been found to perform poorly. Conglomeration entailed large administrative costs and didn't bring entrepreneurial drive to the individual units. Economic reevaluation had depressed stock prices of conglomerates. The parts were now worth more than the whole. The market preferred "pure plays," companies in a single line of business. And by 1980 the merger wave had developed a fierce undertow, forcing conglomerates to make a choice: either realize new profits for their shareholders by selling off businesses acquired in the 1960s or risk being dismantled by corporate raiders in search of those same profits. Jack had begun pruning peripheral businesses. He'd recently spun off Gotaas Larsen Shipping Corporation to IU's shareholders (a transaction I had worked on), and it now traded separately on the Exchange. Jack remained the chairman of that company and would hold the position after he turned over the chairmanship of IU in the next five years.

His trip to Canada was in response to renewed pressure from the Canadian government to relinquish control of IU's electric and gas utility in Alberta. The Canadian government wanted IU to sell some of its subsidiary's shares to Canadians and reduce American ownership to below 50 percent. IU's holdings had declined from about 88 percent in 1972 to approximately 58 percent in 1980. Although Jack had been reducing IU's position by degrees, he'd resisted giving up control for a long time. But now the pressures of the takeover marketplace were forcing him to sell the utility business to harvest value for the shareholders. He would be visiting investment bankers in Toronto and told me that he would see me in a few weeks.

An idea was germinating. Jack always took his time and played with all aspects of a deal before he was willing to discuss it. Once the project was fully formed in his mind, he'd see me. Implementing the plan wouldn't be easy. This transaction, involving Canadian properties, would have, at the very least, cross-border complications. But doing another deal with Jack would be a treat, for Jack never approached problems from obvious directions. His general counsel once told me that if Jack wanted to inspect a building with an open front door, you could expect that he'd want to enter

through the back and begin with the basement. Considering his novel turn of mind, the deal would likely be a first of its kind, even trendsetting.

About a month later Jack called me to set a meeting at my office and told me he'd be bringing three other people. He fixed the time at noon so that we'd be able to have a working lunch and he'd be free later in the afternoon to visit his daughter, a practicing lawyer in New York, and to do some shopping. Jack was wearing a dark blue pin-striped, double-breasted suit with a natty dark blue tie with light blue polka dots that he told me expressed sincerity. For him, his dress asserted his state of mind. It let everyone present know that we were at a revelatory stage in the deal and Jack would be completely open and forthcoming.

With him was Bill Goldstein, a senior tax partner at a prominent Philadelphia law firm, who had represented Jack since 1962 and knew his thinking as well as anyone. He was about my age and I had come to think of him as cousin Bill. He was the cousin of Dan Neff, an associate in the firm close to me, and through Dan I was familiar with Bill's career and achievements. He had done a stint with the Treasury Department at a senior level and was one of the most knowledgeable tax lawyers in America. Also accompanying Jack was Bob Calman, the chief financial officer of IU. His openness and apple-cheeked good humor made him instantly likable. An astute financial executive, he had an uncanny way of translating knotty problems into measurable dollars-and-cents issues. The third person was a senior partner from an Ontario, Canada, law firm, a smart commercial lawyer. To Jack's credit, he always surrounded himself with knowledgeable people. Many chief executive officers have weak staffs and fawning advisers who constantly confirm their worth. The people close to Jack were mature, had a sense of their own worth and a balanced assessment of their involvement. They didn't need Jack and could be effective foils.

On my side of the table I had Peter Canellos, my tax partner. He was not only expert but also sensible and would be in a position to evaluate Bill Goldstein's tax structure. Attending all meetings also was Ilan Reich, a young corporate associate who had been at the firm less than a year and was then working with me full-time. The firm was growing and I had started to work with one or two

newly hired corporate associates. I would have them work exclusively with me on all my matters for a year or two. I was developing my own version of the tutorial process that I had learned at Cravath. By contrast, the other entering corporate lawyers in the firm worked in a pool arrangement, available for different transactions (or aspects of transactions) for the various other partners. From my description of Jack, Ilan shared my sense of anticipation.

"The most interesting way to describe this deal is probably to begin backwards," Jack said, and paused. "Like life, it's always satisfying to know how things will turn out. But let me start at the beginning. That way, you'll see how it's supposed to develop." Jack was acknowledging his penchant for oblique approaches. That introduction promised an adventure.

IU, Jack told us, planned to start an exchange offer in Canada, exchanging the stock of its subsidiary Canadian Utility with IU's Canadian shareholders for IU common stock. The exchange would only be made in Canada. In the proposed swap of stock, IU's ownership of Canadian Utility would be reduced from 58 to 48 percent. Pressure from the Canadian government, Jack said, to relinquish majority control was intense. Various Canadian tax concessions would be granted to IU if the reduction was effected. For Jack, however, the proposed swap of stock in Canada was the official scenario, not the way he would like the matter to come out.

What he thought might happen, Jack told us, was that once he announced an exchange offer and indicated that IU was prepared to reduce its ownership below a majority, there might be bids from a number of Canadian companies for IU's whole majority interest in Canadian Utility. That would give him an opportunity to negotiate for the sale of control, affording IU a chance to get a large premium price for its 58 percent interest. Jack anticipated that he could get a price equivalent to twice the utility's book value at a time when most utilities sold at their book value. In addition to getting an excellent price, Jack also had another objective. He wanted the sale to be free of United States taxes. To accomplish that result, the Canadian acquirer had first to buy IU stock in the market and then swap the stock for the Canadian Utility shares. For the deal to work, the Canadian acquirer had to agree to the two-step process, using only IU stock as its currency.

Bill Goldstein advised us that there was a provision in the tax code which said that if you exchanged shares of a subsidiary company for shares held by a holder of more than 10 percent of the parent company's outstanding shares, the swap would be tax-free. That there were no holders of more than 10 percent of IU's stock didn't bother Bill. In his view, you got the same tax-free result if the Canadian bought more than 10 percent of IU's stock in the open market and then swapped the stock for the Canadian Utility stock. Bill anticipated that the Canadian acquirer, eager to close the deal, would make a tender offer for IU's stock at an agreed-upon premium price, and IU thereafter would swap its Canadian Utility stock.

Bob Calman energetically put the general description we'd heard into concrete terms: "IU's stock is trading about $12 a share," he said. "The tender offer by the Canadian should be made at about $17 a share for about 16 million shares, which is a little less than half of the 35 million outstanding IU shares. If you do the multiplication, the Canadian acquirer is paying about $275 million for the IU shares. Once the shares are swapped for our Canadian Utility stock, IU would have a gain of approximately $90 million on the sale of the subsidiary. In addition, after the swap IU's earnings per share would go up from approximately $1.91 to $2.91 per share. The reason for the increase in earnings per share is that Canadian Utility hasn't been earning as much as IU's other businesses and IU would, after the sale, have significantly fewer shares."

Bob Calman bounced in his chair, delighted with the outcome. "It's as if we sell our majority interest in Canadian Utility for $275 million and buy back and cancel about half our stock, 16 million shares. And IU doesn't pay any tax. After the sale the IU stock should remain at $17 a share or possibly even go higher." He paused to let us contemplate this outcome. "With earnings at $1.91 and the stock at $12, IU trades at a multiple of earnings a little better than six times. The quality of the company after the sale will be at least as good and probably better. With the same multiple of earnings per share, IU's stock should trade around $18." Pleased, he nodded his head before giving his prediction: "In my view, the stock should do better than $18."

"This is a great deal for our shareholders," Jack Seabrook said. "The IU stock they sell gets a premium and the stock they keep is worth 50 percent more. The fly in the ointment," Jack added, "is that the U.S. tax cost is approximately $70 million; and if there is a Canadian tax cost [ordinarily about $20 million], there wouldn't be any gain on the sale. This transaction doesn't bring cash into the company. If we get hit with tax bills, we'd have to sell additional assets to raise the cash, which would significantly reduce our earnings. The transaction doesn't make any sense if we have to pay the taxes."

"Has anyone tried this before?" I asked.

"No," Bob Calman said. "We're plowing new ground."

"How comfortable are you, Jack, about getting Canadian tax relief?" I asked.

"The Canadians want us to sell control and should give us the concession we want," Jack said. "But nothing is certain."

"How comfortable are you on the U.S. tax side?" I asked Bill Goldstein.

"Pretty comfortable," Bill Goldstein said. "The record will show that we weren't seeking to sell Canadian Utility for cash. If we tell the buyer that we won't take cash and will only take IU's stock in exchange, then we fit directly under the rules. Our case is that the company wasn't for sale unless someone swapped stock for it."

"You're still telling the Canadian buyer that you want $17 for the IU stock. Isn't that equivalent to saying you're selling the Canadian Utility stock for cash?" I asked, testing the limits of the tax position. It looked tenuous to me, like a cash sale, but tax lawyers regard the world differently from the rest of us.

"It's not the same as a cash sale," Bill Goldstein said. "The company isn't for sale unless there is a swap for IU stock. That's the distinguishing element."

"Of course, if there are no bidders for the whole company," Bob Calman said, "then we go through with the exchange offer and reduce our position to 48 percent."

"We're fishing in the Canadian pond," Jack said. "And the risk is that there won't be a buyer for our majority interest. But I'm willing to take that risk, because if I don't do a tax-free swap, I

can't temporize with the Canadian government and I'll have to reduce our ownership interest."

"That's why Bill can say to the IRS that Canadian Utility is not for sale for cash," Bob Calman said.

"How does the tax side look to you, Peter?" I asked my partner.

"Literally read, the law covers the transaction and the deal should be tax-free to IU," Peter told me. "Generally, the tax law is read strictly. But the government will probably object. The Internal Revenue Service will argue that the tax law was meant to accommodate only 10 percent holders that held their stock for a significant period prior to a swap."

"There's nothing in the legislative history," Bill Goldstein said, "that negates acquiring an ownership interest immediately before the swap. We expect that the government will challenge us. But we think we have the better case."

Jack had heard all the arguments before and was satisfied with the tax case. He wanted to know from me whether some unexpected third party could make a tender offer for IU and kill his anticipated deal. The likelihood and consequences of hostile takeovers now had to be factored into the planning of all transactions.

"It's a risk," I said. "If a Canadian makes a tender offer at $17 for half your shares, which IU encourages, someone may be induced to make a tender offer for the whole of IU at that price."

"Is there any way to stop an ambush?" Jack asked.

"We should tell shareholders that $17 per share isn't a sales price for the entire company but a value put on the shares for the sake of the Exchange. Specifically," I said, "$17 per share yields only a fair price for your 58 percent interest in Canadian Utility. That approach would give you the right to fight off a tender offer and show that a price of $17 is inadequate for the whole company."

"If the transaction goes through, the stock will be worth more than $17," Jack said, "and we'll tell the shareholders all that."

"That's your best defense," I said. "But having a good defense doesn't mean that someone won't try anyway."

"If we don't take this risk, the IU stock will languish at $12 a share and then we'll truly be vulnerable. It's a risk we have to take," Jack said determinedly. "But what about the Canadian

acquirer of IU deciding to buy the whole of IU at $17?" Jack asked me. "It's pretty tempting. For $275 million he only gets the Canadian Utility company. For another $275 million he gets the whole of IU."

"We'd have a contract with the Canadian acquirer," I answered. "The acquirer would be bound to buy no more than 16 million shares, and bound to exchange them only for the Canadian Utility stock. That's how the agreement would work."

"What about regulatory delays?" Jack asked me.

One of my tasks was to steer the transaction through the regulatory maze of government scrutiny, including processing by the Securities and Exchange Commission. Jack was particularly sensitive because the SEC in an investigation had accused him of misappropriating IU shareholders' money. Jack had denied any wrongdoing but settled all differences with IU by paying it $225,000. The SEC proved to be relentless, and Jack bears the distinction of being the first American to have his Swiss bank records broken into by the SEC (in which, incidentally, the agency found nothing of note). Jack was concerned that the SEC would needlessly delay the transaction.

"We won't need their clearance," I told him, "and they won't interfere, not in a legitimate commercial transaction."

Satisfied, he turned to the Canadian lawyer and asked whether there were any problems in Canada.

"The tender offer would have to be registered with the Ontario Securities Commission," he said, "but that wouldn't hold up the transaction."

"Then we go fishing," Jack said, "and see what we find in the Canadian waters."

In April 1980, IU cast out its line by publicly announcing that it was considering a plan to exchange approximately two million of its Canadian Utility shares for common stock of IU held by Canadians. Consistent with Jack's dual plan, the announced purpose was to facilitate increased ownership by Canadians in Canadian Utility. Jack's assessment of the Canadian market and the response to IU's announcement proved to be correct. Shortly after the announcement IU was contacted by Atco Limited and Calgary Power;

both companies were interested in acquiring IU's 58 percent interest in the Canadian Utility stock. Serious negotiations with the two followed immediately after the first contact.

It was just like Jack to run the two negotiations concurrently so that each party would know that they were merely a contender. Competing deals meant no respite for any of us. We'd finish one meeting and immediately start another with a whole new set of problems and personalities. One deal had become two. Calgary Power's deal was more complicated than Atco's. It was willing to pay cash in the United States to American holders of IU stock but wanted to offer Calgary Power shares to IU's Canadian holders. Calgary Power disliked risk and saw demons everywhere, creating pockets of complexity that made putting the papers together difficult. Jack, however, didn't mind complexity; he enjoyed the twists and turns and kept encouraging them. His encouragement served a sound economic purpose, for Calgary Power had the capacity to pay more than Atco, although it wasn't prepared to reach as far as Atco. Jack spent a lot of time with Calgary Power trying to induce management to keep enhancing their bid. Atco's transaction was basically a leveraged buyout of Canadian Utility, relying largely on Utility's assets to raise the cash purchase price. Jack, not fully comfortable with the leveraging, kept putting them off, which had the effect of getting them to keep raising the price.

Jack was the kind of player who was obsessive and would quickly forget or ignore the time of day or night once negotiations began. He was prepared to go around the clock and begin again the next day without rest, and expected nothing less from me. One evening at 2 a.m. I was working at the downtown law offices of Fried Frank, the firm representing Calgary Power, when Jack called. He'd just finished dickering with Atco and had gotten them to raise their bid again, this time to $17 a share for the IU stock, which is where he thought the price ought to be. "Finish up negotiations with Calgary Power," he told me, "and then begin contract discussions with Atco." He didn't want me to cut short my discussions with Calgary Power's lawyers or to leave abruptly, because he felt he might be able to get Calgary to raise again and wanted to keep the contest going.

"Jack," I said, "it'll be three in the morning before I can finish with Calgary Power."

"Atco will be waiting for you," he said.

"Who's waiting at this hour?" I asked.

"The lawyers at Shearman & Sterling," he said. "They're in the old Citibank building, on Wall Street, a block or two from where you are."

"Who at Shearman & Sterling?" I asked. It was a 400-person law firm, at least. I felt that at such an hour they wouldn't be able to line up anybody of enough seniority to work on the matter. By demanding a specific name, I felt that I'd be able to hold off further negotiations until a reasonable hour in the morning, affording myself and Ilan a decent night's sleep.

Without hesitation, he gave me the name of a young partner working on the project at Shearman & Sterling and his home telephone number. "Call him up," Jack said, "and tell him to meet you at his offices when you're ready. He's waiting for your call." I wasn't surprised to find, on calling the young partner, that he was as much annoyed as we were and thoroughly unenthusiastic. But he wouldn't take responsibility for postponing the meeting. He'd been told to be at the Shearman & Sterling offices whenever I got there with Ilan.

We arrived at 3:30 a.m., walking through dark, deserted streets. The offices were closed, and only the night watchman was there to meet us. Our reason for beginning a meeting at that hour didn't seem credible to him. He said: "I've seen meetings go to this hour, but I've never seen meetings start at this hour." I had to agree with him. Despite his skepticism, he allowed us to use a phone and we called the Shearman & Sterling partner from the watchman's desk. The partner told us he'd be at his offices in about forty-five minutes to an hour, reluctantly admitting to not quite being out of bed yet, but he promised that he'd soon begin showering and shaving and generally getting himself in order.

Waiting for anyone at that hour when a long day has sapped your energy is a form of torture. I figured that his procrastination meant that he'd be arriving at his office at about 6:00 a.m. or later, which was beyond my patience. Also, my fatigue was palpable. My

evening's stubble was tearing at my collar, irritating my neck, and my clothing felt gritty, like sandpaper. I knew that we'd be totally at a disadvantage when he finally arrived in his own good time, freshly showered and rested.

Ilan had been working for the firm about seven months at the time, and I told him that he'd have to hold the fort when the partner arrived by taking all his comments on the papers. In the meantime, I was going home for some sleep, a shower, and a change of clothes and would rejoin him at about ten or eleven o'clock. At that time he'd be able to go home and get some sleep, and we'd be able to spell each other and continue the negotiations. It was too late now to get anyone else in the office to work on the deal since most people were fully committed, and to get immersed in the middle of this imbroglio would be extremely difficult. I had confidence that Ilan would hold up his end.

When I returned I was somewhat refreshed, and Atco's lawyers hadn't gotten very far. They had been as reluctant as we were to begin any discussions early in the morning. At that hour they didn't have contact with their client or the client's Canadian lawyers, so they didn't begin looking at the papers until 9 a.m. Ilan rejoined the group about 4 p.m. and negotiations went into the evening. By that time we'd worked out most of the difficult aspects of the deal, and I was wondering whether Jack had been in further discussions with Calgary Power and would want us to start another session after we'd finished with Atco. Much to my delight, negotiations had broken down with Calgary Power, and Jack, late in the day, was fully occupied in trying to revive them.

That evening we had a rest, but the following morning we found that the deal had spun out of control. Canadian counsel in Ottawa reported that the anticipated tax relief from the Canadian authorities didn't seem to be forthcoming. Counsel had asked for a promised ruling on the sale of the Canadian Utility stock that would save IU approximately $20 million, but after the announcement of the negotiations with the two Canadian buyers, Canadian tax officials had had second thoughts.

We met with Jack to discuss the Canadian tax situation and held a telephone conference call with all the Canadian counsel, including the tax counsel.

"The Canadian tax collectors know we have a deal going," Jack said, "and they've decided that it would be hard or impossible for us to back out." His face twisted in anger. "So they decided they want to collect the revenue." He paused. "Is that a fair summary?"

Canadian counsel told us politely that the tax authorities were no longer receptive to their arguments. They didn't want to attribute reasons to the tax officials' actions.

"What does the Canadian government want more than the tax on this transaction?" I asked Jack.

"The sale of Canadian Utility to Canadians," Jack said.

"Then pull the deal," I said. "And let them know definitively that you won't do the deal."

"They may not care," Bob Calman said. "We'll still have to go back to selling control by degrees."

"Not so," Jack said. "That also was premised on tax relief."

"You still have the benefit of the U.S. tax situation. You save $70 million," I said.

"The U.S. tax position is risky," Jack said. "The Canadian tax position was supposed to be certain. If I have to pay the Canadian tax and have a risk on the U.S. tax, the deal isn't attractive." He was firm.

"Pulling back on the deal," Bob Calman said, "and terminating it is a risky strategy." He didn't like playing brinkmanship with the Canadian tax authorities.

"It's a negotiation," Jack said. "We have to let them know that we have alternatives. Otherwise, they have no reason to give us anything. And the political implications have to be given a chance to percolate."

"We've been at this a year," Bob Calman said. "What happens if we announce that we've withdrawn from the deal and the Canadian tax authorities come back and grant us the tax relief we wanted? Will we be able to put the deal back together?" He saw the IU stock depressed after the failure of the deal and trading again at $12, with the company risking a hostile takeover.

"Both Calgary Power and Atco want this deal," I said. "They too will put pressure on the Canadian tax authorities. If the tax authorities relent, I'm sure one or both of them will be willing to go forward again."

"There are always intervening events that change things," Jack said, affected by Bob Calman's remarks. "What do you think?" he asked, turning to Calman. No one likes to terminate a deal that's about to be made.

"You've convinced me. The risks are worth taking," Bob Calman said. "Let's withdraw from the deal." His decisiveness made up Jack's mind.

Jack issued a press release to the effect that IU had withdrawn from negotiations over the sale of Canadian Utility because of failure to get expected Canadian tax concessions. Concurrently, he called Calgary Power and Atco and told them each that the company wasn't for sale. Canadian tax counsel in Ottawa was instructed to deliver the press release to the taxing authorities and then leave, without discussing the matter.

The next day the tax lawyers in Ottawa got a call from the taxing authorities. Reconsideration was being given to the tax concessions. None of us had anticipated such prompt action. The following day the tax lawyers were handed letters from the revenue authority granting concessions on the disposition of the Canadian Utility stock.

With the Canadian tax ruling settled, we were in a position to have Atco, the high bidder, begin a tender offer, but Jack delayed calling Atco. He'd been brooding about the tax issues for about two days and was concerned about the risks of a $70 million tax bill from the Internal Revenue Service.

We all came together again in my offices for the express purpose of deciding whether we should go forward with the sale of Canadian Utility. No one had any doubt that the IRS would assert a claim for the $70 million and IU would oppose it. Despite resistance, a claim of such magnitude would affect IU's financial statements. IU's auditors would have to determine the chances of success on the part of the IRS. If they thought the IRS would likely succeed, they would want a full reserve for the tax, which was tantamount to having IU pay it. Even if they didn't seek a reserve, they would note the contingent liability of $70 million plus interest on the financial statements. How would such contingency affect the ability of the company to do business and to finance itself? A claim like that could dissuade people from doing business with the company.

Second thoughts about the transaction had blossomed into doubts about the advantages of the deal. "Businessmen are doomed to have their most interesting exploits reported and measured by accountants," Jack said. Today he wore a black suit with a white shirt and a black-and-white tie, stark colors for sobriety.

"Bill Goldstein is prepared to give a strong opinion that the company will prevail on the tax point," Bob Calman said, starting to cut away at the obstacles that seemed to be hindering the deal. "That should go a long way with the auditors." The auditors always relied on outside counsel with respect to matters subject to litigation. They wouldn't require a reserve, but would note the contingent liability.

"I don't think the company will be hurt by the contingency," Bob Calman said, "and it won't affect our stock price." His basic optimism gave everyone assurance.

"You'll have to accept uncertainty for five or ten years," Bill Goldstein said. "It will take that long to resolve the case with the IRS."

"That's a long time," Jack said.

"There's no way to do it any sooner," Bill said. "To win with the Service, it will have to go to trial."

"That's not so bad," Bob Calman said. "Who knows what will happen in five to ten years."

It was then that one of the Canadians told us the story that we all came to refer to as the "camel story." He began in an offhand way, triggered by the thought of the changes that five to ten years could bring. It seems that an important sultan had a camel that had been with him for at least thirty-five years, and over time the sultan had gotten very fond of the camel. The camel not only carried the aging sultan and his supplies wherever he traveled but also was a constant companion. The sultan concluded one day that he would enjoy it very much if the camel could talk. The sultan knew, of course, that this was a difficult, if not an impossible, undertaking, one for which he wasn't equipped. But it was an idea that fascinated him. Talking would enhance the camel's companionship, and of course give the sultan a very different view of the world, one to which few were privileged. He called his counsel of many years, who acted for him on all important matters, and asked him if he

knew if there was anyone in the kingdom who could teach the camel to talk.

"Sire," said the counsel, "no one can teach a camel to talk."

"Then you should do it," said the sultan.

"Sire, I said, no one."

"No one has tried," said the sultan. "It's very important to me, and I'm prepared to pay extremely well."

"You are serious, sire."

"Very," said the sultan.

"It will be very expensive," said the counsel, "and since we are not all that experienced, it may take very long, five to ten years," said the counsel.

"I can understand that," said the sultan, "but if the camel could talk, it will be worth the wait."

"Then it will be done, Your Highness, and I will do it," said the counsel.

At home that evening, the counsel told his wife that he'd agreed to teach the sultan's camel to talk.

"Fool," she said. "No one can teach a camel to talk."

"You don't understand."

"There's nothing to understand," she replied.

"Yes, there is," he said. "I'm going to be paid extremely well to do this, and it will take long. And as I see it, the sultan is seventy-five, the camel is at least thirty-five, and I am seventy-three. A lot can happen in ten years. By the time ten years has passed, one of us is sure to be dead."

We all laughed. Over time every problem goes away—or becomes someone else's. What gripped one about the tale was its offered temptations.

"Unfortunately, what we know," Jack said, testing the moral, "is that the IRS won't die."

"Nor will the company," I added. The story was a cynical way of looking at business matters, but a common one, and of questionable morality, telling you to take the immediate benefits and leave the mess for someone else. In business, at every level, there is always a way out of the consequences of failing to teach the camel to talk; there is always an opportunity to move on to another job,

another town, a new frontier, taking the bonus in the paycheck before the bitter harvest.

"But the camel may talk," Bob Calman said, getting back to the real issue. He could see that, when considered, the story was sobering and having the opposite effect from its teller's intent.

"That's Bill's opinion," Jack Seabrook said, smiling. "You have to believe in the camel's talking. In our case, no matter what happens to us there won't be any dead camels or dead sultans."

"The camel will talk," Bill Goldstein said.

And with that, Jack decided to do the deal.

DESPITE OUR EXPOSING the story as meretricious, it persisted in our minds. Something about it caught our fancy as credible and intriguing, for it dealt with the effects of time on expectations. Once we acted, we were a first cause, but the events that followed were outside our control. That alone made you think, but waiting five to ten years to know the result was a further and substantial part of its engrossing attraction. All our lives were in transition. We could all look back at the past ten years and see what had happened to us. In the next five to ten years, as we all got older, significant change would be more likely than ever before and probably not always as anticipated. At a certain point in your life, you have to recognize that the future isn't life-enhancing. We could see how we would all age, and we could envision desired changes in our lives, but we knew that our individual and collective speculations could only explore likely outcomes. We were thrust into a mystery with its own spell and time limit. Would the consequences of our actions be someone else's problem? Among us there were bound to be survivors who cared and who would be affected. Someday in the next ten years the survivors would meet and reflect and bear witness. At no time in all my practice had I ever been so bonded to a group or so curious about the outcome.

Almost immediately events took an unexpected turn. The deal didn't go unnoticed by other companies. The structure (especially the tax advantages) appealed to the many conglomerate companies looking to sell their subsidiaries. Within a month, Esmark, formerly

the holding company for the Swift meat-packing businesses, while trying to sell its subsidiary Vickers Energy Company to Mobil, decided to restructure the cash purchase arrangement into a transaction like IU's. But when Esmark did the deal, all the subtlety and artifice that Jack had brought to the transaction were ignored. Jack and Bill Goldstein had been careful to make sure that Canadian Utility had never been for sale for cash. At all times only a swap transaction was contemplated. Esmark and Mobil ignored the first principle because their transaction had begun as a cash deal.

But more than first principles were different in the two transactions. In its deal with Mobil, Esmark had started out expecting to pay the tax and then learned of a method, not previously contemplated, that might be used to avoid the tax. These distinctions meant that not only was Esmark's factual situation different from IU's, its economic and psychological positions were also different. For Jack and IU, payment of the tax crippled the transaction, and for Esmark, avoidance of the tax would be nice, but not essential. Esmark could settle or fight, probably creating a bad precedent either way. None of us had anticipated a companion case with a cruder set of facts and less risk to the taxpayer.

Easy emulation of the transaction didn't escape the notice of other companies or the Internal Revenue Service or Congress, and Congress changed the tax law almost immediately to eliminate such tax-free swaps. The Internal Revenue Service, however, wasn't satisfied only to eliminate this method of tax avoidance in the future and brought suit to recover taxes from both IU and Esmark.

Tax litigation is a protracted matter. It doesn't start as a case. First, ordinary year-end tax returns are filed, and then subsequently claims are disallowed. A deficiency assessment by the government results, and then there are the inevitable attempts at settlement. Finally there is a case, with other attempts at settlement. Few matters go to trial. Improbable as it seemed at the outset, no one settled, and both Esmark's and IU's cases went through their full careers, taking eight years before being ready for trial. Given a choice of two cases, the government chose to take to trial first the Esmark case, the more egregious and easier to win of the two. After the government won that case, the IRS would be prepared

to deal with IU. Having no control, IU saw that it could be levered into some objectionable settlement or wind up at trial faced with an unfavorable precedent that the government had earned against Esmark.

What had happened in the eight years? Jack had stepped down as chairman and chief executive officer of IU, but remained on the board of directors until 1987, when he became an honorary director. He continued to serve as the chairman of Gotaas Larsen, the company he'd spun off from IU. John Christie, Jack's heir apparent and chosen successor, had taken over as chairman and chief executive officer of IU, and Bob Calman, the chief financial officer, had left his position at IU to become the chairman of Echo Bay Mines, a major North American gold producer, also a spin-off of IU. Bob Calman continued to serve on the board of IU. Over the eight years, Jack had provided corporate vehicles for the talented executives around him and for himself, making about as graceful a transition as one could imagine.

Bill Goldstein had changed law firms to become the senior tax lawyer at the Philadelphia firm of Drinker, Biddle & Reath, but still acted as a tax adviser to IU, and Peter Canellos and I were still on call to do deals for IU.

For all of us it was striking that the group was largely intact, and shifts in circumstances hadn't materially mattered. The tax situation had become so familiar after eight years that it was largely ignored, although occasionally we'd all recognize that the government was still pursuing the matter, working out its rights against Esmark. Experiencing a gradual, largely foreseeable evolution, we assumed that there wouldn't be any sharp changes.

In January 1988, however, we were all forced to review the tax situation in an unexpected context. A company called Neoax made a cash tender offer, totally unsolicited, to acquire IU. I was called on by John Christie to defend IU against the hostile attack. In that connection an evaluation of IU had to be made as to its worth against the bid. As is usual in those situations, a bidding package was prepared, first to bank lenders and then for third parties. For both the lenders and prospective buyers, the $70 million tax claim, plus interest (which by then had practically doubled the government's claim), had to be evaluated. Unfortunately, the evaluation

wasn't based so much on the subtlety of Jack Seabrook's maneuvers as on the likely result of the Esmark case, which by then had been tried in the tax court and was awaiting decision. The tender offer couldn't have happened at a worse time. Everyone had a negative view of the outcome of the case, and the tender offer didn't allow for waiting until the tax court decided, although the decision could come down from the court at any time.

It didn't matter from whose point of view you looked at the tax case; the impact of the case was harmful. Take John Christie, who was a believer that the $70 million tax wouldn't ultimately have to be paid. Defending against the tender offer, he first tried a recapitalization of the company and then proposed a leveraged buyout. In both cases the banks weren't sympathetic to any assumption that didn't provide for payment to the government of at least $70 million. Every evaluation was forced to assume liquidation of the company, the corporate equivalent of the company dying. That was a situation we hadn't considered, showing the limits of our vision.

The benign view was that the cost of the tax case would be in the range of $70 million, or about $2 a share. IU, as reconstituted at the time of the bid, had doubled its shares from the time of the Canadian Utility transaction and was traded at about $14 or $15 a share. Stretched to the limit, the company might be worth about $21 if you didn't give it credit for winning the tax case. In other words, the tax case was worth about 10 percent of the value of the whole company.

In 1988 the average time to completion of a tender offer was about forty-five to sixty calendar days, although the initial expiration time was always set for twenty business days (about twenty-six calendar days). In defending, we delayed the contest as long as we could with every dilatory move I could manage, hoping for a decision by the tax court. Given all the negative assessments of the outcome of the tax case, only the tax court offered any hope.

Delay worked. The decision came down before the last round of bidding for IU. The tax court found for Esmark against the government. The decision immediately increased the value of IU by $2 a share. If Esmark won with its crude case, then IU would win hands down.

When we all met after the tax court decision, we felt like survivors, privileged to see the result of our efforts. We were at an IU board meeting, and Jack was attending as an honorary director. "Well," Jack said, "I was getting worried, but the camel learned to talk." He paused and smiled broadly. "And at the right time." And then he added, looking thoughtfully at all of us, "What will the next ten years bring?"