1961

CANADA

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Exchequer Court of Canada

RALPH M. SPANKIE, Q.C.

ADRIEN E. RICHARD, B.C.L.

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JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

THE HONOURABLE JOSEPH T. THORSON

(Appointed October 6, 1942)

PUISNE JUDGES:

THE HONOURABLE J. C. A. CAMERON

(Appointed September 4, 1946)

THE HONOURABLE JOHN DOHERTY KEARNEY

(Appointed November 1, 1951)

THE HONOURABLE ALPHONSE FOURNIER

(Appointed June 12, 1953)

THE HONOURABLE JACQUES DUMOULIN

(Appointed December 1, 1955)

THE HONOURABLE ARTHUR LOUIS THURLOW

(Appointed August 29, 1956)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

The Honourable W. ARTHUR I. ANGLIN, New Brunswick Admiralty District—appointed June 9, 1945.

His Honour HAROLD L. PALMER, Prince Edward Island Admiralty District—appointed August 3, 1948.

The Honourable SIR BRIAN DUNFIELD, Newfoundland Admiralty District—appointed May 9, 1949.

The Honourable HENRY ANDERSON WINTER, Newfoundland Admiralty District—appointed May 9, 1949.

His Honour VINCENT JOSEPH POTTIER, Nova Scotia Admiralty District—appointed February 8, 1950.

The Honourable ARTHUR IVES SMITH, Quebec Admiralty District—appointed June 16, 1950.

The Honourable ESTEN KENNETH WILLIAMS, Manitoba Admiralty District—appointed February 26, 1952.

The Honourable ROBERT STAFFORD FURLONG, Newfoundland Admiralty District—appointed October 8, 1959.

The Honourable DALTON COURTWRIGHT WELLS, Ontario Admiralty District—appointed January 28, 1960.

His Honour JAMES AUGUSTIN MACDONALD, Prince Edward Island Admiralty District—appointed July 11, 1961.

The Honourable THOMAS GRANTHAM NORRIS, British Columbia Admiralty District—appointed September 28, 1961.

DEPUTY JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

The Right Honourable JAMES L. ILSLEY, Nova Scotia Admiralty District—appointed November 3, 1958.

ATTORNEY-GENERAL OF CANADA:

The Honourable EDMUND DAVIE FULTON, Q.C.

SOLICITOR GENERAL OF CANADA:

The Honourable WILLIAM JOSEPH BROWNE

The Honourable Alphonse Fournier, Puisne Judge of the Exchequer Court of Canada died during the current year.

CORRIGENDA

On page 2 in the headnote the word "same" in line 5 should read "sale".

On page 191 in the headnote the word "appellant" appearing in lines 10, 12, 26 and 30 should read "respondent".

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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BETWEEN:

1960

Apr. 10

Sept. 9

J. A. VERRET ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ....RESPONDENT.

Revenue—Income tax—Capital or income—Apartment houses built as investment—Sale forced by financial difficulties—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 24(1) and 129(1)(e).

A building contractor in 1952 exchanged an apartment house which he had built for his own account for a parcel of land on which he proposed building two apartment houses as an investment but on which to make full use of the land he subsequently built seven. As a result of the more ambitious scheme he became involved in financial difficulties. The buildings were completed in October 1953 and were operated on a rental basis to August 1955 during which time several offers to purchase were refused. Then the appellant to meet his liabilities and to secure capital to engage in the building for resale business sold six of the apartment houses at a profit of some $26,000. As part of the purchase price he agreed to accept $35,000 of the preference shares of the purchasing corporation. The purchaser subsequently became bankrupt and the shares became worthless. The Minister added the profit realized on the sale of the apartment houses to the appellant's 1955 income. On an appeal to this Court from a decision of the Income Tax Appeal Board affirming the assessment, the appellant submitted that if any profit had been made from the sale of the apartment houses, which he denied, it was a capital gain, and in the alternative that if a profit was realized the selling price should be reduced by $35,000 which represented not cash but worthless securities.

Held: That the profit was not due to any increase in the value of an investment but to an adventure or concern in the nature of trade within the meaning of s. 139(1)(*e*) of the *Income Tax Act* R.S.C. 1952, c. 148, which bore all the marks of characteristics of a business

1960
VERRET
v.
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venture or of a project which had been undertaken with the intention of making a profit. The appellant's course of conduct was similar to that of other contractors engaged in the building and selling business.

2. That the fact that the appellant agreed to take preference shares as part of the same price could not, in view of the provisions of s. 24(1) of the *Income Tax Act*, in any way affect the determination of the appellant's income nor the amount of the transaction.

APPEAL from a decision of the Income Tax Appeal Board.[1]

The appeal was heard before the Honourable Mr. Justice Fournier at Quebec.

Roger Letourneau, Q.C. for appellant.

Paul Boivin, Q.C. and *Paul Ollivier* for respondent.

FOURNIER J. now (September 9, 1960) delivered the following judgment:

Dans cette cause il s'agit d'un appel de la décision de la Commission d'Appel de l'Impôt sur le Revenu en date du 3 septembre 1959, confirmant une cotisation du Ministre du Revenu national, datée le 18 septembre 1957, dans laquelle un impôt supplémentaire de $8,059.06 a été prélevé à l'égard du revenu de l'appelant pour l'année d'imposition 1955.

La question soumise à la Cour est celle de déterminer si la vente en 1955 par l'appelant de six maisons-appartements, dans les circonstances établies par la preuve, constitue de sa part une «initiative ou affaire d'un caractère commercial» au sens de l'article 139 (1) (*e*) de la Loi de l'impôt sur le revenu. Dans l'affirmative, une initiative ou affaire d'un caractère commercial étant une «enterprise» au sens de l'article 3 du Statut, s'il y a eu réalisation d'un gain par suite de la transaction ce gain doit être considéré comme revenu imposable. Dans la négative, s'il y a eu profit le gain sera considéré comme provenant de la disposition d'un actif, capital, placement ou investissement à un prix plus élevé que celui payé par l'appelant; par conséquent, un gain de capital et non imposable.

Les articles 3 et 139 (1)(*e*) de la loi se lisent comme suit:

3. Le revenu d'un contribuable pour une année d'imposition, aux fins de la présente Partie, est son revenu pour l'année de toutes provenances à l'intérieur ou à l'extérieur du Canada et, sans restreindre la généralité de ce qui précède, comprend le revenu pour l'année provenant

[1] 59 D.T.C. 531

a) d'entreprises,
b) de biens, et
c) de charges et d'amplois.

139. (1) Dans la présente loi,

e) «entreprise» comprend une profession, un métier, un commerce, une fabrication ou une activité de quelque genre que ce soit et comprend une initiative ou affaire d'un caractère commercial, mais ne comprend pas une charge ou emploi;

Avant de décider s'il s'agit d'un placement de capital, d'une entreprise commerciale ou d'une initiative ou affaire d'une nature commerciale, il est nécessaire de considérer tous les actes de l'appelant afin de découvrir ses intentions véritables et de déterminer la nature de ses transactions; je crois donc utile de relater les faits qui me semblent avoir été établis devant la Cour.

L'appelant est un entrepreneur en construction depuis 1942. Jusqu'à l'automne 1955, il construisait des édifices sur plans et devis après soumission aux architectes et aux clients. De 1942 à 1955, il n'a jamais construit d'édifices pour fins de vente, sauf en deux circonstances, alors qu'il voulait fournir du travail à ses employés pendant la morte-saison. Il construisit deux maisons qu'il vendit avec profit. Dans son rapport d'impôt il fit mention du profit réalisé et paya l'impôt requis sur icelui.

En 1944, sur un terrain lui appartenant et où était situé son atelier, il avait construit pour lui-même, pour fins de placement et revenu, une maison-appartements sur la partie avant de ce terrain. Il en conserva la propriété jusqu'au 16 décembre 1952. Vers cette date il accepta, à certaines conditions, d'échanger sa propriété pour un vaste terrain situé Chemin Ste-Foy, à Québec. A l'occasion de cette transaction, il reçut, en plus du terrain avec maison, une somme de $10,000 et autres considérations. Le profit réalisé par l'appelant par suite de cet échange, soit $11,312.81, a été considéré par l'intimé comme gain de capital.

Sur ce nouveau terrain, l'appelant voulait construire deux maisons-appartements pour lui-même comme placement et source de revenu. Quand il voulut obtenir son permis de construction, il apprit que le règlement nº 849 de la cité de Québec serait modifié en vue de décréter que

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seules des maisons isolées ou semi-isolées pourraient être construites à cet endroit. On lui conseilla de faire préparer et déposer au cadastre un plan de subdivision de son terrain; ce plan porte la date du 11 mai 1953.

Vu la valeur des terrains il était nullement intéressé à construire sur les lots des maisons isolées ou semi-isolées. N'ayant que peu de temps à sa disposition, il entra immédiatement en négociations avec le représentant à Québec de la Société centrale d'hypothèques et de logement et reçut l'assurance que la Société lui consentirait des prêts de construction à raison de $45,000 pour chacune des maisons-appartements qu'il construirait. Comme il construisait lui-même et pour son propre compte, i.e. à titre de placement, ce montant était plus que suffisant. Pour éviter de tomber sous le règlement de construction proposé, il entreprit immédiatement de construire sept maisons-appartements, et ce, avant d'avoir complété ses ententes avec la Société. Agissant à l'encontre des règlements de la Société, il entreprit ses constructions avant d'avoir fait approuver ses plans et travaux. La Société exigea qu'il change ses plans et devis et modifie les travaux déjà exécutés, et, même dans ce cas, les prêts qu'elle consentait à lui faire n'étaient que de $30,000 par maison.

Il s'adressa à Imperial Life Insurance Company pour le financement nécessaire. Il put obtenir $30,000 pour chacune des maisons qu'il construirait suivant ses plans et devis. Les travaux furent commencés vers le 1er juillet 1953 et terminés au mois d'octobre de la même année. A la fin de l'année ses 42 logements étaient loués et lui rapportaient des revenus. Lorsque le coût total de la construction fut établi, ses maisons-appartements lui coûtaient $43,000 l'unité, soit en tout $301,000. Comme il n'avait reçu de Imperial Life Insurance Company qu'un montant de $210,000, qu'il avait épuisé ses propres fonds et qu'il devait $51,000 à ses fournisseurs de matériaux, il emprunta sur deuxième hypothèque une somme de $15,000, laquelle il reçut, mais l'acte d'obligation était fait pour un montant de $17,250. Il emprunta aussi $8,000 sur troisième hypothèque. Sa mise de fonds et les terrains s'élevaient à une somme de $80,000.

L'appelant a construit ses maisons à titre de placement ou investissement et en conserva la propriété d'octobre 1953 à août 1955. Il en retira les loyers pendant cette période.

Durant la construction et jusqu'en juin 1955 l'appelant n'a cherché en aucune façon à vendre ses propriétés. Au cours de cette période il ne fit aucune démarche, sollicitation ou publicité pour disposer de ses appartements et lui et son comptable refusèrent même diverses offres pour la vente de ses maisons. Comme en 1953 l'appelant avait subi une perte relativement à l'exploitation des maisons, cette perte ne fut pas considérée par l'intimé comme une perte commerciale déductible des revenus d'exploitation. D'ailleurs les revenus nets de 1954 furent considérés par l'intimé comme revenu de placements.

En juin 1955, il reçut une offre d'une compagnie d'acheter les sept maisons-appartements à raison de $47,000 l'unité. Malgré ses difficultés financières temporaires il refusa cette offre.

Quelque temps après, se rendant compte que des changements radicaux et importants s'étaient produits dans le domaine et le marché de la construction, qu'il devenait de plus en plus difficile d'obtenir des contrats pour construction de maisons d'après plans et devis et soumissions d'architectes et clients, et que les entrepreneurs qui semblaient réussir étaient engagés dans la construction pour fins de revente, il décida de suivre leur exemple et de construire pour fins de revente. Pour obtenir le capital nécessaire à cette nouvelle entreprise et se libérer de ses obligations, il accepta l'offre qui lui avait été faite mais seulement quant à six des maisons-appartements, désirant conserver comme placement la septième maison-appartements ainsi que la maison d'habitation située sur le terrain. En fait, l'appelant est encore propriétaire de ces édifice et maison et en retire les revenus.

Il vendit donc les six maisons-appartements pour une somme globale de $282,857, mais par convention séparée il s'engageait à acheter des actions privilégiées de Quebec Investment Corporation pour $35,000 que l'acheteur devait racheter au pair chaque année à raison de 10% du nombre desdites actions. Par la suite, l'acheteur fit faillite et les actions privilégiées n'ont plus de valeur réelle et marchande.

Dans la cotisation, objet du présent litige, l'intimé a ajouté au revenu de l'appelant pour l'année d'imposition 1955 un montant de $26,167.47 à titre de profit imposable

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sur la vente des six maisons-appartements. S'il y a eu bénéfice, ce que l'appelant nie, il prétend que le montant ne constitue pas un revenu assujetti à l'impôt mais un gain de capital.

Dans le cas des causes d'espèce qui sont basées sur des faits particuliers, ces faits doivent s'interpréter suivant certaines règles générales applicables au calcul du revenu. Lorsqu'il s'agit de déterminer si le profit provenant d'une transaction est un gain de capital ou un revenu imposable, tous les actes posés par le contribuable et toutes les circonstances relatives à la transaction doivent être examinés. L'intention du contribuable lors de l'acquisition et de la disposition du bien, ce qu'il en a fait pendant l'intervalle de temps écoulé entre ces opérations et les motifs de ses actions sont des éléments qui aideront à résoudre le problème. En définitive, il faudra décider s'il s'agit d'un placement fait sans intention d'en disposer dans le but de faire un profit mais pour en retirer un revenu. Lorsqu'il disposera de ce placement à un prix supérieur à son coût, le profit réalisé sera soit un gain de capital ou un revenu imposable. J'ai lu quelque part que

> Under the Canadian income tax system, the only receipt which is certain to escape the taxing provisions is a profit from the realization or change of an investment. All other gains may, depending upon the circumstances surrounding their realization, become income.

Les circonstances envisagées dans les remarques ci-dessus sont illustrées dans *Californian Copper Syndicate v. Harris*[1] par Clerk, L.J. (p. 166):

> . . . But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. . .

Si la transaction que nous avons à considérer dans le présent litige a les marques ou les caractéristiques d'une entreprise commerciale ou d'une initiative ou affaire d'un caractère commercial dont le but est de réaliser un profit, ce profit sera sujet à taxation. Comme il s'agit d'une transaction isolée, je crois devoir exprimer l'opinion que ce fait n'est pas un critère suffisant pour conclure qu'elle n'a pas le caractère d'une initiative ou affaire commerciale.

[1] (1904) 5 T.C. 159.

Dans la cause de *Commissioners of Inland Revenue v. Livingston*[1], Clyde, L.P., à la page 542 (*in fine*) dit:

> . . . I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, "in the nature of trade", is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as "in the nature of trade", merely because it was a single venture which took only three months to complete. . . .

Dans la cause de *Cragg v. Minister of National Revenue*[2], les notes préliminaires du Président de cette Cour se lisent en partie comme suit:

> 2. . . . Such a decision cannot depend solely on the number of transactions in the series, or the period of time in which they occurred, or the amount of profit made, or the kind of property involved. Nor can it rest on statements of intention on the part of the taxpayer. The question in each case is what is the proper deduction to be drawn from the taxpayer's whole course of conduct viewed in the light of all the circumstances. . . .

D'ailleurs, la règle qu'une transaction isolée n'est pas un critère suffisant pour décider que le profit réalisé par l'opération était un gain de capital a été suivie dans cette Cour à maintes reprises (voir *Chutter v. Minister of National Revenue*[3]).

Je me propose d'interpréter les faits essentiels de la présente cause à la lumière des règles précitées. L'appelant est entrepreneur général en construction depuis 1942. C'est dire qu'en 1952 il avait acquis une grande expérience dans l'érection de maisons d'habitation de diverses catégories. Il devait connaître la situation du marché immobilier dans son district ainsi que le prix des matériaux de construction et le coût de la main-d'œuvre. Il ne pouvait ignorer que la plupart des entrepreneurs de l'époque construisaient en vue de vendre à profit. Ses démarches indiquent qu'il avait une bonne idée de la procédure à suivre pour financer la construction des maisons-appartements qu'il projetait d'ériger.

A la fin de décembre 1952, il fit l'échange d'une maison-appartements—laquelle il avait construite pour son propre compte—pour un vaste terrain situé Chemin Ste-Foy à Québec sur lequel était érigée une maison d'habitation. Lors de cet échange il reçut une somme de $10,000. Dans son

[1] (1926-27) 11 T.C. 538.
[2] [1952] Ex. C.R. 40.
[3] [1956] Ex. C.R. 89.

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témoignage il dit qu'il avait l'intention de construire deux maisons-appartements sur ce terrain pour fins de revenu. Il projetait d'en construire d'autres plus tard si les circonstances et ses moyens le lui permettaient. Entre-temps, une bonne partie du terrain serait donc improductif.

A cause de certaines difficultés—qu'il relate au long dans son témoignage—,il dut changer son projet. Avant d'avoir fait tous les arrangements nécessaires pour financer les constructions projetées, il entreprit d'ériger sept maisons-appartements. C'était d'abord deux; c'est maintenant sept. Il procéda aux travaux préliminaires d'excavation et de fondations puis apprit que sa demande d'emprunt lui était refusée. D'ailleurs, même s'il s'était conformé aux exigences de son prêteur, il ne lui aurait pas été possible d'obtenir un montant suffisant pour compléter son projet. Il s'adressa ailleurs tout en continuant les travaux. Il n'avait alors que les lots à bâtir, peut-être la somme de $10,000 reçue par suite de l'échange des propriétés et son crédit auprès des fournisseurs de matériaux et de la main-d'œuvre. Il parvint à obtenir une somme de $210,000 sur première hypothèque, mais le coût de construction des sept maisons-appartements, en définitive, s'éleva à $301,000. Pressé par ses créanciers, il parvint à obtenir $17,500 sur deuxième hypothèque, mais ne reçut que $15,000 de cet emprunt. Comme cette somme était loin d'être suffisante pour satisfaire ses créanciers, il fit un nouvel emprunt de $8,000 sur troisième hypothèque. Malgré cela, il était encore endetté pour un montant de $51,000.

Même en admettant que son intention au début était de construire deux maisons-appartements pour fins de revenu, i.e. comme placement, devant les difficultés qu'il avait à surmonter, il a dû se demander, ainsi que l'aurait fait tout homme raisonnable et prudent, s'il pouvait raisonnablement entreprendre un projet de plus grande envergure pour la même fin. Comme le succès de son entreprise était problématique, il n'a pu s'empêcher de penser que s'il ne réussissait pas il pourrait trouver un acheteur, vu le marché des immeubles à l'époque et le fait qu'il était de pratique courante que les entrepreneurs construisaient pour vendre. A mon avis, il a dès ce moment commencé à modifier son intention première et à considérer l'idée de construire pour

vendre—sinon toutes les maisons-appartements qu'il construirait, peut-être quelques-unes. A tout événement, après avoir complété la construction, épuisé ses propres ressources, emprunté tout ce qu'il pouvait sur hypothèque, il devait encore une somme considérable à ses fournisseurs de matériaux et autres. A ce stage, pressé par ses créanciers, il devait remplir ses obligations. Pour ce faire il n'avait d'autre alternative que de vendre ses propriétés—du moins les maisons-appartements—ou déposer son bilan. D'après la preuve il est évident qu'il ne pouvait conserver tout ce qu'il avait construit.

Il accepta donc l'offre qui lui était faite de disposer de six maisons-appartements pour un prix global de $282,857, afin de se libérer de ses obligations et obtenir un montant pour entreprendre de construire des immeubles pour fins de vente. Il réalisa de cette transaction un profit d'environ $26,000. Comme partie du prix de vente il reçut des actions privilégiées de l'une des parties au contrat ou s'engagea à acheter ces actions privilégiées avec partie du montant reçu pour la vente. Il a été soumis à la Cour que ces actions privilégiées étaient devenues sans valeur, que l'appelant n'aurait pas fait de profit par suite de la transaction et que le montant de $35,000 payé pour ces actions ne devait pas être inclus dans le calcul de son impôt. Cette prétention n'est pas justifiable vu les dispositions de l'article 24(1) de la Loi de l'impôt sur le revenu qui se lit comme suit:

24 (1) Lorsqu'une personne a reçu un titre ou autre droit ou un certificat ou autre preuve de dette, en totalité ou en partie, à titre ou en remplacement du paiement ou en acquittement d'un intérêt, dividende ou autre dette alors exigible et dont le montant, s'il avait été payé, serait inclus dans le calcul de son revenu, la valeur du titre, du droit ou de la dette ou de la partie applicable en l'espèce doit, nonobstant la forme ou l'effet juridique de l'opération, être comprise dans le calcul de son revenu pour l'année d'imposition où il a été reçu; et un paiement en remboursement du titre ou en exécution du droit ou en acquittement de la dette n'est pas compris dans le calcul du revenu du bénéficiaire.

D'après le contrat de vente avec Le Comptoir de Crédit Limitée, le montant de la transaction est de $282,857. Le fait que l'appelant ait accepté de recevoir les actions privilégiées comme partie du prix de vente ne peut en aucune façon, selon moi, affecter le calcul du revenu de l'appelant ou le montant de la transaction.

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L'ensemble de la preuve m'a convaincu que l'appelant a fait l'échange de sa propriété pour un vaste terrain, lequel, subdivisé en lots à bâtir, pouvait servir à construire un nombre assez considérable de maisons-appartements, mais qu'il n'avait pas les moyens d'utiliser tous ces lots pour construire des immeubles qu'il garderait à titre de placement ou source de revenu. Il avait déjà construit des maisons pour fins de vente et il savait qu'il était de pratique courante pour les entrepreneurs en construction à cette époque de faire l'acquisition de terrains en vue de les subdiviser et d'y construire des maisons ou appartements pour fins de vente. La plupart avaient discontinué la construction sur plan et devis. Pourquoi aurait-il acquis tous ces lots à bâtir qu'il ne pouvait pas utiliser comme investissement? Il n'avait pas les moyens d'y ériger des immeubles pour fins de revenu. Je n'ai pas de doute que son intention était de les utiliser pour construire et ensuite vendre. Il n'est pas raisonnable de supposer qu'il laisserait ces lots improductifs. Il entreprit donc la construction de maisons-appartements, tout comme les autres entrepreneurs en construction, et les événements ont prouvé que s'il ne pouvait construire à titre de placement il pouvait réaliser un profit en vendant les maisons-appartements ainsi érigées par lui. Lorsque toutes les difficultés furent réglées par suite de la vente de six maisons-appartements, il demeurait propriétaire d'une maison d'habitation dont il retirait un revenu, savoir, une maison de six logements qui lui rapportait des loyers, outre un profit de $26,000. Le profit ne provenait pas de l'augmentation de valeur d'un placement ou investissement mais bien d'une initiative ou affaire qui avait toutes les marques ou caractéristiques d'une enterprise commerciale ou un projet entrepris dans le but de faire un profit. Tout ce qu'il a fait ressemble étrangement à ce que font les autres entrepreneurs dans le commerce de la construction et de la vente. Il a acquis un terrain, l'a subdivisé, a érigé des maisons sur ces lots alors qu'il devait savoir qu'il ne pouvait pas les conserver pour fins personnelles; enfin il a vendu les maisons avec profit.

Les faits dans la cause de *Minister of National Revenue* and *Ben Constant*[1], bien que pas identiques, ont une grande similarité avec ceux ci-dessus décrits, j'ai fait certaines remarques qui, dans mon opinion, sont applicables au présent litige. Je cite (p. 252):

> One thing I am convinced of is that the partners did not have the means to build such an apartment without the assets of their company and were in no position to finance the sums owing to the creditors after the completion of the work. The sale of the building was their only solution. They knew very well their personal financial position, as they knew that of their company, when they embarked on this project, and I am sure they knew they would be in no position to keep the building for income purposes. . . . I cannot agree with the argument that the leasing of the apartments before the sale of the building establishes that the associates intended to keep the building as a personal investment. . . . I rather believe that by leasing the apartments they were in a strong position to obtain a more favourable price for the building.
>
> * * *
>
> The whole transaction has all the earmarks of a business or trading transaction carried on as a profit making scheme. It follows the same pattern as that followed by the partnership and the company in similar operations. . . .

Je ne vois pas de distinction entre le fait que l'intimé dans la cause ci-dessus mentionnée a procédé avec son projet de construction de la même manière que la société ou corporation dont il était un des membres ou actionnaires et le fait que l'appelant ici ne faisait que répéter ce qu'il avait fait dans le passé et ce qu'il a continué de faire après avoir vendu les six maisons-appartements.

Pour ces raisons, l'appel est renvoyé avec dépens.

Jugement en conséquence.

ALPHONSE FOURNIER

[1] [1958] Ex. C.R. 246.

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BETWEEN:

GARAGE HENRI BRASSARD LIMITÉE .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Business losses—Right to deduct losses from profits—The Income Tax Act, R.S.C. 1952, c. 148, s. 27(1)(e)(iii)(A).

A company incorporated under the *Quebec Companies Act* to carry on an automobile and garage business operated at a profit from 1951 to 1953 and at a loss in 1954 and 1955. It ceased operations in 1954 and in 1955 liquidated all its assets. In 1956 its letters patent which were still in force were acquired by B by a purchase of all the issued shares. B then obtained supplementary letters patent whereby the name of the company was changed and its head office re-located in a town in which B carried on garage and automobile dealer business and which business he then sold to the company for among other consideration, the balance of its unissued and unsubscribed shares, and became the only shareholder and sole owner of the company as well as its president and manager. In its 1956 income tax return the company declared a profit from which it deducted the losses it had suffered in 1954 and 1955. The Minister disallowed the deductions and an appeal from his ruling was dismissed by the Income Tax Appeal Board. On an appeal by the company to the Court

Held: That under the provisions of s. 27(1)(*e*)(iii)(A) of the *Income Tax Act,* R.S.C. 1952, c. 148, the right to deduct losses does not extend to a profit from a business other than the business in which the loss was sustained.

2. That the appellant company had ceased its business operations before the end of 1955 and disposed of all its assets and when the new shareholders obtained control in 1956 it acquired and began to operate a new business and no longer had the right to deduct from its 1956 profits the losses sustained in 1954 and 1955, because these profits did not arise from the business in the course of which the losses had been sustained.

APPEAL from a decision of the Income Tax Appeal Board[1].

The appeal was heard before the Honourable Mr. Justice Fournier at Quebec.

Raymond Decary for appellant.

Paul Boivin, Q.C. and *Paul Ollivier* for respondent.

[1] 59 D.T.C. 409.

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FOURNIER J. now (September 14, 1960) delivered the following judgment:

Dans cette cause, il s'agit d'un appel de la décision de la Commission d'Appel de l'Impôt sur le Revenu en date du 15 juin 1959, confirmant la cotisation du Ministre du Revenu national du 3 mars 1958 par laquelle un impôt au montant de $13,690.40 a été établi à l'égard du revenu de l'appelante pour l'année d'imposition 1956.

L'appelante, dans son rapport de revenu pour l'année d'imposition 1956, avait déclaré un profit net de $34,695.07 résultant de l'opération de son entreprise, mais elle avait déduit de ce montant les pertes subies pendant les exercices financiers de 1954 et 1955. Par contre, l'intimé en cotisant le revenu de l'appelante n'a pas admis la déductibilité du montant des pertes subies. La Commission d'Appel de l'Impôt sur le Revenu a confirmé cette cotisation. C'est l'appel de ce jugement qui est présentement devant la Cour.

Les parties basent leurs prétentions respectives sur les dispositions de l'article 27(1)(*e*)(iii)(A) de la Loi de l'impôt sur le revenu qui étaient en force en 1956. Ces dispositions se lisent comme suit:

27. (1) Aux fins du calcul du revenu imposable d'un contribuable pour une année d'imposition, il peut être déduit du revenu pour l'année ceux des montants suivants qui sont applicables: . . .

(*e*) les pertes commerciales subies pendant les cinq années d'imposition qui précèdent, et dans l'année qui suit, l'année d'imposition mais . . .

(iii) aucun montant ne peut se déduire, à l'égard des pertes, sur le revenu d'une année quelconque sauf jusqu'à concurrence du moindre des montants suivants:

(A) le revenu du contribuable pour l'année d'imposition provenant des affaires dans lesquelles la perte a été subie.

Les faits qui ont été admis et établis par la preuve verbale et écrite dans cette cause entrent-ils dans les cadres des dispositions citées et l'interprétation de cet article de la loi? C'est là la question qui est soumise à la Cour. Dans l'affirmative, les pertes subies en 1954 et 1955 seront déductibles dans le calcul de l'impôt sur le revenu de l'appelante. Dans le cas contraire, celle-ci faillira dans son appel.

Les faits d'abord. La Compagnie Ranger Motor Sales Ltée fut incorporée en vertu de la Loi des Compagnies de Québec le 22 mars 1922. Le capital-actions fut fixé à $60,000, représenté en définitive par 450 actions privilégiées d'une

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valeur nominale de $100, 5%, non cumulatives et rachetables, et de 1,500 actions ordinaires de $10, total $60,000. Les principaux objets des lettres patentes étaient l'exploitation d'un commerce d'automobiles et d'un garage. Comme il appert des déclarations d'impôt sur le revenu, ce genre d'affaires fut exercé à Lachine, dans la province de Québec, avec profit de 1951 à 1953 et perte de $34,532.35 en 1954.

Le 18 décembre 1954, les directeurs de la compagnie, par résolution, ont décidé de vendre à Durocher Automobile Ltée les «stocks de marchandise comprenant les pièces et accessoires d'automobile et de camion, ainsi que l'essence, l'huile et autres fournitures et lubrifiants, les pneus et tubes neufs selon l'inventaire; l'équipement et outillage du garage, l'ameublement et les accessoires de bureau; aussi deux camions usagés.» C'est sans doute pour cette raison que dans le bilan préparé par l'auditeur et approuvé par le conseil d'administration il est fait mention que la compagnie a cessé d'opérer le 20 décembre 1954 et que dans la déclaration d'impôt sur le revenu de 1954, en date du 3 octobre 1955, le président certifie qu'il a examiné le rapport, y compris les relevés et états y annexés, et qu'il est vrai, exact et complet. Selon la preuve, la mention ci-dessus aurait été faite pour avertir le Ministre du Revenu national que la compagnie avait cessé ses opérations. D'ailleurs, il ne restait plus à vendre qu'un certain nombre d'automobiles usagées, dont la dernière fut vendue à la fin de l'été 1955, ce qui compléta la liquidation de l'inventaire.

D'après la déclaration d'impôt de 1955, produite le 22 novembre 1956, les disponibilités se composaient seulement de comptes de banque s'élevant à $75.61; d'un fonds de réserve I.A.C. de $793.64; d'un fonds de réserve G.M.A.C. de $288 et de l'impôt fédéral à recevoir, soit $788.38. Selon l'état des profits et pertes, les pertes se seraient élevées à $3,369.02.

En somme, à la fin de l'année 1955 la compagnie avait tout liquidé. Elle n'avait plus d'inventaire, d'outillage, de mobilier de bureau, de marchandises, de fournitures, d'automobiles et elle avait abandonné le garage et son bureau d'affaires. En d'autres termes, la compagnie avait mis fin à son entreprise et commerce.

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L'actif de la compagnie se composait des créances déjà énumérées; le passif, d'une dette pour avances faites par un des actionnaires. Le ou avant le 13 janvier 1956, la compagnie se départit de ses créances en faveur de son créancier pour le compenser de ses avances. Toutefois, les lettres patentes d'incorporation de la Compagnie Ranger Motor Sales étaient encore en vigueur, MM. Origène et Florian Ranger et Mlle Hélène Ranger étant les seuls propriétaires des actions émises, soit 1,147 actions ordinaires et 427 actions privilégiées.

Le 13 janvier 1956, ces actionnaires ont vendu leurs actions à M. Henri Brassard pour une somme de $1,500, ce dernier devenant le seul propriétaire des actions émises de Ranger Motor Sales Ltd. Le 24 janvier 1956, des lettres patentes supplémentaires sont émises changeant le nom de la compagnie en celui de Garage Henri Brassard Ltée et changeant, de Lachine, P.Q., au village de St-Marc des Carrières, Co. Portneuf, P.Q., le lieu du siège social. Le lendemain, soit le 25 janvier 1956, Henri Brassard a vendu, cédé et transporté à la Compagnie Garage Henri Brassard Ltée l'actif et le passif du commerce de garagiste et de vente d'automobiles qu'il exploitait à St-Marc des Carrières moyennant une considération de $20,376.99, payable par l'émission de 23 actions privilégiées à $100 chacune, soit $2,300; 350 actions ordinaires à $10 chacune, soit $3,500, et des billets de l'acheteur représentant un montant de $14,576.99, au taux de 5% l'an, à Henri Brassard. L'actif et le passif de l'entreprise de Henri Brassard sont donc devenus l'actif et le passif de la compagnie autrefois connue sous le nom de Ranger Motor Sales Ltd., devenue maintenant le Garage Henri Brassard Ltée. En achetant les actions d'une compagnie, Henri Brassard voulait perpétuer sa propre entreprise par l'entremise d'une corporation. Il croyait que cette manière de procéder serait plus avantageuse pour l'exploitation de son commerce. Il devint le président et gérant de la compagnie et prit charge de l'opération du garage et du commerce d'automobiles et de camions.

Il est admis que l'appelante fut la même entité juridique depuis sa création jusqu'à ce jour. Il est en preuve que l'appelante, de 1951 à 1954, alors qu'elle était connue sous le nom de Ranger Motor Sales Ltd. exploitait un garage et un commerce de voitures-automobiles et d'accessoires pour

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automobile. Il a été établi hors de tout doute qu'elle a cessé d'opérer son commerce le 20 décembre 1954 et que pendant 1954 et 1955 elle a vendu son actif. Lorsque les actions sont passées en d'autres mains, l'appelante a fait l'acquisition d'un autre commerce consistant dans l'opération d'un garage et d'une agence de vente d'automobiles et de camions. Elle a réalisé des profits en 1956, mais elle avait subi des pertes en 1954 et 1955. Il s'agit donc de déterminer si le revenu de l'appelante pour l'année 1956 provenait des affaires au cours desquelles les pertes avaient été subies en 1954 et 1955.

Lorsque Henri Brassard fit l'acquisition des actions de Ranger Motor Sales Ltd., l'appelante avait tout liquidé; par conséquent, n'ayant plus de commerce, elle ne pouvait pas vendre une entreprise commerciale qui avait cessé d'exister. En fait, la transaction ne faisait que transporter à l'acquéreur un certain nombre d'actions, ce qui lui permettait de se servir du nom et des pouvoirs d'une compagnie limitée pour exploiter son propre commerce. Il vendit donc son commerce à l'appelante, reçut, entre autres, la balance des actions non émises et souscrites et devint le seul actionnaire et propriétaire de la Compagnie.

En résumé, l'appelante, sous un nouveau nom et ayant un nouveau siège social, fait l'acquisition d'une entreprise commerciale qu'elle commence à opérer avec de nouveaux actionnaires, directeurs et officiers. Elle ne pouvait pas recommencer ses affaires antérieures, ayant définitivement discontinué l'exploitation de son commerce à Lachine et ayant disposé de tout son actif. C'est donc autre entreprise qu'elle commence à opérer à St-Marc des Carrières. Les pertes subies par l'appelante en 1954 et 1955 par suite de ses affaires sont-elles, d'après les dispositions de la Loi de l'impôt sur le revenu et particulièrement de l'article 27(1)(*e*)(iii)(A), déductibles des profits qu'elle a réalisés en 1956 et qui découlaient de son entreprise commerciale?

La Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 3, décrète:

3. Le revenu d'un contribuable pour une année d'imposition, aux fins de la présente Partie, est son revenu pour l'année de toutes provenances à l'intérieur ou à l'extérieur du Canada et, sans restreindre la généralité de ce qui précède, comprend le revenu pour l'année provenant

(*a*) d'entreprise . . .

Et l'article 4 dit:

> 4. Sous réserve des autres dispositions de la présente Partie, le revenu provenant, pour une année d'imposition, d'une entreprise ou de biens est le bénéfice en découlant pour l'année.

Ainsi donc, le revenu d'un contribuable pour une année d'imposition est son revenu pour cette année-là; et s'il provient d'une entreprise, c'est le bénéfice qui en découle pour l'année.

L'article 27(1)(*e*)(iii)(A) crée une exception à la règle générale et donne le droit au contribuable de déduire de son revenu pour l'année d'imposition les pertes subies pendant les cinq années d'imposition qui précèdent et l'année d'imposition qui suit; mais l'exception ne s'applique qu'en tant que les faits établis rencontrent les exigences des termes exprès de la disposition.

Autrefois, l'exception n'avait d'effet que si le contribuable durant l'année d'imposition exerçait la même entreprise que celle qu'il exerçait pendant l'année où la perte avait été subie. Aujourd'hui, sont déductibles les pertes subies lorsque le revenu du contribuable pour l'année d'imposition provient des affaires au cours desquelles les pertes ont été subies. Il ne s'agit plus, comme sous l'ancienne loi de l'impôt de guerre sur le revenu, de l'exploitation de la même entreprise commerciale pour bénéficier de l'exception de déduction des pertes subies, mais du fait que le revenu du contribuable provient des affaires au cours desquelles les pertes ont été subies.

La cause du *Ministre du Revenu National* et *Eastern Textile Products Ltd.*[1] a été citée, commentée et interprétée par les procureurs des deux parties. Les faits de cette cause et les remarques et conclusions de l'honorable J. T. Thorson, président de la Cour de l'Échiquier, seront certainement utiles à la solution du problème qui nous a été soumis.

Il s'agissait d'une compagnie qui manufacturait et vendait des produits textiles. Elle opérait dans un local privé. Peu après sa période fiscale en 1950, elle vendit son établissement et conclut un arrangement avec l'acheteur par lequel celui-ci entreprit de manufacturer ses produits, produits que la compagnie continua à vendre. Elle s'engagea ensuite, avec une autre compagnie, à acheter et à vendre des moteurs d'avions

[1] [1957] C.T.C. 48; 57 D.T.C. 1070.

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et des parties et en 1951 elle en a effectué la vente avec bénéfices. De plus, la compagnie a réalisé des bénéfices quant à ce qui concerne ses ventes de textiles. Pendant les années qui avaient précédé la vente de son usine, elle avait subi des pertes dans le cours de ses opérations et voulut déduire de ses profits de 1951 les pertes qu'elle avait subies durant les années précédentes. La Cour de l'Échiquier en arriva à la conclusion que la compagnie, ayant disposé de son entreprise et cessé ses opérations et affaires en 1950, n'avait pas droit aux déductions réclamées. A la page 58, le Président Thorson dit:

> . . . The right to deduct losses does not extend to a profit from an activity other than the business in which the loss was sustained. It seems to me that it is contrary to the policy as declared in the section that a taxpayer should have the right to deduct from his income for any taxation year a business loss sustained in another year in a case where his income is not from the business in which the loss was sustained. Thus, if he ceases to carry on the business in which the loss was sustained and, therefore, does not make any profit from it the right to deduct a business loss does not enure to him. The purpose of the policy no longer exists.
>
> Consequently, since the respondent ceased its manufacturing business prior to 1951 and that was the business in which its losses in 1947, 1948, 1949 and 1950 were sustained, and it did not in 1951 make any profit from such business but made it from something else, its case comes within the limitation of subsection (iii) of Section 26(*d*) and it is not entitled to deduct from its income for 1951, even its income from the sale of textiles in that year, any of the business losses sustained by it in 1947, 1948, 1949 and 1950.

Si j'ai bien compris les remarques du savant juge interprétant les dispositions de l'article 26(*d*)(iii)—aujourd'hui l'article 27(1)(*e*)(iii)(A)—, il pose le principe suivant: une personne qui, opérant une entreprise commerciale, en fait la vente ou dispose de tout son actif et cesse ses opérations, ne peut réclamer la déduction des pertes découlant de l'opération de cette affaire des bénéfices qu'elle pourrait réaliser de l'exploitation d'une nouvelle ou autre industrie, même si cette dernière est semblable à la première.

Je suis d'opinion que la règle indiquée par le Président dans la cause citée *supra,* à l'effet que "the right to deduct losses does not extend to a profit from an activity or business other than the business in which the loss was sustained", est bien l'interprétation des termes exprès de la disposition de la loi qui est applicable au présent litige.

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Ayant considéré tous les faits qui ont été admis et prouvés, j'en suis arrivé à la conclusion que l'appelante avait cessé l'opération de son entreprise à Lachine, sous le nom de Ranger Motor Sales Ltd., avant la fin de l'année 1955 et qu'elle avait disposé de tout son actif. Avant le changement de son nom et du lieu de son siège social, elle s'était départie de ses quelques créances en règlement de ses dettes. Lorsque de nouveaux actionnaires eurent pris le contrôle de la compagnie, elle fit l'acquisition d'un nouveau commerce et en commença l'opération. Au sens des termes de la disposition d'exception de la loi sous considération, qui doit être interprétée strictement, elle n'avait plus le droit de déduire des bénéficies résultant en 1956 de cette entreprise les pertes subies dans l'opération du commerce qu'elle exerçait en 1954 et 1955, parce que des bénéfices ne provenaient pas des affaires au cours desquelles les pertes avaient été subies.

Pour ces raisons, l'appel est renvoyé avec dépens.

Jugement en conséquence.

BETWEEN:

1960 — Feb. 4 — Sept. 22

HARRY SILVERMAN ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ....RESPONDENT.

Revenue—Income—Income tax—Bonus paid by real estate dealer to obtain mortgage loans—Whether capital outlay or deductible expense—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 11(1)(cb), 12(1)(a) and (b).

Appellant was a member of a partnership which carried on the business of buying and selling real estate. In December 1954 a property was purchased for $9,000 and sold the following February for $12,500. Prior to the sale the partners mortgaged the property to secure repayment in five years of $4,200, and it was a term of the agreement of sale that the purchaser, in payment of $4,200 of the selling price, should assume the mortgage. Of the $4,200 the partners received $4,000, a $200 bonus being exacted by the mortgagee. The evidence did not disclose what the money was used for or why it was borrowed.

A second property was purchased in November 1954 for $12,200 and sold in February 1955 for $15,000. It too was mortgaged prior to sale to secure repayment in five years of $6,500, and the assumption of the

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mortgage by the purchaser represented $6,500 of the selling price. The proceeds of the loan were $6,000 after deduction by the mortgagee of a $500 bonus. The evidence was that the moneys received were applied in part payment of the balance of the purchase price by the partnership. In calculating its trading profit for 1955 the partnership deducted from its gross profit the bonuses of $700 as expenses incurred in arranging first mortgages. In making the assessment the Minister added back this amount on the ground that the bonuses were outlays made to secure working capital the deduction of which is prohibited by s. 12(1)(*b*) of the *Income Tax Act.*

The appellant appealed to this Court from a decision of the Income Tax Appeal Board dismissing his appeal from the assessment.

Held: That the loan secured by the property in respect of which a $500 bonus was paid while on its face not of a temporary nature could be so regarded since the partners did not expect to have the property for long and the assumption and retirement of the loan were in fact provided for in the transaction in which the property was sold. Further the borrowed money was directly used to pay part of the purchase price of a property acquired as a revenue asset and it did not add anything of a permanent nature to the assets employed as either fixed or circulating capital in the business.

2. That in the circumstances the money so borrowed was not used as capital in the business in the sense in which the word "capital" is used in s. 12(1)(*b*) of the *Income Tax Act.*

3. That the $500 bonus was not a payment or outlay on account of capital within the meaning of s. 12 (1)(*b*) and its deduction should be allowed.

4. That with respect to the mortgage on which a $200 bonus was paid the evidence did not show why the money was borrowed or what it was used for and the taxpayer not having met the onus placed upon him to satisfy the Court that the bonus was not incurred on account of capital failed to establish any right to its deduction.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Thurlow at Toronto.

Charles Drukarsh, Q.C. and *J. G. McDonald* for appellant.

F. J. Cross and *G. W. Ainslie* for respondent.

THURLOW J. now (September 22, 1960) delivered the following judgment:

This is an appeal from a judgment of the Income Tax Appeal Board dated September 28, 1955, dismissing an appeal by the appellant against an assessment of income tax for the year 1955. In making the assessment, the Minister added to the income of the appellant an amount of $233.33, representing the appellant's share of a sum of $700

which had been deducted by the appellant in his computation of the profit of a partnership known as Pearl Realty, in which he had a one-third interest, and the issue in the appeal is whether the appellant is liable to tax in respect of this amount.

The partnership was formed in November, 1954 and carried on the business of buying and selling real estate in Toronto until March 31, 1955, when it was dissolved. In that period, three properties were bought and sold, the transactions pertaining to two of such properties, namely 23 Cowan Avenue and 61 Beatrice Street, being in question in these proceedings. Twenty-three Cowan Avenue, was purchased for $9,000 on December 20, 1954, the date set for completion of the purchase being December 31, 1954. The property was sold on or about February 21, 1955 for $12,500. In the meantime, on or about January 30, it had been mortgaged by the partners to secure repayment in five years of $4,200 and interest at 6½ per cent, and it was a term of the agreement of sale that the purchaser, in payment of $4,200 of the selling price, should assume the mortgage. Of the $4,200 so secured, the partners had received $4,000, the remaining $200 being a bonus exacted by the mortgagee. As to this transaction, the evidence shows that on February 2, 1955 the solicitor for the partnership sent to it a cheque for $3,941.50, representing the proceeds of the loan, but there is no satisfactory evidence as to what this money was used for or why it was borrowed. In particular, the evidence leaves me unsatisfied that the money was used to pay for the property.

The property known as 61 Beatrice Street was purchased on November 22, 1954 for $12,200 and was sold on February 26, 1955 for $15,000. In the meantime, it, too, had been mortgaged to secure repayment in five years of $6,500 and interest at 6½ per cent, and the assumption of the mortgage by the purchaser represented $6,500 of the selling price. The proceeds of the loan were $6,000, the remaining $500 being a bonus exacted by the mortgagee. In this case the evidence shows that the moneys received, less some legal fees, were applied in part payment of the balance of the purchase price payable by Pearl Realty when the purchase was completed on or about February 7, 1955.

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The evidence also shows that the appellant put $6,000 or $7,000 into the partnership as his share of its capital and that the other partner was expected to put in somewhat more, but it is not clear how much he did in fact contribute.

In the trading account of the partnership for the period from January 1, 1955 to March 31, 1955, which accompanied the appellant's income tax return for 1955, the receipts from sales of the three properties were shown at $42,300, which included the $12,500 and the $15,000 for which 23 Cowan Avenue and 61 Beatrice Street, respectively, were sold, and from the gross profit calculated after deducting the cost of purchasing the properties and a sum for improvements and repairs, there was deducted under the heading "Expenses" an amount of $700 entitled "Bonus on arranging of First Mortgages." In making the assessment, the Minister added back this amount, and the issue is whether he was right in so doing.

The appellant put his case in two ways. He submitted first that the $700 was never received by the partnership and would never be received and that, although in the method of accounting used the $700 had been included in the receipts and then deducted, it would have been equally accurate and in accordance with the requirements of the *Income Tax Act* not to include it in the receipts and not deduct it. Secondly, he submitted that, if it was necessary in computing income to include in the receipts the full selling price of the properties, the $700 was properly deducted. The position taken by the Minister was that the full selling price of the properties must be brought into the computation and accounted for and that the bonuses were outlays made by the partners to secure working capital for their business and were thus payments or outlays on account of capital, the deduction of which in computing income for income tax purposes is prohibited by s. 12(1)(*b*) of the *Income Tax Act*.

By s. 3 of the *Income Tax Act*, R.S.C. 1952, c. 148, it is declared that, for the purposes of Part I of the Act, the income of a taxpayer for a taxation year is his income from all sources and includes income for the year from all businesses, and by s. 4 it is provided that, subject to the other

provisions of Part I, income for a taxation year from a business is the profit therefrom for the year. Clauses (*a*) and (*b*) of s-s. (1) of s. 12 are as follows:

> 12. (1) In computing income, no deduction shall be made in respect of
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,
> (b) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part,

In s. 11(1)(*c*) provision is, however, made that, notwithstanding paras. (*a*), (*b*) and (*h*) of s. 12(1), interest on borrowed money used for the purpose of earning income from a business may be deducted, and by s. 11(1)(*cb*) it is also provided that a taxpayer may deduct an expense incurred in the year in the course of borrowing money used by the taxpayer for the purpose of earning income from a business, but not including any amount in respect of a bonus paid or payable to a person from whom the money was borrowed.

It will be observed that the statute does not define what is to be taken as the profit from a business, nor does it prescribe how or by what method such profit is to be computed, though it does contain provisions to which, for income tax purposes, any method adopted is subject. However, since what is declared to be the income from a business is the profit therefrom for the year, the method adopted must be one which accurately reflects the result of the year's operations, and where two different methods, either of which may be acceptable for business purposes, differ in their results, for income tax purposes the appropriate method is that which most accurately shows the profit from the year's operations.

Thus in *Publishers Guild v. Minister of National Revenue*[1] Thorson P. said at p. 29:

> What is basically to be determined under the *Income War Tax Act* is the amount of "net profit or gain . . . received" by the taxpayer during the year. It was established by the House of Lords in *Sun Insurance Office v. Clark*, [1912] A.C. 443, that "the question of what is or is not profit or gain must primarily be one of fact, and of fact to be ascertained by the tests applied in ordinary business". Thus, what is to be determined here is, not whether the Department has accepted the accrual basis system of accounting and rejected the instalment system, but rather which system more nearly accurately reflects the taxpayer's income position.

[1] [1957] C.T.C. 1; 57 D.T.C. 1017.

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See also *Minister of National Revenue v. Anaconda American Brass Ltd.*[1] and *Ken Steeves Sales Ltd. v. Minister of National Revenue*[2].

Turning now to the question whether the $700 must, in the first instance, be included in the computation as a receipt since it formed part of the nominal selling price of the two properties, there being but two transactions to consider, both of which were substantially completed in the accounting period, it would seem that the result ought to be the same whether the method of computation used is that employed in the appellant's income tax return or any other logical method. If, however, instead of the nominal selling price of the properties, one takes as the starting point of the computation what was actually received, it becomes necessary, in my opinion, to examine the transactions themselves, in which the properties were sold, to see what was in fact realized in them. It should here be noted that the transactions in which the properties were mortgaged do not, in my opinion, enter into the computation. The mortgaging of the properties cannot be regarded as a partial disposal of them, nor do the sums received from the mortgagees form part of the proceeds of their disposal or become revenue receipts of the partnership. In each case, however, when the property was sold, the partners were liable for the mortgage debt, which included the bonus granted by them and, when selling the property, the partners received a portion of the purchase price in cash and a second mortgage for another portion of it. There is no doubt that both the amount received and the value of the second mortgage must be brought into the computation. In addition, on each occasion the partners obtained the purchasers' undertaking to pay to the mortgagee the sum which they were obligated to pay to him. In my view, this undertaking was something of value to the partners since, without it, they would have been obliged sooner or later to find the money to discharge their obligation and the purchasers' undertaking relieved them of the obligation to do so. It seems to me, therefore, that the actual receipts at the time of sale in each case were made up of the cash and second mortgage received and a contractual obligation as well, which *prima facie* was worth

[1] [1955] C.T.C. 311; 55 D.T.C. 1220.
[2] [1955] Ex. C.R. 108.

to the partnership the amount outstanding on the first mortgage. Moreover, while the actual payment of the first mortgage by the purchaser would probably not be completed for some years, so far as the partners were concerned in the ordinary course of events there would be nothing more to be done by them in any subsequent year to earn or obtain this portion of the selling price of the property. This feature distinguishes the case on its facts from that of *Publishers Guild v. Minister of National Revenue* (*supra*). The amount of the bonuses assumed by the purchasers accordingly, in my opinion, forms part of the total amount to be accounted for by the partners as receipts from the sales of the properties, and it thus makes no difference for the purposes of this case whether what is taken as the starting point of the computation is the nominal selling price of the properties or what was actually received.

Having reached this conclusion, it becomes necessary to consider whether the bonuses or either of them may properly be deducted as expenses.

In *Royal Trust Company v. Minister of National Revenue*[1] Thorson P., in discussing the approach to the question of allowance of deductions under the *Income Tax Act,* said at p. 42:

> Consequently, if the correct approach to the question of whether a disbursement or expense was properly deductible in a case under the *Income War Tax Act* was the one which I have outlined, it follows, *a fortiori,* that it is the correct approach to the question of whether an outlay or expense is properly deductible in a case under the *Income Tax Act.* Thus, it may be stated categorically that in a case under the *Income Tax Act* the first matter to be determined in deciding whether an outlay or expense is outside the prohibition of Section 12(1)(*a*) of the Act is whether it was made or incurred by the taxpayer in accordance with the ordinary principles of commercial trading or well accepted principles of business practice. If it was not, that is the end of the matter. But if it was, then the outlay or expense is properly deductible unless it falls outside the expressed exception of Section 12(1)(*a*) and, therefore, within its prohibition.

In *B.C. Electric Railway Co. Ltd. v. Minister of National Revenue*[2] Abbott J., with whom the Chief Justice and Fauteux J. concurred, said at p. 137:

> Since the main purpose of every business undertaking is presumably to make a profit, any expenditure made "for the purpose of gaining or producing income" comes within the terms of s. 12(1)(*a*) whether it be classified as an income expense or as a capital outlay.

[1] [1957] C.T.C. 32; 57 D.T.C. 1055.
[2] [1958] S.C.R. 133.

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Once it is determined that a particular expenditure is one made for the purpose of gaining or producing income, in order to compute income tax liability it must next be ascertained whether such disbursement is an income expense or a capital outlay. The principle underlying such a distinction is, of course, that since for tax purposes income is determined on an annual basis, an income expense is one incurred to earn the income of the particular year in which it is made and should be allowed as a deduction from gross income in that year. Most capital outlays on the other hand may be amortized or written off over a period of years depending upon whether or not the asset in resepct of which the outlay is made is one coming within the capital cost allowance regulations made under s. 11(1)(*a*) of *The Income Tax Act*.

In *W. E. Bannerman v. Minister of National Revenue*[1] Kerwin C.J., in delivering the unanimous judgment of the Court, said at p. 564:

> Under Section 12(1)(*a*) of the present Act it is sufficient that an outlay be made or expense incurred with the object or intention that it should earn income, but since in one sense it might be said that almost every outlay or expense was made or incurred for that purpose, a line must be drawn in the individual case depending upon the circumstances and bearing in mind the provisions of Section 12(1)(*b*).

See also *Evans v. Minister of National Revenue*.[2]

In the present case, it was not contended that the deduction of the expense attending either of the two mortgages was prohibited by s. 12(1)(*a*), and the matter falls to be determined on whether the bonuses were outlays on account of capital the deduction of which is prohibited by s. 12(1)(*b*). This question, in my opinion, turns on whether or not the borrowed moneys in respect of which the bonuses were incurred were in fact used as capital in the partnership business.

In *The European Investment Trust Co. v. Jackson*[3] Romer L.J., referring to the judgment of the House of Lords in *Scottish North American Trust Ltd. v. Farmer*[4], said at p. 16:

> The House of Lords, affirming the decision of the Court of Session in Scotland, held that the moneys so borrowed were not sums employed as capital in the trade, within the meaning of what then, I think, corresponded to Rule 3, Sub-rule (*f*). In point of fact, the money which was held not to be capital—although it was capital, as I say, in the sense that it was not income—was, really, what is frequently referred to as circulating capital. But, again, it is impossible, I think, to treat the decision of the House of Lords as laying down that capital, which is used as circulating capital, is not capital within the meaning of Sub-rule (*f*).

[1] [1959] S.C.R. 562.
[2] [1960] S.C.R. 391.
[3] 18 T.C. 1.
[4] 5 T.C. 693.

To start with, they did not, in terms, draw any distinction between circulating capital and fixed capital and, in the next place, they did not overrule, although they commented upon, the decision in the *Anglo-Continental Guano Works v. Bell,* reported in 3 T.C. 239, where money that, so far as I can see, was borrowed and used as a circulating capital, was treated as capital within the meaning of Sub-rule (*f*). The only conclusion that I can draw from those cases, therefore, is this, that, in each case, it is a question of fact whether the capital money borrowed is or is not capital employed in the trade within the meaning of this subparagraph, and if the Commissioners have decided, as a question of fact, that it is, then this Court cannot interfere.

In the same case, Finlay J. had said at p. 11:

Now, here it seems to me that the principle may be stated in this way: if you get a company dealing with money, buying or selling stocks or shares, Treasury bills, bonds, all sorts of things, and if you get that company getting, as such companies constantly do get, temporary loans from their bank—accommodation, I suppose, for sometimes twenty-four hours, or even less, sometimes for a good deal longer—if you get that sort of thing, then the interest on that money, the hire, so to speak, paid for that money, may properly be regarded as an expenditure of the business, an outgoing to earn the profits. On the other hand, if the truth of the thing is that by the payment of the interest the company does not obtain mere temporary accommodation, day to day accommodation of that sort, but does, in truth, add to its capital and get sums which are used as capital and nothing else, then I think that in that case all the authorities show that that deduction cannot properly be made.

In *Ascot Gas Water Heaters Ltd. v. Duff*[1] Lawrence J. said at p. 176:

It appears, therefore, from those observations of Romer, L.J., that the matter cannot be concluded by considering simply whether the sum in respect of which the sum is sought to be deducted is fixed capital or circulating capital, and it appears to me that the only true principle must be the principle which is laid down by Finlay, J., and which is binding upon me, no other decision or criticism of his statement of the principle having been brought to my notice. The principle, therefore, which the Commissioners ought to have applied in each of these cases was whether the sums in respect of which the commission dealt with in these two cases was payable, were sums which, although capital, were temporary in their nature and might be regarded as an ordinary incident of carrying on the business of the Company.

In the case before Lawrence J., two sums were in issue, one of which was a payment made by the taxpayer to obtain a guarantee for indebtedness incurred for raw materials purchased in the course of trading and the other a payment made for a guarantee of a loan raised in order to provide credit and reserves necessary for the expansion of the business and the commissioners had held the first

[1] 24 T.C. 171

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sum so paid to be a proper deduction and the second to be not a proper deduction. With respect to the latter, Lawrence J. held that there was overwhelming evidence before the commissioners on which they might find, as they had, that the latter sum was not deductible, and he then proceeded as follows at p. 177:

> In the other case there is much more difficulty, but the Commissioners have in that case expressed their finding as a finding of fact that the money was wholly and exclusively laid out for the purposes of the business, and was a proper deduction. Having regard to the fact that the commission was payable in resepct of a sum of money which was raised in respect of the guarantee of the amount of an existing trade debt, and the fact that that trade debt was very largely reduced in the two years after the guarantee had been given, and the fact that the parties were, according to the evidence, anxious that this loan should be repaid as quickly as possible, I feel unable to say that there was no evidence upon which the Commissioners might come to the conclusion of fact which they did.

In *Ward v. Anglo-American Oil Co. Ltd.*[1] Singleton J. expressed the distinction thus at p. 108:

> It is unnecessary for me to deal further with the matter except to say that bearing in mind the words of Lord Sumner and Lord Parker in the case of *Usher's Wiltshire Brewery, Limited v. Bruce*, 6 T.C. 399, and that which was said by Lord Justice Warrington in *Atherton v. British Insulated & Helsby Cables*, 10 T.C. at page 182, I conceive the scheme of that part of the Act and of Schedule D, which deals with profits or gains from trade and deductions which can be made therefrom, to be this: that one must arrive at profits or gains in the ordinary commercial or business sense. Interest on ordinary bankers' overdrafts which has arisen for ordinary trading purposes is a legitimate deduction, because it is money wholly and exclusively laid out or expended for the purpose of trade. On the other hand, interest on an issue of notes, whether for one year or for a longer period, may fall, and in the circumstances of this case does fall, into an entirely different category. It seems to me to savour much more of a capital nature or of some fund employed or intended to be employed as capital, and I do not think the issue of notes on which interest accrued would be regarded by business men as of the same nature as facilities obtained for ordinary trading purposes.

In *Bennett and White Construction Co. Ltd. v. Minister of National Revenue*[2] the Supreme Court of Canada considered a case under the *Income War Tax Act* wherein the taxpayer had incurred expense in securing the guarantees of its principal shareholders for its indebtedness to a bank

[1] 19 T.C. 94

[2] [1949] S.C.R 287; C.T.C. 1; 49 D.T.C. 514.

and held that the expense in question was an outlay or payment on account of capital. Locke J., with whom Rinfret C.J. concurred, said at p. 292:

I am of the opinion that expenditures such as these made by reason of the necessity of obtaining working capital are payments of the same nature.

Rand J. said at pp. 292-293:

The case for the company is that the payments were "wholly, exclusively and necessarily" paid out to earn the income. In a remote sense that is so; but the same can be said for almost every outlay in the organization of the company. The conception of the statute however is an earning of income through the use of capital funds which in one form or another constitute the means and instruments by which the business is prosecuted; but that providing or organizing them must be clearly differentiated from the activities of the business itself has been lately reaffirmed by the Judicial Committee in *Montreal Coke and Manufacturing Company v. The Minister of National Revenue,* [1944] C.T.C. 94, [1944] A.C. 126.

The acquisition of capital may be by various methods including stock subscriptions, permanent borrowings through issues of securities, or term loans; and ordinarily it should make no difference in taxation whether a company carried on financially by one means or another. In the absence of statute, it seems to be settled that to bring interest paid on temporary financing within deductible expenses requires that the financing be an integral part of the business carried on. That is clearly exemplified where the transactions are those of daily buying and selling of securities: *Farmer v. Scottish Trust,* [1912] A.C. 118: or conversely lending money as part of a brewery business: *Reid's Brewery v. Mail,* [1891] 2 Q.B. 1.

Now the Crown has allowed the deduction of interest paid to the bank, and it must have been either on the footing that the day-to-day use of the funds was embraced within the business that produced the profit, or that the interest was within section 5, paragraph (*b*). But setting up that credit right or providing the banking facilities is quite another thing from paying interest; it is preparatory to earning the income and is no more part of the business carried on than would be the work involved in a bond issue. The lender might insist on being furnished with premises near the scene of the works; it might exact any other accommodation as the price of its willingness to provide funds; but all that would be outside the circumference of the transactions from which the income arises. Within the meaning of the Act, the premiums create part of the capital structure and are a capital payment: *Watney v. Musgrove,* 5 Ex. D. 241. they furnish a credit apparatus to enable the business to be carried on, and although they affect the distributable earnings of the company, they do not affect the net return from the business. That was the view of O'Connor, J. below and I agree with it.

Estey J. said at p. 296:

This was not a borrowing of money on a temporary or short-term basis such as is necessary and incidental to the ordinary and usual transactions in the course of the appellant's business.

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> The learned trial Judge held that the sums as borrowed were capital and the evidence fully supports his finding.

and at p. 299:

> The appellant upon obtaining this line of credit was enabled to complete its financial arrangements at the bank, which enabled it to undertake the larger volume of business. Sums borrowed under such circumstances are capital and the sums paid are not deductible under the provisions of 6(1)(*a*).

In the present case, while the loan secured by the partners by mortgaging 61 Beatrice Street was on its face not of a temporary nature I think it may in the circumstances be inferred that the partners expected to dispose quickly of the property in just such a transaction as subsequently occurred. From their point of view the borrowing can, I think, accordingly be regarded as temporary since they did not expect to have the property for long and the assumption and retirement of the loan were in fact provided for in the transaction in which the property was sold. Next it appears that the borrowed money was not simply deposited in the partnership bank account to be used as the day-to-day exigencies of the business might require but was directly used to pay a part of the purchase price of the property itself, a property which was undoubtedly acquired as a revenue asset of the business. And in the ordinary course neither this money nor anything representing it would again fall into the hands of the partners or be capable of use by them in their business. Though in being used to purchase a trading asset it was used as circulating capital is used, it would not be used again in the way that circulating capital is ordinarily used over and over again. Nor did this borrowing expand or add anything of a permanent nature to the assets employed as capital in the business. I am accordingly of the opinion that the money so borrowed was not used as capital in the business in the sense in which the word "capital" is used in s. 12(1)(*b*) and that the bonus of $500 was not a payment or outlay on account of capital within the meaning of that clause. It follows that the bonus was properly deductible in computing the profit from the partnership business. Nor, in my opinion, is this conclusion affected by s. 11(1)(*cb*), which operates to permit the deduction therein mentioned, whether it is prohibited or not by s. 12(1)(*a*), (*b*), and (*h*), but does not itself prohibit deduction of an amount the deduction of which is not prohibited by s. 12.

On the other hand, with respect to the mortgage on 23 Cowan Avenue the situation differs in that the evidence does not show why the money was borrowed or what it was used for, and the burden being on the taxpayer to satisfy the Court that the bonus which he seeks to deduct was not incurred on account of capital, even though the retirement of the loan was provided for in the same way as for the other loan, in the absence of satisfactory evidence that the borrowed money was not used to provide fixed or working capital for the partnership, I am of the opinion that the appellant has not established any right to deduct the bonus.

The appeal will be allowed with respect to the bonus on the mortgage on 61 Beatrice Street only, and the assessment will be referred back to the Minister to be revised accordingly. The appellant is entitled to the costs of the appeal.

Judgment accordingly.

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BETWEEN:

EDGAR LOISELLE ....SUPPLIANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Crown—Petition of right—Expropriation—Injurious affection to land—Compensation—St. Lawrence Seaway Authority Act, R.S.C. 1952, c. 242, ss. 3(1), 10, 18(3)—Exchequer Court Act, R.S.C. 1952, c. 98, ss. 46, 49.

The suppliant, a garage operator, sought damages for loss of business and injury to his property resulting from the construction of a canal and locks on an adjoining property by the St. Lawrence Seaway Authority, an agent of the Crown in the right of Canada. He alleged that such construction resulted in the obstruction of the highway on which his land abutted and necessitated a relocation whereby he was deprived of access to the highway and his property left in a cul de sac. No land of the suppliant was expropriated for the purpose of the seaway.

Held: That the evidence established that the construction of the works of the Authority, an agent of the Crown, rendered inevitable the consequences of which the suppliant complained.

2. That the *St. Lawrence Seaway Authority Act,* R.S.C. 1952, c. 242, created the St. Lawrence Seaway Authority and authorized it in the exercise of its powers to acquire lands by expropriation and to pay compensation for lands injuriously affected by the construction of works erected by it.

3. That in a case of injurious affection a claim for loss of business profits cannot be maintained. The damage or loss must be to the property itself and not in respect of any particular use to which it may from time to time be put. *Beckett & Midland Ry. Co.* L.R. 3 C.P. 82.
4. That the lands of the suppliant were injuriously affected by the works erected by an agent of the Crown (the Authority) and for such injuries the suppliant was entitled to be paid compensation as provided by s. 18(3) of the *St. Lawrence Seaway Authority Act.*

Autographic Register Systems v. C.N.R. [1933] Ex. C.R. 152; *Renaud et al. v. C.N.R.* [1933] Ex. C.R. 230 at 234; *Beckett v. Midland Ry. Co.* 3 L.R.C.P. 82; *Metropolitan Board of Works v. McCarthy* L.R. 7 H.L. 243, referred to.

PETITION OF RIGHT for the recover of damages against the Crown for loss of business and injurious affection to suppliant's land resulting from the construction of a public work.

The action was tried before the Honourable Mr. Justice Dumoulin at Montreal.

François Dorval and *M. S. Yellin* for suppliant.

André Sabourin, Q.C., Luc Couture and *Roger Tassé* for respondent.

DUMOULIN J. now (October 6, 1960) delivered the following judgment:

Par cette pétition de droit, monsieur Edgar Loiselle fait valoir que, depuis 1949, il exerçait le métier de garagiste dans le village de Melocheville, municipalité rurale sur le parcours de la route nationale numéro 3, qui relie Montréal et Valleyfield. Sise à l'une des entrées de Melocheville, cette propriété était la première en direction de Valleyfield.

Loiselle nous apprend qu'il acquit le terrain en 1948 au prix de $5,000, et que la construction de son garage aurait coûté approximativement $10,000.

L'acte d'achat corroboratif, pièce P-1, daté le 16 juin 1948, porte que «. . . cet emplacement est maintenant connu et désigné comme étant partie de la subdivision du lot numéro UN du lot originaire numéro TROIS CENT (Ptie No. 300-1) des plan et livre de renvoi officiels de la paroisse de St-Clément, comté de Beauharnois; mesurant quatre-vingt-seize pieds de largeur par cent quarante-quatre pieds de profondeur, mesure anglaise; borné, en front au sud-est par le chemin public, . . .»

Attenante à ce garage, sur le lot n° 300-1, se trouve aussi la maison de M. Loiselle.

L'évaluation des propriétés du pétitionnaire par le constructeur Rosaire Gratton, dont la version orale est aussi consignée dans la pièce littérale P-16, assigne à cette résidence et à ses dépendances, dépréciation déduite, une valeur de $9,761.80, avant le 30 juin 1957.

«Le, ou vers le, 30 juin 1957,» lisons-nous à l'art. 5 de la pétition, «l'Administration de la VOIE MARITIME DU SAINT-LAURENT,» «un mandataire de Sa Majesté, du chef du Canada», selon l'expression usitée au para. (2) de l'art. 3 du chap. 242, Statuts revisés de 1952, «. . . dans l'exercice de ses attributions et à l'occasion de la canalisation du Saint-Laurent, a bloqué complètement la route nationale, et, en déviant la course, elle a isolé le commerce du demandeur dans un cul de sac, lui causant ainsi des dommages très considerables;» en compensation desquels le pétitionnaire réclame la somme de $85,000 et les intérêts.

Loiselle explique, à l'art. 3 de sa pétition que son poste de commerce (garage) avait front alors sur la nationale 3, conduisant de Montréal à Valleyfield, route «. . . très achalandée . . .» et qu'il «. . . y exploitait un commerce florissant».

«L'Administration de la VOIE MARITIME DU SAINT-LAURENT,» ajoute la pétition en son art. 13, «ayant creusé son canal sur la propriété adjacente à celle du pétitionnaire, a obligé, par son fait, le Ministère de la Voirie de la Province de Québec, à trouver un moyen de permettre à la circulation routière de franchir le Canal, soit par un pont, soit par un tunnel, et peu importe la formule adoptée, les droits du pétitionnaire sont atteints . . .» Une partie des vastes propriétés de la Voie maritime est située, en effet, à l'est de l'emplacement d'Edgar Loiselle (voir, entre autres, le plan, pièce P-11), un mince intervalle de dix pieds séparant le garage de la ligne de division (pétition, art. 7).

Aucune expropriation n'ayant été pratiquée sur le lot 300-1, les griefs allégués par le requérant, pour dépréciation de la valeur de ses immeubles et perte d'achalandage commercial, découlent uniquement de ce détournement de la route nationale 3, dont j'essaierai de déduire les conséquences physiques et pécuniaires selon la preuve soumise.

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Le garage public et la résidence de M. Loiselle sont construits sur une rue qui porte le nom de «Principale», avec accès direct, avant le 30 juin 1957, à la grande voie carrossable Montréal-Valleyfield. Sur le graphique de localisation, pièce P-5, le témoin Loiselle a désigné par un «X» le site du garage et par «Y» celui de sa maison. Ce poste de commerce était affecté aux réparations «générales», mais de façon beaucoup plus rémunératrice aux ventes d'huiles lubrifiantes et de gazoline. A ce sujet, notons-le sans plus, Loiselle nous apprendra que: «Autrefois [c.-à-d. jusqu'au 30 juin 1957], ma clientèle passante, non résidente à Melocheville, représentait 75% de mon achalandage; depuis, cette clientèle est tombée à 25% environ. Jadis, il me fallait trois employés, un seul suffit maintenant».

Trois photographies (les pièces 6, 7 et 8), plusieurs devis ou esquisses, mais particulièrement le plan P-11, facilitent la compréhension des changements drastiques à l'état des lieux, nécessités par le creusage du canal de la Voie maritime du Saint-Laurent.

La réalisation de ce gigantesque projet dans la région de Melocheville, a déterminé d'abord le sectionnement et la fermeture de la nationale 3 à 68 pieds, direction nord-ouest, du garage Loiselle, afin d'y aménager un canal de renvoi et l'écluse appropriée, comme le laisse entrevoir la photo, P-6, sur laquelle apparaissent aussi deux petits bâtiments de contrôle. Une partie de ces ouvrages, correspondant à ce qui était hier un élément de l'artère principale numéro 3, en occupe dorénavant l'assiette. Une clôture de broche, faiblement imprimée sur P-6, et posée par les agents de l'intimée à 70 pieds au nord-ouest de la propriété Loiselle, interdit toute circulation au-delà.

M. Alphonse Gratton, de Westmount, ingénieur en chef adjoint au ministère provincial de la Voirie, l'un des deux signataires du plan P-11, dira que le canal secondaire ou de renvoi et l'écluse connexe sectionnent l'ancien tracé de la route nationale, reconstituée présentement à 600 pieds au sud-est du garage d'Edgar Loiselle (cf. plan P-11), mais sans aucune communication possible avec ce lot 300-1.

Désormais, tout piéton ou automobiliste qui se rendrait au garage du pétitionnaire devra, au retour, rebrousser chemin sur une distance de 1,500 pieds jusqu'au rond-point, au sud-ouest du nouveau parcours de la route nationale 3.

Loiselle témoigne que, par suite de ce bouleversement, «la clientèle est éloignée de mon garage au point qu'elle ne sait pas où il se trouve».

Je ne saurais mieux terminer ce chapitre des transformations radicales apportées à l'état des lieux par les mandataires de l'intimée qu'en référant aux photographies, P-7, P-8 et au plan P-11, dont je résumerai les indications.

P-7 est une photo aérienne montrant, au nord-ouest, le village de Melocheville avec, en aval, l'écluse du canal de la Voie maritime. Sur cette pièce, Loiselle a tracé un «X» à la hauteur de l'exutoire de renvoi, à 70 pieds de son terrain, indiquant par une ligne continue l'assiette de l'ancienne route 3, et, par des hachures, le nouveau chemin.

P-8, autre photographie aérienne, montre de façon très nette le canal principal et le secondaire ou de renvoi marqué d'un «X».

Le grand plan P-11, dressé par les cartographes du ministère de la Voirie, situe avec une précision absolue: a) le lot 300-1, et au moyen de deux rectangles rouges, le garage et la demeure du pétitionnaire; b) la course, maintenant disparue de la voie principale n° 3, coloriée en rose; c) le rond-point de raccord semblablement teinté, puis, d) la «nouvelle route n° 3», tracée à l'encre jaune avec ligne médiane verte.

Enfin, il est de notoriété publique, et la correspondance déposée au dossier l'établit, qu'un tunnel à deux pistes ou tubes, ayant chacun 24 pieds de largeur, assure, sous le canal, la continuité de la nationale 3, récemment construite.

L'intimée, par son plaidoyer de défense, nie les allégations de la pétition de droit, ajoutant (art. 12) «qu'il n'existe aucune atteinte défavorable (injurious affection) et que le requérant n'a subi aucun préjudice ou dommage par suite des actes de l'Administration de la Voie Maritime du St-Laurent». Cette négation des faits est suivie, à l'art. 13, d'une défense en droit énonçant que: «. . . il n'y a aucun lien de droit entre le requérant et l'intimée; le changement d'assiette de la Route n° 3 a été décidé par le ministère de la Voirie de la Province de Québec, lequel ministère a juridiction sur ladite route n° 3».

Ce dernier moyen, une sorte de mise en cause *proprio motu* du ministère québécois de la Voirie, réapparaît à la p. 2 du mémoire ou factum de l'intimée. «C'est la province»,

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voyons-nous, «qui effectivement a déplacé, détourné et relogé la route; à ces fins, l'Administration n'a qu'effectué certains travaux ayant permis cette relocation suivant la décision ou détermination de la province elle-même, soit du Ministre de la Voirie, en raison de l'approbation des plans des travaux de la Voie Maritime . . .» Conclusion, quelques lignes plus bas: «En conséquence, si l'Administration est responsable, sa responsabilité n'est qu'indirecte et ses travaux ne sont que la cause indirecte et trop lointaine de l'isolement ou atteinte défavorable dont se plaint Loiselle».

Disposons immédiatement de cette tentative d'exonération en répondant à la question: Qui, en fait et en droit, a rendu inévitable par ses actes le détournement de la route n° 3?

Le 11 janvier 1956, l'honorable Lionel Chevrier, alors président de l'Administration de la Voie maritime du Saint-Laurent, écrivait au ministre de la Voirie, l'honorable Antonio Talbot, une lettre dont il importe de reproduire les deux premiers paragraphes (pièce A):

Cher monsieur Talbot,

L'Administration de la Voie Maritime du Saint-Laurent est maintenant prête à mettre à exécution ses plans pour la construction d'écluses dans la section de Soulanges afin de relier le Canal hydraulique de Beauharnois au Lac Saint-Louis. La construction des écluses exigera une réorganisation des installations routières.

Notre administration est prête à assumer à elle seule le coût du détournement de la route N° 3 sous le canal au moyen d'un tunnel à un seul tube avec route de 28 pieds et chaussée de 5 pieds, tel qu'indiqué sur les dessins N° 4819 et 4731-12A.

Le 21 février 1956, l'honorable Monsieur Chevrier écrit à ce même sujet au Premier Ministre de la Province de Québec, l'honorable Maurice Duplessis. Je cite le troisième paragraphe de cette lettre, pièce B:

Afin de hâter la solution de ce problème, je suggère l'arrangement suivant:

1. L'Administration de la Voie Maritime du Saint-Laurent construira un tunnel à deux tubes (deux routes de 24 pieds), tel qu'indiqué sur les plans 4819 et 4731-13A déjà en votre possession.
2. La Province de Québec contribuera la somme de $300,000 à ces travaux [qui, tel que dit à la pièce A, devaient coûter $2,826,501].
3. L'Administration se rend responsable de l'entretien du tunnel.

Dans sa réponse à cette lettre, l'honorable Monsieur Duplessis, le 16 mars 1956 (pièce C) précisait que:

> Quant au tunnel, il est compris et accepté de part et d'autre:
>
> (1) que l'Administration de la Voie Maritime du Saint-Laurent construira un tunnel à deux tubes (deux routes de 24 pieds), tel qu'indiqué sur les plans 4819 et 4731-13A qui nous ont été remis lors de l'entrevue à mon bureau, à Québec, le 10 février dernier. [ces deux plans furent préparés par les services techniques de l'intimée].
>
> (2) que la province de Québec apportera une *généreuse* [ce soulignement n'est pas de moi] contribution de $300,000.00 à la construction de ce tunnel.
>
> (3) que l'entretien de ce tunnel sera à la charge et sous la responsabilité de l'Administration de la Voie Maritime du St-Laurent.

Cette correspondance démontre bien que la cause, non seulement immédiate, mais unique, du détournement de la route nationale est spécifiée dans la lettre du 11 janvier 1956, de l'honorable Lionel Chevrier à l'honorable Antonio Talbot (pièce A), et je répéterai cette phrase: «La construction des écluses exigera une réorganisation des installations routières».

N'eût été le creusage de ces écluses, appartenant à la Voie Maritime, jamais ne se fût soulevé le problème du déplacement de la route provinciale. Le gouvernement du Québec aurait eu mauvaise grâce—et, probablement, mauvaise cause—de vouloir gêner la poursuite de ces travaux d'envergure internationale. Il reste que l'acte d'un «mandataire» de l'intimée a rendu inéluctable les conséquences dont se plaint le pétitionnaire.

Une loi particulière, le chap. 242 des Statuts revisés du Canada, 1952, crée «. . . une corporation appelée l'Administration de la voie maritime du Saint-Laurent» (art. 3-1); l'investit du pouvoir requis à la poursuite de ses objets (art. 10), par le moyen, entre autres, de l'expropriation (art. 18). Advenant une prise forcée de possession ou une «atteinte défavorable», l'art. 18(3) édicte que:

> L'Administration doit verser une indemnité à l'égard des terrains pris ou acquis sous le régime du présent article, ou à l'égard des dommages causés aux terrains défavorablement atteints par la construction d'ouvrages établis par elle, et toute réclamation contre l'Administration, pour une telle indemnité, peut être entendue et décidée en la Cour de l'Échiquier du Canada selon les articles 46 à 49 de la *Loi sur la Cour de l'Échiquier*.

Les biens immeubles du requérant n'ayant été l'objet d'aucune expropriation, il reste à voir, par ailleurs, s'ils n'auraient point subi une certaine «atteinte défavorable»,

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comme le prévoit la loi, en conséquence directe de travaux exécutés ou rendus nécessaires par l'Administration de la voie maritime.

Posons tout d'abord les principes qui devront guider cette investigation.

Dans son remarquable traité: "The Law of Expropriation" (1954), l'honorable Juge Challies, de la Cour Supérieure à Montréal, rappelle, à la p. 136, que:

> The conditions that must be fulfilled to justify a claim for injurious affection, if no land is taken, are well set forth by Angers J. in *Authographic Register Systems v. C.N.R.* [1933] Ex. C.R. 152, 155.

Ce quadruple facteur, feu le juge Angers, l'avait déjà consigné en français, antérieurement à l'instance précitée, dans la cause *Renaud et al. v. Canadian National Railway Co.*[1], où nous lisons que:

> Pour donner lieu à un recours en indemnité, quatre conditions sont requises:
>
> 1. il faut que le dommage ait été causé par un acte autorisé par le statut;
> 2. il faut que ce dommage provienne d'un acte qui, s'il n'eût pas été autorisé par le statut, aurait donné ouverture à une action en vertu du droit commun;
> 3. il faut que le dommage soit causé à l'immeuble lui-même, c'est-à-dire que la construction de l'ouvrage public le déprécie ou en diminue la valeur; il ne peut être question d'indemnité dans le cas de dommage personnel ou au Commerce;
> 4. il faut que le dommage résulte de la construction et non de l'exploitation de l'ouvrage public.

Il semble manifeste que la réclamation de Loiselle satisfasse d'emblée aux exigences de la première, de la seconde et de la quatrième condition.

En effet, un texte législatif autorise, *inter alia,* le creusage de canaux, ouvrage qui, joint à la fermeture d'un élément de route nationale, eût été exorbitant du droit des individus ou de l'autorité municipale. Et il n'est pas moins assuré que la construction du canal de renvoi et de l'écluse, et non leur utilisation, est le facteur déterminant du préjudice pour lequel le requérant demande réparation.

[1] [1933] Ex. C.R. 230, 234.

La troisième condition demeure seule en cause; elle ne peut avoir d'effet que si la construction de l'ouvrage public déprécie ou diminue la valeur d'un immeuble, sans aucune acception du préjudice occasionné à la jouissance personnelle ou aux avantages commerciaux.

L'actuelle pétition de droit, il convient de le répéter, postule une indemnité de $85,000 pour perte d'achalandage, mais généralement aussi pour atteinte aux droits et dépréciation des biens du pétitionnaire (articles 10 et 13).

Informés, comme nous le sommes maintenant, des principaux incidents du litige, il est compréhensible, sinon admissible en droit, que Loiselle, commerçant de son état, ait mis en vive lumière la perte de sa clientèle, et appuyé moins sur la dévalorisation de ses immeubles, indépendamment de leur destination mercantile.

Or, une jurisprudence constante, britannique et canadienne, se refuse à indemniser le dommage infligé par la contraction des affaires ou du chiffre des profits.

L'honorable Juge Anglin de la Cour Suprême du Canada (et peu après juge en chef), se prononçant dans l'affaire *Canadian Pacific Railway Co. and Alberta Albin*[1], à la suite d'une revue de doctrine anglaise et de décisions canadiennes sur un sujet analogue à celui qui nous occupe, concluait que:

> Under English law an award for loss of business profits in a case of injurious affection cannot be maintained.

Dois-je joindre que le distingué juriste tenait que les solutions apportées sur ce point par nos cours pouvaient s'inspirer du droit anglais.

C'est à cette opinion, je présume, que l'hon. Juge Angers entendait se conformer quand, dans la cause citée plus haut de *Renaud v. Canadian National Ry. Co.*, il s'exprimait en ces termes (p. 235):

> Il ne suffit pas que le propriétaire subisse quelque inconvénient ou encourt quelque perte dans son commerce pour qu'il ait droit à une indemnité; il faut que l'immeuble lui-même, pour le propriétaire actuel ou pour tout autre, soit détérioré . . .

Puis ceci, quatre lignes plus bas:

> Il ne faut pas que le dommage causé en soit un dont souffre le public en général; ce dommage doit être particulier à la propriété du réclamant.

[1] (1919) 59 Can. S.C.R. 151, 161.

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Et la conséquence résumée à la p. 242:

En somme la doctrine aujourd'hui est bien établie et ne se discute plus; il ne peut y avoir recours en indemnité que lorsque la propriété est détériorée ou lésée, en d'autres mots, lorsqu'elle est dépréciée ou diminuée en valeur, ou, selon l'expression anglaise, *injuriously affected*. Aucun recours n'existe lorsqu'il n'y a qu'un inconvénient dont souffre le public en général.

Un précédent anglais, celui de *Beckett v. Midland Railway Co.*[1], dont l'âge vénérable n'obnubile pas la clarté, dans un cas identique au nôtre à toutes fins utiles, enseigne que:

... the damage complained of must be one which is sustained in respect of the ownership of the property,—in respect of the property itself, and not in respect of any particular use to which it may from time to time be put: in other words it must ... be a damage which would be sustained by any person who was the owner, to whatever use he might think proper to put the property ... The property is to be taken in *statu quo,* and to be considered with reference to the use to which any owner might put it in its then condition, that is, as a house.

Conformément à ces directives, sans mettre en ligne de compte le métier du requérant, recherchons si l'ouverture d'un canal, le montage d'une écluse à proximité immédiate du lot 300-1, la fermeture de la route nationale à 70 pieds au-delà, l'enfouissement de cette propriété, naguère riveraine de la grand-route, au fond d'une impasse ou cul-de-sac, recherchons, dis-je, si de pareilles perturbations, imputables aux agents de l'intimée, ont pu se produire et laisser intacte la valeur réelle ou marchande du terrain, de la maison et des bâtiments de Loiselle.

Au vrai, cette recherche ne saurait être ni longue ni ardue, car poser la question c'est répondre, implicitement du moins, à tous les points soulevés. C'est reconnaître que les inconvénients majeurs infligés au propriétaire ne se limitent pas à «quelque perte dans son commerce", ne sont pas du genre de ceux dont souffrirait le public en général, mais, au contraire, sont «particuliers à la propriété du réclamant», et que l'immeuble ainsi affecté souffre d'une indéniable dépréciation «pour le propriétaire actuel ou pour tout autre».

Voudrait-on une corroboration tangible de ce préjudice particularisé que la pièce P-2 ne laisserait pas de la procurer. Nous y trouvons la constatation authentifiée le 26 mai 1956, de l'achat par Edgar Loiselle, au prix de $3,500,

[1] (1867) L.R. 3 C.P. 82, 94, 95.

d'un emplacement en bordure de la nationale 3, «à deux milles de son ancien garage», afin, dira le réclamant, d'y ériger un nouveau poste commercial.

Par ailleurs, dans la cause de *Metropolitan Board of Works v. McCarthy*[1], un arrêt des tribunaux anglais, vidant un litige qui s'apparente de près au nôtre, Lord Penzance écrivait que:

> The question then, is, whether when a highway is obstructed, the owners of those lands which are situated in a sufficient degree of proximity to it to be depreciated in value by the loss of that access along the highway which they previously enjoyed, suffer especial damage "more than" and "beyond" the rest of the public. It surely cannot be doubted but that they do.
>
> The immediate contiguity to a highway, commonly called frontage, [c'était naguère le cas pour le lot 300-1], is a well known and powerful element in the value of all lands in populous districts. Where frontage to a highroad does not exist, propinquity and easy access to a high road are equally undoubted elements of value in such districts, distinguishing lands which have them from those which have them not. If, then, the lands of any owner have a special value by reason of their proximity to any particular highway, surely that owner will suffer special damage in respect of those lands beyond that suffered by the general public if the benefits of that proximity are withdrawn by the highway being obstructed. And if so, the owner of such lands appears to me to fall within the rule under which an action is maintainable, though the right interfered with is a public one.

De tout ce qui précède, les faits, la loi organique, la jurisprudence, il me faut conclure que les travaux exécutés par les mandataires de Sa Majesté la Reine ont causé aux immeubles du pétitionnaire ce tort sérieux qui astreint l'infracteur au paiement d'une adéquate indemnité, prévue à l'art. 18(3) du chap. 242.

Les biens immobiliers d'Edgar Loiselle, indépendamment de toute affectation, ayant subi une dévalorisation appréciable en argent, quel en sera l'indice réel?

Loiselle avait rapporté que: «Dans mon bout la canalisation n'a déterminé aucune plus-value des terrains». Il n'était guère besoin de le signaler, pas même dans le dessein d'écarter l'hypothèse compensative suggérée à l'art. 49 de la *Loi sur la Cour de l'Échiquier*.

Un courtier en immeubles, M. Guy Dansereau, de Port-Masson, s'est rendu sur place afin de dresser une évaluation de la propriété Loiselle dans sa condition présente. Dansereau, par ailleurs, a pris connaissance du rapport déposé au dossier de la cause sous la cote P-16, par M. Rosaire Grat-

[1] (1874) L.R. 7 H.L. 243, 263.

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ton de Montréal, constructeur-évaluateur, dont il a entendu aussi le témoignage. Il corrobore les constatations consignées dans l'expertise susdite ajoutant: «Je ne crois pas qu'il serait facile d'obtenir un prix de $10,000 actuellement pour le garage Loiselle». Il importe de remarquer, et j'en ai éprouvé l'impression très nette, que l'expression «garage» englobait, dans l'opinion du témoin, la résidence et les dépendances.

Six mois auparavant, soit à la fin de mai 1959, Guy Dansereau occupait encore les fonctions de gérant d'une compagnie de finance à Beauharnois, près de Melocheville. Il affirme qu'en cette qualité de financier, il n'aurait pas avancé $100 à M. Loiselle sur le crédit de ses immeubles: «parce qu'ils sont commercialement dévalorisés au complet». L'exagération péjorative ici est flagrante, car la dépréciation, si importante soit-elle, ne saurait être totale.

Les indications fournies oralement par Rosaire Gratton, et réitérées avec de plus amples détails dans la pièce P-16, constituent l'apport basique et suffisant pour liquider les dommages-intérêts. Je résume ce relevé comptable que l'on pourra relire plus au long à la pièce P-16.

Le terrain: Superficie totale de 14,283 pieds carrés. Valeur avant les travaux de canalisation, à raison de $0.50 le pied carré:		$7,141.50
Le garage: 30 pieds de front par 50 en profondeur et 15 en hauteur; 22,500 pieds cubes, à $0.60 du pied, donnant une valeur de $13,500, moins la dépréciation depuis 1948, computée à 10%, soit $1,350, laissant un reliquat utile de	$ 12,150.00	
Cabinet d'aisance: Adjacent au garage; profondeur: 10 pieds par 6½ en front et 12 de haut; 780 pieds cubes, évalué, après dépréciation, calculée toujours, depuis 1948 et au taux de 10%:	500.00	
Entrepôt à marchandises: Situé à l'arrière du garage; 900 pieds cubes; valeur dépréciée:	500.00	
Fosse à réparations (Repair Pit): Creusée dans le roc; épaulements de béton; munie d'un dispositif pour ajustage des roues; évaluée, dépréciation déduite, à:	600.00	
Piston hydraulique pour lubrification: (Hydraulic Hoist). Soit un cric hydraulique, avec rainures pour rails de soutien; évalué à:	400.00	
	$ 14,150.00	

Le garage avec ses dépendances et accessoires auraient donc, selon les chiffres incontestés de M. Gratton, une valeur de $14,150, le terrain étant porté à $7,141.50. Voyons maintenant ce qu'il faut penser des autres constructions.

La résidence: Comprenant un cubage de 14,215 pieds—maison neuve—avec lambris extérieurs en papier-brique; toit en bardeaux d'asphalte; cheminée en blocs de ciment; porche en façade, couvert; galerie grillagée; 5 chambres et une très grande cuisine; une chambre de bain; carré de la bâtisse principale (pièce sur pièce) de douze pouces (12") d'épaisseur, décoration à l'émail, évaluée à $0.60 le pied cube; dépréciation déduite depuis 1948:	$ 8,529.00
Dépendance: Un cubage de 3,082 pieds, valant, à raison de $0.40 le p.c. après dépréciation:	1,232.80
Garage privé: En bois; volume total: 2,195 p.c., valeur dépréciée:	800.00
	$ 10,561.80

Soit pour la résidence, dépendance et garage privé, une valeur résiduaire de $10,561.80 qui, additionnée avec celles du terrain, du garage et constructions annexes, forment un total de $31,853.30.

J'ignore si le piston ou cric hydraulique, affermi à sa base dans le ciment du plancher peut être enlevé utilement. Dans le doute, je dois m'abstenir et n'accorder rien.

En l'occurrence, le lot 300-1 et ses constructions diverses sont resserrés dans une sorte de cercle vicieux. Selon les témoignages, du reste non contredits, le garage commercial nuit à la maison auprès de qui n'entendrait acquérir que celle-ci; la maison, par choc en retour, nuisant au garage pour qui, et on ne sait trop dans quelle vue, désirerait acheter ce seul bâtiment.

Tout considéré et attentivement pesé, j'estime que le terrain, la résidence, la dépendance attenante et le garage privé sont «défavorablement atteints» (injuriously affected), dans la proportion de moitié de leur valeur telle qu'elle était le, et avant le 30 juin 1957; quant au garage commercial avec ses dépendances et accessoires fixés à perpétuelle demeure, le coefficient de leur dépréciation, depuis la même date, ne saurait être inférieur aux deux tiers de leur valeur.

Appréciées en argent ces proportions de dévaluation donnent des montants de:

Pour le terrain: 50% de $7,141.50, soit une indemnité de:	$ 3,570.75
Pour la maison, etc.: 50% de $10,561.80, soit une indemnité de:	5,280.90
Pour le garage, etc.: 66⅔% de $13,750, soit une indemnité de: ...	9,166.67
	$ 18,018.32

La compensation globale se totalise donc à cette somme de $18,018.32.

Un dernier mot. Comme il ne m'est pas loisible d'indemniser spécifiquement le garagiste Loiselle pour perte de clientèle et diminution corollaire du volume de ses affaires, je ne puis faire état de la pièce P-17, l'audition de ses livres, par M. A. Lavigueur, comptable accrédité, qui atteste une moyenne annuelle de profits réels de $6,347.10 durant la période quinquennale 1952-1956.

Par tous les motifs qui précèdent, cette Cour ordonne et décide que le pétitionnaire a droit de recouvrer de Sa Majesté la Reine la somme de $18,018.32, étant une partie du recours sollicité dans sa pétition de droit, avec l'intérêt à 5% l'an depuis le 30 juin 1957, et les frais à taxer.

Jugement en conséquence.

BETWEEN:

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THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

CLAUDE ROUSSEAU ....RESPONDENT.

Revenue—Income—Income tax—Credit balance not a "payment" or "receipt" subject to tax—The Income Tax Act, R.S.C. 1952, c. 148, ss. 2(3), 3, 4, 5, 6, 11(6)(9)(11) and 24.

By resolution of a company of which he was a shareholder, president and managing director, a taxpayer was authorized to be paid an annual salary of $10,000, and as owner of a building leased to the company, an annual rental of $12,000. In his income tax return for 1954 the taxpayer declared his annual income to be $22,000. The Minister added to the declared income, capital allowance on the taxpayer's car and certain travelling expenses paid by the company. By notice of objection the taxpayer alleged that the additions were not justified because although he had declared an income of $22,000 and paid income tax thereon he had received but $15,265.86 in cash and the balance constituted a credit on the company's books. The taxpayer's appeal to the Income Tax Appeal Board was allowed in part. The Minister appealed from the decision and the taxpayer cross-appealed.

Held: That the general rule under the *Income Tax Act* is that in the absence of express provision to the contrary only income paid or received is taxable. The fact that a taxpayer is credited with a balance owing him on a company's books does not constitute a payment nor a receipt within the meaning of the Act. *Capital Trust Corporation Ltd. v. Minister of National Revenue* [1936] Ex. C.R. 163, affirmed by [1937] S.C.R. 192; *Gresham Life Assurance Society Ltd. v. Bishop* [1902] A.C. 287 at 296.

2. That as to the exceptions to the rule, s. 6 refers to interest and income from partnerships or syndicates, and s. 24 to securities in satisfaction of income debts, and neither provision applies to the facts in the instant case. Other than these exceptions a tax cannot be levied on debts so long as they remain unpaid.
3. That under s. 5(*b*)(*v*) the taxpayer was not entitled to deduct the disputed travelling expenses as they were personal disbursements.
4. That the taxpayer having failed to prove he met the requirements of subsections (6) or (9) of s. 11 was not entitled to capital car allowance under s. 11(11) of the Act.

APPEAL and cross-appeal from a decision of the Income Tax Appeal Board.[1]

The appeal was heard before the Honourable Mr. Justice Fournier at Quebec.

Paul Boivin Q.C. and *Paul Ollivier* for appellant.

[1] (1958) 58 D.T.C. 631; 20 Tax A.B.C. 333.

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MINISTER OF NATIONAL REVENUE v. ROUSSEAU

Louis N. LaRoche for respondent.

FOURNIER J. now (October 11, 1960) delivered the following judgment:

Dans cette cause, le Ministre du Revenu national en appelle du jugement de la Commission d'Appel de l'Impôt sur le Revenu en date du 19 août 1958 qui confirme en partie l'appel de Claude Rousseau relativement à la cotisation de son revenu, pour fins d'impôt, provenant de son salaire et de loyers pour l'année d'imposition 1954.

L'appelant a déterminé la cotisation en se basant sur la déclaration d'impôt sur le revenu de l'intimé et celle de son employeur, The Electrical Manufacturing Company Limited. L'intimé est actionnaire, président et gérant de cette compagnie. Son salaire, autorisé par résolution de la corporation, est de $10,000 par année. A titre de propriétaire de l'édifice loué à la compagnie pour la manufacture de ses produits il a droit à un loyer annuel de $12,000.

Dans sa déclaration d'impôt sur le revenu pour l'année d'imposition 1954, son revenu net déclaré est de $22,000. Par avis de cotisation, l'appelant a signifié à l'intimé qu'il portait le revenu net à $23,440.76 par l'addition au montant déclaré des montants de $561.89, $175 et $703.87 comme rémunération additionnelle, dépenses de voyage, usage de son automobile pour les fins des affaires de son employeur et dépréciation de sa voiture-automobile. L'intimé dans son avis d'opposition allègue que les additions à son revenu ne sont pas justifiables, vu que ces montants, bien que chargés par lui à The Electrical Manufacturing Company Ltd., n'avaient pas encore été reçus par lui. De plus, nonobstant le fait qu'il avait déclaré un revenu de $22,000 et avait payé l'impôt sur ce montant, il n'avait reçu de son employeur que la somme de $17,824.85. Par avis de nouvelle cotisation, l'appelant a avisé l'intimé qu'il avait corrigé sa première cotisation en remplaçant le montant de $561.89 comme autre rémunération par le montant de $375 et en désallouant la dépréciation de l'automobile de $496.13. Le revenu net, au lieu d'être $23,440.76, est maintenant $23,750.

L'intimé a appelé de cette cotisation à la Commission d'Appel de l'Impôt sur le Revenu, qui a maintenu l'appel en partie et a déféré le dossier au Ministre du Revenu national, afin qu'il émette une nouvelle cotisation. C'est de cette décision que le Ministre en appelle à cette Cour.

A l'appui de son appel il invoque les articles 4 et 5 de la loi et soumet que l'intimé, ayant droit pour l'année d'imposition 1954 à un salaire de $10,000 et à un loyer au montant de $12,000, a effectivement reçu de son employeur et locataire, The Electrical Manufacturing Company Limited, et touché ce montant de $22,000 en 1954. Il a reçu en espèces au moins $15,265.86 et un compte personnel qu'il avait avec la compagnie, et sur lequel il pouvait tirer à volonté, a été crédité de la différence entre cette somme de $22,000 et le montant reçu en espèces.

Par contre, l'intimé prétend qu'au sens des articles 3(*c*) et 5 de la loi il n'a touché que $15,263 de son revenu déclaré et qu'il n'a pas reçu la somme de $6,737 qui était inscrite à son crédit à la fin de l'année 1954 dans les livres de la compagnie, son employeur.

Je crois que les articles 3, 4, 5 et 11(6) ou (9) de la Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, et modifications, sont applicables à la présente cause. Les dispositions de l'article 3 indiquent les sources du revenu d'un contribuable pour une année d'imposition.

3. Le revenu d'un contribuable pour une année d'imposition, aux fins de la présente Partie, est son revenu pour l'année de toutes provenances à l'intérieur ou à l'extérieur du Canada et, sans restreindre la généralité de ce qui précède, comprend le revenu pour l'année provenant

a) d'entreprises,

b) de biens, et

c) de charges et d'emplois.

Le revenu déclaré par l'intimé provient de son salaire comme gérant de manufacture de la compagnie qui l'emploie et du loyer d'un immeuble qu'il loue à la même compagnie pour les fins de son industrie. Ce sont donc les dispositions de l'article 3(*b*)(*c*) qui s'appliquent à son revenu de biens et à son salaire comme employé. Quant au revenu provenant de biens l'article 4 dit:

4. Sous réserve des autres dispositions de la présente Partie, le revenu provenant, pour une année d'imposition, . . . de biens est le bénéfice en découlant pour l'année (is the profit therefrom for the year).

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Les mots «sous réserve des autres dispositions de la présente Partie» prévoient que les déductions mentionnées à l'article 2 (3) s'appliquent au revenu provenant de biens et déterminent «le bénéfice en découlant». L'article se lit:

2(3). Le revenu imposable d'un contribuable pour une année d'imposition est son revenu pour l'année moins les déductions permises par la section C (calcul de l'impôt).

Pour ce qui concerne le salaire ou autre rémunération de l'intimé comme employé de la compagnie, c'est l'article 5 qui s'applique. Je cite:

5. Le revenu provenant, pour une année d'imposition, d'une charge ou d'un emploi est le traitement, salaire et autre rémunération, y compris les gratifications, que le contribuable a touchés dans l'année, plus . . .

Il s'agit donc de déterminer si les faits ayant été admis et établis dans cette cause entrent bien dans le cadre des dispositions susmentionnées et de celles de l'article 11 (6) ou (9).

Il est vrai que l'intimé est l'employé d'une corporation et qu'il loue un immeuble à son employeur. Dans sa déclaration d'impôt sur le revenu pour l'année d'imposition 1954, il a déclaré qu'il avait droit de recevoir de son employeur et locataire, tant à titre de salaire qu'à titre de loyer, un montant de $22,000 par année. Toutefois, il est en preuve qu'il n'a touché ou reçu en espèces qu'une somme de $15,263 et que la balance de $6,737 avait été créditée à son compte dans les livres de comptabilité de son employeur et locataire.

L'appelant soumet que, par suite du fait que la somme de $6,737 a été portée dans les livres de la corporation à un compte personnel de l'intimé, il avait touché ou reçu le total de son salaire et de son loyer pour l'année 1954. Du moment que le montant ci-dessus avait été mis à la disposition de l'intimé, ce montant de $6,737 ne représentait plus du salaire ou du loyer dû mais constituait une créance de l'intimé et une obligation ou dette de la corporation. Il s'ensuivrait que le revenu du contribuable devrait être considéré comme ayant été touché ou reçu en espèces et, partant, une créance en faveur de l'intimé. Est-ce le sens qu'il faut donner aux dispositions de la loi sur lesquelles l'appelant base ses prétentions?

D'autre part, l'intimé prétend que ce montant qui n'a pas été touché ou reçu ne devrait pas être considéré dans le calcul de son impôt sur le revenu pour l'année 1954, parce qu'il n'a pas été reçu durant l'année d'imposition. L'entrée dans les livres de la compagnie n'est qu'une reconnaissance que cette dernière, à la fin de l'année 1954, devait à l'intimé une balance de salaire et de loyer de $6,737. Par conséquent, au sens des articles 3, 4 et 5 de la loi cette opération comptable de la compagnie n'a pas pour effet d'établir que l'intimé a touché ou reçu tout le salaire et le loyer qui devaient constituer son revenu pour 1954.

Il n'y a pas de contradiction quant au montant du salaire et du loyer déclaré par l'intimé et cotisé comme revenu de l'intimé, ni du montant reçu en espèces par ce dernier et de la balance créditée à son compte personnel par la compagnie. Il appert que la compagnie, n'ayant pas les moyens de rencontrer toutes ses obligations, retenait depuis plusieurs années un certain montant qu'elle devait à son employé. Mais l'intimé, chaque année, payait l'impôt sur le montant du salaire et du loyer. Durant l'année 1954, la compagnie a crédité dans ses livres au compte personnel de l'intimé la somme de $22,000. Effectivement, celui-ci, durant l'année en question, n'a touché ou retiré que $15,263.86 à titre de salaire, loyer ou vieilles dettes. La balance est demeurée à son crédit. A quels item cette balance était-elle applicable, je l'ignore.

En principe, c'est le revenu touché ou reçu qui est imposable. Il est vrai que la loi a décrété des exceptions à cette règle générale, mais en l'absence de dispositions expresses je crois que c'est la règle générale qui doit être appliquée au calcul de l'impôt. Dans le cas actuel, il y a eu discussion sur le sens du mot «touché» mentionné dans l'article. Ce mot est synonyme de reçu. D'ailleurs la version anglaise de la loi se sert du mot "received". Les mots «recevoir» et «reçu» ont été considérés dans de nombreuses causes, entre autres celle de *Capital Trust Corporation Limited et al.* et *The Minister of National Revenue*[1].

Un exécuteur testamentaire devait recevoir $500 par mois comme rémunération pour ses services. Pendant plus de deux ans après la mort du testateur, il négligea de toucher

[1] [1936] Ex. C.R. 163.

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la rémunération mensuelle. En 1927, il a touché le montant accumulé qui lui était dû et par la suite il reçut le montant de $500 par mois jusqu'à sa mort. Le Ministre établit la cotisation en se basant sur le montant global reçu en 1927 . . . En appel devant la Cour de l'Échiquier, le préambule de la décision rendue par le juge Angers se lit ainsi:

> *Held:* That the remuneration of $500 per month to J. M. as provided for in the codicil was in payment of his services as executor and not a gift or bequest, and therefore taxable under the Income War Tax Act, R.S.C. 1927, c. 97.
>
> 2. That the Income War Tax Act assesses income for the year in which it is received, irrespective of the period during which it is earned or accrues due.

Cette décision fut confirmée par la Cour suprême du Canada[1].

Dans la cause de *Gresham Life Assurance Society Limited* et *Bishop*[2], Lord Lindley, traitant du sens du mot «reçu» ou "received", dit (p. 296):

> . . . to constitute a receipt of anything there must be a person to receive and a person from whom he receives, and something received by the former from the latter, and in this case that something must be a sum of money. A mere entry in an account which does not represent such a transaction does not prove any receipt, whatever else it may be worth.

Le juge Rowlatt, un des plus grands juristes en matière fiscale, a déjà dit:

> Now one must, I think, remember this, that receivability without receipt for the purpose of Income Tax is nothing at all. There is no Income Tax or Super-tax upon a good debt or upon the value of a moderate debt. I am not speaking, of course, of mercantile accounts where these things are brought in, or anything of that sort; but there is no such thing as Income Tax upon a debt until it is paid. *Leigh v. C.I.R.*, [1926-1927] 11 T.C. 590, 595 *in fine.*

Dans le cas actuel, il y avait une personne qui devait recevoir et une personne de qui elle devait recevoir. Ce qu'elle devait recevoir était une somme d'argent en paiement de son salaire et du loyer de son immeuble. Le fait qu'elle a été créditée de la balance qui lui était due ne constitue pas un paiement au sens de la loi, non plus qu'un reçu suivant les dispositions citées à la Cour.

[1] [1937] S.C.R. 192. [2] [1902] A.C. 287.

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Si le législateur avait voulu inclure dans le revenu d'un contribuable les montants recevables pour salaire ou loyer, il l'aurait mentionné expressément, tout comme il l'a fait pour les intérêts et bénéfices de syndicats ou sociétés. L'article 6 couvre ces cas; je cite:

6. Sans restreindre la généralité de l'article 3, doivent être inclus dans le calcul du revenu d'un contribuable pour une année d'imposition

b) les montants reçus ou à recevoir dans l'année (selon la méthode que suit régulièrement le contribuable dans le calcul de ses bénéfices) à titre d'intérêts, ou à compte ou au lieu de paiement, ou en acquittement d'intérêts;

c) le revenu que le contribuable a tiré d'une société ou d'un syndicat pour l'année, qu'il l'ait touché ou non pendant l'année;

Rien de tel n'est prévu dans la loi concernant les salaires ou les loyers. Il y a bien l'article 24 qui traite des titres en acquittement de dettes à l'égard du revenu, mais je ne crois pas que les dispositions de cet article soient applicables aux faits de la présente cause. Le contribuable n'a pas reçu un titre ou autre droit ou un certificat ou autre preuve de dette, en totalité ou en partie, à titre de remboursement du paiement de son salaire ou de son loyer. La compagnie, incapable de rencontrer toutes ses obligations, pour les fins de sa comptabilité, la préparation de son bilan et de sa propre déclaration d'impôt, a ouvert un compte dans ses livres indiquant les montants dus à l'intimé et a porté ces montants au débit de ses opérations. Ces entrées dans les livres de la compagnie, dans mon opinion, ne peuvent constituer, au sens des articles cités par les parties, un titre en acquittement de dettes ou un reçu par l'intimé pour les montants dus. Je ne crois pas que la méthode suivie par The Electrical Manufacturing Company Limited puisse affecter la position légale de l'intimé. Le montant de $6,737, pour salaire et loyer, n'ayant pas été payé par la compagnie, elle est donc endettée pour autant envers son employé et locateur. Sauf les exceptions établies par la loi, un impôt ne peut être prélevé sur les dettes tant et aussi longtemps qu'elles n'ont pas été payées.

Je suis convaincu que la loi et les faits me justifient de conclure que le Ministre n'avait pas le droit, en cotisant l'intimé, d'inclure le montant de $6,737 dans son revenu imposable. Par conséquent je rejetterai l'appel.

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D'autre part, Claude Rousseau, l'intimé, a logé un contre-appel de cette partie de la décision de la Commission d'Appel de l'Impôt sur le Revenu dans laquelle elle a maintenu la cotisation du Ministre quant aux montants ajoutés au revenu net déclaré de $22,000 pour dépenses reçues comme autre rémunération et dépréciation d'automobile. Ces montants s'élèvent à $1,750, comme suit:

Dépenses payées par The Electrical Manufacturing Co. Ltd. pour voyage aux États-Unis, considérées comme autre rémunération	$ 375.00
Dépenses d'auto, partie personnelle	175.00
Reçu pour dépréciation d'automobile	1,200.00
Total:	$1,750.00

La preuve est à l'effet que l'intimé a présenté à son employeur un compte de $1,123.78 pour dépenses encourues lors d'un voyage, accompagné de son épouse, aux États-Unis. La compagnie a porté ce montant à son compte d'opération. La compagnie a aussi payé ou crédité à l'intimé une somme de $700 pour dépenses d'automobile ainsi qu'une somme de $1,200 pour dépréciation de son automobile. Le tout pendant l'année d'imposition 1954.

Le Ministre, se basant sur cette preuve et les articles 5 et 11 (6) (9) de la loi, a ajouté au revenu net déclaré de l'intimé les montants de $375 pour dépenses de voyage, $175 pour partie personnelle des dépenses d'automobile comme autre rémunération et a refusé de reconnaître comme déduction la dépréciation de son automobile au montant de $1,200. Le montant qu'il a ainsi ajouté s'élève à $1,750.

La somme de $1,123.78 réclamée par l'intimé pour dépenses de voyage aux États-Unis, moins $375, a été considérée comme déductible de son revenu imposable. Le montant de $375 qui lui avait été payé ou crédité par son employeur est présumé représenter les frais de voyage de son épouse, qui n'avait pas droit à des dépenses de voyage. Comme toutes les dépenses d'automobile ne furent pas faites pour les fins des affaires de son employeur, la somme de $175 fut ajoutée à titre de déboursés personnels. Ces deux item seraient de la catégorie dite «Autres rémunérations».

A l'article 5 (*b*) (*v*) il est décrété:

b) tous montants qu'il a reçus dans l'année à titre d'allocation pour frais personnels ou de subsistance ou à titre d'allocation pour toutes autres fins sauf

(v) les allocations raisonnables pour frais de voyage reçues de son employeur par un employé en ce qui concerne une période de temps pendant laquelle il était employé relativement à la vente de biens ou à la négociation de contrats pour son employeur.

En d'autres termes, les seuls montants ayant été ajoutés sont ceux qui ont été crédités ou reçus pour les dépenses de voyage de l'épouse de l'intimé et ses dépenses d'automobile pour son propre agrément. En vertu des dispositions précitées de la loi, ces dépenses ne sont pas déductibles de son revenu.

Pour que l'intimé puisse obtenir le montant de $1,200 pour dépréciation de son automobile, selon l'article 11 (11) de la loi il doit établir qu'il rencontre les conditions prévues à l'article 11 (6) ou (9). Je cite:

11(6) Lorsqu'une personne était, dans une année d'imposition, employée relativement à la vente de biens ou à la négociation de contrats pour son employeur et

a) aux termes de son contrat d'emploi était tenue d'acquitter ses propres dépenses,
b) était ordinairement tenue d'exécuter les fonctions de son emploi ailleurs qu'au lieu d'affaires de son employeur,
c) était rémunérée entièrement ou en partie par des commissions ou autres montants semblables fixés par rapport au volume des ventes effectuées ou des contrats négociés, et

(9) Lorsqu'un fonctionnaire ou employé, dans une année d'imposition,
a) était ordinairement tenu d'exercer les fonctions de son emploi ailleurs qu'au lieu d'affaires de son employeur ou à différents endroits,
b) était tenu, aux termes de son contrat d'emploi, d'acquitter les frais de voyage que lui occasionnait l'accomplissement des fonctions de sa charge ou de son emploi, et

* * *

il peut être déduit, dans le calcul de son revenu provenant de sa charge ou de son emploi pour l'année . . . les montants qu'il a dépensés pendant l'année pour fins de voyage dans le cours de son emploi.

La preuve établit que l'intimé ne rencontre aucune des conditions mentionées dans les dispositions de l'article 11 (6). Aux termes de son contrat il n'était pas tenu d'acquitter ses dépenses de voyage. D'ailleurs il les a réclamées et elles lui ont été allouées. Il n'était pas tenu ordinairement d'exécuter ses fonctions ailleurs qu'au lieu d'affaires de son employeur et il n'était pas rémunéré au moyen de comissions pour ses ventes.

Dans le cas de l'article 11 (9) le contribuable est tenu d'exécuter les fonctions ordinaires de son emploi ailleurs qu'au lieu d'affaires de son employeur, ou à différents

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endroits, et d'acquitter les frais de voyage occasionnés par l'accomplissement de ses fonctions ou les devoirs de sa charge. Ce n'est pas le cas de l'intimé dans cette cause.

Comme l'intimé ne rencontre ni les conditions de l'article 11 (6) ni celles de l'article 11 (9), en vertu de l'article 11 (11) il ne peut bénéficier d'une déduction pour la dépréciation de son automobile. Ce dernier article stipule une déduction de ce que coûte en capital au contribuable une automobile utilisée dans l'exécution des fonctions de sa charge ou emploi mais seulement si la déduction peut s'opérer aux termes du paragraphe (6) ou (9) dans le calcul du revenu de l'intimé. Tel n'est pas le cas ici. Il était employé à salaire fixe et avait droit à des frais de voyage. Il ne payait pas ses dépenses ou, s'il les payait, elles lui étaient remboursées ou acquittées par son employeur.

Je suis satisfait que l'intimé, à qui incombait le fardeau de la preuve, a failli à la tâche. Il n'a pas réussi à établir que la cotisation du Ministre était erronée en droit et en fait. Le Ministre était donc justifiable d'inclure dans le calcul du revenu de l'intimé les item relatifs aux dépenses de voyages, dépenses de son épouse et dépréciation de son automobile.

Je suis donc d'opinion que l'intimé n'a pas touché ou reçu en salaire et en loyer le montant cotisé par l'appelant et que le montant de $6,737 n'aurait pas dû être inclus dans le revenu impossable de l'intimé. Quant au contre-appel de l'intimé je crois qu'en fait et en droit le Ministre était justifié d'ajouter au revenu imposable de l'intimé les montants considérés comme autre rémunération et dépréciation de son automobile.

Pour ces raisons, la Cour renvoie l'appel de l'appelant avec frais et renvoie le contre-appel de l'intimé avec dépens.

Jugement en conséquence.

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Sept. 22
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Oct. 31

BETWEEN:

THE CITY OF QUEBEC .... SUPPLIANT;

AND

HER MAJESTY THE QUEEN .... RESPONDENT.

Crown—Action to recover cost of snow removal from street bordering Crown property—Municipal by-law obligating property owners to pay cost ultra vires as against the Crown in the right of Canada—Cross-demand to recover payments made through error of law—Laws of prescription not applicable to proceedings brought by the Crown against the subject—The British North America Act, 1867, s. 125—An Act to amend the Charter of the City of Quebec, S.Q. 1945, c. 71, s. 20; S.Q. 1952, c. 63, s. 8(154); Civil Code arts. 1047, 2260.

The City of Quebec by Petition of Right sought to recover payment of $259.25 for removal of snow and ice in the winter of 1951-52 from that part of Grand Champlain Street bordering property of the Crown in the right of Canada and administered by the National Harbour Board. The respondent pleaded that the claim constituted a municipal tax and since the property in question was Crown property it was exempt from municipal or provincial taxation by virtue of s. 125 of the *British North America Act, 1867*. The City submitted that under the laws of the Province of Quebec and in particular *An Act to Amend the Charter of the City of Quebec*, S.Q. 1945, c. 71, s. 20(154) and under the city by-laws and in particular City By-Law 823, the amount claimed was not a municipal tax.

As a further subsidiary defence the Crown submitted that by an Order in Council dated April 28, 1952, the Federal Cabinet authorized payment to the City of an annual grant of $42,000 for the five year period 1950-1954 inclusive in payment of all municipal services other than water. The City contended that the grant did not include snow removal and that its claim, whether a tax or not, was for a service from which the defendant had benefited and for which it should pay a just and reasonable amount.

The Crown by cross-demand claimed re-imbursement of $4,671.10 which it alleged its agent, the National Harbour Board, had through error in law paid the City for the period 1942-1954 for snow removal from in front of the property in question. The City admitted that for all intents and purposes the amount claimed had been paid, but for the reasons set out in its Petition, alleged payment had been made knowingly and willingly by the Crown and its agent the National Harbour Board and that in any event the greater part of the claim was prescribed.

Held: That having regard to the provisions of ss. 10 and 11 of City By-Law No. 823, that the cost of snow removal shall be collected as "an assessment tax on the said immoveables", and in view of the provision of s. 8(154) of *An Act to Amend the Charter of the City of Quebec*, S.Q. 1952, c. 63 that "the city's claims shall be privileged, ranking with municipal assessments or taxes"—the charge in question had all the essential characteristics of a tax imposed on the property of the defendant.

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2. That the provisions of s. 20 of *An Act to Amend the Charter of the City of Quebec,* S.Q. 1945, c. 71, that "the owners of non-taxable immoveables shall be obliged to pay for snow removal like the other taxpayers" was, in view of s. 125 of the *British North America Act, 1867,* clearly *ultra vires* insofar as the Crown in the right of Canada was concerned.
3. That on the evidence the error in law had been proven.
4. That the law of prescription does not apply to proceedings of the Crown against the subject. *The Queen v. Montreal Transportation Commission* [1955] Ex. C.R. 83 at 91.
5. That the petition should be dismissed and the cross-demand allowed.

In view of the finding on the main issue the Court did not deal with the subsidiary defence.

PETITION OF RIGHT by suppliant to recover cost of snow removal from street bordering property owned by the Crown. Cross-demand to secure reimbursement of moneys paid for snow removal through error in law.

Ernest Godbout, Q.C. for suppliant.

Robert Perron, Q.C. and *Paul Ollivier* for respondent.

KEARNEY J. now (October 31, 1960) delivered the following judgment:

L'action principale par voie de pétition de droit porte sur une requête de la cité de Québec pour le paiement d'une somme de $259.25, avec intérêt à 5% depuis le 1er septembre 1952, afférente à l'enlèvement de la neige et de la glace au cours de l'hiver 1951-52 sur la rue Grand-Champlain, à Québec, en front des lots 167 et 168 (parties), appartenant à Sa Majesté la Reine du chef du Canada (ci-après appelée la «Couronne»), lesquels sont possédés et administrés par le Conseil des Ports nationaux du Canada (ci-après désigné le «Conseil»), un corps politique, en sa qualité de mandataire de la Couronne.

L'intimée nie qu'elle est responsable pour le paiement du montant réclamé, principalement parce qu'il consiste d'une taxe municipale et que ces propriétés appartenant à la Couronne sont exemptes de toute taxe municipale ou provinciale en vertu de l'article 125 de l'*Acte de l'Amérique du Nord britannique* de 1867, 30 Victoria, c. 3.

La ville maintient qu'en raison de la loi de la province de Québec, plus particulièrement S.Q. 1945, 9 Geo. VI, c. 71, art. 20(154), et des règlements municipaux, surtout le n° 823, le montant réclamé ne constitue pas une taxe municipale.

Subsidiairement les parties invoquent dans un sens contraire une convention entre la ville et le Conseil en vertu de laquelle, conformément à l'arrêt ministériel du cabinet fédéral du 26 avril 1952, le Conseil a accordé à la ville une subvention annuelle de $42,000 pour une période de cinq ans, notamment de 1950 à 1954 inclusivement.

Le Conseil soutient que par suite de l'entente quinquennale il a acquitté tous les services municipaux, sauf celui de l'eau; mais la ville d'autre part allègue que l'entente ne comprenait pas l'enlèvement de la neige et de la glace et, que taxe ou non, le montant de $259.25 est réclamé pour un service dont l'intimée a bénéficié et pour lequel elle doit payer un montant juste et raisonnable.

Quant à la demande reconventionnelle, la Couronne réclame $4,671.10 que son mandataire, le Conseil local, à Québec, aurait payé à la ville entre 1941-42 et 1953-54 inclusivement pour l'enlèvement de la neige et de la glace en front desdites propriétés, et déclare que ces versements ont été faits à son insu par erreur de droit. La défenderesse reconventionnelle admet que le Conseil a payé un certain montant à cette fin, lequel ne s'élevait qu'à $4,664.96. La différence entre ces deux sommes est minime et les pièces justificatives P3 indiquent que le total des factures en question est bien $4,664.96.

La cité rejette la demande reconventionnelle en invoquant les mêmes arguments présentés au cours de l'action principale, et en outre maintient que le montant susmentionné a été payé sciemment et volontairement par la Couronne et son mandataire, le Conseil, et qu'à tout événement la demande est en grande partie prescrite.

Les faits sont peu contestés. Les procureurs des parties ont soumis des mémoires écrits et ont signé ensuite un accord relatif à plusieurs faits, lequel a été amendé de consentement mutuel et mis en dossier le onzième jour du mois courant.

L'action principale soulève deux questions de droit primordiales, à savoir: (1) le coût de l'enlèvement de la neige constitue-t-il ou non une taxe? (2) Dans l'affirmative, la Couronne en est-elle exempte?

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Au sujet de la première question il serait utile d'abord de relater l'historique de l'enlèvement de la neige à Québec et de mentionner quelques généralités qui ne sont pas contestées. On pratique à Québec depuis plus d'un siècle l'entretien et la réparation des rues et chemins, y inclus leur déneigement, et la cité ordonna à ses citoyens de prendre les moyens nécessaires à cette fin. Sous le gouvernement des généraux et des juges de paix les hommes de 18 à 60 ans étaient tenus de faire des œuvres serviles pour l'enlèvement de la neige, mais ce genre de servage fut bientôt aboli par l'État. En vertu de l'article 29(33), S.C. 1865, 29 Victoria, c. 57, tel qu'amendé en 1866, 29-30 Victoria, c. 57, articles 17 et 18,

> Le Conseil peut . . . faire des règlements pour les objets suivants, savoir:
>
> * * *
>
> Pour ordonner l'enlèvement de la neige des rues, ruelles, places publiques et toit des maisons et autres édifices . . .

Plus tard, par règlement n° 227 du 15 janvier 1869, passé en vertu de cette législation de 1865 ci-haut mentionnée, les propriétaires, y compris les membres des gouvernements militaire et civil, de propriétés riveraines situées sur les rues publiques étaient responsables de l'enlèvement de la neige sur la moitié de la largeur de la rue. Peu à peu, à compter de 1919, la ville assuma cette tâche mais aux frais et dépens desdits propriétaires; et l'origine des pouvoirs actuels de la cité remonte à la refonte de sa charte, S.Q. 1929, 19 Geo. V, c. 95, art. 336(154). A l'époque en question le déneigement se faisait à tant par pied linéaire et plus tard selon la valeur des propriétés. Au début cette municipalisation de l'enlèvement de la neige ne s'appliquait qu'à certaines rues, ensuite à quelques zones et enfin, en 1954, à toute la ville.

Il est admis que les terrains concernés mesurent 1037 pieds linéaires en bordure de la rue Grand-Champlain et que la somme de $259.25 représente la répartition suivant la loi alors en vigueur, à 0.25 le pied linéaire, pour le déneigement en front desdits terrains; et que la neige, d'une façon ou d'une autre, doit être enlevée. L'intimée ne conteste pas le droit de municipaliser partiellement ou entièrement l'enlèvement de la neige et convient que le taux de $0.25 n'est pas déraisonnable.

Aux termes de S.Q. 1945, 9 Geo. VI, c. 71, art. 20(154), il est légiféré que la ville se chargera de l'enlèvement de la neige dans toutes ou quelques-unes de ses rues et que—

> Le coût de l'enlèvement, du grattage ou du soufflage de la neige ou de la glace pourra être réparti entre les propriétaires riverains de toute rue, groupe de rues ou zone suivant la longueur de leurs propriétés.
>
> Si l'enlèvement de la neige est municipalisé dans toute la cité, le Conseil (municipal) devra répartir uniformément le coût dudit service en chargeant le même taux dans toute la cité et en prenant comme base l'évaluation des propriétés immobilières ou des terrains seulement. (Le mot entre parenthèses a été ajouté.)
>
> Ce dernier mode de répartition du coût du service n'aura pas pour effet de lui conférer un caractère de taxe.
>
> Les propriétaires d'immeubles non imposables seront tenus de payer pour le service de la neige comme les autres contribuables.

La ville a adopté le 26 octobre 1951 le règlement n° 823 qui définit ainsi l'enlèvement de la neige et de la glace:

> Enlèvement de la neige et de la glace:—L'enlèvement de la neige et de la glace consiste à entretenir les chaussées et trottoirs de rues, conformément aux prescriptions de la loi et des règlements municipaux concernant l'entretien des rues pendant l'hiver; la Cité assumant toutes les obligations que tels loi ou règlements imposent à toute personne à ce sujet.

L'article 10 de ce règlement prévoit que—

> Le coût réel desdits enlèvement de la neige et de la glace, grattage ou soufflage de la neige dans les rues ci-dessus énumérées sera remboursé à la Cité par les propriétaires riverains desdites rues et computé par pied linéaire de la longueur du front des immeubles bordant lesdites rues, déduction faite de ce qui doit être payé par The Quebec Railway, Light, Heat & Power Co. conformément au contrat passé entre la Cité et la Compagnie le 1er mars 1941 et ratifié par la loi 5 Geo. VI, chapitre 72.

L'article 11 se lit comme suit:

> Le coût réel desdits enlèvement de la neige et de la glace, grattage ou soufflage de la neige, sera recouvré et perçu comme une taxe foncière sur lesdits immeubles, sera exigible et portera intérêt, à compter du 1er septembre de chaque année.

Il convient de citer aussi la loi 15-16 Geo. VI, c. 63, art. 8, S.Q. 1951-52, aux termes duquel le paragraphe 154 a été remplacé par un nouveau paragraphe 154 qui change peu l'étendue de la responsabilité que la ville assumait concernant le déneigement. Mais cette loi contient une

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prescription autorisant la ville, si elle juge à propos de ce faire, de municipaliser complètement le service en question par toute la ville et d'imposer aux propriétaires une charge uniformément basée sur l'évaluation des propriétés et non suivant leur longueur de front. Ce paragraphe continue comme suit:

La répartition du coût de ce service n'aura pas pour effet de lui conférer un caractère de taxe mais le coût sera calculé à un taux basé sur l'évaluation en vigueur durant l'exercice financier au cours duquel le compte deviendra dû et exigible.

Dans le cas des immeubles bénéficiant d'une exemption ou d'une commutation d'évaluation ou de taxes, le taux ci-dessus s'appliquera sur la valeur réelle sans tenir compte de l'exemption ou de la commutation, excepté quant aux biens appartenant aux commissions scolaires catholiques et protestantes, aux hôpitaux, aux hospices et aux biens religieux, évêchés, églises et presbytères et propriétés des communautés religieuses, ou le taux ne s'appliquera que sur l'évaluation des terrains.

Dans tous les cas, la créance de la cité sera privilégiée au même rang que les cotisations ou taxes municipales.

S'agit-il ici d'une taxe? Voici la signification que les dictionnaires publiés vers la fin du dix-neuvième siècle donnent au mot «taxe»;

Universal Dictionary of the English Language (1898):

A contribution imposed by authority upon people to meet the expenses of government or other public services.

A government imposition, or charge made by the State on the property of individuals, or on products consumed by them.

Tax applies to or implies whatever is paid by the people to the government according to a certain estimate.

Bouvier Law Dictionary, third revision:

A pecuniary burden imposed for the support of government.

The enforced proportional contribution of persons and property, levied by the authority of the state for the support of government, and for all public needs.

Il est à propos de signaler ici que la loi refondant la charte de la cité de Québec susmentionnée, à l'article 1(*k*) définit le mot «taxe» ainsi:

Le mot «taxe» signifie l'impôt personnel ou le coût d'une licence prélevée sur le commerce, les affaires, les occupations ou professions quelconques. Il signifie aussi, quand il est employé d'une manière générale, toute taxe personnelle ou foncière.

Une taxe, mise en contraste avec un contrat, est une somme d'argent imposée par les autorités constituées. Sir W. J. Ritchie, J.C. fait la distinction entre une taxe et un contrat, dans la cause de *Lynch v. The Canada N.W. Land Co.*[1], dans les termes suivants:

> It is abundantly clear that taxes are not contracts between party and party either express or implied, but they are the positive acts of the government through its various agents binding upon the inhabitants, and to the making or enforcing of which their personal consent, individually, is not required.

La jurisprudence établie aux États-Unis apporte le même effet. Ainsi au *Corpus Juris Secundum* 84 (1954), pages 32 et 34, nous lisons:

> Every burden which the state imposes on its citizens to secure revenue for support of its government or any of its political subdivisions is levied under the power of taxation whether under the name of a tax or some other designation—*Morton Salt Co. v. City of South Hutchinson,* C.C.A. Kan., 159 F. 2d 897.
>
> Any levy or duty or impost for the support of government may be regarded as a tax.—*Woodward v. City of Philadelphia,* A. 2d 167, 333 Pa. 80.
>
> The question whether a particular contribution, charge, or burden is to be regarded as a tax depends on its real nature and not on its designation.
>
> A "tax" is imposed on person paying it by mandate of public authority, without his being consulted with respect to its necessity, or having any option as to its payment, the amount not being determined by any reference to service which he receives from government, but by his ability to pay, based on property or income, while a "fee" is voluntary in that person who pays it originally has, of his own volition, asked a public officer to perform certain services for him, which presumably bestow on him a benefit not shared by other members of society.—*Stewart v. Verde River Irrigation & Power Dist.,* 68 P. 2d 329, 49 Ariz. 531.

La charte de Québec apparemment ne fait aucune distinction entre une taxe foncière et une cotisation, aux termes de l'article 1(*j*) de la loi 19 George V, c. 95, susmentionnée, lequel se lit ainsi:

> (*j*) Les mots «taxe foncière», «cotisation», «répartition» ou «contribution foncière» signifient l'impôt sur la propriété.

En droit anglais ces deux mots «taxe foncière» et «cotisation» ont le même sens. Dans la cause de *Lowther v. Clifford*[2] il s'agissait de déterminer si le coût du pavage d'une rue calculé, comme dans le cas présent, au pied linéaire, tombait sous le coup d'une clause d'un contrat en raison de laquelle un locataire s'engageait à rembourser au propriétaire "all

[1] (1891) 19 Can. S.C.R. 204, 208. [2] [1927] 1 K.B. 130, 131.

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. . . . assessments, impositions, and outgoings now payable or hereafter to become payable by or be imposed upon either landlord or tenant in respect of the premises except the landlord's property tax". A la page 148, le juge Scrutton s'exprime comme suit au sujet de ces impositions:

> It is either an imposition or an outgoing, or both; I incline to think that "assessment" is also a very suitable word to express it.

Vu les articles 10 et 11 du règlement 823 qui prescrivent une contribution obligatoire pour un service public dont le coût sera recouvré et perçu comme «une taxe foncière sur lesdits immeubles» et que la loi 15-16 Geo. VI précitée décrète que «la créance de la cité sera privilégiée au même rang que les cotisations ou taxes municipales», l'imposition en question à mon avis, nonobstant les statuts 9 Geo. VI et 15-16 Geo. VI, possède, sauf le nom, toutes les caractéristiques essentielles d'une taxe imposée sur les propriétés de l'intimée. A la page 32 du *Corpus Juris Secundum* 84, susmentionné, on lit que:

> The question whether a particular contribution, charge, or burden is to be regarded as a tax depends on its real nature and not on its designation.

Sir Charles Fitzpatrick, J.C., qui a rendu le jugement de la cour, déclarait dans *Gauthier v. Le Roi*[1]:

> And, in any event, the provinces have, in my opinion, neither executive, legislative nor judicial power to bind the Dominion Government.

Il faut donc conclure que la disposition à l'article 20 de la loi 9 Geo. VI, c. 71 que «les propriétaires d'immeubles non imposables seront tenus de payer pour le service de la neige comme les autres contribuables» est clairement *ultra vires* en tant que Sa Majesté comme chef du Canada est concernée.

La cité maintient que le montant exigé du Conseil pour l'enlèvement de la neige sur la rue Grand-Champlain était bien raisonnable et que le Conseil a bénéficié des travaux exécutés et qu'en conséquence il doit les acquitter. Elle invoque la décision du Conseil Privé dans *Dominion of Canada v. City of Levis*[2] où il s'agissait du prix d'une marchandise, notamment l'eau, que le gouvernement fédéral ne pouvait pas s'attendre de recevoir sans en payer la juste valeur.

[1] (1917) 56 Can. S.C.R. 176, 182. [2] [1919] A.C. 505.

Lord Palmoor, à la page 511 du jugement précité, dit:

> Water supplied at the cost of the municipality from artificially constructed waterworks is in the nature of a merchantable commodity, and their Lordships are of opinion, that unless some statutory right is established, the Government of Canada cannot claim to have a supply of water for the Government building, unless it is prepared to pay and to continue to pay in respect thereof a fair and reasonable price.

Si le cas en litige portait sur l'approvisionnement de l'eau, la Couronne serait tenue de payer un tarif raisonnable, pourvu qu'elle en consommât bien entendu; mais il est question ici d'un impôt sur la propriété de la Couronne pour un service municipalisé. La ville ne laisse aucunement entendre que l'impôt pour l'entretien et réparation des rues en été ne constitue pas une taxe, et je ne vois pas de différence fondamentale entre l'entretien et la réparation en été et le déneigement en hiver.

La cité a appuyé sa demande sur le jugement de l'honorable Wilfrid Girouard, juge de la Cour Supérieure, dans *Cité de Québec v. Société d'Hypothèques et de Logement,*[1] en date du 6 septembre 1958, actuellement pendante en appel devant la Cour du Banc de La Reine. Le savant juge, dans cette cause, a condamné la société à payer la somme de $290.33 réclamée à titre de frais fixés pour l'enlèvement de la neige pendant l'hiver 1954-55. Il faut distinguer la cause susmentionnée du cas en litige, si pour aucun autre motif, du moins parce que l'action n'était pas dirigée contre la Couronne et le savant juge déclare que la Société d'Hypothèques et de Logement était propriétaire des immeubles en question. Dans la présente cause le propriétaire est Sa Majesté La Reine et non pas le Conseil des Ports nationaux.

La seconde question de droit soulève l'article 125 de l'*Acte de l'Amérique du Nord britannique,* 30 Victoria, c. 3:

> Nulle terre ou propriété appartenant au Canada ou à quelque province ne sera sujette à la taxation.

Quant à la signification du mot «taxation», on peut lire à la page 119 du dictionnaire intitulé *A New English Dictionary on Historical Principles,* rédigé par Sire James Murray, vol. IX, 2e partie, édition 1919, où on trace l'historique du mot «taxe»:

> *Taxe* and *taske* . . . were at first almost synonymous but in their sense-development they were differentiated, *tax* following that of the corresponding verb as an assessed *money* payment.

[1] (September 6, 1958, Unreported)

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1. A compulsory contribution to the support of the government, levied on persons, property, income, commodities, transactions, etc., now at fixed rates, mostly proportional to the amount on which the contribution is levied.

"Tax" is the most inclusive term for these contributions, esp. when spoken of as the matter of *taxation*.

Il faut donc donner un sens très large au mot «taxation» et, en raison de l'article 125 susmentionné, je ne vois pas comment la législature provinciale puisse obliger Sa Majesté La Reine du chef du Canada de payer sous forme d'impôt le coût de l'enlèvement de la neige sur une rue appartenant à la ville lorsque celle-ci se charge d'exécuter ces travaux.

Dans la cause de *City of Halifax v. Halifax Harbour Commissioners*[1] Duff, J.C., parlant de ce qui, virtuellement, n'était autre chose qu'une proposition d'assujétir le gouvernement du Canada ou la propriété du gouvernement à un impôt, dit:

Any such attempt must fail, as *ultra vires* of a Provincial Legislature.

A la page 76 de son mémoire la ville tire un autre argument de quelques dispositions de la Loi sur les Ports nationaux, sousmentionnées, 1 Édouard VIII, c. 42, art. 10 (maintenant S.R.C. 1952, c. 187), paragraphe (2):

. . . les prescriptions de la loi relative au Conseil diffèrent quant au droit de propriété des immeubles lui appartenant et sont moins explicites quant à son obligation d'acquitter les taxes.

On a renvoyé le tribunal à la loi susdite:

10(2) Tous biens acquis ou détenus par le Conseil sont dévolus à Sa Majesté du chef du Canada. 1936, c. 42, art. 10.

L'article 24 de la même loi prescrit que:

Nonobstant les dispositions de la *Loi sur l'administration financière*, le ministre des Finances peut, sous réserve des dispositions de la présente loi, effectuer des déboursés à même le Compte spécial, à la demande du Conseil ou de ses fonctionnaires autorisés, pour les objets suivants ou l'un d'entre eux:

(*a*) le paiement de toutes les dépenses nécessaires faites dans l'administration, la gestion et la régie des ports, ouvrages et biens relevant du Conseil;

* * *

(*d*) le paiement de l'intérêt et du principal de toutes débentures ou autre dette du Conseil. 1936, c. 42, art. 24.

[1] [1935] S.C.R. 215, 231.

Le procureur de la demanderesse a ajouté qu'il s'ensuit que—

> . . . le Conseil doit payer les charges administratives, d'opération et de contrôle pour les propriétés sous sa juridiction et qu'il doit également solder les intérêts sur ses dettes. Or, le prix du service de la neige n'est-il pas une dépense nécessaire pour opérer le Port de Québec et les propriétés du Conseil, et celui-ci s'étant refusé d'acquitter la créance de la Cité n'est-il pas tenu de payer l'intérêt. L'intérêt sur les redevances municipales est prévu par l'article 273 de la Charte:
>
> 273. L'intérêt sera payé à raison de cinq pour cent l'an, sur toutes sommes exigées par la corporation pour toutes taxes quelconques non payées avant le premier novembre de chaque année; cet intérêt courra dudit premier novembre jusqu'au parfait paiement, et pour les comptes se rapportant au coût de l'enlèvement de la neige, l'intérêt commencera à courir du premier septembre de chaque année. Quant aux autres comptes, l'intérêt courra à compter de trente jours de l'envoi du compte de l'année courante. Il sera exigé un intérêt de six pour cent l'an sur toute licence non payée dans les trente jours de l'exigiblité de ladite licence.

A mon avis l'argument du savant procureur de la cité repose sur de fausses prémices quand il parle du «droit de propriété d'immeubles appartenant au Conseil», car il s'agit ici de propriétés qui n'appartiennent pas au Conseil mais à la Couronne, conformément à l'article 10 susmentionné. La demanderesse était au courant de ce fait puisqu'elle n'a pas dirigé son action contre le Conseil des Ports nationaux mais contre la Couronne.

Vu le jugement rendu par les présentes, il ne peut être question d'intérêt tel que mentionné aux articles 24(*d*) de la loi précitée et 273 de la charte; mais mettant de côté la question d'intérêt, il me semble qu'il serait difficile d'interpréter l'article 273 de la charte autrement que dans le sens que l'enlèvement de la neige entre dans la catégorie des taxes. Le Conseil avait sans doute le pouvoir de payer ses frais administratifs proprement dits, mais je ne suis pas d'avis qu'il avait le droit, en qualité d'agent de la Couronne, et à plus forte raison le gérant local encore moins, de céder sans une autorisation spéciale l'exemption d'impôt dont elle jouit et de payer un compte dont elle n'était pas redevable.

La demande reconventionnelle se fonde sur l'article 1047 du Code civil.

> Celui qui reçoit par erreur de droit ou de fait, ce qui ne lui est pas dû, est obligé de le restituer; et s'il ne peut le restituer en nature, d'en payer la valeur.

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[Si la personne qui reçoit est de bonne foi, elle n'est pas obligée de restituer les profits qu'elle a perçus de la chose.]

C'est un genre d'action qui se déroule assez souvent devant les tribunaux. Faribault, dans son *Traité de Droit civil du Québec*, n° 7-bis, p. 128, dit que:

185. Celui qui, par erreur de droit ou de fait, paie des taxes qui ont été imposées illégalement, peut recourir à l'action *condictio indebiti* pour se faire rembourser ce qu'il a ainsi payé indûment. Nos tribunaux ont appliqué cette règle en de nombreuses circonstances.

L'intimée soutient qu'une erreur de droit s'est produite parce que, contrairement à l'intention du président et des membres du Conseil, le gérant du port aurait approuvé les comptes pour le service municipal de la neige, les aurait transmis au Bureau du Trésor, à Ottawa, lequel les aurait payés sans savoir ce qu'il acquittait.

Voici les faits:

Au début de chaque année le Conseil est tenu de soumettre au Ministre, pour chaque port relevant de lui, un budget annuel révélant le revenu estimatif et les dépenses estimatives de l'administration, en conformité de l'article 26 de la Loi sur le Conseil des ports nationaux, lequel budget doit être soumis par le Ministre au gouverneur en conseil.

Aussitôt que possible, mais dans un délai de trois mois, après l'expiration de chaque année civile, le Conseil doit soumettre un rapport annuel au Ministre en la forme que celui-ci peut prescrire, et le Ministre doit présenter ce rapport au Parlement, conformément à l'article 32 de la loi susmentionnée. Comme le sont d'ailleurs tous les revenus et dépenses publics, ceux du Conseil sont sujets à la vérification de l'auditeur général de la même manière, selon les dispositions de l'article 34 de la même loi.

Monsieur M. Latouche, ingénieur au port du Québec, a déclaré qu'à l'item «neige» du budget qu'on transmettait à Ottawa on inscrivait un chiffre estimatif global, soit $25,000, $30,000 ou $50,000, selon les besoins que prévoyait le Conseil. Ainsi on payait à la cité de Québec le compte de l'enlèvement de la neige en front des lots susdits, mais il n'y avait quoi que ce soit dans aucun rapport budgétaire ou financier qui indiquât que tel ou tel versement était fait à la ville. Ces rapports n'indiquaient aucune particularité mais seulement un chiffre global pour le déneigement annuel, embrassant dans un cas les dépenses prévues et dans l'autre

les déboursés. Alors le Ministre de même que le président du Conseil ignoraient les versements faits à la ville, et à plus forte raison, que ces versements défrayaient le coût du déneigement sur une rue de la ville.

Les terrains sous la juridiction du Conseil, à Québec, ont une étendue considérable où les chemins privés et les édifices de l'administration requièrent l'enlèvement de la neige. Les témoignages ne révèlent pas la somme totale remise chaque année pour ce déneigement par les autorités du port aux entrepreneurs, charretiers ou journaliers, autres que ceux de la ville; mais ils font mention de la location par le gérant du port de véhicules et de l'embauchage d'hommes aux fins susdites, et qu'entre 1938 et 1956 la ville a touché quelque $17,000 pour ce service. Cette somme n'est pas en litige et n'a aucun rapport avec les $4,664.96 versés pour l'enlèvement de la neige sur la rue Grand-Champlain.

Monsieur Bennett Roberts, membre du Conseil depuis 1936 et son président depuis 1955, a corroboré le témoignage de monsieur Latouche.

Q. At the time these payments were made, was the Board aware that they were being made?

A. No. It was a great surprise to me to learn they had been made, because the Board, with respect to other municipalities, as referred to the Order, they had no liability to make such payment.

Q. The Board did not authorize these payments?

A. No.

Q. Would you explain, Mr. Roberts, why it is that payments were made and the Board didn't know of it?

A. We had no financial system provided for such appropriation for various of the harbours, and the local authority, within limitations, do spend for such services such amount, and necessarily, we would not see the individual accounts and we don't approve the payment, because the officer was an officer of the Department of Finance who signed and receipted the cheques;—he had a certain responsibility to check any authorized payment, and, in due course, he would have been concerned with that. In details, the Board was not knowing the details of the payments of expenses as it was under the Auditor's control.

Monsieur Roberts a aussi déclaré relativement à la politique des autorités du port ce qui suit:

Q. Mr. Roberts, in the period up to 1950, can you tell us what was the policy of the National Harbours Board with regard to the municipal services?

A. The policy based upon our constitution, or our legal ability, was to refuse all assessment on our possessions in municipalities.

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Vu les témoignages non contredits de monsieur Latouche et de monsieur Roberts, je suis d'avis qu'on a prouvé l'erreur de droit.

Le procureur de la défenderesse reconventionnelle soumet que la demande reconventionnelle sera, en tout cas, en grande partie prescrite en vertu de l'article 2260 C.C. cité ci-dessous:

> L'action se prescrit par cinq ans dans les cas suivants:
>
> * * *
>
> 8. Pour répétition de taxes ou cotisations payées par erreur de droit ou de fait.

Pour ma part, je partage l'opinion de l'honorable juge Fournier qui a affirmé dans *La Reine v. La Commission de Transport de Montreal*[1] qu'on ne peut invoquer la prescription contre la Couronne.

Pour les raisons précitées j'estime que l'action principale doit être rejetée avec dépens et que la demande reconventionnelle est bien fondée et doit être maintenue avec dépens pour la somme de $4,664.96.

Jugement en conséquence.

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Apr. 27

Dec. 15

BETWEEN:

METEOR HOMES LIMITED .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Payment by company to permit group of shareholders acquiring control not an expense incurred to earn income—Accounting—Whether payments recorded in company's books as owing for sales tax a contingent liability—Income Tax Act, R.S.C. 1952, s. 12(1)(a) and (b).

The appellant company was incorporated in January 1954 to acquire lands and build houses thereon for sale at a profit. This was pursuant to an agreement entered into between two groups, A and B, whereby each was to acquire a 50% interest and to have equal representation on the Board of Directors. The duration of the agreement was to be for at least five years unless a majority of the Board deemed an

[1] [1955] Ex. C.R. 83, 91

earlier dissolution advisable. Each of the parties before selling to a non-shareholder was required to offer his shares to existing shareholders at their book value. Shortly thereafter the two groups entered into a second agreement under which another company was incorporated with the same objects and under similar terms. By a third agreement the annual salaries to be paid by the appellant were fixed at $21,000 of which $14,000 was to be paid to Group A's representatives and $7,000 to Group B's. In July following dissension between the parties a final agreement was entered into whereby Group A agreed to sell to Group B its shares in both companies for the amount of its investment in them and Group B, in consideration of the cancellation of the partnership agreements, undertook to pay $32,500 to Group A. The appellant company was not a party to the agreement but it paid the $32,500 and in computing its income for 1954 claimed the sum as a deduction for salary payments and/or operating expenses. It also claimed a deduction of $3,978 for legal fees paid in connection with the termination of the partnership agreements. The Minister disallowed both claims as not being outlays incurred by the company taxpayer for the purpose of earning income within the meaning of s.12(1)(a) of the *Income Tax Act*.

The appellant also sought to deduct for the years 1955, 1956 and 1957, amounts recorded in its books as owing under the *Retail Sales Act*, S.Q. 1940, c. 14, but not paid pending determination of the constitutionality of the Act. The Minister ruled the amounts constituted contingent liabilities within the meaning of s. 12(1)(e) and were not deductible. On an appeal to this Court.

Held: That there was no evidence to establish that the appellant company was bound to fulfill Group B's obligation to Group A, or that the stipulations contained in the final agreement constituted any benefit to the appellant. In any event the $32,500 payment was not an expense made or incurred by the taxpayer for the purpose of producing income from the business of the taxpayer within the meaning of s.12(1)(a) of the *Income Tax Act*.

2. That for the same reasons the claim for legal fees was not deductible.
3. That the validity of a statutory law must be presumed until the contrary is proved and until then any monetary obligation which it imposes should be treated as an outstanding liability. At the date of the trial the contingency of the Quebec *Retail Sales Act* being declared unconstitutional was too remote to bring it within the purview of s. 12(1)(e) of the *Income Tax Act*. The deductions claimed for sales tax should therefore be allowed.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Kearney at Montreal.

Philip Vineberg, Q.C. for appellant.

Paul Boivin, Q.C. and *P. M. Ollivier* for respondent.

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METEOR HOMES LTD.
v.
MINISTER OF NATIONAL REVENUE

KEARNEY J. now (December 15, 1960) delivered the following judgment:

This is an appeal from a decision of the Minister of National Revenue, notice of which was given in conformity with s. 58 of the *Income Tax Act* to the appellant on January 28, 1959, whereby the Minister confirmed the following assessments previously issued against the appellant:

1954	$3,735.41
1955	6,123.59
1956	5,383.48
1957	1,990.36

The appellant claimed that a sum of $32,500 which it paid in 1954 in connection with the termination of two partnership agreements entered into by two groups of its shareholders, and $3,978.00 paid as legal fees in 1955, constituted ordinary operating expenses, and therefore deductible items, which the Minister had failed to take into account when assessing the appellant.

The deductibility of these two amounts, which are correlated, constitutes the primary claim in this case. The Minister disallowed them on the grounds that they were not outlays and expenses incurred by the taxpayer for the purpose of gaining and producing income, within the meaning of s. 12(1)(*a*) of the Income Tax Act, quoted hereunder:

In computing income, no deduction shall be made in respect of

(a) General limitation.—an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer.

The appellant also sought to deduct from its taxable income $14,525.30 in 1955, $7,225.97 in 1956, and $4,855.97 in 1957, because they were liabilities consisting of moneys due and payable to the Comptroller of Provincial Revenue of the Province of Quebec as provincial sales tax. The Minister, on the grounds that the provincial sales tax charges were unsubstantiated and of a contingent nature, disallowed these amounts as deductions by reason of the provisions of s. 12(1)(*e*) of the Act which reads as follows:

Reserves, etc.—an amount transferred or credited to a reserve, contingent account or sinking fund except as expressly permitted by this Part.

The deductibility of these amounts which total $26,607.24 constitutes the second point in issue.

The item of $32,500 in another connection has already been the subject of consideration by Fournier J. in *Minister of National Revenue* v. *Alfred Manaster*[1]. The following is an outline of the essential factors which in the instant case give rise to this disputed item.

Towards the end of 1953, a father and two sons, named Manaster, who through Century Construction Ltd. had been and continued to be engaged in building and selling houses, met a large family called Schouela who, with a son-in-law and an outsider, had formed a registered partnership under the name of Schouela Bros. & Co. of Canada. Most of the Schouelas were relatively new arrivals from Egypt. They had money to invest and, though without previous experience, were interested in establishing themselves in the real estate and building business. In January 1954 the two groups agreed to incorporate the appellant company for the purpose of acquiring land in the town of Dorval, Que., which involved an investment of $380,000, with the intention of building thereon small residences which they hoped to sell at a profit. Each undertook to acquire a 50% interest in treasury common stock and non-voting preferred shares to be issued by the company. Both groups vested one common share in the person of Notary Maurice J. Garmaise who thus held the balance of the voting power and was more or less in the position of an arbitrator.

The Manasters, apart from supplying the skill and experience, were to furnish some initial capital, but to a lesser extent than the Schouelas. The duration of the agreement was to be for not less than five years unless, in the opinion of the majority of the Board of Directors, they deemed it advisable to order an earlier dissolution of the company, either because of losses as shown in the operation of the company or because the majority of the Board of Directors were dissatisfied with the conduct towards the company of any of its directors or shareholders. The agreement also contained a restriction on the transferability of shares which required each of the parties before selling to a non-shareholder to offer his shares to existing shareholders at their book value, as established

[1] [1958] Ex.C.R. 314.

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by the last annual balance sheet rendered by the auditor of the company without regard to profit or loss in the interval. The Board of Directors consisted of two representatives from each group and Notary Garmaise constituted the fifth.

About two weeks later the same parties entered into another agreement to incorporate for like purposes a second company to be called Meteor-Century Builders Inc. The land to be acquired was located on Gouin Boulevard, Cartierville, in the city of Montreal, the purchase price whereof being $720,000. The stock ownership and voting control of the first and second company were similar. The first agreement of January 28, 1954, was slightly modified by a third agreement, and the three agreements were filed as exhibits A-1, A-2 and A-3.

By agreement A-1 Josef Manaster and Alfred Manaster were to be appointed president and treasurer respectively; and Ezekiel Schouela and Benjamin Azarut, secretary and vice-president, respectively, of the appellant company. But by agreement A-2 Ezekiel Schouela and Edouard Schouela were to become president and treasurer respectively; and Josef Manaster and Leon Manaster, vice-president and secretary of the second company. Exhibit A-1 contained a stipulation that yearly salaries totalling $35,000 were to be divided as follows: $21,000 between the Manasters who became active in the enterprise and the remaining $14,000 to be similarly divided between the Schouela interests. This was amended by A-3 which provided that total salaries would be reduced to $21,000—$14,000 to the Manasters and half that amount to the Schouelas. Exhibit A-2 stipulated that in Meteor-Century Builders Inc. the salaries of $21,000 were to be divided equally between the representatives of the two groups. It also contained a provision whereby the first and second parties agreed to subscribe $100,000 each for 100 shares of the company's common stock and 900 shares of preferred stock, both of a par value of $100 each, subject to the stipulation that each of the parties was to make an immediate payment of $20,000 and that the balance need not be paid until a notice was sent by any of the directors that a deed of sale for the Gouin Boulevard land was within one week of signature and that funds were required to make the initial

payment thereon. The last clause in this agreement contains a stipulation that, since the major portion of their assets is vested in Century Construction Ltd., the Manasters shall have the right to purchase any shares to be allotted to them in their own names or in the name of Century Construction Ltd., or in any combination of such ownership; and upon the undertaking of the latter to observe all the conditions of the agreement in regards to Meteor-Century Builders Inc.

The evidence reveals that in July 1954 the Schouelas developed suspicions that the Manasters were taking advantage of their position in the appellant company to further their interests in their own company, Century Construction Ltd., to the detriment of Meteor Homes Ltd., and they decided to suspend furnishing further capital to the new company so long as the Manasters retained their stock interests in it. There is no evidence that a majority of the Board of Directors were dissatisfied with the conduct of the Manasters or that the company was incurring losses, and I do not consider that the charges made against the Manasters were substantiated; but an agreement was reached, no doubt with the intervention of Notary Maurice Garmaise, and signed before Notary Max Garmaise on July 9, 1954, whereby the Schouelas bought out the Manasters. It is stipulated in this deed (Ex. A-5) that the agreements of partnership (Exs. A-1 and A-2) between the Manasters and the Schouelas, called respectively the first and second parties, are hereby cancelled and annulled *à toutes fins que de droit;* and it is stated further that the first parties sell to the second parties all of the common and preferred shares of the capital stock of the appellant company issued to them for $25,000, receipt whereof was acknowledged by the first parties, consisting of forty-nine common shares and 200 preferred, both of a par value of $100 each. It describes the similar transaction in respect of Meteor Century Builders Inc., whereby the first parties in consideration of the acknowledged receipt by them of $20,000 sell all the shares of the capital stock which, with the exception of one common share issued to Notary Maurice Garmaise, had been issued in equal proportions to the first parties and Century Construction Ltd.; and the second parties oblige themselves to indemnify and hold

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harmless the first parties against any claim of whatever nature arising from the fact of non-payment of the balance of the subscription price ($20,000), payment having been withheld with the consent of the second parties and of the directors of the said company.

From the two above-mentioned transactions the first parties simply received the return of the money they had invested in these two companies.

In paragraph 4 of the receipt, release and discharge (A-5) reference to an additional consideration of $32,500 is made in the following terms:

> In consideration of the termination of the Agreement between the parties and of the assumption by the Second Parties of the undertaking, the Second Parties agree to pay to the First Parties the sum of $32,500 which the First Parties acknowledge to have received to their satisfaction at the execution hereof and whereof quit.

In paragraph 5—

> The Parties agree that the termination of the said partnership and the payments hereinabove specified are made in full and final settlement of any claim of whatever nature of the First Parties against the companies involved or against the Second Parties and of any claim of whatever nature of the companies or of the Second Parties against the First Parties, the parties acknowledging to have settled all accounts between them and to be content and satisfied therewith.

A glance at exhibit A-5 shows that the appellant company, although referred to in this agreement, is not a party to it. It is to be noted that it was the second parties (Schouelas) who, by the terms of the agreement, undertook to pay to the first parties the above-mentioned sum of $32,500, but such payment was not made. Instead it was effected by two cheques of the appellant company, both dated July 9, 1954, and signed on its behalf by E. Schouela and Josef Manaster. It is claimed in the notice of appeal that this amount constituted salary payments and/or operating expenses of the appellant company. I will deal with the merits of that submission shortly. This agreement contains an *omnibus* clause that grants a mutual receipt, release and discharge between the parties *inter se* as well as with respect to the companies mentioned in the agreement; and the most that can be said for it is that the money was paid for multiple reasons and that only a small amount, if any, could be regarded as a payment by the

company to the Manasters in lieu of salary. In my opinion, any evidence to the contrary notwithstanding, the main consideration for which the Schouelas undertook to pay the sum of $32,500 was to break a deadlock of their own creation and to obtain absolute control not only of the appellant company but also of Meteor-Century Builders Inc.

It goes without saying that verbal evidence cannot be entertained to vary or contradict the terms of a valid written agreement. Counsel for the appellant submitted that the $32,500 was paid by the appellant company to get rid of the Manasters because, rightly or wrongly, in the opinion of the Schouelas the company would be ruined instead of benefitted by their services, but this is contradicted in the following evidence given by Alfred Manaster:

> Q. Did you also hear, Mr. Manaster, Mr. Schouela say that "at the time of the dissolution of the agreement, the Company Meteor Homes was in a worse position that it was when it was first formed?"
>
> A. I did hear him say so, but I will have to disagree with this statement, because at the time of the dissolution, we had under construction thirty-seven (37) homes in Dorval which were being built by us as a part of the greater project for approximately one hundred and sixty (160) homes. And according to my knowledge, the response we had received from the public was very good and the sales for these homes were foreseeable and the profit also was foreseeable. At the time, thirty seven (37) houses were built.

Mr. Edouard Schouela in his evidence sought to connect his undertaking to pay the Manasters' combined salaries of $14,000 a year for five years, with the payment by the appellant company of $32,500. He stated that this figure constituted a fair settlement of a $70,000 debt made up of $14,000 per annum for five years. If such payment had been intended to cover only salary, one would expect it to have been made with one cheque, but it was effected without explanation with two cheques of July 9, 1954, for $27,500 and $5,000.

An obvious weakness in the above statement is that the record contains no evidence whatsoever that the appellant company undertook to pay $14,000 per annum for five years to the Manasters who were president and treasurer of the appellant company. Section 178 of the *Quebec Companies Act*, R.S.Q. 1941, c. 276, states that, in the absence of other express provisions, the election of directors shall

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take place yearly. So, at most the appellant company could only be held liable for the Manasters' salaries for a period of six months, the unexpired portion of the current year, since it appears that they had been paid up to July 1954; and, if misfeasance on the part of the Manasters as charged by the Schouelas were provable, the appellant would have been justified in dismissing them for cause without further compensation. If the appellant failed to make payment to the Manasters of $14,000 per annum for the four subsequent years, their recourse would be against the Schouelas who had assumed the responsibility of paying such sum, and not against the company.

A person, according to Art. 1028 C.C., cannot by a contract in his own name bind anyone but himself, his heirs and legal representatives; and Art. 1029 C.C. provides in part that a party, in like manner, may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself, or of a gift which he makes to another.

In my opinion the evidence does not establish that the appellant was bound to fulfill the obligations of the Schouelas towards the Manasters; or that the multiple stipulations contained in exhibit A-5 constituted a benefit to the appellant. In any event, from the proof I am led to believe that the sum of $32,500 paid by the taxpayer was certainly not an expenditure in the ordinary course of business.

Fournier J. in *Minister of National Revenue* v. *Manaster* (*supra*) held that the receipt of the $32,500 by the Manasters was not income to them but a payment of a capital nature and consequently deductible; but the payment in question should be considered in relation to the instant taxpayer only, because cases can arise where payments may be deductible to the payer and not taxable to the payee, but I do not think that this is such a case.

Counsel for the appellant assimilated the present case to *B. W. Noble, Ltd.* v. *Mitchell*[1]. In that case the moneys were expended in consideration of the cancellation of an agreement between the company and a particular shareholder, and it was held that the amount paid was "no more than a payment to get rid of a servant in the course of the business in the year in which the trouble comes." In

[1] 11 T.C. 372, 420.

the present case we are dealing with two groups of shareholders who had agreed to go into business together and, unlike the above case, the agreement makes no reference to the riddance of a servant of the company. The same may be said of *Commissioner of Inland Revenue* v. *Patrick Thomson, Ltd.*[1] and two other subsidiary companies of a common parent company, wherein it appears that certain sums were paid by the companies to their managing directors in connection with the cancellation of their contracts, the payments being expressed in the first two cases to be in satisfaction of rights to future remuneration, and in the third to be in lieu of notice.

Although the amount of $32,500 was paid by the company, the prevailing circumstances were unusual and I am far from satisfied that, as contemplated in s. 12(1)(*a*), it was an expense "made or incurred by the taxpayer for the purpose of gaining or producing income from . . . a business of the taxpayer."

The claim for $3,978 covering legal fees paid in 1955 in connection with the termination of the partnership was not raised during the hearing, but it follows in my opinion that it is likewise non-deductible for income tax purposes.

The second point in issue is whether or not the amounts of $14,525.30, $7,225.97 and $4,855.97 claimed by the appellant as deductions from income for the years 1955, 1956, 1957, respectively, constituted a reserve within the meaning of the Act and were properly or improperly disallowed. The reasons given for disallowance of these deductions rest on very narrow and what I consider to be tenuous grounds, namely, that the amounts in question did not constitute deductible liabilities as claimed by the appellant, but constituted a reserve for contingent liabilities which was not expressly permitted under s. 12(1)(*e*).

The arithmetical correctness of the deductions claimed are not in issue, and it is conceded that these sums represent sales tax imposed under the *Retail Sales Tax Act*, S.Q. 1940, 4 Geo. VI, c. 14. Under this Act the appellant as a member of the building trade is required to pay a provincial and municipal sales tax on the price of materials purchased for conversion into residences or other things built for the purpose of sale. No person may effect such sales unless he has first obtained a certificate of registration

[1] 37 T.C. 145.

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from the Comptroller of Provincial Revenue. It is not disputed that the appellant had conformed to the requirements of the Act and that the system of accounting in use by it was the accrual method.

Mr. Joseph Roston, a qualified chartered accountant with some thirty years' experience, testified in his quality of auditor of the appellant company that each month the amount of provincial sales tax was calculated and recorded in the appellant's books not as a reserve but as an ordinary liability; and, speaking from his experience and knowledge, he was definitely of the opinion that it constituted a liability. The witness, when asked how in general practice such sales tax indebtedness was treated, added that he had quite a few other clients in the real estate and building business, all of whom set it up in the same way as a liability but that most of them paid it monthly. Counsel for the respondent neither cross-questioned the witness nor led any evidence to contradict his testimony.

I think Mr. Roston's evidence establishes that the appellant by showing the sales tax in its books of accounts as an ordinary liability was conforming to usual commercial and good accounting practice, and such practice must prevail unless there are statutory provisions to the contrary. *Vide Royal Trust Co.* v. *Minister of National Revenue*[1]; *Imperial Oil Ltd.* v. *Minister of National Revenue*[2]; *Consolidated Textiles Ltd.* v. *Minister of National Revenue*[3].

Edouard Schouela, whose evidence is uncontradicted stated in substance that month by month the amount of the sales tax was recorded in the company's books as a liability in favour of the Provincial Government; that the latter had never demanded payment or sent an inspector to find out what monthly amounts the appellant had set up in its books for sales tax; that the company admits the amounts are owing but that it had not paid them because its lawyer in the present case, who was also acting for another client in an action in which the validity of the *Retail Sales Tax Act* was contested, advised it "to wait for a while until he sees the outcome of his case."

Counsel for the respondent in argument also mentioned, but not by name, a Quebec case which, I gathered, was pending, and in which the constitutionality of the *Retail*

[1] [1957] C.T.C. 32, 40. [2] [1947] Ex.C.R. 527.
[3] [1947] Ex.C.R. 77.

Sales Tax Act was attacked. He added that judgment had not yet been rendered and that the taxpayer did not recognize any liability for the sales tax until a decision was rendered. The only case resembling that description which I could find is the unreported action of *The Attorney-General of the Province of Quebec* v. *Louis B. Magill Co.*[1], wherein the plaintiff instituted action against the defendant, a building contractor, for the recovery of sales tax payable by the defendant on materials admittedly purchased for use in its building operations. The case was heard before Ralston J. who by judgment No. 306,791 of the records of the Superior Court, dated May 27, 1957, dismissed it on the grounds that the action was improperly instituted, having been brought in the name of the Attorney-General of the Province of Quebec instead of in the name of the Comptroller of Provincial Revenue; and the above judgment has not been appealed. The grounds on which that case was decided render it of little value in the instant case.

Mr. Schouela's evidence clearly indicates that we are not here dealing with a case wherein the appellant set up an amount in its books as a reserve and claimed it was deductible but counsel for the respondent submitted that, regardless of how the account was set up, the amount of sales tax is not an account payable but a contingent account, within the meaning of s. 12(1)(*e*) and cannot be claimed as a deduction for income tax purposes. In support of the foregoing contention he referred, *inter alia,* to the case of *Robertson Limited v. Minister of National Revenue*[2]. In that case the taxpayer had received in certain taxation years commissions which were unearned and which it might have to refund. It set up in its books certain reserves against such contingency and claimed unsuccessfully that, so long as such commissions remained paid, they were deductible items. In the present case the appellant, far from acknowledging that the amount sought to be deducted constitutes a reserve set aside against a contingency, claims that it is a liability created by statute and incurred in the ordinary course of business.

[1] (May 27, 1957, Unreported). [2] [1944] Ex. C.R. 170.

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The Court was also referred to *Eli Lilly and Co. (Canada) Limited v. Minister of National Revenue*[1]. The *Lilly* case concerns payments for goods sold and moneys loaned by the appellant, a Canadian company and wholly owned subsidiary of an American corporation, payable in American funds. The Minister added to the revenue of the appellant an amount which included savings effected in the repayment of the indebtedness made possible because the Canadian dollar, which had formerly sold at a discount, was at the time of repayment selling at a premium. A majority of the Supreme Court held in part that the fact that the appellant in prior years had been allowed to deduct the amount of exchange necessary to bring the cost of the goods to cost in Canadian dollars was an inapplicable criterion. No one will deny that the time and extent of fluctuations in currency exchange rates is uncertain; but such contingencies are not to be compared, in the absence of proof to the contrary, with a mere possibility of the unconstitutionality of a statutory enactment.

Other cases cited dealt with reserves set aside to cover contingent obligations in respect of outstanding milk tickets and returnable milk bottles left with customers, and the refund by a book distributor to the vendor of the purchase price of unsold books subject to reimbursement. But these cases are of little assistance because they deal with situations where the amounts sought to be deducted were by reason of the terms of the contract obviously contingent amounts and only exigible when the contingency had ceased to exist.

Referring in argument to the foregoing cases, counsel for the respondent stated:

> All the above cases serve to illustrate the principle that, in the case of a taxpayer on an accrual basis, where an expense is incurred and the amount is definitely ascertainable and legally liable or payable in the year in which it is incurred, such amount may be claimed as an expense of the year.
>
> On the other hand, where a liability is not definitely ascertainable and the amount is not legally liable or payable because of a factor of contingency involved, an amount claimed as deduction from income to take care of such contingent liability cannot be allowed.

[1] [1955] S.C.R. 745.

I do not think there is any doubt that the expense was incurred and payable in the same year because the amount of the obligation and the terms of payment were imposed on the appellant by statute. There cannot be any question of ascertainment of the amounts due since the accuracy of each amount was conceded. There remains the question which in my opinion constitutes the main issue in this case, namely—because of a factor of contingency, was the appellant legally liable for the expense which had been thrust upon it? Much depends on the meaning to be attached to the words "contingent" and "legally liable."

The *Shorter Oxford English Dictionary*, third edition, defines liability as follows:

> *Law*—The condition of being liable or answerable by law or equity.

It has been said that the word "liability" is a very general one and will, as a rule, include even contingencies. See *J. D. McArthur Co. Ltd. v. Alberta & G.W. Ry. Co.*[1] referred to by Sanagan and Drynan in *The Encyclopedia of Words and Phrases Legal Maxims*, Vol. III, p. 347. Kohler, *A Dictionary for Accountants*, second edition, p. 290, defines a legal liability as—

> A responsibility for some obligation, enforceable at law, as distinguished from a moral responsibility.

Counsel for the respondent referred to the definition found in the *Shorter Oxford English Dictionary*, second edition, of the word "contingency," i.e., "liable to happen or not . . . Dependent on a probability; conditional; not absolute . . . " Apart from drawing attention to the words "liable," meaning apt to, and "probable," signifying likely, I think this last definition requires elaboration, as there are several types of contingencies, some of which would operate in favour of the allowance as a deduction of the items claimed and others against it. Mertens, *Law of Federal Income Taxation*, Vol. 2, c. 12, p. 127, considers "the problem of *when* items are . . . deductions to the taxpayer on the accrual basis," and deals with it at p. 132 in these terms:

> Not every contingency prevents the accrual of income; the contingency must be real and substantial. A condition precedent to the creation of a legal right to demand payment effectively bars the accrual of income until the condition is fulfilled, but the possible occurrence of a condition *subsequent* to the creation of a liability is not grounds for postponing the accrual. (Emphasis mine).

[1] [1924] 2 D.L.R. 118

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Kohler, at page 120 (*supra*), defines contingent liability as—

> An obligation, relating to a past transaction or other event, that may arise in consequence of a future event now deemed *possible* but not *probable*. If probable, the obligation is not contingent but real (ordinarily, a current liability), and recognition in the accounts is required, . . . (Emphasis mine)

In *Simon's Income Tax*, second edition, Vol. II, pp. 203 and 204, Viscount Simon, commenting on *Peter Merchant, Ltd. v. Stedeford (Inspector of Taxes)*[1], states:

> For income tax purposes it was held that a distinction must be drawn between an actual, i.e., legal, liability, which is deductible, and a liability which is future or contingent and for which no deducton can be made . . . The basis of the decision was that the real liability under the contract was contingent, not actual, since the obligations of the company were not such that it might be sued for the cost of replacements at current prices, but only for possible damages for breach of contract . . .
>
> In cases, however, where an actual liability exists, as is the case with accrued expenses, a deduction is allowable; and this is not affected by the fact that the amount of the liability and the deduction will subsequently have to be varied. A liability, the amount of which is deductible for income tax purposes, is one which is actually existing at the time of making the deduction, and is distinct from the type of liability accruing in *Peter Merchant, Ltd.* v. *Stedeford* (*supra*), which although allowable on accountancy principles, is not deductible for the purposes of income tax.

In the above-mentioned case, Singleton J., after quoting Lord Haldane in *Sun Insurance Office v. Clark*[2] to the following effect:

> It is plain that the question of what is or is not profit or gain must primarily be one of fact and of fact to be ascertained by the tests applied to ordinary business. Questions of law can only arise when (as was not the case here) some express statutory direction applies and excludes ordinary commercial practice, or where, by reason of its being impracticable to ascertain the facts sufficiently, some presumption has to be invoked to fill the gap,

goes on to say that "the ordinary commercial practice in arriving at the profits of a fire insurance company was what was being considered in that case," and I think the same conditions exist in the present case. In the case of *Peter Merchant, Ltd. v. Stedeford (H.M. Inspector of Taxes)*, p. 505 (*supra*), Singleton J. states:

> Before me the case of the Company is that it ought to be allowed to make deductions in respect of possible losses or possible claims. I do not think that is permissible in the circumstances of this case. As I have said, I see no reason for the departure from the ordinary accepted principles, and this appeal must be dismissed.

[1] (1948) 30 T.C. 496, C.A. [2] 6 T.C. 59, 78.

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In the present case there was no condition precedent to prevent the provincial authorities from preferring a claim against the appellant; and whether the law under which the claim was instituted might later be declared *ultra vires* constituted a condition subsequent. In my opinion the validity of a statutory law must be presumed until the contrary is proved, and until then any monetary obligation which it imposes should be treated as an outstanding liability. In this case there is evidence that contractors in the province of Quebec generally set up the retail sales tax as a liability and paid it monthly. Whether some one contractor has attacked the Act on several counts including its constitutionality is not the criterion by which the instant case is to be judged.

Counsel for the appellant suggested that perhaps the reason why the Quebec Government had been lenient and had not pressed its claim against the appellant was because of a Saskatchewan case pending in the Supreme Court of Canada, which *inter alia* involved the constitutionality of an Act not unlike the *Retail Sales Tax Act.* Be that as it may, there was nothing to prevent such action from being taken and there is no evidence that the appellant, if sued, would risk the expense of defending the action; and the only thing it stood to lose by delaying payment as long as possible was interest charges at five per cent which would accrue in the meantime. I have no doubt that the Saskatchewan case alluded to is *Cairns Construction Ltd. v. The Government of Saskatchewan*[1]. Counsel for the respondent made no reference to the *Cairns* case and, though perhaps unnecessary for me to do so, I will comment on it. That case dealt with the validity and applicability to the person sued of *The Education and Hospitalization Tax Act,* R.S.S. 1953, c. 61, which imposes a tax on consumers and users of tangible personal property purchased at retail sales prices in the province for consumption and use, and not for resale. The Supreme Court of Canada which rendered judgment on June 13, 1960, found unanimously that the Act in

[1] 1960) 24 D.L.R. (2d), 1, 2.

question was constitutional and applicable. Martland J., who wrote the judgment of the Court, referring to the decision in the courts below, said:

> The appellant bases its claim upon two grounds: first that the Act in question is *ultra vires* of the Saskatchewan Legislature and, second, that even if it is valid, the appellant is not, under the terms of the Act obligated to pay this tax.
>
> Both the learned trial Judge [9 D.L.R. (2d) 721] and all the members of the Court of Appeal [16 D.L.R. (2d) 465] of Saskatchewan decided the first issue in favour of the respondent. A majority of the Court of Appeal also decided the second issue in its favour. The learned trial Judge and Gordon J.A., who dissented on this point in the Court of Appeal, held in favour of the appellant in respect of the second issue.

The terms of the Saskatchewan Act differed from those of the Quebec Act, and it is not the applicability of the statute to a particular individual but its constitutionality which may be of interest in the present case. The judgment of our court of last resort was not known at the time the instant case was heard but the judgments of the trial court and the provincial Court of Appeal had been rendered; and I think the unanimity of opinion therein expressed on the constitutional issue has added importance. Had the five learned judges of the Saskatchewan courts expressed an opposite opinion, it could have been argued that at least insofar as the *Cairns* case was concerned, such judgments would have been sufficient to neutralize any previous presumption in favour of the validity of the Act in question. The opinions which were actually expressed, I think, far from rebutting the presumption serve to strengthen it.

Since we are here dealing with a statutory liability concerning which no contingency in the nature of a condition precedent existed at the time such liability was incurred, I do not think a *post hoc* contingency requires consideration, but in any event I believe on the known facts at the date of trial that the *post hoc* contingency of the Quebec *Retail Sales Tax Act* being declared unconstitutional was too remote to bring it within the purview of s. 12(1)(*e*). In my opinion it would have been little short of foolhardiness or wishful thinking on the part of the appellant or its auditor to have shown the disputed items at anything less than their face value and otherwise than as a real liability.

For the foregoing reasons I dismiss the appeal as to the items of \$32,500 and \$3,978; but maintain it for the amounts of \$14,525.30, \$7,225.97 and \$4,855.97 which I consider were improperly disallowed as deductions from taxable income. The case will be referred to the Minister of National Revenue for reassessment, and I think the appellant is entitled to its costs.

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Judgment accordingly.

BETWEEN:

1960 Mar. 24 — Nov. 8

JOSEPH BAPTISTE WILFRID JOLICOEUR .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Profit from sale of timber cutting rights—Capital gain or income—Meaning of "with all due despatch"—Effect of lack of notification within 180 days after service of Notice of Objection—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 46, 58(3), 59(1), 61, 92(1), 105(2) and 139(1)(e).

The appellant carried on general insurance business and that of a lumber merchant. In the latter business in addition to buying logs, sawing them into lumber and selling the lumber wholesale, he also bought timber lots which he re-sold after reserving the cutting rights thereon. In the years 1950, 1951, 1952 and 1953 he sold five of his cutting rights at a profit. On August 14, 1956 the Minister re-assessed for the taxation years 1950 to 1954 inclusive and added to the appellant's declared income the profits made on the sale of the five cutting rights. The taxpayer's appeal from the assessment to the Income Tax Appeal Board was allowed in part but the Board affirmed the addition of the profits made on the sale of the cutting rights. On an appeal from the decision to this Court the taxpayer contended that the profit made on the sales in question represented the liquidation of capital assets held for investment and for the support of his children. Two questions of law were also submitted to the Court: 1. Whether the Minister had acted with "all due despatch" in notifying the taxpayer of his reconsideration of the assessment for the taxation years in question. 2. Whether lack of such notification within a delay of 180 days pursuant to s. 59(1) carries with it the nullity of the assessments.

Held: That after the time the appellant submitted he had decided to discontinue his business and liquidate his assets, he continued his lumber business and sold the five cutting rights in question from which it was to be concluded that the profits arising from their sale resulted from

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commercial transactions within the meaning of sections 4, 5 and 139(1)(*e*) of the *Income Tax Act* and were properly added to the appellant's declared income.

2. That the re-assessments of the appellant's income were all made within the period of time during which the Minister was lawfully allowed to do so and the appellant received due notice of the re-assessments.
3. That the meaning to be assigned to the words "with all due despatch" in s. 46 of the Act is that the Minister may exercise his power of assessment during a specified period, formerly six, now four years, from the date of the original assessment.
4. That the fact that the Minister did not serve on the taxpayer within the time limit of 180 days after receipt of the Notice of Objection, notice that the assessments had been reconsidered, has no effect on the validity or non-validity of the assessments.
5. That the words "with all due despatch" in ss. 46(1), 58(3) and 105(2) of the Act have the same meaning as "with all due diligence" or "within a reasonable time" and are to be interpreted as giving a discretion, justified by circumstances and reasons, to the person whose duty it is to act. They are not to be interpreted as meaning a fixed period of time but purport a discretion of the Minister to be exercised for the good administration of the Act, with reason, justice and legal principles.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Fournier at Montreal.

Philip Vineberg, Q.C. for appellant.

Paul Boivin, Q.C. and *Roger Tassé* for respondent.

FOURNIER J. now (November 8, 1960) delivered the following judgment:

Dans cette affaire il s'agit d'un appel de la décision de la Commission d'Appel de l'Impôt sur le Revenu du 16 février 1959 relative au calcul du revenu et de la cotisation de l'impôt sur le revenu de l'appelant pour les années d'imposition 1950, 1951, 1952, 1953 et 1954. Le jugement maintient en partie la cotisation de l'intimé et défère le tout au Ministre du Revenu national pour qu'il émette une cotisation revisée.

La partie de l'appel qui a été maintenue concerne une somme de $9,252.37 qui fut ajoutée par l'intimé au revenu net déclaré de l'appelant pour l'année 1952, mais que la Commission a considérée comme montant des économies de l'épouse, et non pas comme revenu imposable du contribuable, dans la cotisation de son revenu pour cette année.

Cette partie de la décision de la Commission n'est pas l'objet du présent appel devant cette Cour et l'intimé n'a pas logé de contre-appel à ce sujet.

La cause du litige provient surtout du fait que l'intimé a ajouté au revenu de l'appelant, pour fins d'impôt, les bénéfices qu'il avait réalisés par suite de la vente de certains droits de coupe de bois et de bois. Pour les années d'imposition dont il est question, l'appelant a déclaré son revenu net tel que ci-après et c'est à ce revenu que l'intimé a ajouté les profits mentionnés *supra* en établissant le revenu imposable du contribuable.

Année	*Revenu net déclaré*	*Revenu établi par l'intimé*
1950	$ 9,658.93	$66,095.78
1951	3,356.21	27,419.61
1952	5,729.51	24,136.30
1953	8,200.45	15,938.50
1954	4,555.10	11,468.22

Le 14 août 1956, le Ministre donna avis à l'appelant d'une cotisation revisée pour ces années. Le 5 septembre, l'appelant fit signifier à l'intimé un avis d'opposition à la cotisation avec raisons à l'appui. Le 17 juin 1957, le Ministre émit une nouvelle cotisation confirmant la première, après avoir fait certaines déductions pour des intérêts payés sur des emprunts de banques, et en donna avis au contribuable. Celui-ci en appela à la Commission, qui maintint l'appel en partie; de cette décision il y a appel à cette Cour.

En somme, il s'agit de déterminer, en se basant sur la preuve offerte, si les profits provenant de la vente de cinq droits de coupe de bois sont de la nature d'un revenu capital ou s'ils découlent de transactions commerciales au sens des dispositions des articles 4, 5 et 139(1)(*e*) de la Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148. Dans le premier cas, le revenu n'est pas imposable; dans le second, il est soumis aux dispositions ayant trait à l'imposition d'impôt.

Les articles 3, 4 et 139(1)(*e*) de la loi édictent:

3. Le revenu d'un contribuable pour une année d'imposition, aux fins de la présente Partie, est son revenu pour l'année de toutes provenances à l'intérieur ou à l'extérieur du Canada et, sans restreindre la généralité de ce qui précède, comprend le revenu pour l'année provenant

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(*a*) d'entreprises,

4. Sous réserve des autres dispositions de la présente Partie, le revenu provenant, pour une année d'imposition, d'une entreprise ou de biens est le bénéfice en découlant pour l'année.

139(1) Dans la présente loi

(*e*) «entreprise» comprend une profession, un métier, un commerce, une fabrication ou une activité de quelque genre que ce soit et comprend une initiative ou affaire d'un caractère commercial, mais ne comprend pas une charge ou emploi.

Le législateur, dans ces dispositions de la loi établissant les règles générales qui doivent être applicables au calcul de l'impôt, emploie des termes couvrant presque toutes les activités humaines dont le but est de réaliser des bénéfices. Toutefois, il n'exprime pas l'intention de taxer les profits provenant de la vente de placements ou d'actifs d'une nature capitale, sauf exceptions ou à moins que ces transactions ne revêtent les caractères d'une entreprise, affaire ou initiative commerciale. La difficulté est de déterminer, dans chaque cause, si tous les actes et agissements du contribuable, ainsi que les faits et circonstances entourant la ou les transactions, indiquent qu'elles avaient les empreintes d'une entreprise, affaire ou initiative commerciale.

Voyons, en résumé, la preuve. L'appelant a demeuré à St-Évariste, Co. Frontenac, de 1919 à 1952. Vers 1924, il a ouvert un bureau d'assurances générales (vie, feu, accident, dommage), représentant en particulier la compagnie Mutual Life Insurance of Canada. Il continua ce genre d'affaires à St-Évariste jusqu'en 1949, alors qu'il vendit son bureau et son commerce. Outre ses affaires d'assurance, en 1934 il entreprit d'acheter des coupes de bois d'une compagnie possédant des limites à bois. Pendant la saison d'hiver, il faisait faire la coupe du bois. Une fois coupé, il faisait transporter ce bois au moulin et le faisait scier, puis le vendait en gros. Durant les premières années, il opérait seul, mais de 1936 à 1946 il exploitait ce commerce avec un associé et tous deux se partageaient les profits de l'entreprise. Après 1946, tout en continuant la vente en gros du bois, il se mit, pour ces fins, à acheter des cultivateurs du bois qu'il faisait préparer pour le marché. A ce stage, je crois qu'il est logique de dire qu'il exerçait son commerce de bois par l'achat de droits de coupe de bois, qu'il exploitait lui-même ou avec

des associés, et que de plus il achetait des cultivateurs du bois qu'il faisait préparer pour le marché et qu'il vendait ensuite en gros.

Pendant cette même période et par la suite, il fit l'acquisition d'un certain nombre d'immeubles. Ces transactions consistaient surtout en l'achat de lots à bois et de droits de coupe de bois. Dans presque tous ces derniers cas, il vendait le fonds de terre et se réservait les droits de coupe. L'appelant explique sa manière de procéder en disant que c'était un placement qu'il faisait en prévision des besoins futurs de sa famille et en vue d'utiliser lui-même ces droits de coupe s'il en avait besoin. Je crois qu'il est possible de conclure que, s'il avait été préférable pour l'appelant d'utiliser ce bois pour son commerce de bois de construction, plutôt que d'acheter des droits de coupe de compagnies ou d'acheter du bois des cultivateurs, il aurait opté pour la première alternative.

L'appelant a parlé de raisons de famille. Il avait des fils qu'il espérait pouvoir intéresser à son commerce d'assurances et à ses autres activités commerciales; les fils décidèrent d'aller s'établir dans d'autres régions. Il dit que c'est alors (vers 1948) qu'il prit la décision de vendre son commerce d'assurance ainsi que son actif et d'aller demeurer à Montréal. Toutefois, même après ces événements il a continué à vendre de l'assurance, à opérer un commerce de bois et à acheter, échanger et vendre des propriétés.

Tout le présent débat repose sur l'achat et la vente de cinq droits de coupe de bois. Les profits doivent-ils être considérés comme revenus imposables ou gains de capital? C'est là le problème à résoudre. Les ventes ont été faites en 1950, 1951, 1952 et 1953. Les profits provenant de ces ventes sont indiqués aux documents qui sont annexés aux déclarations du revenu net de l'appelant pour ces années, mais il a considéré ces bénéfices comme profit de capital. En se basant sur les déclarations de l'appelant, l'intimé a reconstitué l'avoir du contribuable et a considéré le profit des ventes comme revenu imposable. Le résumé des transactions suit.

Le 22 octobre 1936, à une vente annoncée par le shérif, l'appelant fit l'acquisition des lots à bois n°s 156 et 157 de la Paroisse St-Samuel de Gayhurst pour $1,010 et le 6 octobre 1942 il acheta le lot 7 du 8e rang du canton de Shenley-Sud

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pour $1,000. La vente du 18 octobre 1950 des droits de coupe sur ces lots a été effectuée pour la somme de $59,875, dont $30,000 payable avant le 1er juin 1951 et la balance, soit $29,875, avant le 1er décembre de la même année.

Le 6 octobre 1943, il avait acheté les lots 36 et 38 du rang 11 du canton de Shenley. Le 10 juillet 1944, il avait vendu le fonds de terre pour la somme de $3,000, se réservant le bois qui croît ou qui croîtra sur les dits lots pendant 30 ans. La vente de la coupe de bois sur le lot 36 fut effectuée en 1951 pour la somme de $25,000 et celle sur le lot 38 en 1952 pour la somme de $16,500.

La quatrième vente est celle des droits de coupe de bois sur le lot 564 et partie du lot 563. L'appelant avait acheté ces lots en 1951. Il en avait vendu le fonds de terre le 30 octobre 1952 pour $13,000 et les droits de coupe le 20 novembre 1952 pour $1,500. Il avait acheté cette propriété et les droits de coupe pour $10,000 peu de temps auparavant.

L'appelant avait acquis les droits de coupe sur les lots 28 et 29 du rang 13 de St-Évariste pour une somme de $100. En 1953, il fit la vente de ces droits pour une somme de $3,000.

Bien que la preuve documentaire au dossier ne soit pas complète en ce qui regarde ces transactions, il y a au dossier une lettre indiquant que l'appelant ne conteste ni les transactions relatives aux droits de coupe de bois ni les montants mentionnés à la cédule annexée à ladite lettre. D'ailleurs c'est à l'appelant qu'incombait le fardeau de démolir les faits prouvés et d'établir que les dispositions de la loi sur lesquelles l'intimé avait basé sa cotisation n'étaient pas applicables au litige. Il a failli à la tâche, à mon avis, quant aux faits relatifs aux points précités.

Il est évident que l'appelant, même après avoir décidé de liquider ce qu'il désigne comme ses placements, a continué à vendre de l'assurance et du bois de construction et à acheter et vendre des immeubles. Il se réservait invariablement le droit de coupe du bois. Il avait donc le droit de couper et scier ce bois et de le vendre; s'il ne l'a pas vendu, il est raisonnable de croire qu'il attendait l'occasion pour ce faire ou pour en disposer autrement. Là se trouvait deux alternatives d'en retirer des revenus. Le fait qu'il a prétendu avoir voulu les garder pour assurer l'avenir de ses enfants ne m'a pas impressionné, étant donné toutes ses activités

commerciales au cours de sa carrière d'homme d'affaires. Du reste, un exemple, que je veux citer, illustre bien sa méthode d'opération. A la pièce R-2 (vente de coupe sur les lots 156-157 du cadastre officiel de la Paroisse St-Samuel de Gayhurst) se trouve la clause suivante:

> La coupe de bois ci-dessus vendue ainsi que le bois coupé demeurera la propriété du vendeur jusqu'à paiement complet des paiements dus et le vendeur aura droit d'étamper à son nom le bois coupé en quelqu'endroit qu'il soit, même après le sciage et l'empilage, jusqu'à parfait paiement.

L'appelant a prétendu qu'il ne faisait pas le commerce de coupes de bois, mais la clause qui précède me porte à croire le contraire. Depuis de nombreuses années, son commerce de bois consistait en l'achat de droits de coupe de bois ou en l'achat de bois des cultivateurs; à le faire scier, préparer pour le marché et à le vendre en gros. La vente du 18 octobre 1950 me semble une méthode améliorée, et probablement plus lucrative, d'exercer son commerce. Le contrat indique clairement que le contribuable a vendu du bois ayant été coupé, ouvré et préparé. Une telle transaction est certainement de nature commerciale ou d'inspiration spéculative.

M. le juge Locke, parlant pour la Cour, dans la cause de *Sutton Lumber & Trading Co. Ltd.* et *Minister of National Revenue*[1], exprime l'avis ci-après relaté:

> The question as to whether or not the present appellant was engaged in the business of buying timber limits or acquiring timber leases with a view to dealing in them for the purpose of profit is a question of fact which must be determined upon the evidence. . . .

Comme il y a rarement deux causes dont les faits sont identiques, il est admis que chaque cas doit être décidé au regard des faits qui lui sont propres. Ici il s'agit d'un contribuable qui a passé sa vie d'adulte à transiger des affaires d'une nature commerciale. S'il vendait des assurances, il réalisait un profit sous forme de commission. S'il achetait des droits de coupe, il en retirait des revenus sous forme de bénéfices provenant du sciage, de la préparation et de la vente du bois. Lorsqu'il achetait des terres sur lesquelles il y avait du bois, il vendait le fonds de terre, se réservait le droit de coupe, puis, pendant une certaine période, vendait non seulement le droit de coupe mais aussi le bois debout, dont il gardait la propriété jusqu'au paiement, même si le bois avait été coupé, scié et empilé, et cela après l'avoir

[1] [1953] C.T.C. 237, 253.

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étampé à son nom. Il suivait, je n'en ai pas de doute, la même procédure que celle adoptée par les compagnies qui dans le passé lui avait vendu des droits de coupe.

Dans la cause *C. W. Logging Co. Ltd.* et *Minister of National Revenue*[1] qui m'a été citée, le juge Ritchie a décidé:

> That the 1950 sale of the cutting rights to the merchantable timber was a sale of the residue of the mature timber crop and was made in the course of carrying on a business of dealing with timber either by logging operations conducted by the appellant itself or by the sale of stumpage.

Dans la présente instance, l'appelant possédait des coupes de bois. Il pouvait lui-même les exploiter et vendre le bois; il a préféré vendre et le droit de coupe et le bois. Il exerçait une entreprise où il pouvait acheter et vendre du bois ou acheter des permis de coupe et vendre et ces droits et le bois se trouvant sur les terrains.

Le Président de cette Cour, en commentant sur l'expression «une initiative ou affaire d'un caractère commercial» qui forme partie de la définition du mot «entreprise» contenu dans les articles 3 et 4 de la loi, fait les remarques suivantes:

> The intention to sell the purchased property at a profit is not itself a test of whether the profit is subject to tax, for the intention to make a profit may be just as much the purpose of an investment transaction as of a trading one. The considerations prompting the transaction may be of such a business nature as to invest it with the character of an adventure in the nature of trade even without any intention of making a profit on the sale of the purchased commodity. Voir *Minister of National Revenue* et *Taylor* [1956] C.T.C. 189, 190.

Plusieurs faits qui ont été établis par la preuve testimoniale et documentaire ainsi que par les propres déclarations de l'appelant viennent en contradiction avec la position prise dans son appel, lequel, en somme, est basé sur le fait qu'il avait décidé de discontinuer ses activités commerciales, de liquider ses biens et d'aller demeurer à Montréal. Il est bien difficile de concilier ces faits avec les actes qu'il a posés par la suite. Il a continué à vendre de l'assurance et à exploiter un commerce de bois. Il a continué à acheter et vendre des immeubles. En 1950, il a acheté un terrain; il dispose du fonds de terre mais se réserve le droit de couper le bois. En 1952, il vend ce permis de coupe de

[1] [1956] C.T.C. 15.

bois. Voici un cas où il est impossible de dire qu'il a acheté ce permis de coupe pour satisfaire à l'avenir de ses enfants, mais d'où l'on peut déduire qu'il continuait à vendre du bois.

S'il n'y avait pas eu entente entre les parties au début du procès à l'effet que les procureurs produiraient chacun un mémoire écrit sur une question de droit au sujet d'un point de procédure, je déciderais, pour les raisons susmentionnées, que l'appel doit être rejeté. Les factums produits au dossier étant en anglais, je me propose de traiter dans cette langue la question qui m'a été soumise.

Two questions of law are submitted to the Court. The first is whether the Minister had acted with "all due dispatch" in notifying the taxpayer of his reconsideration of the assessment for the taxation years under review, pursuant to s. 58 (3) of the *Income Tax Act,* R.S.C. 1952, c. 148 (identical in wording with s. 53 of the *1948 Income Tax Act*). The second is whether a lack of such notification within a delay of 180 days pursuant to s. 59 (1) carries with it the nullity of the assessments.

The taxation years involved are 1950, 1951, 1952, 1953 and 1954. The original assessment for 1950 was dated May 29, 1951. The taxpayer was re-assessed on August 14, 1956. The notice of objection was submitted on September 5, 1956. The Minister's notice in reply was dated June 17, 1957. For the following years, the dates of the original assessments, re-assessments, notices of objection and notifications in reply are as follows:

Taxation	*Dates*			
years	*Assessment*	*Re-assessment*	*Objection*	*Notice of reply*
1951..	May 15, 1952	Aug. 14, 1956	Sept. 5, 1956	June 17, 1957
1952..	June 3, 1953	" " "	" " "	" " "
1953..	June 4, 1954	" " "	" " "	" " "
1954..	" 17, 1955	" " "	" " "	" " "

In 1956, the Minister re-assessed the appellant under the provisions of s. 42 of the *1948 Income Tax Act* for the taxation years involved.

Up to January 1, 1957 there was a 6-year statute limitation on re-assessments under s. 46 of the *Income Tax Act.* Effective January 1, 1957 the limitation was reduced to four years.

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The re-assessments were made within six years from the day of the original assessments in each case, as provided for in s. 42 of the 1948 Act and in s. 46 of the *Income Tax Act*. The notifications were made 285 days after the appellant's notice of objection, pursuant to s. 53 of the *1948 Income Tax Act* and s. 58 of the *Income Tax Act*.

The appellant contends that all the assessments, and not just the 1950 one, became invalid because of the failure of the Minister to act "with all due diligence as required by law". On the other hand, the respondent submits that the statutory delay set forth in s. 46(4) and 59(1) of the *Income Tax Act* does not apply to s. 58(3) and that the assessments did not become invalid pursuant to the fact that the Minister notified the taxpayer after 180 days from the receipt of the notice of objection.

The provisions of the Act which give power to the Minister to assess the taxpayer's income are found in ss. 46, 58 and 92 of the *Income Tax Act*. They read:

46. (1) The Minister shall, with all due despatch, examine each return of income and assess the tax for the taxation year and the interest and penalties, if any, payable.

(4) The Minister may at any time assess tax, interest or penalties and may

(*a*) at any time, if the taxpayer or person filing the return has made any misrepresentation or committed any fraud in filing the return or supplying information under this Act, and

(*b*) within 4 years from the day of an original assessment in any other case,

re-assess or make additional assessments.

58. (3) Upon receipt of the notice of objection, the Minister shall with all due despatch reconsider the assessment and vacate, confirm or vary the assessment or re-assess and he shall thereupon notify the taxpayer of his action by registered mail.

92 (1) The Board may dispose of an appeal by

(*a*) dismissing it,

(*b*) allowing it, or

(*c*) allowing it and

(i) vacating the assessment,

(ii) varying the assessment, or

(iii) referring the assessment back to the Minister for reconsideration and re-assessment.

So the Statute clearly expresses that the Minister is allowed to assess and re-assess the taxpayer's income within six years from the date of an original assessment and at any time in case of misrepresentation or fraud. Since January 1, 1957, the time is limited to four years. Thus, notwithstanding any previous assessment, he may re-assess as often as he thinks it necessary within the time limit fixed by s. 46(4).

In *Minister of National Revenue* and *British and American Motors Toronto Ltd.*[1] Cameron J. states:

> . . . The provisions of s. 42(4), now 46(4), of the Income Tax Act, empowering the Minister to re-assess or make additional assessments in certain cases within a period of six years from the day of the original assessment would indicate that a previous assessment is not in all cases final and conclusive, but may be reconsidered in the light of subsequent evidence.

As regards the taxation years herein discussed, the re-assessments of the appellant's income were all made within the period of time during which the Minister was lawfully allowed to do so, to wit August 14, 1956. It appears that the appellant received due notice of the re-assessments. I do not believe it necessary to deal with these re-assessments otherwise than to say that on the above-mentioned date the re-assessments were to be considered as having been determined according to the provisions of the Statute. The rule laid down in the case of *Johnston* and *Minister of National Revenue*[2], which puts the onus of proof that the assessment is erroneous on the taxpayer, is certainly applicable to assessments objected to by the taxpayer because s. 58(1) says that the notice of objection must set out the reasons for the objection and all relevant facts. Here is what Kellock J. states in his remarks at page 492:

> As I read the provisions of the statute commencing with s. 58, a person who objects to an assessment is obliged to place before the Minister on his appeal the evidence and the reasons which support his objection. It is for him to substantiate the objection. If he does not do so he would, in my opinion, fail in his appeal. That is not to say, of course, that if he places before the Minister facts which entitle him to succeed, the Minister may arbitrarily dismiss the appeal.

[1] [1953] Ex. C.R. 153.
[2] [1948] S.C.R. 486.

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The above test is to be applied when the taxpayer, dissatisfied with the assessment, has objected to it and appealed from the Minister's decision. But before reaching that point, the Statute makes the following statement at s. 46(7).

(7) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a re-assessment, be deemed to be valid and binding notwithstanding any error, defect or omission therein or in any proceeding under this Act relating thereto.

So before an objection has been notified or an appeal from the assessment is taken the assessment is deemed to be valid and binding. At that stage, no error, defect or omission can affect its validity.

When dissatisfied with the assessment, the taxpayer may serve by registered mail a notice of objection to the Deputy Minister of National Revenue for taxation at Ottawa. This is followed by s. 58(3) which deals in essence with the reconsideration of the assessment with all due despatch.

58. (3) Upon receipt of the notice of objection, the Minister shall with all due despatch reconsider the assessment and vacate, confirm or vary the assessment or re-assess and he shall thereupon notify the taxpayer of his action by registered mail.

Tax liability under the Act is determined by an assessment or a re-assessment which is equivalent of an assessment. The original assessment and others are made pursuant to the powers conferred under s. 46. The Minister may, at any time within the time limit, determine the assessments. After reconsideration of an assessment or re-assessment objected to by the taxpayer, other re-assessments may be made under s. 58(3). After an appeal is made by the taxpayer and allowed by the Tax Appeal Board or the Courts, the Minister shall re-assess under s. 92(1) of the *Income Tax Act*.

It is noticeable that in s. 46 the Act enacts that the Minister shall, with all due dispatch, assess the tax for the year, but qualifies the terms by adding a time limit for doing so. Thus the meaning to be assigned to the words "with all due dispatch" in that section is that the Minister may exercise his power of assessment during a specified period, to wit, six years formerly or four years now.

Under s. 59, which deals with appeals to the Income Tax Appeal Board from assessments objected to by the taxpayer, it is provided that the latter may appeal either "after the Minister has confirmed the assessment or re-assessed, or after 180 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that he has vacated or confirmed the assessment or re-assessed." It is clearly stated that the taxpayer may appeal whether the Minister has notified or not the taxpayer that the assessment is confirmed, modified or vacated. The delay to institute the appeal is 90 days from the day notice has been given under s. 58. These sections empower the Minister to assess and re-assess and give the taxpayer the right to appeal from the assessment and the re-assessments. In the first case, the duty of the Minister is to assess the tax "with all due dispatch"; in the second, the taxpayer's right of appeal is limited by a specified period of time.

Section 59 of the Act does not provide that the Minister must notify the taxpayer within 180 days of the serving of a notice of objection. In my view it is in no way related to the provision of s. 58 that the Minister shall with all due dispatch reconsider the assessment upon receipt of the taxpayer's notice of objection. All it says is that the taxpayer has a right of appeal, but that right is limited to a certain period of time. If the Minister has confirmed the assessment or re-assessed, the appeal must be instituted within 90 days from the day such action was notified to the taxpayer. Even if the taxpayer has not been served with a notice, he still has the right to appeal from the assessment during a period of 90 days after 180 days have elapsed after the service of his notice of objection.

The appellant's contention that all the assessments involved are invalid is solely based on the fact that the words "with all due dispatch" in s. 58 impose on the Minister the duty of reconsidering the assessments and of giving notice of his action to the taxpayer within a period of 180 days from the service of the taxpayer's notice of objection. It seems that the appellant's argument on this point is that the time limit found in ss. 46(4) and 59(1)(*b*)

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should be applied when interpreting the words "with all due dispatch" of s. 58(3). This is quite difficult to admit, seeing that the two sections are different in construction and deal with completely different matters.

In my opinion the fact that the Minister did not serve on the taxpayer, within the time limit of 180 days after the receipt of the notice of objection, a notice that the assessments had been reconsidered has no effect on the validity or non-validity of the assessments. The appeal to this Court provided by the Act is an appeal from the assessment.

In my opinion the words "with all due dispatch" have the same meaning as "with all due diligence" or "within a reasonable time". They appear in ss. 46(1), 58(3) and 105 (2) of the *Income Tax Act* and other fiscal statutes. In a legal sense, they are interpreted as giving a discretion and freedom, justified by circumstances and reasons, to the person whose duty is to act. The acts involved are not submitted to a strict and general rule.

In *Colley v. Hart*[1], at page 184 Mr. Justice North states,

> . . . In my opinion, it is quite impossible to fix any precise time within which such an action should be commenced; it must depend entirely upon the circumstances of the particular case. The action might well, under one set of circumstances, be commenced with due diligence, if it were commenced at a certain time after the threats of action, whereas under other circumstances it would clearly not be commenced with due diligence if it were commenced after a lapse of exactly the same time. . . .

There is no doubt that the Minister is bound by time limits when they are imposed by the statute, but, in my view, the words "with all due dispatch" are not to be interpreted as meaning a fixed period of time. The "with all due dispatch" time limit purports a discretion of the Minister to be exercised, for the good administration of the Act, with reason, justice and legal principles.

The subject-matter in this appeal being the assessments, what the Court has to consider is the correctness of the assessments in question. In *Provincial Paper Ltd. v. Minister of National Revenue*[2] the President of this Court stated at page 373,

> . . . There is no standard in the Act or elsewhere, either express or implied, fixing the essential requirements of an assessment. It is, therefore, idle to attempt to define what the Minister must do to make a proper

[1] 44 Ch. D. 179.
[2] [1954] C.T.C. 367.

assessment. It is exclusively for him to decide how he should, in any given case, ascertain and fix the liability of the taxpayer. The extent of the investigation that he should make, if any, is for him to decide. Of necessity it will not be the same in all cases.

There is no doubt that the Minister is required to reconsider the assessment upon receipt of a notice of dissatisfaction in the time best suited for the accomplishment of his duty; however, the determination in each case as to whether he has executed his duty "with all due dispatch" is a question of fact. He may be delayed in his determination by many reasons and factors. But as said above, it is exclusively for him to decide how he should, in any given case, ascertain and fix the liability of the taxpayer and the extent of his reconsideration. This being so, how can the courts interfere and decide that an assessment becomes null and void because notice of reconsideration was not served in the time limit of 180 days?

For better understanding, I shall summarize. Tax liability is determined under the Act by an assessment or re-assessment. The first determination is made by an assessment or re-assessment under the provisions of s. 46. After reconsideration of an assessment objected to by the taxpayer, a new re-assessment can follow under s. 58(3). Upon the allowance of an appeal by the Tax Appeal Board or the Courts, the Minister shall re-assess under s. 92(1) of the *Income Tax Act* and, in my opinion, he is not subjected to the limitation of s. 46(4). Finally s. 61 of the Act provides a general rule which reads as follows:

61. An assessment shall not be vacated or varied on appeal by reason only of any irregularity, informality, omission or error on the part of any person in the observation of any directory provision of this Act.

I have come to the conclusion that the question at issue should be determined under the provisions of s. 58(3) and not of ss. 46(4) and 59(1). It is under s. 58(3) that the Minister is directed to reconsider assessments after receipt of a notice of objection and the service of a notice of his decision. The time stated therein for the reconsideration of the assessment is "with all due dispatch".

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I find that the provisions of s. 59(1) have no relation to the reconsideration of the assessment or the service of the notice of s. 58(3). In that section the time period is not defined. The Minister has to decide on the time that should be taken to reconsider the assessment. This will vary and no two cases may take the same time. Many factors may arise to prolong his investigation or examination of the facts underlying his determination of the assessment or the fixing of the taxpayer's tax liability.

Je suis d'opinion qu'ayant décidé que les profits découlant de la vente de cinq droits de coupe de bois provenaient de transactions commerciales au sens des dispositions des articles 4, 5 et 139(1)(*e*) de la Loi de l'impôt sur le revenu, l'intimé a légalement ajouté ces profits aux revenus nets déclarés par l'appelant en cotisant les revenus imposables de ce dernier pour les années d'imposition dont il s'agit.

Je ne crois pas que l'absence de notification au contribuable dans les délais prévus aux dispositions de l'article 59(1)(*b*), relativement à la notification par le Ministre au contribuable du fait qu'il a annulé ou ratifié la cotisation ou procédé à une nouvelle cotisation, ait pour effet de rendre la cotisation erronée, illégale ou nulle.

C'est pour ces raisons que je renvoie l'appel de l'appelant avec frais.

Jugement en conséquence.

IN THE MATTER OF monies paid into Court under *The Exchequer Court Act*, R.S.C. 1952, c. 98, s. 24(2).

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AND

IN THE MATTER OF a Petition by HELEN SHAUL for payment out of Court pursuant to s. 24(3) of *The Exchequer Court Act*.

Crown—Practice—Property re-sold under Veterans' Land Act—Surplus proceeds paid into Court—Rights of creditors and veteran—The Veterans' Land Act, R.S.C. 1952, c. 280, ss. 2(1), 3(1)(2), 5(1)(2)(4), 10(4) and 21(1)—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 24(2)(3)(4)(5)—The Execution Act, R.S.O. 1952, c. 120, ss. 20(2), 24(2)(3)(4) and (5).

By s. 21(1) of the *Veterans' Land Act*, R.S.C. 1952, c. 280, it is provided that

"Where a contract made by the Director with a veteran is rescinded or otherwise terminated and any property that was sold by the contract is re-sold by the Director for more than the amount owing under the contract, the surplus shall be paid by the Director to the veteran."

In January, 1957, the Director, the *Veterans' Land Act*, re-sold a property which had been the subject matter of an agreement made pursuant to the statute between the Director and one H, a veteran, and on such re-sale realized a surplus of $3,247.17. While this surplus was still in the Director's hands, notices purporting to seize H's right to this fund under a number of executions against him, including one issued by the Supreme Court of Ontario and held by the Sheriff of Carleton County in the Province of Ontario were received. By s. 20(2) of the *Execution Act*, R.S.O. 1950, c. 120, a sheriff holding a *fieri facias* is authorized to seize any book debts and choses in action of the execution debtor and to sue in his own name for the recovery of the monies payable in respect thereto. Thereafter, the Attorney-General of Canada, being in doubt as to the proper party to whom the money should be paid, applied for and obtained an order pursuant to s. 24(2) of the *Exchequer Court Act*, permitting the payment of such sum into the Exchequer Court. In this order, it was expressly provided that the payment into Court should be without prejudice to the rights, if any, of H or of any party who had laid claim to the money.

In proceedings taken by a judgment creditor of H, asking for payment out of Court to her of the money or for determination of the party entitled thereto, claims were filed by H and by the Sheriff of Carleton County, as well as by several execution creditors, and on the trial it was contended on behalf of H that, since the Director is an agent of the Crown money in his hands is not subject to seizure under execution and that, accordingly, H was entitled to have the money paid out to him.

By s. 5 of the *Veterans' Land Act*, it is provided that

"Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the Director on behalf of Her Majesty, whether in his name or in the name of Her Majesty,

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may be brought or taken by or against the Director in the name of the Director in any Court that would have jurisdiction if the Director were not an agent of Her Majesty."

Held: That the right of a veteran under s. 21(1) of the *Veterans' Land Act* to the surplus proceeds arising on a re-sale is a personal right and there is neither any statutory provision nor any valid objection on grounds of public policy rendering such surplus proceeds unassignable by the veteran or unavailable to satisfy the claims of his creditors.

2. That the Sheriff of Carleton County, by giving to the Director at Ottawa notice of seizure under the execution held by him, had effected a valid seizure of H's right entitling him to sue for and recover money.

3. That the effect of s. 5(2) of the *Veterans' Land Act* is to remove the impediment which normally prevents the attachment of public moneys owing to a judgment debtor and that no valid objection of that kind could be raised by either the Director or the veteran to a suit or proceeding by the sheriff to recover in his own name under s. 20(2) of the *Execution Act,* money payable pursuant to the provisions of the *Veterans' Land Act* by the Director to the veteran, where the veteran's right to such money had been seized by the sheriff under an execution. *C.N.R. v. Croteau,* [1925] S.C.R. 384 at 388, referred to and followed.

4. That although no action or suit had in fact been brought while the money remained in the hands of the Director, what the sheriff had done was sufficient to give him an enforceable right to payment of it and that, accordingly, the money in Court should be paid out to him to be dealt with by him as money of H levied under execution against his property.

PETITION by a judgment creditor for payment out of Court pursuant to s. 24(3) of *The Exchequer Court Act.*

The petition was heard before the Honourable Mr. Justice Thurlow at Toronto.

Alfred Shifrin, Q.C. for petitioner.

James Stephenson for Trustees, Toronto General Hospital.

M. A. Brown for Antoinette Fedele.

B. C. Burden for Trull Funeral Homes.

K. G. Dawe for Jack R. Hewitt.

THURLOW J. now (October 26, 1960) delivered the following judgment:

This is a petition for determination of the right to a sum of $3,247.17, which was paid into this Court by The Director, The Veterans' Land Act pursuant to an order of Cameron J.

The money in question represents surplus proceeds arising upon a re-sale made by the Director on or about January 22, 1957, of land which had previously been the

subject of a contract of sale made (and later rescinded) under the provisions of the *Veterans' Land Act*, R.S.C. 1952, c. 280, between the Director and one Jack Reginald Hewitt, a veteran. By s. 21(1) of that Act, it is provided as follows:

21. (1) Where a contract made by the Director with a veteran is rescinded or otherwise terminated and any property that was sold by the contract is re-sold by the Director for more than the amount owing under the contract, the surplus shall be paid by the Director to the veteran.

The affidavit filed on the application for the order for leave to pay the sum in question into court shows that on December 11, 1957, a notice of seizure of all monies, cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, or other securities for money belonging to Jack R. Hewitt was directed to the Department of Veterans' Affairs at Toronto by the Sheriff of the County of Simcoe under a writ of *fieri facias* issued out of the County Court of the County of York at the suit of the Robert Simpson Company Limited against Jack R. Hewitt. This notice was later withdrawn. On December 12, 1957, the Sheriff of the County of York "purported to direct" to the Department of Veterans' Affairs at Toronto a notice of seizure of, *inter alia*, all choses in action belonging to John Hewitt pursuant to two writs of *fieri facias* issued out of the County Court of the County of York against John Hewitt, one at the suit of Trull Funeral Homes Limited and the other at the suit of The Trustees of the Toronto General Hospital. The affidavit further states that on June 3, 1958, the Sheriff of the County of Carleton directed a notice to The Director, The Veterans' Land Act, in Ottawa under a writ of *fieri facias* in an action in the Supreme Court of Ontario between Antoinette Fedele and Jack R. Hewitt. By this notice, to which a copy of the writ was attached, the Sheriff purported to seize all deposits, credits, book debts, choses in action, and all cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, or other securities and equities therein belonging to Jack R. Hewitt up to the amount of $17,707.32, and he demanded payment thereof forthwith. The affidavit, which was sworn on December 15, 1958, also shows that a number of persons, including the petitioner, Helen Shaul, claimed to have an interest in the surplus proceeds arising on the sale. Thereafter, on January 20, 1959, the Attorney-General of Canada

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applied for and obtained an order under s. 24(2) of the *Exchequer Court Act* under which the sum in question was paid into this Court. In this order, it was expressly provided that such payment into court should be without prejudice to the rights, if any, of the said Jack Reginald Hewitt and such rights, if any, of any claimant set forth in the notice of the application. By s. 24(2), (3), (4), and (5) of the *Exchequer Court Act*, it is provided as follows:

(2) The Court may, upon the application of the Attorney General of Canada, in any case in which the Crown finds itself in possession of any moneys belonging or payable to some one other than the Crown, and the Attorney General is in doubt as to the person or persons to or among whom such moneys should be paid or distributed, make an order permitting the payment of such moneys into Court.

(3) Upon payment of any such moneys into Court in accordance with any such order, the Crown is *ipso facto* released and discharged from any and every liability whatsoever regarding the moneys so paid into Court, and any person claiming to be entitled to the whole or any share of the moneys so paid in is at liberty to institute an action in the Exchequer Court by way of petition for the recovery of the same; and in any such action the Court has power to determine the rights of the claimant or of any other person to the fund in question, and may make such order or give such directions, and may make such regulations as will enable the Court to adjudicate upon the rights of all persons interested in the fund, and to order payment out to any person of any such moneys or portion thereof in accordance with the finding of the Court.

(4) In any such action the Court may give directions as to the parties to whom notice thereof shall be given, the time or times within which such parties shall be required to file their claims, and, generally, as to the procedure to be followed to enable the Court properly to adjudicate upon the rights of the parties and to give judgment upon any claim or claims against the fund in Court; and any claim that is not entered within the time limited by order of the Court shall be barred, and the Court may proceed to determine the other claims and distribute the moneys among the parties entitled thereto without reference to any claim so barred; and in any case where the moneys in Court are not sufficient to satisfy all claims the Court may order that the moneys be distributed *pro rata* among the parties entitled.

(5) The Court may also make such order as to costs as it may deem fit.

The present petition was brought by Helen Shaul, a judgment creditor of the veteran, Jack Reginald Hewitt. At the hearing, counsel on her behalf asked that the money be paid out to the creditors of Hewitt who have filed their claims pursuant to an order made in these proceedings, by which it had been directed that notice of the petition be

sent to the persons referred to in the affidavit already mentioned, requiring them to file their claims in this Court within a time limited by the order, failing which such claims would be barred.

Pursuant to this order, claims had been filed by the Sheriff of the County of Carleton in respect of the execution already mentioned and by Antoinette Fedele, The Robert Simpson Company Limited, Trull Funeral Homes Limited, and The Trustees of the Toronto General Hospital, all as judgment creditors of Hewitt, and by the veteran, Jack Reginald Hewitt, as well, who claimed the full amount of $3,247.17 in question and asked that it be paid to him. No claim was filed by the Sheriff of Simcoe or of York County.

It is, I think, clear that the right of a veteran under s. 21(1) of the *Veterans' Land Act* to surplus proceeds is a personal right which accrues to him upon the realization by the Director of such a surplus from the re-sale of property which had been the subject matter of a contract between him and the Director. *Vide The King v. McClellan*[1] and *Ponkka v. Butchart et al.*[2] While the contract of sale is in force, the veteran is prohibited as provided in s. 10(4) from assigning the subject matter of the contract, that is, the property, but I see no reason to think that the prohibition of s. 10(4) applies to the veteran's right under s. 21(1) to surplus proceeds on a re-sale of the property. Nor do I think there is any valid objection on grounds of public policy to the veteran's right to such a surplus being assigned. In my opinion, there was accordingly nothing to render the surplus proceeds from the re-sale in question unassignable (*vide The Queen v. Cowper*[3] at p. 121 *et seq.*) or unavailable to satisfy the claims of Hewitt's creditors.

It does not, however, appear that Hewitt ever made any assignment of his right, and the mere recovery of a judgment against Hewitt would not have the effect of transferring his right to the judgment creditor. However, under s. 20(2) of the *Execution Act*, R.S.O. 1950, c. 120, a sheriff holding a *fieri facias* is authorized to seize any book debts or other choses in action of the execution debtor and to sue in his own name for the recovery of the monies payable in respect thereto. In my opinion, the veteran's right to

[1] [1932] S.C.R. 617. [2] [1956] O.R. 837.
[3] [1953] Ex. C.R. 107.

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the money in question was a chose in action within the meaning of this clause, and but for the fact that the veteran's right was a right against The Director, The Veterans' Land Act (a matter to be dealt with later in this judgment) I can see no reason to think that such right was not liable to seizure under execution. I doubt that what was done by the Sheriffs of Simcoe and York Counties can be treated as a valid seizure of the veteran's right to the sum in question, since in each case the Sheriff's notice was directed to the Department of Veterans' Affairs at Toronto, rather than to the Director, The Veterans' Land Act, and there is nothing in the record to indicate that the chose in action in question was situate in either of their bailiwicks, but in any event, no claim was filed in these proceedings by either of such Sheriffs. On the other hand, the Sheriff of Carleton County directed his notice to the Director, The Veterans' Land Act, at Ottawa, which is in his bailiwick and where, I think, in the absence of any indication to the contrary, the situs of the chose in action may be presumed to be, and I therefore regard what was done by him as amounting to a valid seizure under execution of such right entitling him to sue for and recover the money. As he has also filed a claim in these proceedings, I am of the opinion that he would be the party now entitled to payment of the money in court unless the fact that, in the present case, the veteran's right was one against The Director, The Veterans' Land Act, makes a difference.

The appointment by the Governor in Council of an officer to be known as "The Director, The Veterans' Land Act" is provided for by s. 3(1) of the *Veterans' Land Act,* and by s-s. (2) of the same section it is provided that the Act is to be administered by the Minister of Veterans' Affairs and that the powers and duties conferred or imposed by the Act on the Director shall be exercised or performed subject to the direction of the Minister. Subsections (1), (2), and (4) of s. 5 are as follows:

5. (1) For the purposes of acquiring, holding, conveying and transferring and of agreeing to convey, acquire or transfer any of the property that he is by this Act authorized to acquire, hold, convey, transfer, agree to convey or agree to transfer, but for such purposes only, the Director is a corporation sole and he and his successors have perpetual succession, and as such is the agent of Her Majesty in right of Canada.

(2) Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the Director on behalf of Her Majesty, whether in his name or in the name of Her Majesty, may be brought or taken by or against the Director in the name of the Director in any court that would have jurisdiction if the Director were not an agent of Her Majesty.

* * *

(4) All property acquired for any of the purposes of this Act shall vest in the Director as such corporation sole; but the provisions of this section do not in anywise restrict, impair or affect the powers conferred upon the Director generally by this Act nor subject him to the provisions of any enactment of the Dominion or of any province respecting corporations.

At the hearing, counsel for Hewitt contended that, since the Director is an agent of the Crown, money in his hands is not subject to seizure under execution, and in support of his contention he pointed out that garnishee proceedings will not generally lie against the Crown or its agents. The nature of this objection is stated as follows by Duff J. in *Canadian National Railways v. Croteau*[1] at p. 388:

The real difficulty in attaching moneys payable by the Crown to a third person lies in the inability of the courts to make an order against the Crown. Generally speaking, moneys payable by the Crown are subject to equitable execution, the appointment of a receiver operating as an injunction prohibiting the judgment debtor from receiving the fund attached. The process involves no order against the Crown. Only by leave of the court and, of course, after fiat granted, can the judgment creditor proceed to enforce the judgment debtor's claim by petition of right. The position may be illustrated by reference to sequestration. Sequestration will lie to attach moneys payable by the Crown, subject to this, that no order against the Crown can be made. *Willcock v. Terrell,* [1878] 3 Ex. D. 323. Here, again, the process operates only indirectly, by precluding the judgment debtor from receiving payment.

In the *Croteau* case, the Court upheld a garnishee order made against the Canadian National Railway Company, attaching the pay of a railway employee, and besides the particular provisions of the *Canadian National Railways Act* the Court invoked the provisions of the *Interpretation Act* in support of their conclusions. In the present case, s. 5(4) of the *Veterans' Land Act,* in my opinion, excludes the application of s. 30 of the *Interpretation Act,* leaving the matter to be determined solely by reference to subsections (1) and (2) of s. 5. There is also the further difference that, in the *Croteau* case, the objection was

[1] [1925] S.C.R. 384.

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taken by the Canadian National Railway Company, whereas in the present case neither the Director nor the Crown has taken the objection, the matter being raised only on behalf of the veteran.

Referring to the particular provisions of the *Canadian National Railway Act* authorizing "actions, suits or other proceedings" to be brought by and against the Canadian National Railway Company, Duff J. said at p. 388:

> Now s. 15, whatever its limitations, does contemplate judgments against the company for the payment of money in actions arising out of the operation and management of the Government Railways, as well as in other cases. Moreover, the use of the word "suits" in addition to "actions" indicates that equitable proceedings—proceedings of that class which normally culminate in a judgment *in personam*—are contemplated by the section. The necessary effect of s. 15 would, therefore, appear to be that it removes the impediment which normally prevents the attachment of public moneys owing to a judgment debtor; and it would therefore appear to be in harmony with the principle and policy of the section to attribute to the word "proceedings" a scope which would bring within the ambit of the section the kind of proceeding that is in question here.

This reasoning appears to me to be equally applicable in the present case. By various sections of the *Veterans' Land Act,* the Director is empowered to acquire real and personal property and to contract with a veteran for the sale to him of such property upon the terms prescribed by the Act. Obviously, the exercise of these powers would in the ordinary course raise contractual obligations between the Crown, represented by the Director, on the one hand and vendors of land or veterans on the other, the existence of which could be expected to give rise to disputes from time to time. In this situation s. 5(2) provides that "Actions, suits and other legal proceedings" in respect of such obligations may be brought by or against the Director in his name in any court that would have jurisdiction if the Director were not an agent of Her Majesty. Like the section considered in the *Croteau* case, s. 5(2) appears to me to contemplate judgments against the Director in actions pertaining to obligations lawfully incurred by the Director on behalf of Her Majesty, and the word "suits" in addition to "actions" indicates that judgments against the Director *in personam* are also contemplated. The effect would, therefore, appear to be the same as in the *Croteau* case; that is, to remove the impediment which normally

prevents the attachment of public moneys owing to a judgment debtor and thus to permit garnishee proceedings against the Director at the suit of a creditor of a veteran. If, as I think, this is the effect of s. 5(2), I can see no valid objection either by the Director or the veteran to a suit or proceeding by the sheriff to recover in his own name under s. 20(2) of *The Execution Act* money payable pursuant to the provisions of the *Veterans' Land Act* by the Director to the veteran, where the veteran's right to such money has been seized by the sheriff under an execution. Here no action or suit was in fact brought while the money remained in the hands of the Director, but the fact that what the sheriff had done was sufficient to give him an enforceable right to payment of the money was, in my view, all that was required to entitle him to payment of it. The objection taken on behalf of the veteran accordingly fails.

It follows that, subject to payment which I order to be made therefrom of the costs of the petitioning creditor up to the time of the trial herein, the Sheriff of Carleton County is entitled to the sum in court by virtue of his having seized the veteran's right thereto under the execution held by him, and the said sum will be paid out to him to be dealt with by him as money of the veteran levied under execution against his property. The money will, however, remain in court pending expiry of the time for appealing from this judgment and thereafter, if an appeal has been taken, until the disposition of such appeal.

Judgment accordingly.

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Feb. 3
Oct. 30

BETWEEN:

HILL-CLARK-FRANCIS LIMITED ......APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Lumber company purchased to serve as subsidiary sold at a profit—Whether profit on sale income or capital gain—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, and 139(1)(e).

The appellant company, a general contractor and trader in building supplies and lumber, had for some years purchased a large portion of its lumber from P. Co. In June, 1952, P. Co. was in financial difficulties and the appellant, with the intention of making P. Co. a subsidiary and thus assuring the continuance of that source of supply, obtained for $100 an option, exercisable up to November 30, 1952, to purchase the latter's outstanding shares for $50,000. In September the appellant, having received from S, a lumber dealer, an offer of $160,000 for the shares, completed the purchase and a few days later sold them to S. In order to ensure that the opportunity to make this sale should not be lost, the appellant had arranged for the modification of the terms of a cutting lease held by P. Co., which S considered too onerous, and had relinquished to P. Co. its right under contract to the bulk of P. Co.'s season's cut of lumber and accepted repayment of $272,000, which had been advanced on the purchase price thereof.

The Minister having treated the profit made on the sale of the shares as income, the appellant appealed from the assessment on the grounds that the option to purchase the shares was a capital asset, that what had occurred was in substance the realization of that capital asset, and that the profit realized from the transaction was capital and not income within the meaning of the *Income Tax Act.*

Held: That what in fact was sold was not the option but the shares, and these were sold after the appellant had acquired them not to keep as capital assets, a purpose which had already been abandoned, but for the purpose of selling them for a profit.

2. That the profit so realized was profit from a business within the meaning of that term in s. 3(*a*) of the *Income Tax Act,* as defined by s. 139(1)(*e*), and was properly treated as income.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Thurlow at Toronto.

P. N. Thorsteinsson for appellant.

D. S. Maxwell and *G. W. Ainslie* for respondent.

THURLOW J. now (October 30, 1960) delivered the following judgment:

This is an appeal from a reassessment of income tax for the year 1955. In that year the appellant had an operating profit from which, for income tax purposes, it sought to

deduct pursuant to provisions of the *Income Tax Act* operating losses allegedly incurred in earlier years. In 1952, however, the appellant had sold at a profit certain shares in Poitras Freres Inc., and the Minister, in making the assessment for the year 1955, treated this profit as income and to that extent disallowed the alleged losses as a deduction from 1955 income. The issue in this appeal is whether he was correct in so doing, and this turns on whether or not the profit on the sale of the shares was income or a capital gain.

The appellant is an Ontario corporation incorporated in 1913 and carries on an extensive business as a general contractor and as a trader in building supplies and lumber. Its sales in 1952 were in the vicinity of $20,000,000. In the course of its business, the appellant purchases large quantities of lumber, some of which is used in its contracting business and some sold through its retail outlets, the remainder, if any, being disposed of in wholesale transactions. It also has a number of wholly owned or controlled subsidiary companies, at least two of which are engaged in producing lumber which the appellant purchases from them. In 1949, besides purchasing lumber from other suppliers, the appellant purchased the total lumber output of twenty-seven suppliers, among whom was Poitras Freres Inc., a corporation organized under the laws of the Province of Quebec. In 1952 there were five or six such suppliers, including Poitras Freres Inc., which supplied about one-third of the appellant's total purchases of lumber. This company, however, appeared to be getting into financial difficulties and, having in mind the loss of this source of supply if Poitras Freres Inc. should discontinue its operations, the appellant, intending to make the company a subsidiary, in June, 1952 obtained for $100 from Roger Poitras, the principal shareholer, an option exercisable at any time up to November 30, 1952 to purchase the outstanding shares of the company for $50,000.

The appellant had never engaged in the business of dealing in timber properties or in shares of timber or other companies, but because, through its subsidiary companies, it controlled substantial timber holdings, it had from time to time received enquiries for timber properties from persons interested in acquiring them. In September, 1952, a

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Mr. Horace F. Strong, who was also engaged in the lumber business and with whom one of the appellant's subsidiaries had had a previous transaction, and who by some means had apparently become aware of the appellant's ability to sell the shares of Poitras Freres Inc., offered the appellant $160,000 for them. Despite the appellant's interest in maintaining Poitras Freres Inc. as a source of supply, this offer was too tempting to resist, and the appellant, thereupon, undertook a number of steps to ensure that the sale should not be lost. Among other things, the appellant arranged for a modification of certain terms of a cutting lease held by Poitras Freres Inc. which Mr. Strong considered too onerous, and it also relinquished its right under contract with Poitras Freres Inc. to the bulk of that company's 1951-52 season's cut of lumber.

This, as previously mentioned, was about one-third of the appellant's total purchases of lumber. It was expected to amount to about 4,000,000 f.b.m., and up to the time of the sale of the shares to Mr. Strong, the appellant had advanced $272,000 to Poitras Freres Inc. on account of the purchase price of it. Most of the lumber had at that time been sawn but remained undelivered. At that time, the net value of the shareholders' equity in Poitras Freres Inc., as indicated in its balance sheet, was $71,129.59. On the face of the transaction, this equity, represented as it was by the shares, was what Mr. Strong was paying $160,000 to obtain, but in the transaction the appellant relinquished its right to the undelivered timber and accepted repayment of the advances, a matter which I think played its part in bringing the transaction to fruition. It was not, however, suggested that the transaction was in substance a manner of disposing of the timber or that the appellant entered into it for that purpose.

The actual purchase of the shares by the appellant was made on or about September 24, 1952, some time after the offer had been received, and they were sold to Strong under a contract dated September 30, 1952, which provided for completion of the sale on the following day.

The question to be determined is whether in the circumstances these transactions were made in the course of the appellant's business or in the course of carrying on an undertaking or an adventure or concern in the nature of trade. If

so, the profit therefrom was income for the purposes of the *Income Tax Act*, under ss. 3, 4, and 139(1)(*e*). The test to be applied for resolving this question is that stated in *Californian Copper Syndicate v. Harris*[1]. *Vide Minerals Limited v. Minister of National Revenue*[2]. The appellant's contention was that the option to purchase the shares was acquired, not with a view to disposing of it or of the shares, but for the purpose of making Poitras Freres Inc. a subsidiary, that the option, when acquired, was accordingly an asset of the appellant acquired for a capital purpose, that the sale of the shares was in substance the realization of that capital asset, and that the proceeds of such realization were, therefore, capital and not income within the meaning of the *Income Tax Act*.

On the evidence, I find that the intention of the appellant, when acquiring the option, was indeed to make Poitras Freres Inc. a subsidiary company and, in the circumstances as described in the evidence, I would draw no inference from the appellant having taken an option that it intended at that time to sell the shares or that it took the option for the general purpose of turning it or the shares to account for profit by whatever favourable means might be available. But I do not think that these findings dispose of the matter in the appellant's favour for, even assuming that the purpose for which the option was acquired was entirely a capital purpose as distinct from a revenue or trading purpose, it does not, in my opinion, follow that the shares, when acquired, were acquired for the same capital purpose or that they ever became or represented capital, as distinct from revenue assets of the appellant. It should not, I think, be overlooked that what the appellant acquired for a capital purpose was not shares at all but an option for which it paid $100. Had the appellant gone on and acquired the shares with the same purpose in mind and carried out its plan to make Poitras Freres Inc. a subsidiary, the shares might well have constituted in the appellant's hands assets of a capital, as opposed to a revenue, nature. What happened in fact was, however, quite different, and I do not regard it as in any real or practical sense the equivalent of a mere realization of the capital asset represented by the option. Much more than the option and its value was involved in the

[1] (1904) 5 T.C. 159 at 165. [2] [1958] S.C.R. 490 at 495.

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transaction with Mr. Strong. By the time the contract with him was completed, the sum of $50,000 had been invested in the project, and in the course of and as part of the deal an important contract for a year's cut of lumber had been abrogated. Moreover, the purchaser did not buy or pay for, nor did the appellant sell the option. I do not doubt the credibility of the evidence as to why the appellant did not want to sell the option itself, but the reason for not selling it cannot change the fact that it was not sold. What was in fact sold was the shares, and these were sold after the appellant had acquired them, not to keep as capital assets, a purpose which had already been abandoned, but for the purpose of selling them in the transaction which ensued.

At this stage, there was clearly a scheme on foot for profit-making by acquiring and selling the shares in question, and the actual purchase of the shares for which the appellant paid out $50,000, something which it was not bound to do, as well as the contract for the sale of the shares and the various steps taken by the appellant to secure it and to carry it out, including the giving up of its right to the 1951-52 cut of lumber, were all, in my view, steps taken in the carrying out of that scheme. To my mind, the fact that the appellant, in carrying out this scheme, made use of a capital asset in the form of the option no more by itself stamps the whole transaction as a realization of that asset than the giving up in the same transaction of a revenue asset in the form of a right to the 1951-52 cut of timber by itself characterizes the transaction as one on revenue account. But in my opinion, in the whole of the circumstances, the fact that the appellant, having a right to acquire the shares, proceeded to exercise that right not for the purpose originally intended (which nothing whatever prevented it from following) but as a matter of business judgment, for the purpose of disposing of the shares for profit, and thereafter did dispose of them in carrying out its scheme for making profit therefrom in a transaction which involved more than a mere sale of the shares so acquired, marks both the purchase and the sale as transactions of a trading character, rather than as steps in the mere realization of a capital asset. The profit so realized was, accordingly, profit from a

business within the meaning of that term in s. 3(*a*) of the *Income Tax Act*, as defined by s. 139(1)(*e*) and was properly treated as income.

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The appeal will be dismissed with costs.

Judgment accordingly.

THE MINISTER OF NATIONAL REVENUE .... PLAINTIFF;

1959
Oct. 22
Dec. 21

AND

BERTRAND BOLDUC .....DEFENDANT AND OPPOSANT.

Revenue—Practice—Income Tax Act—Certificate registered under s. 119(2) not a judgment by default—Opposition to judgment filed under Code of Civil Procedure not applicable—Nature of certificate—Jurisdiction of Exchequer Court—The Income Tax Act, R.S.C. 1952, c. 148, s. 119(1)(2)—Code of Civil Procedure, arts. 1163, 1168, 1172 and 1175—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 29, General Rules and Orders, r. 6(2).

By s. 119(1) of the *Income Tax Act*, R.S.C. 1952, c. 148, an amount payable under the Act that has not been paid may, subject to the terms of the subsection, be certified by the Minister. By s. 119(2):

"On production to the Exchequer Court of Canada, a certificate made under this section shall be registered in the Court and when registered has the same force and effect, and all proceedings may be taken thereon, as if the certificate were a judgment obtained in the said Court for a debt of the amount specified in the certificate plus interest to the day of payment as provided for in this Act."

A certificate purporting to be made in respect of an amount payable by one B of Rouyn in the Province of Quebec having been registered pursuant to s. 119(2), B filed in the Court an opposition to judgment, alleging various objections to the certificate and its registration and ending with a claim that «le jugement obtenu contre lui par défaut comme susdit» be annulled and other declaratory relief.

To the opposition so filed the Attorney General of Canada subsequently filed a contestation denying all save one of the paragraphs contained in the opposition and objecting that the facts therein contained were illegally and irregularly pleaded and offered no right to the relief claimed.

On a motion by the Attorney-General of Canada to have the points of law raised on the contestation determined and to dismiss the opposition.

Held: That the certificate was not a judgment and, in any case, was not a judgment by default and that it was accordingly not open to attack under the rules contained in the *Code of Civil Procedure* of the Province of Quebec providing for oppositions to judgments by default and that the opposition should be quashed.

2. Observations on the nature of the certificate and the jurisdiction of the Court pertaining thereto.

MOTION by the Attorney General of Canada to have determined the points of law raised on the contestation of an opposition to a certificate registered by the Minister of National Revenue under s. 119(2) of the *Income Tax Act,* R.S.C. 1952, c. 148, and to dismiss the opposition.

The motion was heard before the Honourable Mr. Justice Thurlow at Ottawa.

P. M. Ollivier for plaintiff.

M. Paul Cuddihy, Q.C. for defendant-opposant.

THURLOW J. now (December 15, 1961) delivered the following judgment:

On August 13, 1959, a certificate, dated the same day and purporting to be signed on behalf of the Minister of National Revenue, was registered in this Court, stating that under the *Income Tax Act,* R.S.C. 1952, c. 148, Bertrand Bolduc of Rouyn in the Province of Quebec was indebted for tax, penalties and interest for the year 1957 in the sum of $3,609.51 and for tax and interest for the year 1958 in the sum of $14,920.72, and that 30 days had elapsed after the date of default of payment. Under s. 119 (2) of the *Income Tax Act* such a certificate, when made and registered in accordance with the section, "has the same force and effect, and all proceedings may be taken thereon, as if the certificate were a judgment obtained in the said Court for a debt of the amount specified in the certificate, plus interest to the date of payment . . ."

On August 25, 1959, an opposition to judgment was filed on behalf of Mr. Bolduc, setting out a number of objections to the certificate or its registration, some of which raise questions of law, including objections to the constitutional validity of the *Income Tax Act,* and others matters of fact, and ending with a claim that «le jugement obtenu contre lui par défaut comme susdit» be annulled and other declaratory relief. Under Art. 1172 of the *Code of Civil*

Procedure of the Province of Quebec, this procedure, when properly taken, operates to stay execution until final judgment on the opposition. It does not appear, however, that Art. 1168, requiring the opposition to be accompanied with an order of the judge allowing it to be filed, was complied with. To the opposition so filed, the Deputy Attorney-General of Canada on October 7, 1959, filed a contestation by which he denied all save one of the paragraphs contained in the opposition and added that the facts therein alleged were illegally and irregularly pleaded and afforded no right to the relief claimed.

Thereupon, by a notice of motion filed the same day, the Deputy Attorney-General, on behalf of the Crown, launched this application to have the points of law raised upon the contestation of the opposition to judgment determined and to dismiss the opposition. On the application, no evidence was offered on any of the issues of fact nor did counsel for the opposant argue the points of law raised in the opposition. It was submitted on behalf of the Crown that some, if not all, of the matters raised in the opposition were bad in point of law and that the whole proceeding was irregular and not authorized by the rules and practice of the Court.

So far as I am aware, no precisely similar case has heretofore been considered in this Court. In *Minister of National Revenue v. Tanguay*[1], a taxpayer endeavoured to invoke Art. 645 of the *Code of Civil Procedure* of the Province of Quebec by filing in this Court an opposition to a seizure made pursuant to an execution issued upon the registration of such a certificate, and the President held the procedure inapplicable since r. 208 of the General Rules and Orders of this Court provides a procedure for obtaining relief of the kind sought and there is no scope for the application of r. 2(1)(*b*), and thus of the practice and procedure of the Superior Court of the Province of Quebec. Here, however, no execution has issued, but what the opposant attacks is the certificate itself and the right of the Minister to have it registered in this Court, as provided by the *Income Tax Act*. For such an attack r. 208 is, in my opinion, inapplicable, and this, I think, is so even though that rule provides a

[1] [1955] Ex. C.R. 50.

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procedure to obtain relief against a judgment and is somewhat wider in its terms than the corresponding English rule (O. 42, r. 27). For, though s. 119(2) provides that, when registered, the certificate has the same force and effect and all proceedings may be taken thereon as if it were a judgment obtained in this Court, such a certificate is not in fact a judgment, nor does s. 119(2) say that, on registration, it is to be or becomes a judgment of this Court. The effect of the making and registration of the certificate is precisely what the *Income Tax Act* says it is, no more and no less, and as I read the statute that effect is not that the certificate is or is to be deemed to be a judgment but simply to provide that such a certificate may be made and registered in this Court and that, upon this being done, it has the same force and effect and the same proceedings may be taken upon it as if it were a judgment. The certificate, however, in my opinion, remains merely a certificate, albeit one of a unique nature, upon which the proceedings authorized by the statute may be taken. Moreover, even if the certificate is deemed to be a judgment to the extent stated by s. 119(2), the extent there stated is that it is to have the same force and effect and all proceedings may be taken thereon as if it were a judgment, *et cetera,* and I do not think a proceeding the purpose of which is to eliminate the certificate or its registration falls within the purview of the expression "proceedings thereon", nor do I think the right to bring such a proceeding is to be regarded as an "effect" of a judgment.

It does not follow, however, that the making of such a certificate and its registration are not open to attack of any kind. The certificate is a creature of s. 119 of the *Income Tax Act* and that Act is the sole authority for its registration in the records of this Court. The interpretation and enforcement of s. 119 itself is a matter over which this Court has jurisdiction under s. 29 of *The Exchequer Court Act,* if not under any other statutory provision, and a person affected by the registration of such a certificate is entitled to invoke the exercise of the Court's jurisdiction to determine the regularity or otherwise of its making and registration. Moreover, as the registration of the certificate is an act carried out in the Court, I think the Court has jurisdiction to examine both the constitutional validity of the statute authorizing such procedure and the facts upon which

the right of the Minister to make such a certificate and to have it registered in this Court depends, the whole as an incident of its inherent authority to secure and maintain the legality of its records and to correct or avoid abuse of its processes.

How then may this jurisdiction of the Court be invoked? In my opinion, it is clearly open to a person against whom such a certificate is registered to contest it in an independent proceeding by a petition of right claiming a declaration of the invalidity of the certificate or its registration (*vide* r. 6(2)), and at least in cases where there is no serious dispute about the facts and the matter arises in a part of Canada other than the Province of Quebec, in my opinion, it is also open to the Court to deal with the matter as circumstances may require on a summary application to be made in the original proceeding by any party affected thereby. *Vide Annual Practice 1959,* p. 577, and cases there cited, including *Nixon v. Loundes*[1] and *Harrod v. Benton*[2].

But I can see no warrant whatever, even where the matter arises in the Province of Quebec, for invoking Art. 1163 of the *Code of Civil Procedure,* upon which counsel for Mr. Bolduc supported the procedure adopted in the present case for, as previously mentioned, the certificate is not a judgment, such a proceeding is not a proceeding upon a judgment within the meaning of s. 119(2) of the *Income Tax Act,* and, even if the certificate can be considered a judgment for this purpose, in my opinion, it is not a judgment "by default to appear or to plead" within the meaning of Art. 1163.

This, in my opinion, is sufficient to dispose of the present application, but I may add that I do not think procedure by petition in revision of judgment under Art. 1175 or by petition in revocation of judgment under Art. 1177 would be any more appropriate, nor was I referred to any other article of the *Code of Civil Procedure,* and I have not found any therein, providing procedure which would, in my opinion, be appropriate to raise in the original proceeding objections to such a certificate or to its registration in this Court.

[1] [1909] 2 Ir. R. 1. [2] 8 B. & C. 217.

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I am, accordingly, of the opinion that the procedure adopted by Mr. Bolduc is not applicable or appropriate for an attack upon the registration of such a certificate and that the objection to such procedure should be sustained. No doubt, the proceeding might have been treated as a summary application for the relief sought (*vide Minister of National Revenue v. Tanguay* (*supra*) at p. 54), but, as previously mentioned, no evidence was given on any of the disputed matters of fact and, when invited to state the points of law upon which objection was taken to the certificate, counsel for the opposant stated that he had not come prepared to state or argue them, as they would be matters to be dealt with on the hearing of the opposition. The opposition will, accordingly, be quashed with costs but without prejudice to the right of Mr. Bolduc to raise any of the matters therein set out in any proper proceeding he may see fit to take.

1960
Jan. 25, 26, 27, 28
Nov. 29

BETWEEN:

LAWRENCE B. SCOTT ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income or capital—Income Tax Act R.S.C. 1952, c. 148, ss. 46(1)(2)(3)(4)(6)(7), 51(1), 52(1), 56, 57(1), 58(1) and 61—Sale of inventory on cessation of business for lump sum—Lump sum is income subject to tax—"Day of assessment"—Proper notice of mailing of a notice of assessment to a taxpayer—Duty to send "a notice of assessment to the person by whom the return was filed"—Appeal allowed.

Appellant between 1945 and 1952 carried on business as a registered broker-dealer under the *Securities Act of Ontario*. In association with others he caused the incorporation of a company for the purpose of exploring and exploiting certain gas and petroleum rights. Through underwriting agreements appellant became the owner of shares of the capital stock of three companies. In 1952 appellant's registration as a broker-dealer

was cancelled by the Ontario Securities Commission. He thereupon sold all his stock holdings in bulk and received for them the sum of $100,000. This he did not report in his income tax return for 1952 and the Minister in making a re-assessment for that year added that sum to his taxable income. Appellant contends that the amount received was capital and not income. Appellant filed his income tax return for 1952 in April 1953 giving his correct residence and business address. Appellant also contends that the re-assessment was not made within the four years limited by the Act. The original notice of assessment was mailed to appellant on May 28, 1953. After 1953 appellant terminated his business and moved his residence to a place unknown to the department. On May 16, 1957 an assessor in the department made a recalculation of appellant's tax for 1952 and on May 28, 1957 a notice of re-assessment was mailed to appellant in care of a solicitor who had represented him on an earlier tax problem. The solicitor photostated the contents of the letter and returned envelope and contents to the District Taxation Officer the next day stating he did not represent the appellant. The photostats were sent by the solicitor to an accountant who had acted for appellant earlier. The department on June 7, 1957 again mailed the notice of re-assessment to appellant's actual residence. There was no allegation of fraud or misrepresentation by the appellant.

Held: That the sale of appellant's stock was the final act in a joint profit-making scheme between appellant and his associate and the sale having occurred in the course of carrying on business the profit therefrom was income and subject to tax, and the fact that it was a bulk sale did not alter its character as income.

2. That the mailing of the notice of re-assessment on May 28, 1957 to the solicitor who had no authority to receive it nor to act for the appellant was not a valid discharge of the Minister's duties under s. 46(2) of the Act which requires him to send "a notice of assessment to the person by whom the return was filed".
3. That the re-assessment was invalid not having been made within the four year period prescribed by the Act.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Thurlow at Toronto.

J. G. McDonald and *David A. Ward* for appellant.

Gordon W. Ford, Q.C. and *F. J. Dubrule* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THURLOW J. now (November 29, 1960) delivered the following judgment:

This is an appeal from a re-assessment of income tax made in 1957 in respect of the appellant's income for the year 1952. Two questions are involved in the appeal, the

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first being that of whether a profit realized by the appellant in 1952 was income and the other being whether the re-assessment was made within the limitation period of four years from the day of the original assessment provided by s. 46(4) of *The Income Tax Act*, R.S.C. 1952, c. 148, as amended by Statutes of Canada, 1956, c. 39, s. 11.

The profit in question was realized in the following circumstances. The appellant was registered in 1945 as a broker-dealer under *The Securities Act of Ontario* and thereafter carried on business as a dealer in shares under the firm name of L. B. Scott & Company. In 1949, prompted by the appellant, one George Tabor who was the manager of a collecting agency in Toronto and a long-time friend of the appellant, secured certain natural gas and petroleum rights in Alberta and transferred them to Alsa Holdings Limited, a corporation formed in July, 1949, for the purpose of exploring and exploiting these rights. The consideration for the transfer was 256 shares of Alsa Holdings Limited. At about the same time, Capitol Petroleums Limited and Mammoth Petroleums Limited were incorporated and Tabor transferred 128 of the shares of Alsa, held by him, to Capitol, in consideration of 800,000 shares of that company, and the other 128 to Mammoth in consideration of 800,000 shares of that company. Capitol thereupon entered into an underwriting agreement with L. B. Scott & Company for the sale to Scott of some of its shares, with options to purchase additional shares, which agreement was subsequently expanded as to the number of shares, and extended in time. In 1950 and 1951, Scott purchased and sold to the public upwards of 1,000,000 shares of Capitol, thereby providing that company with funds with which it in turn financed the exploratory operations carried out by Alsa. During the same period, Albert N. Richmond was the under-writer of shares of Mammoth which he sold to the public and thus enabled Mammoth to assist on an equal basis with Capitol in financing Alsa. Initially, all but 80,000 of Tabor's 800,000 shares of Capitol were in escrow in the sense that they could not be sold without prior consent of the Ontario Securities Commission, but in April, 1950, 40,960, and in May, 1950, an additional 259,040 of these shares were released. Early in June, 1950, the whole of Tabor's holdings

of Capitol shares were transferred to Scott who says he paid Tabor $10,000 for them. Shares of Capitol not subject to escrow arrangements were being traded at that time at fifty cents a share. Within a month afterwards, on payment of a like sum, Tabor transferred his shares of Mammoth to Richmond. More than 200,000 of the shares of Capitol transferred to Scott by Tabor, had been sold by Scott to the public in the course of his business when, on June 23, 1952, Scott's registration as a broker-dealer was cancelled by the Ontario Securities Commission. Over a period of four months preceding this event, inquiries had been received by Scott from time to time as to his willingness to sell the whole of his Capitol holdings, but he had declined to sell them in bulk. One or more of these inquiries had been made on behalf of a man named Roman and on receipt of the notice of cancellation of his licence, the appellant immediately advised Mr. Roman that he would be interested in making such a sale. Five days later, on June 28, 1952, the appellant and Richmond jointly sold to Roman all their holdings in Alsa, Capitol and Mammoth, and in two other companies as well, for $250,000, of which the appellant ultimately received $100,000 as his share.

On receipt of the notice of cancellation of his licence, the appellant also dismissed all but two of his fourteen employees, had all but one of his fourteen telephones disconnected, sold his office furniture, and arranged with his landlord to find a sub-tenant to take over his office premises. One of the remaining employees stayed on the job for two weeks after the cancellation of the licence, and the other, an accountant, remained for a month, during which securities belonging to clients were delivered and other details of the closing of the business were carried out, but no new purchases of shares were made and no sales of shares save that above mentioned were made. Scott later applied for registration as a salesman, but was refused, and he has not at any time since then been engaged in dealing in securities.

The sum of $100,000 so received was not reported as income by the appellant in his 1952 income tax return and the Minister, in making the re-assessment, assumed that the appellant had received $150,000 of the $250,000 and

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that the whole of the $150,000 was income of the appellant, and he assessed tax and interest thereon accordingly. As there is no evidence that the amount received by the appellant was $150,000, and no contradiction of the appellant's evidence that what he received was $100,000, I find that the latter amount is what Scott in fact received.

The appellant's contention on this branch of the appeal was that the sum so received was not income but a capital sum realized on the closing of his business and the liquidation of its assets. The Minister, on the other hand, submitted that from the inception of the three corporations, Alsa, Capitol and Mammoth, the appellant and Richmond were engaged in a joint scheme for making profit by promoting the sale of and selling shares of Capitol and Mammoth, that Tabor was a mere nominee and never was the real owner of the shares which he at one time held, that the sale of the shares of Capitol and Mammoth by the appellant and Richmond was but the final act in carrying out their scheme for profit making and that the profit realized in that transaction was accordingly profit from a business within the meaning of *The Income Tax Act* and income for the purposes of that Act.

While the appellant stoutly denied that Tabor was a mere nominee or that he and Richmond were engaged in any joint scheme for profit making, the inference is clear in my opinion that whether Tabor was a mere nominee or not, and whether there was or was not what might technically be called a joint scheme, there was clearly a scheme in which the appellant was a participant if not the guiding genius for making profit by promoting the sale of and selling shares of Capitol and of Mammoth to the public. And despite the fact that the appellant, by the cancellation of his licence, may have been prevented from selling by retail the remainder of the shares transferred to him by Tabor, I am of the opinion that the sale in question was indeed but the final act in carrying out that scheme and that the profit therefrom was accordingly a "gain made in an operation of business in carrying out a scheme for profit making" as described in the well known test set forth in *Californian Copper Syndicate v. Harris*[1].

[1] 5 T.C. 159.

It was submitted on behalf of the appellant that the case is governed by the judgment of the Supreme Court of Canada in *Frankel Corporation v. M. N. R.*, but in my opinion that case is widely different on the facts from the present one. For even if the present case is regarded as merely one of disposal of inventory on going out of business, it is neither a case of the sale of a manufacturing business, or indeed of a business at all, nor was the sale a slump transaction in which a single consideration was paid for both the revenue and capital assets of a business. Here what was sold was simply inventory and it was inventory of a business which consisted of mere buying and selling. As to this kind of a case, Lord Phillimore said in *Doughty v. Commissioner of Taxes*[1]:

> Their Lordships would repeat that if a business be one of purely buying and selling, like the present, a profit made by the sale of the whole of the stock, if it stood by itself, might well be assessable to income tax; but their view of the facts (if it be open to them to consider the facts) is the same as that of Stout C.J.—that is, that this was a slump transaction.

In *Frankel Corpn. Ltd. v. M. N. R.*[2], Martland J. in delivering the judgment of the Court, said at p. 724:

> The test to be applied is the often quoted one stated by the Lord Justice Clerk in *Californian Copper Syndicate v. Harris*, which was last applied in this Court in *Minerals Ltd. v. Minister of National Revenue*:
>
> * * *
>
> To be taxable the profit must be one from the exercise of trading activity, not the profit from a sale of capital as such. Mere realization of assets does not constitute trading. *Commissioner of Taxes v. British-Australian Wool Realization Association, Ltd.*
>
> In *Doughty v. Commissioner of Taxes*, Lord Phillimore, at p. 331, says:
>
> Income tax being a tax upon income, it is well established that the sale of a whole concern which can be shown to be a sale at a profit as compared with the price given for the business, or at which it stands in the books, does not give rise to a profit taxable to income tax.
>
> He goes on to say:
>
> It is easy enough to follow out this doctrine where the business is one wholly or largely of production. In a dairy farming business, or a sheep rearing business, where the principal objects are the production of milk and calves or wool and lambs, though there are also sales from time to time of the parent stock, a clearance or realization sale of all the stock in connection with the sale and winding up of the business gives no indication of the profit (if any) arising from income; and the same might be said of a manufacturing business which was sold with

[1] [1927] A.C. 335. [2] [1959] S.C.R. 713.

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the leaseholds and plant, even if there were added to the sale the piece goods in stock, and even if those piece goods formed a very substantial part of the aggregate sold.

Where, however, a business consists, as in the present case, entirely in buying and selling, it is more difficult to distinguish between an ordinary and a realization sale, the object in either case being to dispose of goods at a higher price than that given for them, and thus to make a profit out of the business. The fact that large blocks of stock are sold does not render the profit obtained anything different in kind from the profit obtained by a series of gradual and smaller sales. This might even be the case if the whole stock was sold out in one sale. Even in the case of a realization sale, if there were an item which could be traced as representing the stock sold, the profit obtained by that sale, though made in conjunction with a sale of the whole concern, might conceivably be treated as taxable income.

It is the proposition stated in the first of these last two paragraphs which appears to me to be applicable in the present case.

Here, however, put in the most favourable light for the taxpayer, the case does not fall within the first of the last two paragraphs quoted by Martland J. from the *Doughty* case, but is of the kind referred to in the second of those paragraphs, for in the present case the business was one of mere buying and selling shares. Moreover, the sale in question was a sale of what was inventory of the business, and nothing else. Now when the sale here in question was made, the appellant had no doubt determined, because of the cancellation of his licence, to go out of business, and the sale itself probably differed from sales formerly made in the ordinary course of his business in that he was now concerned to effect a bulk sale of the whole of his Capitol and other shares, rather than to dispose of them piecemeal. But these features, while consistent with "mere realization", do not conclude the matter. The mere decision by the appellant to go out of business did not necessarily or in fact put an immediate end to his business or trading activity. The evidence is that on the day he received notice of the cancellation of his licence, he proceeded to let one of the persons who had previously inquired, know that he would now be interested in making a sale of his holdings; a day or so later he provided the same party with information respecting the holdings, and a few days later, when an offer was made, he persuaded Richmond to join with him in accepting it. This, it appears to me, is manifestly a case of the appellant continuing to exercise his trade or business of selling shares until the last of them has been sold and the fact that the

final sale was of a bulk character does not, in my view, make it any the less a sale in the course of that trade or business or the profit therefrom any the less a profit "from the exercise of trading activity". No doubt the sum received from the sale was in a sense a realization of the value of the appellant's shares, but it was in my view a realization achieved by the appellant by continuing to exercise his trade. On this branch of the case, I would accordingly hold that the sum received by the appellant from the sale in question, that is to say, $100,000, was income and that the appeal should be allowed only in so far as the re-assessment relates to the other $50,000.

I turn now to the other question raised in the appeal, that of whether or not the re-assessment was made within the period of four years limited by the statute. For this purpose, it will be convenient to refer at the outset to the relevant provisions of the statute. *The Income Tax Act* is divided into parts, of which Part 1 deals with Income Tax and is itself divided into a number of divisions. Division A contains charging provisions and Divisions B, C, D, E, G and H contain various provisions by which the income, the taxable income and the tax liability so imposed are to be measured. Division F, comprising ss. 44 to 61, provides for returns of income, assessments of tax, times for payment of tax, and appeals. These provisions prescribe the procedure by which the amount of the taxation imposed by the statute on each taxpayer is to be ascertained and settled. In the first instance, the taxpayer is required to furnish the relevant information and to estimate the tax. The Minister is then charged with the duty of examining the taxpayer's return of income and of assessing the tax. In so doing he obviously may agree or disagree with the taxpayer's estimate of the tax, but whether he agrees or not, he is required to send the taxpayer notice of assessment. The taxpayer then has the right to object to the assessment and subsequently to appeal therefrom. For the present purpose, the most important of these provisions is s. 46 which, as applicable to the case at bar, reads as follows:

46. (1) The Minister shall, with all due despatch, examine each return of income and assess the tax for the taxation year and the interest and penalties, if any, payable.

(2) After examination of a return, the Minister shall send a notice of assessment to the person by whom the return was filed.

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(3) Liability for tax under this Part is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made.

(4) The Minister may at any time assess tax, interest or penalties and may

(*a*) at any time, if the taxpayer or person filing the return has made any misrepresentation or committed any fraud in filing the return or supplying information under this Act, and

(*b*) within 4 years from the day of an original assessment in any other case,

re-assess or make additional assessments.

(6) The Minister is not bound by a return or information supplied by or on behalf of a taxpayer and, in making an assessment, may, notwithstanding a return or information so supplied or if no return has been filed, assess the tax payable under this Part.

(7) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a re-assessment, be deemed to be valid and binding notwithstanding any error, defect or omission therein or in any proceeding under this Act relating thereto.

In s. 61 it also provided that no assessment shall be disturbed on appeal by reason only of fault in the observance of any directory provision of the Act.

In Part VII of the Act, which is entitled "Interpretation", it is declared in s. 139(1)(*d*) that "In this Act 'assessment' includes a re-assessment."

The present case raises the question as to what is meant by "the day of an original assessment" in s-s. (4), which in turn involves consideration of what is an assessment within the meaning of s. 46 and when is it made. The case also involves the question of what is meant by the word "send" in s. 46(2).

The facts relevant to this part of the matter are as follows: The appellant's income tax return for the year 1952 was filed on about April 30, 1953, at the District Taxation Office in Toronto, and in it, as required by the prescribed form of return, the appellant gave as his address 100 Old Colony Road, R.R. 2, York Mills, and he also gave as a business address, L. B. Scott & Company, Suite 302, 366 Bay St., Toronto, Ontario.

During the month of May, 1953, the return was examined and checked by several persons employed in the District Taxation Office, a notice of assessment was prepared, and on May 28, 1953, the notice was sent by post to the appellant at 100 Old Colony Road, R.R. 2, York Mills, the address given in the return. The examination of the

return and the calculation of the tax as assessed, as well as the signature by an assessor of a file copy of the notice, which differed in some minor respects from the notice sent to the appellant, had, however, all been completed on or before May 20, 1953. Subsequently, on May 16, 1957, in view of information which had come to light, an assessor of the Department prepared a re-calculation of the appellant's income for the year 1952 and of the tax thereon, together with a report setting out the reason therefor, from which a notice of re-assessment was later prepared and a file copy signed by him. The notice was checked by another employee on May 22, 1957, who also signed the file copy, a calculation of interest was subsequently added, and on May 28, 1957, the notice of re-assessment, which purports to bear the printed signature of the Deputy Minister of Naitonal Revenue for Taxation but not those of the assessor or checker, was mailed to the appellant "c/o Mr. Wolfe D. Goodman, 88 Richmond St. W., Toronto, Ont.".

The reason for so addressing the notice was that the assessor apparently knew that 100 Old Colony Road, R.R. 2, York Mills, Ont., was no longer the appellant's place of abode, that a letter sent a few weeks earlier to the appellant at another Toronto address, that of the same George Tabor already mentioned, which the appellant had given in his 1955 income tax return, had been returned undelivered and that Mr. Goodman had some years previously represented Mr. Scott in connection with a tax question which arose in respect of the taxation of the appellant for a previous year. Mr. Goodman was not in fact the solicitor or agent of the appellant on May 28, 1957, when the notice of re-assessment was so mailed and he returned it to the District Taxation Office on the following day without communicating with the appellant. His instructions in the earlier case had, however, come from Mr. Ralph Fisher, a chartered accountant then representing Scott, and before returning the notice, Mr. Goodman telephoned Mr. Fisher and at his suggestion had the notice photographed. The next day he sent one set of the photographs to Mr. Fisher and on June 4, 1957, on instructions from either Mr. Fisher or from MacCarthy & MacCarthy, a firm of solicitors, he forwarded the remaining photographs to the latter firm. The explanation given by Mr.

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Fisher of his interest in the notice was that he was engaged by George Richmond in resepct of an assessment of his share of the profit which arose out of the same transaction. Mr. Fisher also explained his interest in the notice on the ground that since he had prepared the appellant's income tax return for the year in question, he wanted to be in a position to advise the appellant as to his position, if, on receiving the notice, the appellant should consult him. For that purpose he had requested opinions on several questions pertaining thereto from several solicitors, including MacCarthy & MacCarthy, without communicating with the appellant. This somewhat surprising interest in a problem as to which he had no instructions may excite one's suspicion, but I do not think there is any reason to presume that Mr. Fisher was in fact the appellant's agent, and in any event, I think the preponderance of evidence favours the view that Fisher was not at that time the appellant's agent. On the return of the notice to the District Taxation Office, inquiries were made as to the appellant's address and on June 7, 1957, the notice was mailed to him at another address in Toronto where it reached him.

It was not alleged or argued that there had been any misrepresentation or fraud on the part of the appellant in filing his 1952 return or in supplying information under the Act so as to authorize re-assessment at any time pursuant to clause (*a*) of s. 46(4), and the matter falls to be decided under clause (*b*) of that subsection.

The present appeal has been pending in this Court since May 12, 1959, and is not affected by the amendments enacted by Statutes of Canada, 1960, c. 43.

The appellant's submission was that if the "day of an original assessment" referred to in s. 46(4) is taken as the day the calculations of the appellant's tax were completed, the four year period ran from May 20, 1953, and that the evidence showed that the re-assessment was not completed prior to May 22, 1957, which was beyond the time limited by s. 46(4). Alternatively, if the day of mailing the notice is to be taken as the day of assessment, he argued that for the purposes of the statute, the notice of re-assessment was not effectively sent by addressing it c/o Mr. Wolfe Goodman, and accordingly the re-assessment was not made before June 7, 1957, which was more than four years after May 28,

1953, when the notice of the original assessment was sent.

On behalf of the Minister, it was submitted that an assessment and a notice of assessment are two different things and that an assessment necessarily precedes a notice thereof, that an assessment is complete when but not until the Minister has finally put it out of his power to alter it by posting out notice thereof to the taxpayer, that the day of the original assessment was accordingly May 28, 1953, and the day of the re-assessment May 28, 1957, since despite the fact that the notice mailed on that day was returned, the mailing of it on that day established that the re-assessment was complete on that day, which was a day within four years after the day of the original assessment.

There is, I think, no reason to doubt that an assessment and a notice of assessment are not the same thing. *Vide Pure Spring Co. Ltd.*[1], where Thorson P. said at p. 500:

> The assessment is different from the notice of assessment; the one is an operation, the other a piece of paper. The nature of the assessment operation was clearly stated by the Chief Justice of Australia, Isaacs A.C.J., in *Federal Commissioner of Taxation v. Clarke,* (1927) 40 C.L.R. 246 at 277:
>
> "An assessment is only the ascertainment and fixation of liability."
>
> a definition which he had previously elaborated in *The King v. Deputy Federal Commissioner of Taxation* (S.A.): ex parte Hooper, (1926) 37 C.L.R. 368 at 373:
>
> > An "assessment" is not a piece of paper: it is an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount he sends by post a notification thereof called "a notice of assessment" . . . But neither the paper sent nor the notification it gives is the "assessment". That is and remains the act or operation of the Commissioner.
>
> It is the opinion as formed, and not the material on which it was based, that is one of the circumstances relevant to the assessment. The assessment, as I see it, is the summation of all the factors representing tax liability, ascertained in a variety of ways, and the fixation of the total after all the necessary computations have been made.

See also *Provincial Paper Ltd. v. M. N. R.*[2]

But it does not, in my opinion, follow from the foregoing that the giving of a notice of assessment is not itself part of the fixation operation or procedure which is compendiously referred to in the statute as an "assessment", or if the giving of notice is not strictly part of the assessment

[1] [1946] Ex. C.R. 471. [2] [1955] Ex. C.R. 33.

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itself that the assessment itself is complete until the notice has been effectively given. In *Irving and Johnson (SA) Ltd. v. C. I. R.*[1], Watermeyer C.J. discussed the meaning of assessment as follows at p. 28:

> Now the word "assessment" is defined in the Act as "the determination of an amount upon which any tax leviable under this Act is chargeable" unless the context otherwise indicates. An examination of various sections will show that the word is used in the Act in more senses than one. The word may denote something subjective, i.e., the mental process or act of determining such amount, but it is more usually used to denote something objective, i.e., the visible representation of words and figures of that mental process. Subjectively, an assessment is an abstraction which has no real existence until it is published by being expressed in symbols which convey a meaning to others. So long as it is locked up in the mind of the assessing officer, who is not necessarily the Commissioner, it cannot be dealt with as required by the Act. Its particulars cannot be recorded by anyone except the assessing officer; they cannot be filed (see sec. 67(2)); the Commissioner cannot issue the assessment (see sec. 67(8)), nor can he alter it. It seems clear, therefore, that in most places in the Act the word "assessment" does not mean the unexpressed thoughts of the assessing officer, but the written representation of those thoughts. Again assessment must result in a figure, it is an "amount" which has to be determined and it is that "amount" or figure which the Commissioner may "reduce" or "alter" under sec. 77(6). (See *Commissioner for Inland Revenue v. Taylor* (1934, A.D. 387), *Commissioner for Inland Revenue v. Orkin & An.* (1935), A.D. 18).)
>
> It is inappropriate to speak about "reducing" a "thought" or reducing a mental process. It is also somewhat difficult to see how the Commissioner can "alter" the mental processes of his subordinates who assess; he can, however, alter the expressed result of their mental processes, and this must require some formal act. Presumably what is done is that the record of the assessment is altered on the instructions of the Commissioner. He probably does not make any alteration himself but gives instructions that it should be done.

In s. 46(1) of *The Income Tax Act,* the verb "assess" appears in a context which contains nothing to indicate the exact limits of what is embraced therein. Nor is there anything in the subsection to prescribe the form in which the operation is to be carried out or recorded. As used in s. 46(1) the word "assess" appears to me to be roughly equivalent to "ascertain and fix" and it seems to have two possible senses in one of which the mere acts of ascertaining and calculating only are included, and the other that of computing and stating the tax in the manner prescribed by the statute. In the latter sense, the stating is as much a part of the assessing operation itself as is the computing of the tax, and in the absence of some statutory provision

[1] 14 S.A.T.C. 24.

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for stating in another way, it would, in my opinion, be necessary to state it in such a way as to make the taxpayer aware of it.

In which of these two possible senses is the word used? If it is used in the first sense, it seems to me that because of the absence of any statutory method for recording the assessment "the day of . . . . assessment" referred to in s. 46(4), which I think in its ordinary meaning refers to the day the assessing is done, is, in my opinion, left in uncertainty with no convenient means prescribed for establishing it. Nor do I think there would be any sufficient basis or reason for holding that "the day . . . . of assessment" is the day when the Minister by sending out notice puts it out of his power to alter the assessment, for the last of the computations may have been made some days earlier and *ex hypothesi* it is these computations which constitute the assessment. To my mind, the difficulties and the questions which interpreting the word in this sense would raise suggest that in the absence of any statutory prescription of a means or form of recording the assessment in some official document, it is the other sense in which the word "assess" is used in s. 46(1) and this is, I think, to some extent confirmed by s. 46(2) which requires that a notice of assessment be sent to the person by whom the return was filed—not after the making of an assessment but—"after examination of a return". At first blush it might seem that an assessment must be complete before notice of it can be given, but I see nothing in the statute to require such an interpretation, for it appears to me to be quite consistent with the language used to interpret the subsection as requiring notice to the taxpayer, not that an assessment has been made, but that an assessment is being made. Nor do I think that Parliament, in setting up a procedure by which the rights of the Crown and the taxpayer would be affected, would have used the expression "after examination of a return" if indeed what was meant was "after making an assessment".

Moreover, perusal of the subsequent provisions of Division F appears to me to lend further support to this view. Under s. 46(2), the requirement is that a notice of assessment be sent. It subsequently appears from ss. 51(1), 52(1) and 56 that times for paying the balance of taxes

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assessed and for objecting to the assessment are limited and ascertained by reference to the date of mailing of notice of assessment. The right to object is, however, a right to object to the assessment itself and it would seem to me that to interpret the provisions so that the right to object arises immediately upon the assessment being made is more in harmony with the scheme of the provisions than to interpret them in such a way that there can be a period of uncertain duration between the day when the assessment is made and the day of mailing of notice which, under s. 58(1) is the time when the right to object to the assessment first arises.

I also think that s. 46(7) lends support to this interpretation, for I think it is unlikely that Parliament while providing no form for recording an assessment, nevertheless intended that a mere calculation of tax by an assessor should have binding effect either on the Crown or the taxpayer notwithstanding any error, defect or omission therein or in any proceeding relating thereto before the notice required by s. 46(2) has been given.

I am accordingly of the opinion that the giving of notice of assessment is part of the fixation operation referred to as an assessment in the statute and that an assessment is not made until the Minister has completed his statutory duties as an assessor by giving the prescribed notice. See *Y.W.C.A. v. Halifax*[1].

In this view, "the day of ... original assessment" referred to in s. 46(4) was in the present case May 28, 1953, and it remains to be considered whether the re-assessment under appeal was made within four years from that day. This, it seems to me, turns on whether what was done on May 28, 1957—which was the last day of the four year period—completed the re-assessment and it raises the question whether the mailing of the notice to the appellant in care of Mr. Wolfe Goodman was a valid discharge of the Minister's duty to give notice to the appellant and thereby to complete the re-assessment. It was not disputed that s. 46(2), which requires the Minister to send "a notice of assessment to the taxpayer", applies as well to a re-assessment as to an original assessment. Now, nowhere in the statute is there any express definition of what Parliament

[1] [1933] 1 D.L.R. 713.

intended by the word "send" in s. 46(2), but inferentially from the references in ss. 51(1), 52(1), 57(1) and 58(1) to the "mailing of notice of assessment" and the prescription of times by reference thereto, it would seem apparent that Parliament intended that such notices should be given by post. This, however, being itself an inference from language used in the statute, it is in my opinion also to be inferred that Parliament never intended that such a notice could be given effectively by the "mailing" of it to the taxpayer at some wrong or fictitious address and I find nothing in the statute to suggest that Parliament intended that a taxpayer should be bound by an assessment or fixed with notice of an assessment upon the posting of a notice thereof addressed to him elsewhere than at his actual address or at an address which he has in some manner authorized or adopted as his address for that purpose. *Vide Societa Principessa Iolanda Margherita di Savoia (fondata dai Bonitesi), Inc., v. Broderick*[1], where in a different context Kellogg J., speaking for the Court of Appeals of New York, said at p. 384:

> When the statute says that the superintendent "shall cause said notice to be mailed" to all creditors "whose names appear . . . upon the books," we think the intent clear that the notice must be "mailed" with an appropriate address upon the envelope;

In the present case, the notice of re-assessment which was put in the mail on May 28, 1957, while directed to the appellant, was not directed to his actual address nor was it directed to either of the addresses stated in his 1952 income tax return. Had it been so directed—despite the fact that the appellant no longer lived at the residential address or carried on business at the business address—and even despite the fact that the assessor was aware of these facts—it might well be that in the absence of any act on the part of the appellant to notify the Minister of a change of address, he would be bound by the sending of a notice to either of the addresses so given. That, however, was not done and it is accordingly unnecessary to decide what the effect would have been if it had been done. Nor was the notice sent to the address given by the appellant in his 1955 income tax return and for the same reason it is unnecessary to decide what might have been the effect if the notice had been directed to that address. These, however, were the only

[1] [1932] 183 N.E. 382.

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addresses which the appellant had indicated to the Department and it is not shown that Mr. Wolfe Goodman or any other person was in fact authorized to receive notices on his behalf. In this situation, while it was open to the appellant to adopt and ratify and thus give effect to the sending of notice to that address as a valid notice to him, he was under no obligation to adopt or ratify it and on the evidence I do not think he ever did so. Nor does it appear that the notice so sent in fact reached him as a result of the mailing of it on May 28, 1957, either in the ordinary course of post, or later. In my opinion, such a mailing or sending was not a valid mailing or sending of the notice within the meaning of s. 46(2) of the Act, and it follows that the re-assessment was not made within the four year period limited by s. 46(4). Nor, in my opinion, can the requirement of s. 46(2), that a notice of assessment be sent to the taxpayer, be regarded as a directory provision of the Act. *Vide Nicholls v. Cumming*[1].

The appeal will therefore be allowed with costs and the re-assessment vacated.

Judgment accordingly.

1960
Feb. 1
Dec. 7

BETWEEN:

HARVEY CLARKE SMITH ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—Capital or income—Sale of farm in bloc at substantial profit—Sale by farmer with prior dealings in real estate—Farming successfully carried on for five years—Profits held to be income—Appeal dismissed.

Appellant from 1943 to 1955 had been engaged in farming, first as a salaried employee and from 1949 onward on his own account. During the years from 1943 to 1949 this farming operation included the raising of beef and dairy cattle and hogs. His father was the owner of two tracts of land, one a 55-acre lot bought in 1941 and the other a 100-acre lot

[1] (1877) 1 S.C R. 395.

bought in 1943. Between 1946 and 1949 two portions of the latter lot were subdivided into a total of 75 lots and sold. The appellant assisted his father in making these sales. In 1949 the remaining portion of the 100-acre lot was transferred to appellant who subdivided it into 63 lots, of which 33 were sold by him in the same year.

In 1951 the 55-acre parcel was transferred to appellant in trust for his father. It was subdivided into lots of which a number were sold between 1951 and 1955. Appellant contributed one third of the expenses of this subdivision and received one-third of the profits for looking after it and for the sales of the lots.

In 1950 appellant and his father, who was a printer and not a farmer, jointly purchased a 125-acre farm about one mile away from this original farm, fronting on a major highway and near the City of Toronto, for which they paid $45,000. During the years 1951 to 1955 this property was farmed by appellant with farm help, about 100 acres being used to grow grain and hay. Livestock for personal use was kept and portions of farm buildings not needed by appellant were rented as stables for race horses. The appellant contributed $7,000 to the purchase of this farm and in 1952 the house on it together with one acre of land was sold for $12,000 and provided a further sum of $6,000 towards appellant's share of the purchase price, and the remaining $9,500 was paid by him to his mother after his father's death, his mother having become entitled to the father's property. The remainder of this farm was sold in one single transaction for $260,000 in 1955. Shortly after the sale of the farm, appellant sold his farm machinery and has not since been engaged in farming. The Minister assessed appellant for the profits from this sale for the years 1955, 1956 and 1957. From this assessment appellant now appeals to this Court. He contends that the farm was purchased in 1950 for farming and that it was used for that purpose until sold in 1955, no efforts having been made to sell it, the sale resulting from an absolutely unsolicited offer to purchase, and that he had realised an investment and was not engaged in the real estate business.

Held: That the appeal must be dismissed.

2. That the purchase of the property by appellant and his father was not an investment looking primarily to the maintenance of an annual return but was really a venture of capital in acquiring a property with a view to realising the profit that could be made from seizing upon a favorable opportunity that could be expected to come from selling it either in lots or as a whole.
3. That the profit from the sale of the farm is income from a business as defined in the Act and taxable.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Thurlow at Toronto.

W. D. Goodman for appellant.

W. W. Barrett and *J. D. C. Boland* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

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THURLOW J. now (December 7, 1960) delivered the following judgment:

This is an appeal from assessments of income tax for the years 1955, 1956 and 1957, the issue for each of these years being whether the profit arising from a sale made by the appellant in 1955 of certain real property was income or a capital gain.

The appellant at the time of the trial of the appeal was 35 years of age. After leaving school he had been employed for 14 months by the Canadian Bank of Commerce at Thornhill near Toronto, where he and his parents lived, and subsequently for eight months by the DeHaviland Aircraft Company, but from 1943 until the end of 1955 he had been engaged in farming at first as a salaried employee of his father and from 1949 onward on his own account. Between September, 1943 and May, 1944, the operation included the raising of a herd of some 18 head of beef cattle. In the fall of 1944, 16 head of dairy cattle were acquired, and a herd of this size was kept until 1948 or 1949. During these years from 1943 to 1949 the operation also included raising hogs. There is nothing in the evidence to indicate what the pecuniary results of these operations were.

The farm where the operations were carried on consisted of two lots in Vaughan Township on the west side of Yonge Street in Thornhill, one a lot 55 acres adjoining the house lot on which the appellant's father lived, and the other a 100-acre lot adjoining the 55-acre lot and extending from Yonge Street westerly to Bathurst Street. The appellant's father was president of a printing firm in Toronto and lived on the same residential property at Thornhill for many years until his death in 1953. He had purchased the 55-acre lot in 1941 for $8,000 and the 100-acre lot in 1943 for $11,000 or $12,000. In 1946 a portion of the 100-acre lot adjoining Yonge Street was subdivided into 25 lots which were later sold, the appellant assisting from time to time in making sales. In 1947 another portion of the 100-acre lot was transferred to Thornhill Estates Limited, a corporation controlled and wholly owned by the appellant's father. The land so transferred was subdivided into 50 lots and sold in that year and in 1948. The appellant was nominally

president of the company and had occasion to sign documents pertaining to the sales and to take part in selling some of the lots. When the lots had all been sold, the company was wound up. In 1949 the remaining portion of the 100-acre lot, consisting of about forty acres, was transferred to the appellant, who subdivided it into 63 lots, 33 of which were sold by him in 1949, 24 in 1950, and six in 1953. The appellant paid his father $8,000 for the property, expended a further $5,000 or $6,000 for roads, surveys, legal fees, and other expenses, and realized a profit of $30,000 from the sale of the lots. When arranging sales of lots from the two earlier subdivisions, the agreement of sale had in each case been prepared by a notary. For his own subdivision, however, the appellant drafted the agreements himself. In some cases, he took short-term mortgages to secure payment of the purchase price.

In 1951 the 55-acre parcel was transferred to the appellant in trust for his father, who was then in poor health, and it too was subdivided into lots, of which eight were sold in 1951, 33 in 1952, 17 in 1953, and 14 in 1955. The appellant contributed one-third of the expenses of this subdivision and was given one-third of the profits for looking after the subdivision and the sales of the lots.

In 1950, when the 55-acre lot was the only portion of the farm which had not been subdivided, the appellant and his father jointly purchased a 125-acre farm in Markham Township on the east side of Yonge Street, seven-tenths of a mile to the northward of the properties already mentioned. It lay some 4½ miles north of the point at which Highway 401 crosses Yonge Street and 14 miles from the City Hall at Toronto. For this property, which the appellant described as "a good farm, it had been run down but it was excellent land", $45,000 was paid, the title being taken in the name of the appellant's father. According to the appellant, the reason for taking the title in his father's name was that, "He was a business man and I was not and he looked after all the details in connection with the business". Of the money required to purchase the property the appellant contributed $7,000, the remainder being provided by his father. In 1952 the house on this property, together with one acre of the land, was sold for $12,000, which provided a further contribution of $6,000 towards the appellant's share of the

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purchase money, and the remaining $9,500 was paid by him to his mother after his father's death, his mother having become entitled to the father's property. The remainder of this farm was held until 1955 when, in a single transaction, it was sold by the appellant and his mother for $260,000 and thus gave rise to the profit in question in this appeal, a portion of this profit having been assessed in each of the three years to which the appeal relates.

Besides the house which has been mentioned, the property in question, when purchased by the appellant and his father, had on it two barns, a driving shed, a granary, and a hay barn, and during the years 1951 to 1955 the appellant rented portions of these buildings as stables for race horses and used other portions to stable four retired horses of his own, as well as to house some pigs kept for his own use. For a time he had one full-time farm hand, who worked for him as well as for some of the tenants, and at times he hired casual farm help as well. Of the 125 acres, 100 acres were cultivated land, and in each of the years 1950 to 1955 some 40 to 50 acres of this land were used to grow grain and the remainder to grow hay. For these years the appellant's income tax returns show farming receipts from rents and the sale of hay, straw, and grain and farming expenses, exclusive of capital cost allowances, as follows:

Year	*Rentals*	*Hay and Grain*	*Total*	*Expenses*	*Net*
1951	1,495.85	2,407.26	3,903.11	1,136.00	2,767.11
1952	1,300.00	4,248.50	5,548.50	2,160.76	5,387.74
1953	1,400.00	3,593.82	4,993.82	2,142.00	2,851.82
1954	925.00	2,135.78	3,060.78	1,717.00	1,343.78
1955	250.00	1,229.83	1,479.83	136.40	1,343.43

During these years, a minor improvement was made to the stables and some general repairs were made to make the buildings more suitable for rental.

The appellant gave evidence that the Markham farm was purchased for farming and that it was used for that purpose until the property was sold in 1955. No efforts were made at any time to sell it, but in June of that year an unsolicited offer of $260,000 was received for it. The appellant said he talked this over with his mother and they decided to accept it, she because she was in need of money and he because

the realty tax had tripled from 1950 to 1955 and the prices of cattle, hogs and grain were going down or not increasing in proportion to the cost of farm machinery and maintenance or operation of the farm. As to this explanation, it may be noted that the taxes claimed as an expense in 1951 were $636, in 1952, $704.26, in 1953 (after sale of the house) $602.00, and in 1954, $802. Nor had the appellant ever been engaged on his own account in raising cattle or hogs for marketing. It is plain, however, that his real and immediate reason for selling was the attractive price offered. Shortly after the sale of the farm, the appellant advertised and sold his farm machinery by public auction and has not since been engaged in farming.

That the property was in fact acquired at least in part for farming is borne out by the fact that farming operations were carried on on the property on a substantial scale for five years. At the same time, I am not satisfied that that was the only reason for buying it, and in the circumstances I would infer that the appellant and his father, when purchasing the property, did so with a view to the profit which they hoped and, I think, expected to realize sometime in the future on a sale of the property, whether in lots or in bloc. I also think that the latter was by far their more important motive for buying the farm, a conclusion which, to my mind, is indicated by the course which had been taken with respect to the other farm and the substantial profits realized in disposing of it and the speculative nature of the Markham property. The conclusion, in my view, is also borne out by the evidence of the appellant that, when buying the Markham farm, he gave no thought to what he could expect from it by way of farm income, for if farming the property were his main or only reason for buying it I do not think he would have bought it without having given very considerable thought to what it would produce for him in farm income.

The question of whether the profit from the sale of this farm was income or capital depends on whether or not the purchase and sale of the farm were transactions carried out in the course of a business of dealing in real estate, the term "business" for this purpose being wide enough to

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include an adventure or concern in the nature of trade. The test applicable is that stated in *Californian Copper Syndicate v. Harris*[1] as follows:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.
>
> What is the line which separates the two classes of cases may be difficult to define, and each case must be consideerd according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

The test is not always easy to apply, for there is no single criterion by which the question may be resolved, and cases frequently arise in which there are circumstances or facts pointing to both conclusions. It is well established, however, that the mere fact that property is held for a time during which use is enjoyed or revenue is received from it does not conclude the matter in favour of the profit realized on a subsequent sale being the result of mere realization, rather than the result of trading activity. Thus in *Rutledge v. Commissioners of Inland Revenue*[2] the Lord President (Clyde) said at p. 497:

> It is no doubt true that the question whether a particular adventure is "in the nature of trade" or not must depend on its character and circumstances, but if—as in the present case—the purchase is made for no purpose except that of re-sale at a profit, there seems little difficulty in arriving at the conclusion that the deal was "in the nature of trade", though it may be wholly insufficient to constitute by itself a trade. It is not difficult, on the other hand, to imagine circumstances in which the question might become very narrow; and in *Inland Revenue v. Livingston* I instanced such a case which it may be worth while to expound. Suppose the Appellant on the occasion of his visit to Berlin had seen a picture for sale which he admired and which he thought likely to appreciate in value in the course of years; he might buy it—and might be conclusively influenced to buy it—because of an anticipated rise in its value. After using it to embellish his

[1] 5 T.C. 159 at 165. [2] 14 T.C. 490.

own house for a time, he might sell it if the anticipated appreciation in value ultimately realised itself. In such a case, I pointed out that it *might* be impossible to affirm that the purchase and sale constituted an "adventure . . . in the nature of trade", although, again, the crisis of judgment might turn on the particular circumstances.

The element of use of the property or receipt of income from it for a time was present in *Campbell v. Minister of National Revenue*[1] and in *Noak v. Minister of National Revenue*[2], where in each case the taxpayer failed. In the *Campbell* case Locke J., delivering the judgment of the Court, said at p. 7:

> The learned members of the Income Tax Appeal Board having heard the evidence of the appellant did not accept his statement that he had caused to be built these various properties for the purposes of investment and concluded that in truth he was carrying on the business of constructing them for the purpose of re-sale at a profit.

And in *Noak v. Minister of National Revenue,* the trial judge, with whose opinion all the members of the Supreme Court agreed, had found that the appellant had followed a course or system which had in view not just investment but the intention to make profits by sale, and that in doing so she was engaged in the carrying on of a business.

Reference may also be made to *C. I. R. v. Toll Property Co. Ltd. (in Liquidation)*[3], where a dissenting commissioner had been of the opinion that the property was purchased with the intention of resale at a profit when a suitable opportunity arose and that, therefore, the purchase and sale of the property constituted an adventure in the nature of trade the profit on which was assessable, and the Court of Session, reversing the decision of the majority, held that this was the only reasonable conclusion on the facts, and this notwithstanding the fact that the property had been held from 1942 to 1949, during which period income had been derived from it. The Lord President (Cooper) said at p. 18:

> The majority of the Commissioners have given the reasons for their view in two propositions, first, that the Company was a distinct legal *persona,* and second, that the Company had derived an income from this isolated property transaction for a number of years, and from this they conclude that the transaction was an investment. For myself, I cannot see the necessary relevance of either of the factors founded upon, and I am certain that they are not conclusive in favour of the result which the majority of the Commissioners have reached.

[1] [1952] S.C.R. 3. [2] [1953] 2 S.C.R. 136.
[3] 34 T.C. 13.

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In *Minister of National Revenue v. James A. Taylor*[1], where the various criteria which have from time to time been referred to in determining whether or not a transaction is an adventure in the nature of trade are discussed, Thorson P., referring to the *Californian Copper Syndicate* case (*supra*) said at p. 202:

> The case is also of importance for the stress which the Lord Justice Clerk put on the element of speculation as a determining factor in the decision that the transaction was not the realization of an investment and its transfer into another form but the gaining of profit by the sale of the property and thus a transaction that was characteristic of what a trader would do. This stress on the speculative element is of particular importance when it is coupled with the finding that the sale of a property, which by itself is productive of income and might be regarded as an investment, can be a trade in the property rather than a realization of an investment.

But while the mere receipt of income for a time is not conclusive and may vary in importance depending on the circumstances, neither is an intention at the time of acquiring the property to make a profit by selling it by itself determinative of the question whether the transaction was one in the nature of trade. *Vide Leeming v. Jones*[2] and *Commissioner of Inland Revenue v. Reinhold*[3]. Such an intention is an important fact, but these cases indicate that it is not conclusive, and it may be outweighed by other considerations. The fact that the transaction is not in the way of the taxpayer's ordinary business, the fact that the transaction is an isolated one, and the fact that the property is of a kind in which investments are commonly made tend to offset the effect of such an intention and may, particularly when they are combined, but always having regard to all the circumstances, be sufficient to outweigh it. On the other hand, the fact that the transaction is one in the way of the taxpayer's business, the fact that the property is speculative in the sense that there is good reason to expect it will rise in value, and the fact that the transaction is not an isolated one but fits into a system or pattern of trading transactions in which the taxpayer engages all tend to support the inference from such an intention that the transaction is one in the nature of trade.

[1] [1956] C.T.C. 189. [2] 15 T.C. 333.
[3] 34 T.C. 389.

In the present case there are a number of features, notably the fact that the appellant was a farmer by occupation and required land to carry on his farming operations, the fact that the property acquired was a farm, the fact that farming operations were carried on on it over a considerable period of years, the fact that buildings not required for those purposes were let to tenants over a period of years, the fact that the property was never offered or advertised for sale, and the fact that it was not subdivided for the purpose of sale in lots, all of which, to my mind, weigh in favour of the purchase of these lands being an investment. When isolated from the rest of the circumstances, they may even be said to weigh heavily in favour of that conclusion. But I do not think that these facts are conclusive. They are consistent with the property having been an investment, but at the same time they are not inconsistent with the appellant's purchase and sale of it being regarded as an adventure in the nature of trade. Nor can they properly be isolated from the other circumstances which are present and which point to the latter conclusion. First, the purchase of this property was not a purchase by the appellant alone, but one in which his father was at least as much interested as the appellant. It was a joint venture for some joint purpose, not necessarily that of the appellant alone. The father had no intention of farming, no need of the property for farming, and derived nothing from the operations which the appellant afterwards carried on. And while the father may have been prepared to let the appellant have the use of the whole farm rent free, I would not infer in the circumstances that he became a part owner otherwise than for the purpose of ultimately making a profit for himself from the sale of the property. The appellant, I think, also had the same purpose in mind, and, as already mentioned, I think it was the main purpose of both of them, though it was one that required time to accomplish and thus afforded the appellant his opportunity to farm and derive revenue from it in the meantime. Next, it cannot be said that the appellant was engaged in farming and nothing else. Nor was his father a printer and nothing else. The appellant had for some years been closely associated with his father in the latter's real estate enterprises. And in the same year in which the Markham property was bought, the appellant was himself

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engaged in selling part of the land he had formerly farmed and which he had acquired from his father and subdivided. Moreover, during the period the Markham farm was held he was engaged on his own behalf, as well as on behalf first of his father and later on his mother, in arranging for the subdivision of the 55-acre lot and in selling lots therefrom. Next, it must have been obvious when the Markham property was purchased that, if it was worth $45,000 as a farm, being near to a large city and not far from the other properties which had already been subdivided and sold at a good profit by the appellant and his father, it also had substantial possibilities of use for purposes other than farming, in short that it was a speculative property as events subsequently proved. These considerations lead me to conclude that the purchase of the property by the appellant and his father was no mere investment looking, as Rand J. said in *Gairdner Securities Ltd. v. Minister of National Revenue*[1], "primarily to the maintenance of an annual return", but was in truth a venture of capital in acquiring a property with a view to realizing the profit that could be made from seizing upon a favourable opportunity that could be expected to come for selling it either in lots or as a whole. I also think that the purchase can not be completely dissociated from the other real estate activities in which the appellant and his father had been or were at the time engaged, the purchase of this farm being, in my opinion, but an extension of their activities undertaken to provide them with more land to sell when the sale of the other land was completed and to enable the appellant to continue his farming operations in the meantime. I am accordingly of the opinion that the purchase was not an ordinary investment but was one made in the course of a venture in the nature of trade. The fact that the appellant's father died before the scheme for profit-making was completed put an end to this venture insofar as it was a joint venture with him, but so far as the appellant and his share of the property are concerned I see no reason to think that his original purpose or the carrying out of it ever changed, and I think that for the purposes of this appeal the result, so far as he is concerned, is the same as it would have been had the sale in question been made

[1] [1954] C.T.C. 27.

during his father's lifetime. *Vide MacIntosh v. Minister of National Revenue*[1], where the termination of an association formed for a trading purpose did not affect the liability of the taxpayer for tax on the profit from the sale of his share of a trading asset acquired while the association was in existence.

I am accordingly of the opinion that the profit from the sale in question was income within the meaning of the statute.

The appeal therefore fails and it will be dismissed with costs.

Judgment accordingly.

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Oct. 29
1960
Nov. 4

BETWEEN:

CRANE LIMITED ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 12(1)(e), 14(1), 85B(1) and 139(1)(a)—Contingency reserves—Concurrence of Minister necessary to change in accounting methods—Time of recognition.

Appellant, incorporated in and carrying on business in Canada, allowed a discount to certain classes of customers for prompt payment on the invoice price of sales to them if payment were made before the 15th day of the month following the date of sale. It is the practice of appellant to make monthly payments on account of income tax for the current year as soon as the amount of discounts taken by its customers on the sales of the previous month can be ascertained, calculating the amount of this income tax instalment accordingly. Appellant's fiscal year corresponded with the calendar year and prior to 1954 it entered as taxable income unpaid December sales at their invoice price, paid its tax instalment and closed its books as of December 31, and sometime after the 15th of the following January when it ascertained the exact amount of discount taken on December sales, it claimed and was allowed to deduct such amount from the current years accounts receivable.

[1] [1958] S.C.R. 119.

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In 1954 appellant changed its method of treating discounts by making a 1954 adjustment entry reducing its accounts receivable by the amount of the estimate the discount would be in respect of December billing and would be given at January, 1955, and closed its books without waiting until the exact amount of discount could be ascertained.

The Minister of National Revenue reassessed the appellant on its 1954 income by adding thereto, *inter alia,* the amount of estimated discounts for 1954.

An appeal to the Income Tax Appeal Board was dismissed and appellant appealed to this Court.

Held: That the appeal must be dismissed since the change in accounting methods was made by the appellant without receiving the concurrence of the Minister in accordance with s. 14(1) of the *Income Tax Act* R.S.C. 1952, c. 148.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Kearney at Montreal.

D. R. McMaster, Q.C. for appellant.

John Gotlieb, Q.C. and *Paul Boivin, Q.C.* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

KEARNEY J. now (November 4, 1960) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated July 14, 1958[1], which affirmed a reassessment made by the Minister of National Revenue, whereby the amount of the appellant's declared taxable income for the year 1954 was increased by $49,633.64.

The appellant offered to certain classes of customers a discount for prompt payment, and the above-mentioned sum represents its estimate of the discounts on December sales of which such customers would take advantage. It sought to eliminate it from its accounts receivable for 1954 on the grounds that it was not income, but this was disallowed by the respondent.

The appellant, a company duly incorporated under the laws of Canada, with its head office in Montreal, Que., is a wholly-owned subsidiary of a United States parent corporation with head office in Chicago, Ill. It is engaged in the manufacture, sale and wholesale distribution of valves, fittings, and of plumbing and heating products, sold mainly

[1] 20 Tax A.B.C. 12.

through its numerous wholesale branch offices across Canada. By the terms of the invoice which accompanies shipments made by the appellant to contractors and trade customers, the purchaser is allowed a discount of 2% on the invoice price provided the account is fully paid before the fifteenth day of the month following the date of the sale.

The branch offices always record only the invoice price of sales, and the head office, which follows the practice of making monthly payments on account of income tax for the current year as soon as the amount of discounts taken by its customers on the sales of the previous month can be ascertained, calculated the amount of this income tax instalment accordingly. In following such practice no difficulty presented itself until the last month of the year when it became impossible to determine until the following year the amount of the discounts taken in the previous December. The appellant's fiscal year corresponded with the calendar year and it was important that its audited annual financial statement should be in the hands of the head office of the parent company as soon as possible after the close of the year. In order to comply with this requirement, in 1953 as in previous years instead of keeping its books open until ascertainment sometime later in 1954, of discounts taken, the appellant entered as taxable income unpaid December sales at their invoice price, paid its tax instalment and closed its books as of December 31. Sometime after the 15th of the following January when the appellant ascertained the exact amount of discount taken on December sales, it claimed and was allowed to deduct such amount from its 1954 accounts receivable.

In its income tax return for the year ended December 31, 1954, the appellant for the first time altered its manner of dealing with December discounts and, basing its calculations on previous experience, estimated that its customers would take advantage of the 2% discount in respect of December billing to the extent of $49,633.64. It made an adjustment entry reducing its accounts receivable by the amount of the estimate (Ex. A-5), spread over the last three months of the year (Ex. A-3) and as before closed its books and procured its audited statement without waiting

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until the exact amount of discount taken could be ascertained. It turned out later that its estimate was on the conservative side by about $3,000.

On July 7, 1955, the Montreal office of the Taxation Division of the Department of National Revenue issued a notice of assessment in accordance with the appellant's return, but on February 23, 1956, the Minister issued a notice of reassessment which increased the amount of its taxable income by $86,610.95. This amount was made up of an item of $36,977.31 which, according to the respondent, represented taxable additions to fixed assets less capital cost allowance thereon, with which we are not here concerned; and the item of estimated discounts totalling $49,633.64 which is now before me for adjudication.

On April 18, 1956, the appellant filed a notice of objection to the reassessment and the respondent by notice of January 9, 1957, confirmed it. The appellant on April 3, 1957, gave notice of its appeal to the Income Tax Appeal Board, which resulted in the decision herein first mentioned.

Although it is usual to set out first the grounds on which an appellant bases his appeal, I will begin for convenience by stating the reasons put forward by counsel for the respondent in justification of the Minister's disallowance of the deduction claimed.

It is submitted for the respondent that the amount of $49,633.64 which was claimed by the appellant allegedly as a deduction from income constitutes a reserve for cash discounts and was properly disallowed because it was contrary to the provisions of s. 12(1)(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148, which reads as follows:

> In computing income, no deduction shall be made in respect of an amount transferred or credited to a reserve, contingent account or sinking fund except as expressly permitted by this Part.

Furthermore, counsel for the respondent in oral argument contended that the method adopted by the appellant prior to 1954 for the computation of income in respect of cash discounts had been accepted by the respondent, and that in 1954 it changed such method without prior concurrence of the Minister, in contravention of s. 14(1) of the Act which states:

> When a taxpayer has adopted a method for computing income from a business or property for a taxation year and that method has been accepted for the purposes of this Part, income from the business or property for a

subsequent year shall, subject to the other provisions of this Part, be computed according to that method unless the taxpayer has, with the concurrence of the Minister, adopted a different method.

The appellant submitted that s. 12(1)(*e*) is inapplicable because the amount in question did not at any time, and more particularly in the taxation year 1954, constitute income; that it was not a reserve and was never transferred or credited to a reserve or contingent account. Furthermore it alleged that at no time prior to the hearing did the respondent invoke s. 14(1); that he had restricted himself to s. 12(1)(*e*), and that the case must be judged on that section alone; alternatively, that any change in the appellant's manner of computing income in respect of the cash discounts in the taxation year 1954 did not constitute a change of method such as contemplated by s. 14(1); and if it did, such a change of method was justified because the previous one was incorrect.

As there is no dispute regarding the facts, I need only deal with the expert evidence produced by the respective parties. The appellant called George P. Keeping, an experienced accountant, former president of the Institute of Chartered Accountants of Quebec, of the Institutes of Chartered Accountants of England, Wales and Ontario, and a member of similar institutes of New Brunswick and Nova Scotia. Mr. Keeping became a member of the firm of Arthur Young, Clarkson and Gordon Co. in 1953, the then official auditors of the appellant company, and in 1954 he was placed in charge of the auditing of its accounts.

This witness testified that the practice formerly followed by the company showing accounts receivable at their invoice price was wrong and not in accordance with good accounting practice; that the correcting entry made in 1954 in the accounts receivable with his approval, showing them at their estimated realizable value, was not a deduction from income but one made in order to reflect properly the company's gross income from sales; that the amount of the estimate was never set up in the books of Crane Limited as a reserve or contingent account and cannot be so considered. He cited in support of his opinion Montgomery, *Auditing,* 8th ed., pp. 163 and 165; Smails, *Accounting Principles and Practice,* 5th ed. (1954) p. 156; Geo. O. May, *Financial Accounting,* p. 188. The last mentioned authority,

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to whom Mr. Keeping refers as the dean of the accounting profession in the United States, recommended that in regard to discounts, and the witness agreed with him, the taxpayer should record only the net amount of all receivables instead of estimating the amount of the discounts. The author states at p. 188:

> It follows that in measuring the gain, what is received should be stated at its equivalent in cash, which is not necessarily the face value of the Account Receivable. . . . In relation to discount, the point is obvious. Certainly an Account Receivable cannot be regarded as the equivalent of cash . . . , which would discharge the debt, if it were tendered immediately. Any further sum that may be collected eventually is a penalty paid by the debtor for delay in discharging the debt and is income to the recipient for the period covered by the delay.

If the appellant had wished to follow the method above described, then to be consistent its books should have been kept on that basis that only $98 in respect of any $100 December sale should have been entered as an account receivable at the end of that month in respect of each one of such sales; and not merely in respect of a percentage of its sales estimated on the basis of past experience, which was the method actually followed by the appellant when reporting its income for its 1954 taxation period.

The respondent called Mr. Samuel Horn who, having graduated from McGill University in 1935 with the degree of Bachelor of Commerce, became a chartered accountant of the Province of Quebec in 1942, served with the Department of National Revenue for fourteen years and is presently on the teaching staff of McGill University. Mr. Horn prefaced his evidence by saying: "First of all I would like to state that I do not wish to differ with Mr. Keeping on his general conclusions. However, I feel that the emphasis might be shifted a little on one or two points." He stated that, as a consequence of changing to the estimation method, the appellant company was creating a non-deductible reserve and at the same time studiously avoiding calling it by that name. He added that it seems very close to a contingent reserve. Mr. Horn was able to point to several authorities listed hereunder wherein provision made in respect of cash discounts was referred to as a

reserve: Finney & Miller, *Principles of Accounting Intermediate,* 5th ed., p. 211; Smails and Walker, *Accounting Principles and Practice* (1947), p. 135; Spicer & Pegler, *Bookkeeping and Accounts,* 11th ed., c. 4, p. 74.

Mr. Keeping stated that he and the appellant had studiously avoided making use of the word "reserve" in respect of cash discounts, not for fear of any implications contained in s. 12(1)(*e*), but because its use in such connection was obsolete and erroneous. I think the meaning of words in the accounting world as elsewhere does not remain static and the truth of this observation, in respect to the meaning of the word "reserve," is made abundantly clear by Professor Smails in his 1954 edition of *Accounting Principles and Practice* wherein he states at p. 153:

> Historically, accountants have for centuries used the word "reserve" to denote three quite different things—to the considerable confusion of themselves and the utter confusion of the student and the layman. These three different things are:
>
> (1) an estimate of the amount required to compensate for some overvaluation of assets which is known to exist but whose precise incidence or amount cannot be determined at the moment, e.g., estimated bad and doubtful accounts receivable and estimated depreciation of fixed assets,
>
> or (2) an estimate of the amount required to meet some liability which is known to exist but whose precise amount cannot be determined at the moment, e.g., income taxes not yet assessed,
>
> or (3) a voluntary appropriation of earnings designed to reduce the amount of earned surplus immediately available for distribution in the form of dividends but itself constituting a part of the proprietorship or net worth of the business, e.g., general reserve or reserve for contingencies.
>
> * * *
>
> The professional accounting bodies (The Canadian Institute of Chartered Accountants, the Institute of Chartered Accounts in England and Wales and the American Institute of Accounts) are now formally recommending that the word "reserve" should be used only in reference to appropriations of earned surplus, that is to say in the third of the three senses distinguished above. (See Bulletin No. 9 January 1953 of The Committee on Accounting and Auditing Research of The Canadian Institute of Chartered Accountants.) This recommendation has already been implemented (so far as published statements of corporations are concerned) by *The Companies Act, 1947* of the United Kingdom, and *The Corporations Act, 1953* of Ontario. So-called "reserves" of the first two types distinguished above must therefore be called by some other name. For purposes of this text the "valuation reserve" will be designated an "allowance", the "liability reserve" a "provision". The use of these new terms is urged on all unincorporated businesses and on incorporated companies in those jurisdictions which have not yet regulated the matter by statute.

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At p. 159 under the title of "True Reserves" the same author states:

The creation of an asset valuation allowance or a provision for a liability represents an expense of earning revenue; it effects a reduction of proprietorship (in the form of net profit) and is reflected in a reduction of assets or increase in liabilities. A true reserve, by contrast, is created by transfer from earned surplus account to the credit of some other surplus account; it does not change the total of proprietorship but merely changes the name under which some part of this total is carried.

In ordinary parlance the word "reserve" signifies something set aside that can be relied upon for future use; and in good accounting practice, since 1954 it has been recognized that it is a misnomer to apply the word to an amount which the taxpayer never anticipated receiving and never received.

Mr. Horn subscribed to the statement that before the prohibition against a reserve can be applied there must be an amount received or receivable from which the reserve is set up. The only amount which the appellant could legally receive in 1954 with regard to December sales was, to use the example of a $100 sale, the net figure of $98 and not $100 as shown on the invoice. I do not think the appellant could demand payment of the $98 until the following January 15, but it was entitled to receive that amount and nothing more during the interval so that, if the purchaser inadvertently sent a cheque for $100 to the appellant at any time during December, the latter would be required in law to refund the $2 discount.

Sections 3 and 4 of the Act state:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income *for the year* from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all (emphasis mine)

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom *for the year* (Italics are mine.)

Unless some other section of the Act declares the contrary, I do not think it can be said that the item of some $49,000 can be said to constitute income for 1954. In this connection

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I think that s. 12(1)(*e*) must be read in conjunction with s. 139(1)(*a*) of the Act which defines the word "amount" as follows:

> "Amount" means money, rights or things expressed in terms of the amount of money or the value in terms of money of the right or thing.

The word "right" is undefined and if, as I am led to believe, it means an unconditional right, then the only amount which may be so regarded in the example is the sum of $98, and nobody suggests that the appellant placed an estimated value on this sum, and much less did it transfer it to a reserve. It must be said, however, that in 1954 the appellant had also acquired a conditional or contingent right to receive a further $2 in the event that the account would not be paid by January 15 of the next year.

In the case of *Canadian General Electric Co. Ltd. v. Minister of National Revenue*[1], the appellant, a Canadian company, stood to make a foreign exchange profit on promissory notes payable to its parent company, a United States corporation. Some of them were long-term notes, payable in American dollars; and when given the Canadian dollar was at a discount, but when they fell due Canadian funds were at a premium. Cameron J., after a lengthy review of authorities, held that foreign exchange profits or losses are considered to be contingent until payment is actually received or made, and that no taxable profit in respect of foreign exchange was made in that case by the appellant until the time when the several notes payable in United States currency were actually paid, and I think the same can be said in this case.

The *Canadian General Electric* case was concerned only with the taxation years 1950-51 and 1952; and s. 85B(1)(*b*), since it was enacted by S.C. 1952-53, c. 40, s. 73(1), was not then in force and, though it was not invoked in the present case, it is wide in scope and warrants comment. It reads:

> 85B (1) In computing the income of a taxpayer for a taxation year,
>
> (*b*) every amount receivable in respect of property sold or services rendered in the course of the business in the year shall be included notwithstanding that the amount is not receivable until a subsequent year unless the method adopted by the taxpayer for computing income from the business and accepted for the purpose of

[1] [1960] Ex. C.R. 24, 46.

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this Part does not require him to include any amount receivable in computing his income for a taxation year unless it has been received in the year.

Once again we encounter the word "amount" and I think that the words "notwithstanding that the amount is not receivable until a subsequent year" refer only to the unconditional right to receive $98 if paid on or before December 31, as in the example cited, and not the future contingent right to an additional $2 which the appellant was not entitled to receive and could only be established in the subsequent year. After some hesitation I do not think the intent of the section was meant to cover overlapping discounts from one year into another. To hold the contrary would lead to incongruities. Thus, taking the same example, if at the close of business on December 31 the account is not paid, then it will be taken into 1954 accounts receivable at $100 and the $2 discount will constitute a profit; if the account is paid the next day the same $2 will constitute a loss in 1955. If the case for the respondent rested solely on the applicability of s. 12(1)(*e*), I would be disposed to maintain the appeal.

As I observed during the hearing, I think a more formidable obstacle presents itself by reason of the respondent's invocation of s. 14(1) of the Act. I do not believe that the respondent can be precluded from raising during the argument any provision contained in the Act notwithstanding that it was not mentioned in the pleadings or previously relied upon by the Minister. Neither do I think that the words "change of method" refer only to a change from a cash to an accrual method, or vice versa. Cameron J., in *Canadian General Electric Co. Ltd. v. Minister of National Revenue* (*supra*), stated:

I do not think, however, that the word "method", used in s. 14(1), is in any way limited to those frequently referred to as the "cash" and "accrual" methods.

I believe that a change in the system of treating discounts may constitute a change of method. In the case of *Industrial Mortgage and Trust Co. v. Minister of National Revenue*[1], Thurlow J. made similar observations.

[1] [1958] Ex. C.R. 205, 213.

I think it can be said that three properly so-called methods are described in the evidence: (a) the one which had been followed by the appellant for many, many years, whereby December sales, except those actually paid before the end of the month, were shown on the company's books at the invoice price in the same way as if the invoice contained no reference to a 2% discount; secondly, method (b), in a sense a compromise between (a) and (c), which, as we have seen, treated discounts by an estimation system calculated by past experience and based not on individual accounts but on global averages; and (c) which would take into the current year as income only that amount which the appellant was entitled to receive, i.e., 98% of the invoice price, thus eliminating all discounts from 1954.

A weakness in method (a) is that it included as income in 1954 amounts which were not receivable in that year and the appellant's right to them could not arise before January 15, 1955, and as a result the appellant was required to show in 1954 as taxable income an amount which it never at any time received and which was established sometime in February 1955 at some $52,000.

As regards method (b), had the respondent concurred in its adoption, the appellant would not have paid income tax in 1954 on some $49,000 which it never received; but nevertheless it would have paid in that year income tax on some $3,000 of discounts which it did not receive, and this latter amount would have required adjustment in 1955 when the exact amount of discount had been determined. (A similar adjustment in reverse would have arisen if the appellant had estimated the amount at $55,000.) Another consequence of such a system is that in the same taxation year 1954 the appellant would have been also claiming a deduction in respect of 1953 discounts. At p. 42 of the *Canadian General Electric* case (*supra*), Cameron J., speaking of computations based on estimates, states:

> The computations made by the taxpayer at the end of each year and based entirely on the then current rates of exchange were estimates only and however useful such computations may have been for the domestic purposes of the company, they could be of no assistance in computing the actual costs of the company for the purposes of ascertaining its taxable profit.

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Method (c), like method (a), eliminates all question of a reserve and the necessity of readjusting entries such as would result in (b) due to errors in estimation; and the appellant obtains complete relief from the inclusion of discounts in the taxable income for 1954 compared to partial relief under method (b) and none under (a).

I think it is important to bear in mind that what is being sought is the establishment of particular profits for a particular year. Cameron J., in the course of discussing the prerequisites which would justify a change of method under s. 14(1) said in the *General Electric* case (*supra*) at p. 46:

> In my opinion, a taxpayer can invoke the provisions of s. 14(1) only when the method which he has adopted in an earlier year to compute his income (and which he proposes to follow in the taxation year in question) is one which is computed in accordance with the provisions of the Act and which truly reflects his real profit or loss for the year. If the method that has been used in previous years does not result in the ascertainment of the true gains as nearly as can be done, it is not a method sanctioned by the law. ... It is not, therefore, a method which it is entitled to adopt in a subsequent year even if the respondent's assessors had knowledge of it or if it had been accepted by the respondent in an earlier year.

The Court of Appeal held in *Duple Motor Bodies Ltd. v. Inland Revenue Commissioners*[1] that, if there were two alternative accounting practices which might be applied, that practice should be applied which on the facts of the particular case would produce the fairest result. In that case the question arose whether the direct cost or on-cost method should be applied to valuation of work in progress and there had been a divergence of views in the accountancy profession on the respective merits of the two methods. Pearce, L.J., after referring to the foregoing divergence of opinion, said at p. 118, and I think his observation is particularly applicable in the present case:

> . . . It is a question of fact in each case to ascertain the true profit. The result has been that the ascertainment of the *particular profits for the particular year*—which, after all, was the real object of the enquiry—has been a little submerged by this ideological dispute. . . . It would be unfortunate if dogmas of method obscured the real purpose—the finding of a fair, true and reasonable assessment of the real profit of the business for the year. (Italics mine)

In the above-mentioned cases the better of two alternative methods was being discussed, while here we are concerned with choosing the best of three. I am of the opinion that

[1] [1960] 2 All E.R. 110.

method (c) is the one which most accurately establishes the appellant's taxable income for the year. Mr. Keeping stated that where it was followed it certainly constituted good accounting practice, but in respect of bookkeeping mechanics he considered it inconvenient.

Mr. Horn conceded that method (b), from the point of view of good accounting, had considerable merit. I think it should be borne in mind, however, that the function of a public accountant is to establish in the annual financial statement, for the benefit of the shareholders and the public, the company's net year end worth. In the preparation of this statement the auditor sometimes takes into account items on both sides of the ledger which are not countenanced for income tax purposes. Although advocating method (b) as representative of good accounting, when asked by his counsel: "Would you say it is generally accepted accounting practice?" Mr. Keeping answered: "No."

I think that method (a) conforms much less to the requirements of the Act than the other two and, unless I misunderstood the argument of counsel for the respondent, he does not seek to perpetuate this method. His submission, and I agree with him, is that the appellant has contravened the provisions of s. 14(1) by changing from a method which it has followed for over twenty years and which admittedly was adopted in agreement with the taxing authorities, to another method to which the respondent takes exception.

It is regrettable that the appellant without seeking the respondent's concurrence precipitately adopted method (b) because, as counsel for the respondent observed, the appellant had the choice of adopting method (c) and could have obtained the respondent's concurrence had it been sought.

In conclusion I think it can be said that this case is largely of academic interest because, since the cause of action arose, s. 14(1) has been repealed; and as far as the amount of taxable income is concerned, it matters little into which year the incidence of discounts falls.

For the above reasons I dismiss the appeal with costs.

Judgment accordingly.

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BETWEEN:

LEO CARDINAL, LEOPOLD CARDINAL and DAME THEDEA VIAU, widow not remarried of ADEODAT CARDINAL .... SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Crown—Expropriation—Basis of valuation fair market value based on most advantageous use of property at time of taking—Compensation may include depreciation in value of unexpropriated lands to extent depreciation result of actual or anticipated use of lands taken—The Expropriation Act, R.S.C. 1952, c. 106—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 46.

On January 7, 1954 the Crown in right of Canada expropriated for the purpose of a public work some 45 acres and the buildings thereon of the suppliants' 152 acre farm adjoining the Dorval Airport on the outskirts of the City of Montreal. The suppliants seek by Petition of Right to recover damages in the sum of $217,855, including compensation for the land and buildings taken, damage to the remaining property by severance of the expropriated part, and an allowance for compulsory taking.

Held: That s. 46 of the *Exchequer Court Act* provides that the Court in determining the amount to be paid any claimant for any property taken for the purpose of a public work shall estimate the value thereof at the time when the property was taken.

2. That such value is the property's fair market value at the date of taking estimated on its most advantageous use. *Cedar Rapids Manufacturing & Power Co. v. Lacoste* [1914] A.C. 569 at 576 referred to.
3. That the most advantageous use to which the expropriated property is adapted is industrial or residential development.
4. That since the existing buildings in no way enhance the value of the land for industrial or residential development nothing can be allowed for them in a valuation based on such use. *The King v. Edwards* [1946] Ex. C.R. 311 at 333, followed.
5. That the suppliants are entitled to compensation not only for the value of the expropriated land but also for the depreciation in value of the unexpropriated lands to the extent that such depreciation is the result of the actual or anticipated use of the expropriated land. *The King v. Acadia Sugar Refining Co.* [1947] Ex. C.R. 547 at 566.
6. That an allowance of ten per cent for compulsory taking is not a matter of right, and in the circumstances of this case, should not be allowed. *Diggon-Hibbon Ltd. v. The King* [1949] S.C.R. 712 at 713.

PETITION OF RIGHT to recover damages following the expropriation by the Crown of a part of the suppliant's farm for the purpose of a public work.

The action was tried before the Honourable Mr. Justice Dumoulin at Montreal.

Jacques Décary and *Rhéal Brunet* for suppliant.

Rodolphe Paré for respondent.

DUMOULIN J. now (January 18, 1961) delivered the following judgment:

Le 7 janvier 1954, Sa Majesté la Reine, aux droits du Canada, représentée à cet effet par le ministère des Transports, fit enregistrer, sous le numéro 1050353, au bureau d'enregistrement de la Paroisse Saint-Laurent, comté de Jacques-Cartier, près Montréal, l'avis et le plan réglementaires d'une expropriation affectant, entre autres, certains biens immeubles des requérants. Cet avis et le plan connexe constituent la pièce 1 du dossier.

Les frères Cardinal, tous deux cultivateurs, possédaient à titre de propriétaires, avant le 7 janvier 1954, une superficie de 152 arpents, où se trouvaient deux vieilles maisons et quelques bâtiments de ferme, tous compris dans l'aire de l'emprise.

Pratiquée à la date précitée, la prise de possession ampute cette propriété d'un peu plus de 45 arpents, soit, exactement 45.18 arpents.

Elle porte sur partie des lots 144 et 145 et n'entame point les lots contigus 142 et 143, qui appartiennent aussi aux requérants.

Inspecteur de l'aviation civile au ministère des Transports à Montréal, monsieur Albert Guyot, délimite le rectangle exproprié en lui assignant une profondeur moyenne de 2,122 pieds, une largeur en front sur le Chemin St-François, de 807 pieds, et de 761.3 pieds vers l'arrière ou direction nord. Le département des Transports projette d'établir sur ces terrains, en sens nord-sud, la piste d'urgence, n° 15-33, un dégagement auxiliaire à l'aéroport métropolitain de Dorval, comme l'indique le plan, pièce CC.

La pétition de droit, intentée le 14 mars 1955, fait valoir deux chefs principaux de réclamation: une demande de $2,185 pour chaque arpent exproprié, soit un premier montant de $98,732; puis, pour dépréciation au reste des terres, numéros 142-143-144 et 145, découlant d'inconvénients multiples, un dédommagement de $50,000.

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Un poste de $15,000 vient ensuite pour compenser l'abandon d'un «commerce de laiterie» et la mévente d'un troupeau de 20 vaches. Cette somme comprend aussi les frais d'un déménagement, $225, qui ne se produisit que le 15 mai 1960, et la valeur d'un verger, d'une érablière et de trois puits. Quant aux bâtisses, elles sont évaluées, selon l'admission des parties, au total de $23,000, mais autant que les particularités du cas pourront justifier une indemnité de cette nature.

Enfin, paraphe apparemment sacramentel de toute réclamation du genre, un item de $13,047 pour dépossession forcée, tarifée à 10%, totalise à $201,779 la somme des dommages-intérêts postulés.

A cette pétition de droit, amendée le 29 janvier 1959, l'intimée répond substantiellement, 1° (art. 13 de la défense), que la valeur de l'immeuble approprié n'excède pas $101,538, y compris «. . . tous dommages ou toutes pertes qui peuvent résulter de telle expropriation»; 2° (art. 16), que le 8 septembre 1955, la somme susdite, plus tous frais judiciaires accrus à ce jour, furent régulièrement offerts aux pétitionnaires dans une lettre de monsieur J. P. Adam, agent fédéral des terres; 3° (art. 18), que, cette indemnité ayant été refusée, «Sa Majesté la Reine renouvelle par les présentes ladite offre . . . de $101,538 plus les frais de la présente pétition en date du 8 septembre 1955», aux conditions ordinaires de la remise en bonne et due forme de titres parfaits de propriété.

Les expropriés, comme on l'aura constaté, demandent l'équitable valeur de 45.18 arpents pris par l'État, puis aussi une juste indemnité pour la dépréciation de la partie inappropriée.

Traitons d'abord du premier grief, si l'on peut dire ainsi, de beaucoup le plus considérable.

Mais avant d'en venir au vif du sujet, il importe de signaler une conjoncture d'ordre économique, insolite jadis et presque constante aujourd'hui, l'expansion des grandes agglomérations urbaines, telles Toronto, Vancouver, et, tout particulièrement en l'occurrence, la métropole du pays, Montréal.

L'envahissement persistant et rapide de la périphérie et des zones limitrophes, déclenche nécessairement les mille et une aventures de la spéculation immobilière, entraînant de la sorte la majoration ininterrompue et souvent fantaisiste de l'indice de valeur.

C'est bien ce qui se produisit dans le cas présent, à tel escient, ceci n'est pas contesté, que le témoin expert cité par les pétitionnaires, monsieur Roland Bigras, attribue, en janvier 1954, un prix moyen de $1,500 l'arpent à des terres, dont l'estimation pour affectations agricoles ne dépasserait point le chiffre de $400. Dans le même ordre d'idées, sinon sur un palier monétaire égal, le «légitime contradicteur» de monsieur Bigras, l'agent d'immeubles, R. A. Davis, de Toronto, témoin principal de l'intimée, fixera ce prix moyen à $1,103 l'arpent, abstraction faite des bâtisses, et à celui de $1,235, constructions comprises.

En pareille matière, cet écart d'appréciation entre messieurs Bigras et Davis n'a rien de formidable. Du reste, tous deux conviennent que dès avant 1954, le percement du Boulevard Métropolitain, en direction est-ouest, de Ville Mont-Royal vers la municipalité de Dollard des Ormeaux, constituait d'ores et déjà un projet administratif de notoriété publique. A ceci, joignons l'admission de l'intimée, exprimée à la p. 3 de son mémoire «. . . que le meilleur usage que les expropriés pouvaient faire de leur patrimoine, le jour de l'expropriation, était de le vendre pour fins *plus ou moins éloignées* [je souligne] de lotissement domiciliaire ou industriel».

Tel est bien l'avis consigné par l'évaluateur Davis en divers endroits de son rapport d'expertise, pièce 5, notamment à la p. 11, dont j'extrais ces passages:

The highest use of subject property would likely involve a highly speculative purchase in the hope of ultimate industrial development.

This view is taken after considering, amongst other matters, the trend and direction of development in the area, and along Côte de Liesse Road, the existence of the Canadian National Railways Right-Of-Way abutting subject property and the location of the City of Dorval dump which is 600′ away.

Subject property had a frontage of 1,376′ before the taking. This is much greater than the typical farm, and would add value because of the greater ease of ultimately laying out a subdivision within its borders.

The railway land at the rear would also be an attraction to a speculator.

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Cette valorisation intensive des terres, dans la localité, détermine forcément une dérogation à l'ordonnance coutumière d'une décision en semblable matière. Ainsi, laissant de côté, pour l'instant, le caractère agricole de l'exploitation et tout dommage afférent à la cessation de ce métier, je dois examiner d'abord, en fonction de cette majoration, comme point principal, ce que pouvaient valoir, le 7 janvier 1954, les éléments de propriété enlevés aux réclamants.

De ce qui précède il s'ensuit que de nombreuses transactions eurent lieu dans ce secteur dès 1953 et même auparavant. Les parties dressèrent donc et produisirent des tableaux ou listes de plusieurs de ces ventes; monsieur Roland Bigras, pour les requérants, déposa la pièce E, Messieurs R. A. Davis et Jean Béique, pour l'intimée, ont préparé des cédules jointes, respectivement, aux rapports, 5 et 14. Il a été dit plus haut que la «moyenne» des prix à l'arpent passait de $1,500, computée par monsieur Bigras, à une gradation ascendante de $800, $1,000 et $1,103, telle qu'établie par les experts de la Couronne.

Pour utiles que soient des comparaisons de cette espèce, elles requièrent toutefois un décalage prudent, rendu nécessaire par l'inégalité des avantages attachés à chaque terrain: telles la jouissance de services municipaux, l'ouverture de routes ou de rues, la proximité d'un grand centre.

Je ne repasserai donc que ces mutations de propriété dont l'analogie de temps et de site me semble particulièrement probante.

Onze jours après l'actuelle expropriation, le 18 janvier 1954, nous retraçons la vente «Newman à Freedman» du lot 74 et partie du 75, une superficie de 73.39 arpents, au prix global de $115,000, ou $1,570 l'arpent (pièce n° 10, rapportée aussi au tableau, p. 22 de la pièce 5). Situé dans la paroisse voisine de Pointe-Claire, ce bien n'est éloigné, à sa pointe nord-est (cf. le plan n° 3) que de 400 pieds environ du lot 143 des Cardinal. Ce même Chemin St-François, qui dessert l'avant des lots 144 et 145, longe le 75 sur trois de ses côtés, mais ne paraît pas de ce seul chef lui ajouter cette «valeur bien supérieure» que lui attribue le savant procureur de l'intimée à la p. 6 de son mémoire, par ailleurs très circonstancié.

Autre vente, le 2 décembre 1953, par J. E. L. Boisselle à Rora Inc., du lot 80, paroisse de Pointe-Claire. Au prix global de $7,500 les 7.15 arpents alors vendus attestent une moyenne unitaire de $1,050.

L'extrémité nord-est de cette terre aboutit au lot 144, sans accès aucun au Chemin St-François (voir le plan nº 3). Le tracé de cette langue de terre, un parallélogramme de 4,650 pieds de côté sur une largeur d'environ 600, avec un seul débouché à sa limite nord-ouest, ne permet guère de lui reconnaître des avantages comparables à ceux que possède la contenance de l'emprise, eu égard surtout aux commentaires favorables de monsieur Davis, ci-haut relatés, quant à la bande de 1,376 pieds en bordure du Chemin St-François, et à la présence de la voie ferrée à l'arrière.

Il ne me semblerait pas déraisonnable d'accorder à la terre des Cardinal une préférence commerciale d'un quart (25%), reportant alors la valeur de celle-ci à $1,312.50 l'arpent, si je ne considérais que ce barème.

Hector Leduc, cité par les pétitionnaires, un cultivateur qui, en 1952, possédait les lots 211 et 212, communiquant avec la route de Côte-Vertu, vendit cette même année, le 211 à raison de $1,500 l'arpent. La partie de cette propriété qui borde le chemin mesure approximativement 312 pieds sur sa largeur (voir le plan nº 3). Monsieur Leduc précise que sa ferme se trouve un demi-mille au sud et un mille au nord de la pénétration du développement industriel. De ce terrain à celui des Cardinal, direction nord-ouest, le plan pièce 3, indiquerait une distance d'un mille.

Alexis Lecavalier, autre témoin des requérants, aujourd'hui rentier, il est dans sa soixante-quatorzième année, cultivait, jusqu'en 1957, dans le rang St-François, une terre de 75 arpents, distante de 14 arpents de celle des pétitionnaires. Monsieur Lecavalier nous apprend initialement, avec une pointe assez excusable d'amertume, que des restrictions de zonage affectant son lot (nº 139), avaient empêché, en 1954, la réalisation d'une offre de $45,000 pour un arpent, longeant la route, et sa maison, vieille de 200 ans. Une fois ces restrictions levées, en 1957, le brave homme disposa de ses 75 arpents à raison de $2,700 l'unité. Cette transaction, de trois ans postérieure à celle sous étude, ne suscita point d'objection que je sache. Cependant, elle outrepasse, je crois,

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cette latitude conditionnelle allouée en pareil cas par notre Cour Suprême dans l'affaire *Roberts and Bagwell*[1]; aussi ne retiendrai-je, et avec la circonspection qu'une preuve du genre requiert, que l'incident de la vente avortée.

Le témoignage probablement le plus révélateur sur cet aspect de la cause fut celui, très succinct, de monsieur Richard Ferguson, âgé de 58 ans, marchand de graines de semences, le voisin immédiat des Cardinal, en sa qualité de propriétaire du lot 141.

Voici ce qu'il relate. Le 141, bordé de deux côtés par le Chemin St-François, possède une superficie de 55 arpents carrés, que le témoin évalue, en 1954, à l'indice de $1,000 l'arpent pour la terre «nue». Par contre, n'était le voisinage d'un dépotoir municipal vis-à-vis, de l'autre côté du chemin, Ferguson n'hésiterait pas à majorer de $200 et $250 le prix unitaire. Il pense aussi que ce double accès à la route assure à son lot une certaine plus-value, chose fort possible dans l'état actuel des lieux, mais que la métamorphose de cette campagne en une banlieue domiciliaire et industrielle de la grande ville éliminera demain.

Sans autre objection, ce témoin ajoute qu'il acquit, en 1957, de ses deux sœurs, 20 arpents à l'arrière de sa propriété, payant pour cela $40,000 exactement $2,000 l'arpent.

Ceci nous ramène quelque peu à notre point de départ: l'évaluation de la terre «nue» par le témoin Bigras à $1,500 l'arpent, puis celle de Davis à $1,103 ou $1,235, constructions incluses, le tout analysé à la lumière de la preuve.

Pour terminer cet examen, signalons qu'il est admis par monsieur Bigras que les dix propriétés inscrites sur sa liste, pièce E, à cause, précisément, des embranchements projetés au Boulevard Métropolitain, en 1954, valaient plus que celle des Cardinal. Ce témoin convient d'emblée que la vente 4, à la pièce E, d'un arpent au club de golf Côte-de-Liesse, au denier fort de $7,500, ne saurait aucunement influer en l'occurrence. Répondant à une question que je lui pose, monsieur Bigras dit que la perspective généralement connue de prolonger le Boulevard Métropolitain, n'affectait pas encore, au moment de l'expropriation «ce secteur du Chemin St-François où se trouvent les lots des Cardinal».

[1] [1957] S.C.R. 28.

Particularité plutôt rare, l'évaluateur Davis auquel l'intimée a confié sa propre expertise, ne partage pas cette opinion et voici comme il formule son avis à la page 10 de la pièce 5:

HIGHEST AND BEST USE

Most of the land in subject area is presently being farmed, but in the light of the speculative type of purchases and the prices paid during the past five years, it is held that the highest and best use of land is in an early stage of transition away from agricultural and towards industrial and residential uses.

EXTENT OF SPECULATIVELY HELD LAND

It is estimated that most of the six square miles of subject area is owned by speculators. In explanation of the reasons for such extensive holdings it is thought that rising prices of serviced land closer to Montreal has offered an incentive to the speculator to buy and hold, while awaiting the extension westward of the developments and availability of services that would force values higher.

Certain blocks of land in subject area in a sense have been frozen because the owners have not wished to sell, or prefer to rent to industry rather than sell. The inactivity in connection with these lands has forced speculative purchases to be made farther away from the actual development neighborhoods.

Formulé en termes nets et précis, cet aveu atteste explicitement qu'au jour de l'expropriation et depuis assez longtemps le spéculateur en immeubles avait conscience de l'importance potentielle du secteur dont faisaient partie les lots 144 et 145, occasionnant ainsi l'inévitable corollaire d'une hausse spectaculaire des prix. Est-il de meilleur indice de cette opinion que le témoignage des faits, et je veux parler de deux ventes déjà mentionnées: celle, d'abord, des lots 211 et 212 (Hector Leduc), conclue dès 1952, à raison de $1,500 l'arpent, lots situés, il est vrai, à 2¾ milles de l'immeuble Cardinal; celle surtout, de 73.39 arpents, à 400 pieds seulement et à l'ouest de l'emprise, le 18 janvier 1954, à raison de $1,570 l'arpent (pièce 10). A noter, enfin, que monsieur Davis, à la dernière ligne de la page 16 de son rapport (pièce 5), compute l'accroissement des prix dans la localité à pas moins de quatre par cent (4%) «par mois».

Les pétitionnaires étaient donc investis par la force des circonstances exceptionnelles, le 7 janvier 1954, de tout le bénéfice qu'une semblable transition économique leur assurait, faisant permuter leur patrimoine du domaine agricole à celui d'un lotissement domiciliaire ou industriel. Le droit

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à tous les avantages inhérents, maintes fois reconnu par le Conseil Privé, le fut avec une particulière concision dans la cause *Cedars Rapids Manufacturing v. Lacoste*[1] où Lord Dunedin spécifiait que:

> For the present purpose it may be sufficient to state two brief propositions:—(1.) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2.) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

Cette reclassification dans un potentiel différent de l'affectation primitive, l'agriculture, est radicale, sans que l'on puisse d'aucune façon la relier à l'état antérieur des lieux. Gardons-nous, toutefois, de confondre valeur et dommage.

Il ne m'est donc pas loisible d'allouer aucune somme pour les deux maisons et autres bâtiments. La vétusté de ces résidences, notée aux pages 12 et 13 du rapport numéro 5, où sont révélés des âges vénérables de 130 et de 79 ans, aggravée d'un manque complet de commodités modernes, les dévaloriseraient absolument à toutes fins. Est-il besoin d'ajouter que ces habitations ne représenteraient au regard d'un spéculateur en immeubles qu'autant de démolitions à effectuer sans tarder.

L'interdiction de la dualité d'évaluation, qualifiée de «Duplication trap» par M. Keith Eaton dans son intéressant article sur les problèmes de l'expropriation par l'autorité fédérale «Federal Expropriation Problems», paru dans The Canadian Bar Journal (1958) vol. 1, à la p. 40, ressort avec une remarquable clarté d'une décision du Président de cette Cour dans la cause *The King v. Edwards*[2]; je cite:

> The fallacy in the defendant's valuations lies in the assumption that he was entitled *to the value of the land* for higher than residential use purposes, and at the same time *to the value of the buildings* for such purposes. He cannot have it both ways. He is entitled to a valuation based on either the value of his property for residential use or its value for other purposes but not both. It cannot be put to higher than residential use and at the same time retained for such use. *The defendant cannot have his land valued on one basis and his buildings on a different and inconsistent one.*

[1] [1914] A.C. 569, 576.

[2] [1946] Ex. C.R. 311, 333.

Notre cas est un décalque de ce précédent. De deux choses l'une: ou j'évalue ce bien comme terre à culture au prix ultime de $400 l'arpent, accordant alors $23,000 pour les bâtiments, plus la dépréciation du reste au taux de 25%, et j'obtiens un résultat global de $51,754; ou, comme je le dois, je me conforme aux faits établis, et même à l'instante requête des pétitionnaires, et considérant la valeur dans l'optique d'un lotissement «domiciliaire ou industriel», abstraction faite alors d'immeubles inutiles, j'alloue une indemnité de $1,400 l'arpent, chiffre qui, compte tenu de tous autres inconvénients, apure l'indice compensateur au total de $100,639, soit presque le double de la première appréciation.

Disposant du premier point, je suis d'avis qu'au jour de l'expropriation la propriété des frères Cardinal valait $1,400 l'arpent, soit, pour 45.18 arpents, un montant de $63,252, dont une tranche de $3,180 sera versée à la co-requérante, Dame Thédéa Viau, veuve d'Adéodat Cardinal, au titre de son droit d'habitation dans l'une des deux maisons, servitude légalement éteinte depuis le 7 janvier 1954.

Le second motif de réclamation découlerait du préjudice pécuniaire causé par l'abandon forcé de l'exploitation de la ferme, principalement par la discontinuation du commerce laitier.

Monsieur Léo Cardinal, l'un des requérants, âgé de 53 ans, cultivateur, fut le seul des deux frères à témoigner, mais l'on peut présumer que l'autre eût donné une version identique. Le témoin rapporte, en résumé, que les 152 arpents dont se composait la ferme se répartissaient de la façon suivante: 10 arpents en culture maraîchère, 30 affectés à la croissance du foin, 30 à celle du grain, puis 20 à 25 autres servant au pacage de 20 vaches. Cette terre contenait aussi une petite réserve forestière destinée aux besoins domestiques.

La discontinuation de la vente du lait serait attribuable, à la suggestion de l'agent fédéral des terres, monsieur J. P. Adam, qui dès 1954, aurait dissuadé les réclamants d'engager des dépenses pour l'entretien des bâtiments ou le maintien du cheptel.

Mais, un peu plus loin dans le déroulement de son témoignage, Léo Cardinal attribuera une raison différente à cette décision, spécifiant que son client unique, celui auquel il vendait toute la production de lait, monsieur

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James Wolfenden, de Strathmore, décida, pour des raisons personnelles, d'abandonner ce commerce dès la fin du mois de mai 1954. Wolfenden cité par les pétitionnaires corrobore, mot pour mot, cette explication, et j'ai compris que la diminution rapide des fournisseurs de lait aux environs rendait ce métier impraticable.

Dans ces conditions, je ne puis reporter au passif de l'intimée une conséquence d'ordre général provenant de facteurs étrangers et de circonstances ambiantes.

Je ne saurais davantage accorder compensation pour la mévente de 16 vaches laitières, payées $225 la bête, et revendues aux abattoirs pour $75 chacune.

Monsieur Cardinal dit ensuite qu'il y avait sur leur terre, lors de l'expropriation, environ 450 érables d'un rendement annuel moyen de 75 gallons avec profit réel de $150. A l'instar de tant d'autres cultivateurs, Cardinal ne tient aucune comptabilité et ne paraît pas très certain des chiffres qu'il avance. Cependant ses déclarations n'ayant pas été contredites, j'accorderai une somme de $1,000, la capitalisation à 15% du profit allégué.

Monsieur Aurèle Bédard, ingénieur forestier de Berthierville, a visité, au mois d'octobre 1958, la ferme des Cardinal; il y a compté 55 pommiers, vieux d'environ 20 ans, qu'il évalue à $60 l'arbre, en tout $3,300, avec une production moyenne de $6 l'arbre. Le principal intéressé, autant, du moins, que mes notes me permettent de le constater, n'aurait pas attaché grande importance à cet élément de l'entreprise, car il n'en n'a pas soufflé mot. J'ignore ce que pouvait rapporter la vente de ces fruits. A tout événement, une indemnité de $1,000 suffira amplement à compenser le préjudice probable.

La pétition de droit met de l'avant un troisième et dernier grief, une demande de $50,000 pour dépréciation aux 106 arpents restants. Comme cette dernière partie de la preuve allait débuter, le savant procureur de l'intimée souleva une double objection basée sur la vente, au mois d'avril 1958, de la partie intouchée de la propriété, puis sur ce qu'une seconde pétition de droit aurait été intentée, le 26 avril 1956, réclamant $304,500, par suite de la dévalorisation occasionnée par les règlements de zonage imposés en 1955.

Après mûre considération, je dois rejeter ces objections, déférant en cela aux directives de l'art. 46, de la *Loi sur la Cour de l'Échiquier*, c. 98 des Statuts Refondus de 1952, dont voici le texte:

> 46 La Cour, en déterminant le montant qui doit être payé à un réclamant pour un terrain ou une propriété expropriée pour les fins d'un ouvrage public, ou pour dommages causés à un terrain ou à une propriété, en estime ou établit la valeur ou le montant à l'époque où le terrain ou la propriété a été expropriée ou à l'époque où les dommages dont il est porté plainte ont été causés.

Or, «à l'époque où le terrain ou la propriété a été expropriée» les pétitionnaires demeuraient propriétaires de 106 arpents et «à l'époque où les dommages dont il est porté plainte [auraient] été causés» nulle servitude de zonage ne pesait encore sur l'immeuble.

Il convient de rappeler aussi que les inconvénients provenant des restrictions de zonage, et celles qui résultent normalement du voisinage d'un aéroport, ne sont pas toujours de même ordre. Ce dernier cas pourra entraîner, par exemple, la perte d'une servitude de passage, le sectionnement d'une voie d'accès ou même enclaver la propriété limitrophe; dans le premier, il s'agira habituellement de la prohibition *«non altius tollendi»*, une limitation de la hauteur des constructions. En l'espèce, une présomption d'identité ne s'impose point; seule une preuve régulière dictera la conclusion appropriée.

Je dois maintenant justifier la défaveur matérielle que, par anticipation, je reconnaissais tantôt à la partie non expropriée des lots.

Nous avons vu que le besoin éventuel d'une piste supplémentaire d'atterrissage servait de motif à l'expropriation des 45 arpents. Quelles seront les dimensions de cet ouvrage? Affectera-t-il défavorablement les terrains circonvoisins? Voilà ce que nous apprendra le témoignage de monsieur Henri Gourdeau, régisseur régional de l'aviation civile.

Le procureur de l'intimée s'est opposé à toute preuve d'affectation anticipée de l'emprise, objection que je ne puis contenancer puisque l'utilisation prévisible d'un terrain peut entrer en ligne de compte. A l'appui de cet avis, je citerai une autre décision du Président de la Cour de l'Échiquier,

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dans l'instance *The King v. Acadia Sugar Refining Company Limited and The Eastern Trust Company*[1], où nous lisons que:

> . . . Nor is it necessary to show that such depreciation is the result of *actual* adverse use of the other land taken from the owner; it is sufficient to show that it is due only to *an anticipated use.*
>
> Under the circumstances, I think it may be stated that in Canada if land is expropriated under the Expropriation Act and its actual or *anticipated use* is such that other lands held by the same owner are injuriously affected thereby so that they are depreciated in value the owner is entitled to compensation not only for the value of the expropriated land but also for the depreciation in value of his remaining lands to the extent that such depreciation is the result of the actual or *anticipated use* of the expropriated land.

Le témoin Henri Gourdeau nous apprend donc que l'expropriation des lots 144 et 145 se propose de permettre l'établissement d'une nouvelle piste orientée dans la direction nord-sud. Ce tracé ne serait pas une course principale mais auxiliaire que l'on utiliserait comme piste d'urgence advenant des complications atmosphériques, telle, par exemple, une excessive vélocité du vent. Et il n'est guère encourageant de savoir que la proportion de ces atterrissages forcés ne dépasserait pas 4% de l'activité aéronautique car, ici, ce que l'on gagne numériquement, on le perd en sécurité. La voie projetée, continue le préposé à l'aviation, comme toutes autres, mesurera 1,200′ dans le sens de sa largeur, incluant une bande pavée large de 200.

Monsieur Gourdeau prévoit que cette piste, d'une longueur première de 8,000 pieds, atteindra une étendue définitive de 9,300. Il ne fait pas de doute, conclut-il, que la lisière d'atterrissage ou «run-way» entraînera «le sectionnement du Chemin St-François», la voie publique qui dessert encore le devant des lots. L'époque même de l'éventualité importe peu, il suffit que l'on puisse raisonnablement «l'anticiper», si l'on me passe cet anglicisme.

Aux ennuis matériels, restrictions des droits de propriété, perte de facilité d'accès, qui résultent de l'immédiate proximité d'un ouvrage public du genre ci-haut décrit, s'ajoutent le vrombissement assourdissant des avions et la prévisibilité d'accidents, un ensemble de facteurs peu enviables, qui déprécient la propriété sur laquelle ils pèsent. Comme je l'ai indiqué, un dédommagement à concurrence

[1] [1947] Ex. C.R. 547, 566.

d'un quart de chaque unité de valeur marchande, $1,400, ne me paraît pas exagéré; conséquemment, j'allouerai pour 106.82 arpents, un montant de $37,387.

J'accorde aussi le coût du déménagement, $225, qui eut lieu le 15 mai 1960. Par contre, je ne saurais accueillir la demande d'une indemnité de dix par cent (10%) pour dépossession forcée. Dans l'état actuel de la jurisprudence, cet ajouté n'est pas la suite inéluctable de toute expropriation, mais ne peut être octroyé qu'afin de pallier certaines difficultés d'appréciation dont cette cause n'offre aucun indice. On pourra lire avec avantage l'avis exprimé par M. le Juge Rand, naguère de la Cour Suprême du Canada, in re *Diggon-Hibben Limited v. The King*[1].

Un dernier mot sur le sujet des méthodes auxquelles les experts eurent recours. La formule dite «Before and After», usitée par monsieur Davis, consiste à déterminer la valeur du terrain entier antérieurement à la prise de possession (Before), puis ensuite (After), celle de la fraction restante. Si cette comparaison atteste un fléchissement de prix, c'est qu'il y aura eu dépréciation de cette dernière partie. Pour en connaître l'étendue, il suffira de soustraire le second chiffre du premier. Ainsi, théoriquement, nous obtenons la double information requise, à la condition cependant essentielle que «l'expert» ait calculé juste, ce dont le juge doit s'assurer à l'analyse patiente de la preuve.

Monsieur Bigras a procédé selon la méthode 4-3-2-1 qui, sur papier, sectionne le terrain en quatre lisières d'égale contenance, dans le sens de sa largeur, avec des coefficients décroissants de valeur, allant de 40% pour la bande avant, de 30% à la suivante, de 20% à la troisième jusqu'à 10% pour l'arrière. C'est un procédé qui ne manquerait pas de justesse dans des conditions statiques, si les lieux devaient demeurer tels qu'ils étaient en janvier 1954. Or, c'est une perspective contraire que monsieur Bigras envisage, et selon la prévision rationnelle d'une répartition de tout ce secteur en lots à bâtir, d'un morcellement généralisé, que restera-t-il alors de l'actuelle topographie?

[1] [1949] S.C.R. 712, 713.

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De tout ceci, il résulte que les indemnités accordées seront réparties comme il va suivre:

Pour les 45.18 arpents expropriés, à raison de $1,400 l'unité	$ 63,252.00
Pour dépréciation des autres 106.82 arpents à l'indice de 25%	37,387.00
Pour le préjudice à l'exploitation sucrière	1,000.00
Pour le préjudice causé au commerce de pommes	1,000.00
Pour le coût du déménagement	225.00
Ce qui donne un total de	$102,864.00

montant que je porterai au chiffre «arrondi» de $103,000.

La Cour, en conséquence, statue par ce jugement que le dépôt d'un plan et d'une description desdits terrains et bâtisses, effectué, le 7 janvier 1954, au bureau de la division d'enregistrement de Montréal, a investi Sa Majesté la Reine, depuis la date précitée, des différents droits de propriété foncière sur partie des lots 144 et 145 portés au plan et au livre de renvoi du cadastre officiel de la Paroisse St-Laurent, comté de Jacques-Cartier, Province de Québec, et selon que spécifié dans les pièces produites en cette cause sous les cotes 1 et 2; que les requérants, sur remise par eux faite de titres clairs, nets et libres de toute charge, servitude et hypothèque, établissant naguère leurs droits aux biens expropriés, recevront à titre d'indemnité liquidée une somme globale de $103,000, à diviser entre les trois requérants, dont Dame Thédéa Viau, veuve d'Adéodat Cardinal, suivant leurs droits respectifs, selon les proportions apparaissant aux conclusions de leur pétition de droit; le tout avec intérêt au taux de cinq par cent (5%) l'an, depuis le 15 mai 1960.

Les requérants ont droit de recouvrer tous dépens taxables.

Jugement en conséquence.

BETWEEN:

1960 May 24, 25 — 1961 Jan. 24

THE ALGOMA CENTRAL AND HUDSON BAY RAILWAY COMPANY .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Railroad subsidized by grant of Crown lands—Lands pledged to secure bonds—Whether revenue obtained from sale of mining, prospecting and timber rights, capital or income—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6(1)(j) and 139(1)(e).

The appellant company was incorporated by Act of Parliament in 1899 for the purpose of constructing a railroad through the District of Algoma. To assist in financing the project cash subsidies were paid the company by both the Federal and Ontario governments and the latter body also granted it large tracts of land along the proposed right of way. The appellant subsequently sold bonds to the public and pledged the lands as security. Thereafter the proceeds of any sale of these lands or of the timber or mineral rights thereon had to be accounted for to the trustee for the bondholders. From time to time the appellant disposed of the mineral, surface and timber cutting rights in the lands it had been granted. In assessing the appellant for the years 1953 to 1956 inclusive the Minister added the sum received for such rights to the appellant's declared income. In an appeal from the assessment it was contended for the appellant that the amounts in question were not income but receipts of a capital nature and formed part of the subsidy lands granted and received as capital assets along with the cash subsidies. The Minister submitted that dealing with the granted lands formed part of the appellant's business and the receipts part of its income and, that in any event, they constituted receipts which were dependent upon use of production from property.

Held: That even if the lands when received were of a capital nature, their character was changed by the manner in which they were dealt with by the appellant. To deal with the mining and timber-cutting rights it set up an organization which carried on its activities as a business operation in the same manner as an ordinary trader in such items. The profit was obtained by transactions having the characteristics of a trade, business or of an adventure in the nature of trade, and the profits were properly assessed as taxable income. *The Commissioners of Inland Revenue v. Livingston* 11 T.C. 538 at 542 and *Western Leaseholds Ltd. v. Minister of National Revenue* [1960] S.C.R. 10 at 23, referred to and followed. *Hudson's Bay Co. v. Stevens* 5 T.C. 424, distinguished.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Fournier at Toronto.

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B. V. Elliot, Q.C. and *A. D. McAlpine* for appellant.

G. D. Watson, Q.C. and *T. Z. Boles* for respondent.

FOURNIER J. now (January 24, 1961) delivered the following judgment:

The appellant filed with the Department of National Revenue returns of its income for its taxation years 1953, 1954, 1955 and 1956. By re-assessments, the respondent added to the appellant's declared income for the above years certain amounts on the ground that they were properly taken into account in computing the taxpayer's taxable income in accordance with the provisions of ss. 3 and 4 of the *Income Tax Act*. The appellant objected to the re-assessments and stated that the amounts added to its declared income were not income but receipts of a capital nature derived from Land Grant lands. Nevertheless, the Minister confirmed the assessments and an appeal is now taken thereupon.

The appellant is a company incorporated by a Special Act of Parliament under the name of The Algoma Central Railway Company (Statutes of Canada 1899, 62-63 Victoria, c. 50). Its name was changed to The Algoma Central and Hudson Bay Railway Company in 1901 by 1 Edward VII, c. 46. Its head office is in the city of Sault Ste. Marie, in the province of Ontario. The purposes and powers of the appellant are found in the following sections of the incorporating Statute:

8. The company may lay out, construct and operate a railway . . . from a point at or near the town of Sault Ste. Marie, in the district of Algoma, on the St. Mary River, to a point on the main line of the Canadian Pacific Railway at or near Dalton station, and thence south-westerly to Michipicoten Harbour upon Lake Superior.

9. The Company, for the purposes of its undertaking, may—

(*a*) erect and maintain docks, dock yards, wharfs, slips and piers at any point on or in connection with its railway, and all the termini thereof, on navigable waters for the convenience and accommodation of vessels and elevators;

(*b*) acquire and work elevators;

(*c*) acquire and run steam and other vessels for cargo and passengers upon any navigable water which its railway may connect with;

(*d*) acquire and utilize water and steam power for the purpose of compressing air or generating electricity for lighting, heating or motor purposes, and may dispose of surplus power generated by the Company's works and not required for the undertaking of the Company;

(*e*) acquire exclusive rights, letters patent, franchises or patent rights and again dispose of the same.

10. The Company may construct, work and maintain a telegraph line and telephone lines along the whole length of its railway and branches, and may establish offices for the transmission of messages for the public; and, for the purpose of erecting and working such telegraph and telephone lines, the Company may enter into a contract with any other company.

2. The Company may enter into arrangements with any other telegraph or telephone company for the exchange and transmission of messages, or for the working in whole or in part of the lines of the Company.

3. No rates or charges shall be demanded or taken from any person for the transmission of any message by telegraph or telephone, or for leasing or using the telegraph or telephones of the Company, until such rates or charges have been approved of by the Governor in Council.

4. *The Electric Telegraph Companies Act* shall apply to the telegraphic business of the Company.

In 1901, the appellant was authorized to extend its line of railway "from a point on the main line of the Canadian Pacific Railway, thence in a general direction northerly to some point on James Bay, not further north than Equam River."

The appellant received Dominion subsidies in cash under Statutes of Canada intituled in each instance "An Act to authorize the granting of subsidies in aid of the construction of the lines of railway therein mentioned." These cash subsidies were not considered as taxable income. It also received land grants pursuant to Canada and Ontario Statutes.

The cash and land subsidies granted by the Province of Ontario to the appellant to aid in the construction and operation of the railway were for the public purpose of increasing employment, encouraging immigration and establishing industries. In the preamble of c. 30 of the Ontario Statutes 1899, 63 Victoria, the Legislature, in an *Act respecting aid by Land Grant to the Algoma Central Railway,* recognized the difficulties which would face the Company in its undertaking. Realizing that, owing to the undeveloped character of the country through which the railway would pass, its traffic for some years to come would not be of sufficient value to produce a revenue on the capital invested, it granted in fee simple the lands described in the above Act.

The appellant, to finance the cost of construction of the railway and its operation, in addition to the cash subsidies received, raised funds from the public. It pledged the land grant lands received and its railway line as securities for

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the bonds which were sold to the public, and the proceeds of any sale of these lands or the timber or minerals thereon had to be accounted for to the Trustee for the bondholders to meet the Company's obligations to its bondholders. Even with these subsidies the appellant was in financial difficulties with its bondholders before the construction of the line was completed and until 1959, when all arrears of bond interest and the bonds were redeemed under new financing arrangements. Only then did the Company come under the control of the shareholders.

The appellant received in land grant lands approximately 83 townships having an area of over 2,100,000 acres or 3,347 square miles. The townships were scattered along its railway line. From time to time, it disposed of certain rights inherent to the land grant lands received, including rights to the minerals, timber, surface rights and other rights having value. It is the receipts from the agreements concerning the aforesaid rights, and not that of the land itself, which are the subject of the present litigation.

In the taxation years 1953, 1954, 1955 and 1956, the appellant, in its income tax returns, declared the following taxable incomes:

1953	*1954*	*1955*	*1956*
$1,850,989.75	$743,925.80	$2,489,888.45	$3,170,523.71

During these years, it had also received amounts from Land Grant lands as follows:

	1953	*1954*	*1955*	*1956*
1. Mining claim rentals for 35 sources ....$	2,196.64	$ 2,685.11	$ 1,073.82	$ 1,927.05
2. Prospecting fees from 6 sources	6,700.00	3,300.00	9,700.00	13,500.00
3. Timber dues from 11 sources	36,936.93	52,352.43	41,176.72	73,380.36
4. Timber dues from Great Lakes Power Co.	....	....	512.54	10,294.70
	$ 45,833.57	$ 58,337.54	$ 52,463.08	$ 99,102.11

In its re-assessments for these taxation years, the respondent, under the above headings, added to the appellant's taxable income the amounts *supra,* which he confirmed following the notices of objection.

The question to be answered is whether the amounts added are taxable income within the meaning of the provisions of the *Income Tax Act* or capital gain from the sale of assets in the form of rights inherent to the ownership of land. The provisions of the Act, among others, which should be specially considered in determining the nature of the amounts added to the appellant's income are ss. 3, 4 and 6(1)(*j*). I quote:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, . . .

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

* * *

6. Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year

Payments based on production or use.

(*j*) amounts received by the taxpayer in the year that were dependent upon use of or production from property whether or not they were instalments of the sale price of the property, but instalments of the sale price of agricultural land shall not be included by virtue of this paragraph.

There is no definition of "income" or "capital" in the *Income Tax Act*, so in many instances it is most difficult to find the difference between the "income" contemplated by the provisions of s. 3 of the Act and a "capital gain". Section 4 is of some help when it states that income from a business or property is equivalent to the balance of profits or gains therefrom. On the other hand, it is generally recognized that any profit made from the sale or realization of a capital asset is not a receipt of business or trade unless the realization of such asset forms part of a business, a trade or an adventure in the nature of trade.

The appellant through counsel contends that at all relevant times it was solely engaged in the business of operating a line of railway and a fleet of vessels and did not engage in the business of selling or leasing lands or the timber or minerals thereon. The receipts from the timber and minerals, which are involved in this appeal, were part of the subsidy lands granted to it and received from the Province of Ontario as subsidies in aid of the construction

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of the appellant's line of railway. The lands were also granted for public purposes, namely, to establish new industries and create employment in the province. The timber and minerals disposed of were received as capital assets along with cash subsidies received for the same purpose. The methods used to dispose of part of the assets were in fact sales of such assets in the course of realization of the cash equivalent thereof. The receipts from such sales were capital receipts. The cash subsidies were capital receipts and not taxable. It was finally submitted that if one form of subsidy is not taxable it would seem illogical and unrealistic that the disposal of another capital asset representing another form of subsidy should be taxed.

On behalf of the respondent it was urged that the basis for justification of the land grants by the Province of Ontario to the appellant is expressed in the preamble of the Act as "that, owing to the undeveloped character of the country through which it will pass, the traffic of the railway for some years to come will be limited to carrying timber and mineral ores and will not be of sufficient value to produce a revenue on the capital invested."

To create or increase traffic revenue, the Company disposed of certain lands received and of certain rights inherent therein. When the appellant disposed of certain lands, it was a condition of the grants that the Company's railway would be used for the transporting of supplies, materials to or from the lands sold and all products of the purchaser's industry on the lands. In cases of timber cutting rights agreements it was stated that the purpose of the agreements was to assure the Company of traffic revenue and provided that one of the objects of the lessor in granting the cutting rights was to obtain traffic over its railway lines and was part of the consideration for and a condition of the granting of said cutting rights. The contractor agreed with the Company to route or cause to be routed all of its traffic, both inbound and outbound, through the Company's railway line. Similarly in mining cases, the lessor's primary object in granting the lease was to increase traffic on its railway and to provide cargoes for its ships.

The respondent further submits that the Land Grant lands activities form a significant part of the appellant's complex operations. They are carried on, under the direction and control of an official designated as the Superintendent of Lands and Forests, in a separate corporate division, and are integrated with the other activities so as to complement and augment its railway business. They can hardly be classed as unusual to the Company's ordinary course of business. The business operations are complex and extensive. Not only is there a practice established over many years of dealing with Land Grant lands as part of its business operations, but the continued and repetitive character of the operation is emphasized by the fact that it has apparently been considered necessary to establish and operate a recording office, a transfer office and an issuer (or issuers) of permits to use Land Grant lands for prospecting and trapping. A portion of the salaries of those thus occupied is allocated to operations of this division of the Company's activities. In addition, amounts from $10,000 to $18,000 per year were expended in the pertinent period for the purpose of cruising the Company's limits it requires for railway ties in its operations and inspecting and scaling timber. It is apparent that the development and integration of mining activities and timbering operations in areas tributary to the Company's railway, with a view to developing traffic for its railway lines, is a business purpose ancillary to the main purpose of developing traffic for its railway.

The respondent concludes that the basic facts, found or assumed by the Minister, which are put on issue in this appeal are that receipts from Land Grant land operations are part of the appellant's profit-making activities, to wit, income from its business; that they are not properly classified as receipts from the sale of a capital asset outside the course of established business; that in any event they constitute receipts which were dependent upon use of or production from property.

I believe that the admitted or established facts which are important and material to the issue are those concerning the amounts added to the appellant's taxable income. The sums thus added were received by the appellant as a result

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of certain agreements between the Company and third parties. These agreements were related to mining claims, prospecting privileges and timber dues and not to the sale of the lands received as land grants.

It was realized at the very outset that the Company, to meet its purposes and the objects of its incorporation, would need the help of both the Canadian and the Provincial Governments. Statutory cash subsidies were paid by both authorities as the construction work progressed. Land grants were received from the Province of Ontario for the reasons recited in the preamble of the above Act. The Company, to finance the railway line and operate its railway, had to issue bonds. The subsidy lands were used or given as collateral security for the bonds. When the Company granted or disposed of mining claims, prospecting privileges or timber cutting rights, the monies received therefrom had to be accounted for to the trustee of the bondholders and for their benefit.

The method followed by the Company in dealing with the aforesaid assets is interesting and important. The agreements concerning the mining rights were in the form of documents drawn in pursuance of *The Short Forms of Leases Act* (R.S.O. 1950, c. 361). They were in the basic form of a lease of land which, in consideration of rents and other considerations reserved, demises to the lessee a specified area for a specified period of time. The rent therefor being the sum of $1 per acre on the execution of the lease, a further sum of 25 cents per acre in each year thereafter during the currency of the lease and paying as rent, in addition thereto, specified royalties related to the profits of any mine which may be located on the land, with special per ton royalties in respect of iron and pyrite mines. The receipts from mining land leases in the period under discussion were the amounts paid by way of annual rentals and not royalties for ore extracted.

The receipts from prospecting agreements were amounts paid for the right to exclusive user of specific rights on designated areas of land for limited periods. There were no amounts received for removal of minerals.

The timber cutting rights were disposed of and paid for on the basis of the amounts of the quantities cut—in other words, on the "stumpage basis".

The last items subject to this litigation are the amounts received from Great Lakes Paper Co. in 1955 and 1956. It appears that pulpwood cutting rights in the designated area had been granted to Lake Superior Paper Co. Ltd. in 1911 and assigned to Abitibi Power & Paper Co. Ltd. in 1928. In December 1928, a lease of a water site was granted by the appellant to The Algoma District Power Co. with the incidental right to flood certain areas. This lease must have been subject to the prior cutting rights granted to Lake Superior Paper Co. over part of the same lands. The Power Company decided to raise its dams and to flood additional acreage. In January 1955, the appellant obtained from Abitibi Power & Paper Co. a release of its interest in the areas to be flooded and in the timber in such areas, subject to certain conditions. It was then arranged between the appellant and Great Lakes Power Co. that all merchantable timber possible of salvage within economic limits would be salvaged and utilized and offered to Abitibi Power & Paper Co. and that Great Lakes Power Co. would pay the same stumpage as was payable under the cutting agreement held by Abitibi Power & Paper Co.

Neither the amounts involved in the re-assessments, which were taken from statements prepared by the appellant at the request of the respondent, nor the agreements forming part of the record are in dispute, except as to the inferences to be drawn from the evidence. To arrive at correct and legal conclusions, many tests are, of necessity, to be applied to the facts, assumed or established.

Certain general principles have to be kept in mind when determining whether the amounts assessed are income or capital gains. Income tax is a tax imposed on the person measured by his income from all sources. The fact that income is not defined by the Statute leaves the determination of the income of the taxpayer according to the facts of each case under the general law as provided in the different Parts of the Act. But, as stated in *The Saskatchewan Co-operative Wheat Producers, Ltd.* and *The Minister of National Revenue*[1].

Capital must not be confused with income which is equivalent to the expression of "balance of gains and profits".

[1] [1928-34] C.T.C. 41, 46.

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Lord Macmillan, in *Minister of National Revenue* and *Spooner*[1], said (p. 186, *in fine*):

> . . . It is necessary in each case to examine the circumstances and see what the sum really is, bearing in mind the presumption that "it cannot be taken that the Legislature meant to impose a duty on that which is not profit derived from property, but the price of it" . . .

As neither "income" nor "capital gain" are defined, the line of separation between the two is difficult to determine. In this respect, Lord Justice Clerk, in *Californian Copper Syndicate v. Harris*[2], at page 166, said:

> What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

The finding may be that an investment has been sold or a trade has been carried on. When in doubt, means have to be taken to establish what the intention of the taxpayer was and also the latter's whole course of conduct when dealing with the items in question. The intention is determined according to the facts. As to the taxpayer's whole course of conduct, the President of this Court, in the case of *Cragg* and *Minister of National Revenue*[3], at page 45 (*in fine*), says:

> There is, I think, no doubt that each of the profits made by the appellant could, by itself, have been properly considered a capital gain and the Court must be careful before it decides that a series of profits, each one of which would by itself have been a capital gain, has become profit or gain from a business. Such a decision cannot depend solely on the number of transactions in the series, or the period of time in which they occurred, or the amount of profit made, or the kind of property involved. Nor can it rest on statements of intention on the part of the taxpayer. The question in each case is what is the proper deduction to be drawn from the taxpayer's whole course of conduct viewed in the light of all the circumstances. . . .

It is important at the outset to see how the Province of Ontario was induced to grant lands and the rights inherent therein to the appellant and the object of the grant. These facts are indicated in the preamble of the Statute (S.O. 1900, 63 Vict., c. 30). I quote:

> . . . and whereas The Lake Superior Power Company has constructed a large hydraulic power canal at the Town of Sault Ste. Marie, in the Province of Ontario, and power houses, plant and works supplying power

[1] [1928-34] C.T.C. 184. [2] [1903-11] 5 T.C. 159.
[3] [1952] Ex. C.R. 40 at 45; 5 D.T.C. 34; [1951] C.T.C. 322.

to operate the industries now located upon it, and The Sault Ste. Marie Pulp and Paper Company has constructed and now operates large industries at the Town of Sault Ste. Marie, Ontario, whereby the natural resources of the region are being utilized in its manufacturing processes, and the said two last mentioned companies have, as an inducement to the granting of the said lands to the railway company, severally offered, in consideration of such grant being made, to construct, equip and operate large and important additional works and industries in the Province of Ontario, to make use of such raw materials, and manufacture the same, and thus promote immigration to the Province by furnishing employment to labour therein, contribute to the development of its resources and add to the public wealth thereof; . . .

It is evident that the Province was induced to part with the lands for the consideration that two large companies agreed to undertake works and developments which in the last analysis would be in the interest of both companies and the Province. The business operations of the companies would be increased by the new undertakings. The influx of new inhabitants, the use of raw material and manufacture of such would contribute to the development of its resources and add to the public wealth of the Province.

As to the appellant railway company, it had applied to the Government for land grants of a specified number of acres of the Crown lands for each mile of its railway, constructed or to be constructed. The main reason given for the granting of the request is indicated in the following words of the preamble (O.S. 1900, c. 3):

. . . and whereas, such railway will run through a country not hitherto accessible for the purpose of habitation, and its construction is rendered difficult and costly by reason of the nature of the territory to be traversed by it; and whereas, owing to the undeveloped character of the country through which it will pass, the traffic of the railway for some years to come will be limited to carrying timber and mineral ores and will not be of sufficient value to produce a revenue on the capital invested therein;

The above indicates two difficulties facing the Company in its undertaking. Firstly, the construction of its railway line would be a costly enterprise by reason of the nature of the territory to be traversed; secondly, the revenue from the traffic, limited to timber and mineral ores, would be, for some years, insufficient to meet the obligations incurred by the financing of the project. The grants of Crown lands could help pay the construction costs with the proceeds of the sale or sales of the land, if disposed of or used as collateral security for loans, bonds, etc. The receipts from the renting, leasing or granting of the rights attached

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thereto could be used to supplement the revenue from traffic as to meet its financing obligations or paying part of its operating expenses.

During the period under review, no proceeds from the sale of land was considered as income or added to the appellant's income, but agreements were entered into with regard to mining claims, prospecting privileges and timber cutting rights. I have examined *supra* how the appellant dealt with these items and the amounts received therefrom.

Though the appellant strongly urged that Land Grant lands were capital assets just as much as cash subsidies, it should be kept in mind that, even if the lands when received were of a capital nature, this character could be changed by the manner in which they were dealt with and used. The proceeds arising therefrom could then be considered as capital gain or income. If the lands had been disposed of as an investment and had thereby realized a profit, it may be considered as capital gain, having regard to all the circumstances of the disposal. On the other hand, if the profit was obtained not by a realization or change of investment but by agreements or transactions having the characteristics of a trade, business or of an adventure in the nature of trade, the profit would be income.

In considering the facts of this case, I will recall that the appellant has submitted that the only way the lands could be converted into cash would be by dealing with them in the way it did. Since it seems generally admitted that it is only from the realization of an investment that a true capital gain can be obtained, it follows that the less an investment is likely to produce a revenue the more difficult it is to establish that it is a capital asset of the nature of an investment. Raw land, mining land, unproven oil acreages-timber limits which cannot be made productive of a yield, except by converting them in some fashion, are not ordinarily acquired as investments. Where the lands herein involved were situated in an undeveloped and rugged country, I am convinced that they could not produce a yield save by converting them in some way. So the appellant made the transactions relating to the mining claims, prospecting privileges, timber cutting rights, trapping rights, etc.

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It is in the case of *The Commissioners of Inland Revenue v. Livingston*[1] that the Lord President (Clyde) said at page 542 (*in fine*):

> . . . I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, "in the nature of trade", is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as "in the nature of trade", merely because it was a single venture which took only three months to complete. . . .

With far more reason would these remarks be applicable to repeated dealings, as in the present instance, where the amounts received arose from many agreements and transactions. The amounts received from mining claims came from thirty-five different sources; prospecting fees, from six; timber dues, from eleven. The appellant admitted that all the receipts from mining land leases, during the period under review, were the amounts paid by way of annual rental and not royalties paid for ore extracted. Payments for prospecting rights were made for the exclusive exercise of specific rights on designated areas for limited periods. No payment was provided for the removal of minerals. If they are to be considered as payments for option rights, in *Western Leaseholds Ltd. v. Minister of National Revenue*[2] Locke J. said that monies received for granting options on potential oil lands were profits realized from the business of dealing in mineral rights just as royalties reserved were.

As to the amounts received for timber cutting rights, the appellant in its notice of appeal says that "it now disposes of its timber as such, being paid for same on the basis of the amounts cut." It has on numerous occasions been decided that repetitive receipts over many years pursuant to well-defined, established and organized practices for dealing with timber cutting rights were income from a business.

As to the monies paid by Great Lakes Power Co. to the appellant, the Railway Company, on May 28, 1956, wrote to the Power Company a letter reading in part as follows:

> With reference to the clearing by you of the land in that part of your Montreal River Storage basin lying within the limits of Township 24, Range XVI preparatory to raising the water level. . . ." (Then it establishes

[1] 11 T.C. 538.

[2] [1960] S.C.R. 10, 23.

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the stumpage dues that shall be paid to the Railway Company for the cutting of the merchantable species to which the appellant would be entitled at certain unit prices).

And the letter continues:

> The said dues except pine, are the same as Crown dues presently assessed for the same purpose, namely, on timber cut during land clearing operations from Crown lands and shall be increased from time to time as said Crown dues are increased, and by the same amount. . . .

This letter would indicate that the raising of the water level would be on the Montreal River Storage basin (Great Lakes Power Company). So the only interest the appellant had on that land was the timber cutting rights. It agreed to receive for its cutting right the same dues as the Government. It would be interesting to know exactly how the State considered these receipts for their timber—was it capital or revenue?—, for in all its dealings with the mining lands and the timber rights the appellant appears to have adhered to the procedure generally followed by the State and the individuals making a business of dealing in such matters.

The parties referred the Court to many decisions wherein it is held that each case should be decided on its own facts. I will not deal with many of the decisions quoted, but seeing that the appellant relied heavily on *The Hudson's Bay Co. Ltd. v. Stevens*[1] I believe I should say a few words about that case.

Here was a company dating back to the time of King Charles II, which had territorial and governmental rights in a vast tract of land in North America. It surrendered those rights in exchange for grants of land in respect of which they occupied the position of a mere landowner. They realized those lands, and that raised the question. The view taken there was that these lands in the possession of the Company, being got in exchange for their original rights, were exactly the same as the inherited lands of a private landowner, and that is the basis upon which that company started. The question was whether, looking at it in that way, they had merely developed and sold their lands as a landowner might whose lands had come down from his ancestors, or whether they had taken those lands into their trade, so to speak, and traded in them. This is a

[1] [1903-11] 5 T.C. 424.

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résumé of the basic facts of the case by Rowlatt J. in *Alabama Coal, Iron, Land and Colonization Co. Ltd. v. Mylam (H.M. Inspector of Taxes)*[1], leading up to the following remarks made by Lord Justice Farwell in the *Hudson Bay* case (*supra*) at p. 437:

> . . . a man who sells his land, or pictures, or jewels, is not chargeable with income tax on the purchase-money or on the difference between the amount that he gave and the amount that he received for them. But if instead of dealing with his property as owner he embarks on a trade in which he uses that property for the purposes of his trade, then he becomes liable to pay, not on the excess of sale prices over purchase prices, but on the annual profits or gains arising from such trade, in ascertaining which those prices will no doubt come into consideration.

Thus, according to these remarks, even a landowner may be liable for trading in land.

Rowlatt J. concludes by saying, "Therefore, even a person in the position of a landowner can use his existing lands, to put it shortly, as an article of trade, if that is the true view of what he has done with them."

I am unable to find any similarity between what was done with the lands granted to the Hudson Bay Co. and what was done in the present instance. In the *Hudson Bay* case there was the transfer of lands as such. Here we have a company which received Crown lands with rights attached thereto. It did not and admits that it could not sell the lands. It only disposed of certain rights. The only way it could receive some cash value was to deal with mining and timber cutting rights. As a result of covenants, agreements and transactions, it received annual benefits, which were not the difference between, say, the sale prices over purchase prices, but profits or gains arising from their leasing the rights of prospecting or mining or the sale of timber cutting rights, all in the same manner as an ordinary trader in such items. It had an organization to deal with the above rights, which carried on its activities as a business operation and which produced revenues. The monies which were received for mining rentals and prospecting privileges were only for the use of a capital asset for a limited period. Even for the timber dues there was no outright sale of the land. The agreements simply give the contracting parties the right to enter upon and cut the timber on a certain area for a specified period of time.

[1] [1926-7] 11 T.C. 232, 253.

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After perusing the evidence adduced and the submission of the appellant, I have found that the appellant had failed to discharge the burden of proof which rested upon it to demolish the facts admitted, established or assumed by the respondent and which served as the basis for the re-assessments.

Though the Railway Company was primarily a freight carrier, after receiving the Crown lands, wishing to dispose of same, it realized that this could not be done, so it embarked on a series of operations of a business nature. It leased lands to contractors for prospecting purposes and, when the activities of the prospectors were successful, it gave permits for mining claims. Every covenant, agreement, was for a consideration which was a unit price per acre on a designated area and for a specified period. These transactions gave rise to monthly or annual revenues. It also granted timber cutting rights for dues on a stumpage basis. The same applied to the timber cut on the land cleared for flooding purposes. The land reverted to appellant after it had become useless for the purposes for which the rights had been granted to the contractors.

So, I find that the amounts added by the respondent in the re-assessments of the appellant's income for the years 1953, 1954, 1955 and 1956 were made in accordance with the facts of the case and the provisions of the *Income Tax Act*.

Therefore, the appeal is dismissed with costs.

Judgment accordingly.

1959 Nov. 16, 17, 18 — 1961 Feb. 21

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

MASSAWIPPI VALLEY RAILWAY COMPANY .... RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 16 and 23—Assignment of right to receive income—Retroactive effect of fiscal legislation—Appeal dismissed.

Appellant corporation in 1871 leased all of its railway property for a term of 999 years, the lessee agreeing to make annual payments to both the bondholders and shareholders of appellant. Appellant was assessed for tax on the amounts paid to the bondholders and shareholders in 1951. An appeal to the Tax Appeal Board was allowed and from that decision the Minister of National Revenue appealed to the Exchequer Court.

Held: That the appeal must be dismissed.

2. That both parties having agreed that the transaction at issue should be envisaged in the light of the Quebec Civil Law, Art. 1029, C.C. regarding "stipulation for third person" should apply, according to which a valid stipulation in favour of a third person creates a contract between the third person and the person who has agreed to be bound by the contract; it establishes a *vinculum juris* between the latter and the third person.
3. That there was no transfer or assignment of any income within the meaning of ss. 16 and 23 of the *Income Tax Act* since the appellant never had the right to the income as the original lease provided that the consideration for it went directly to the bondholders and shareholders.
4. That the appellant could not be held liable for income tax because the contractual obligations under the leasing had been entered into prior to the effective date of the first income taxation statute in 1917.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Montreal.

Guy Favreau, Q.C. and *M. Paquin, Q.C.* for appellant.

John L. O'Brien, Q.C., *F. S. Burbidge* and *E. E. Saunders* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

DUMOULIN J. now (February 21, 1961) delivered the following judgment:

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This is an appeal from the decision of the Tax Appeal Board, given on November 5, 1958, allowing the appeal of the respondent from the assessment of tax for the year 1951 of Massawippi Valley Railway Company, of the City of Montreal, in the Province of Quebec.

Before attempting to review this appeal, it is appropriate to point out that two others were heard jointly with the instant one, the questions at stake in all three cases raising, practically, analogous problems of law. Consequently, the decision herein reached should also apply in the matters of: *Minister of National Revenue and Ontario and Quebec Railway Co.*, number 152826, and *Minister of National Revenue and Quebec Central Railway Co.*, number 152827, of the records of this Court.

The disputed amount is $22,388 (including penalty), exacted from respondent in a notice of re-assessment, dated February 25, 1954, whereby the company's income tax return, for 1951, declared at "Nil", was revised and set by appellant at $48,000.

No factual complexities whatever arise; the entire issue hinges upon the conflicting opinions entertained by litigants regarding the proper legal connotation of uncontested facts.

We must now retrace the path of time back to December 27, 1871, when a long since forgotten railroad, the Massawippi Valley Railway Company, then running from the Quebec Eastern Townships to points in the bordering State of Vermont, U.S.A., pursuant to statutory privileges conferred in 1862 by 25 Vict. c. 61 (s. 15, *inter alia*), leased the total operation and control of its line and properties, for a period of 999 years, to an American competitor, the Connecticut and Passumpsic Rivers Railroad Company (cf. ex. A-1).

Henceforward, to all intents material, Massawippi Valley Railway was to fade into the unsubstantiality of a mere corporative designation.

Some fifteen years after, on June 1, 1887, (cf. ex. A-2), the rights thus demised, in 1871, were passed on by the initial lessees to Boston and Lowell Railroad Corporation, which, in turn, assigned them to the Boston and Maine Railroad, on December 13, 1892. Next, fifty-nine years later, on November 7, 1946 (ex. A-3), the latter railroad entered

into a similar agreement with the Canadian Pacific Railway, rounded by an assignment on the part of Passumpsic and Connecticut Rivers Ry., to the C.P.R. (for short) of its interest in the unexpired residue of the lease or 824 years.

Reverting to the original indenture, ex. A-1, of December 27, 1871, I will reproduce hereunder the gist of its provisions affording relevancy in this litigation. The Massawippi Valley Railway, then:

. . . by these presents do demise and lease for the said period or term of nine hundred and ninety years . . .

The said road or Railway and Branch Line or Spur of the said Company of the first part [i.e. Massawippi Ry.] with all its franchise, rights & privileges secured by Law, and for that purpose do hereby transfer, convey and set over to the Company of the second part accepting as aforesaid all the real and personal Estate, Depots and Stations, houses and other Structures, its road bed and rights of way, gravel pits and every other right or thing pertaining to said Railway & Spur, and the operating and working of the same, and all privileges and franchises which the Company of the first part now have or may hereafter have under the Laws of Canada and of the Province of Quebec.

Monetary stipulations, under the guise of rental, safeguarded the respective interests of the Massawippi Railway's bondholders and shareholders providing, furthermore, for the redemption of its maturing bonds; these clauses read thus:

SECONDLY: That the Company of the second part [i.e. in 1871, the Connecticut and Passumpsic Rivers Railroad Co.] shall and will and they do hereby stipulate, covenant and agree and bind and oblige themselves in consideration of the foregoing premises to pay to the Holders of the Bonds now issued by the Company of the first part, the sum of Twenty four thousand Dollars annually . . . by semi annual instalments . . .

THIRDLY: The Company of the second part shall and will and they do hereby further stipulate & agree and obligate themselves to set aside and pay to the holders of the capital Stock now issued by the said Company of the first part [Massawippi Ry. for short] amounting to the sum of four hundred thousand Dollars, equal dividends per Share as shall be paid to the Holders of the Preferred Stock of the Company of the second part [viz. Connecticut and Passumpsic Ry.].

AND FOURTHLY AND LASTLY: That the Company of the second part shall and will and they do hereby agree and bind and obligate themselves to provide for the redemption of the Bonds aforesaid at their maturity and shall have and receive as a compensation therefor the unissued balance of the capital Stock of the Company of the first part being a sum in stock equal at par value to the Bonds that shall be paid or redeemed and thereafter the said Company of the second part did and do hereby bind and oblige themselves to set aside and pay to the said Holders of the capital stock amounting to the sum of Four hundred thousand Dollars issued for the redemption of the said Bonds, the same rate of dividend as aforesaid.

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Had the Massawippi Railway resolved to sell its line and assets outright, these terms and conditions could quite fittingly have served that end.

In the cognate affairs of the *Minister of National Revenue v. Ontario and Quebec, and Quebec Central railways,* the basic indentures are, respectively, A-5 of January 1884, and A-9, dated October 2, 1912. The duration of the so-called "lease" in the Ontario-Quebec Ry. and C.P.R. deal is stated as "in perpetuity", and fixed at 999 years in the agreement with Quebec Central Ry. (A-9).

Other factors substantially compare with those previously cited, save that a sum of $121,000 is, by appellant's computation, alleged to be Ontario and Quebec Railway's income for taxation year 1951, and $161,900 that of the Quebec Central Ry. during the same period.

I seldom, if ever, recite copious passages of the pleadings, but presently I deem advisable to depart somewhat from such a practice, since the salient points in dispute, pro and con, are adequately set out in paragraphs 7 of the Notice of Appeal, 8 and 13 of the Reply. Section 7 submits that:

7. . . . the amount of $48,000.00 paid during the taxation year 1951 by the Canadian Pacific Railway Company to the holders of the common stock of the Respondent, being the rental payable by that company under the indenture of 1871, between Respondent and Connecticut and Passumpsic Rivers Railroad Company, whose rights were in due course assigned on November 7th, 1946, to Canadian Pacific Railway Company, which amount was so paid to the said holders of the common stock of the Respondent because of the direction contained in the said indenture, constitutes a payment or transfer of money made to the said stockholders pursuant to the direction of or with the concurrence of the Respondent for the benefit of the Respondent or as a benefit that the Respondent desired to have conferred on the said stockholders and to the full extent of the said amount of $48,000.00 would have been Respondent's income if the said payment or transfer had been made to it and, consequently, the said amount of $48,000.00 constitutes income of the Respondent for the said taxation year 1951 under the provisions of Subsection (1) of Section 16 of The 1948 Income Tax Act.

This attack upon the as yet unchallenged *status quo ante* of respondent or, more precisely, of its bondholders and shareholders, is squarely met, first in para. 8 of the Reply:

8. Pursuant to said agreement dated December 27th, 1871, and said assignment and the fulfillment of the conditions thereof, the assets and enterprise of Respondent became vested in Canadian Pacific Railway

Company for the duration of the said period of nine hundred and ninety-nine years, and the only rights which the holders from time to time of the capital stock of Respondent have during the said period of nine hundred and ninety-nine years are to receive payment of the said amounts from Canadian Pacific Railway Company and, if necessary, to enforce payment thereof by Canadian Pacific Railway Company;

Paragraph 13 mentions the legal tenets in whose light the transaction at bar should be envisaged.

13. By the said agreement dated December 27th, 1871, which agreement is goverened by the laws of the Province of Quebec, and in particular, by the provisions of the Civil Code of Lower Canada, and the said assignment to Canadian Pacific Railway Company, the acceptance of the obligation by Canadian Pacific Railway Company and by the stockholders of Respondent that Canadian Pacific Railway Company should pay the said amounts directly to the holders of the capital stock of Respondent rendered Canadian Pacific Railway Company directly liable to said capital stockholders and there was no obligation to make payments to Respondent, nor had Respondent any right to such payments. Respondent, in consequence, had no income for the year 1951, nor had Respondent the right to any income.

Though no doubt subsists as to the relevancy of the laws of Quebec in the matter, formal admissions to this effect, duly signed by both parties and in each appeal, are appended to the pleadings *ex majore cautela.*

It would therefore appear that the covenants of 1871 (A-1), 1884 (A-5) and 1912 (A-9) should be subjected to an initial test, that of the Civil Code, in order to establish their specific and technical entity, before being weighed in the balance of our fiscal statute.

On this score also the viewpoints of the contestants are at complete variance, the appellant holding that these agreements are nothing more than "simple indication of payment" in line with art. 1174 C.C., whilst respondent contends they constitute so many instances of "Stipulations for third parties" according to art. 1029.

A preliminary observation is that each of those three covenants falls in the class of "*sui generis*" contracts, known to the civil law doctrine and jurisprudence under the French appellation of "contrats innomés" innominate contracts.

Such undertakings, albeit nameless, possess a full measure of validity insofar as they do not contravene the laws of public order and good morals. They are construed conformably to their own terms and conditions.

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The spirit of the civil law regulating lease or hire of things, and quite likely the letter itself, seemingly require a specified duration (art. 1601), not exceeding ninety-nine (99) years (art. 568 concerning emphyteusis, a special class of lease). This element, if originally lacking, was excused in the instant cases by two Acts of Parliament, viz. (1862), 25 Vict. c. 61, s. 15; (1884), 47 Vict. c. 54, s. 2; and an Act of the Quebec Legislature (1912), 2 Geo. V, s. 1.

And now, resuming the main trend of argument, do these indentures give rise legally to the effects and consequences inherent to a "simple indication of payment" or, rather, to those of a "stipulation on behalf of third parties"? Article 1174, C.C., enacts that:

> 1174. The simple indication by the debtor of a person who is to pay in his place, or the simple indication by the creditor of a person who is to receive in his place, or the transfer of a debt with or without the acceptance of the debtor, does not effect novation.

If any common sense or strictly legal significance attaches, as it does, to the twice mentioned expression "simple indication", then, assuredly, the intricate, lengthy, documents evidencing the transactions, the Acts of Parliament and of a Provincial Legislature deemed necessary to their validity, and the far reaching extent of the deals, sweep away even the vaguest notion of simplicity. Nor is it "a transfer of a debt" for the decisive reason that as those instruments were executed no debt exisited between the railroad and their stockholders, and, at all events, we would be confronted here with much more than "the transfer of a debt". Therefore, this interpretation cannot be entertained.

On the other hand, art. 1029 provides as follows:

> 1029. A party in like manner may stipulate for the benefit of a third person, *when such is the condition of a contract which he makes for himself*, or of a gift which he makes to another; and he who makes the stipulation cannot revoke it, if the third person have signified has assent to it. [italics are mine]

This section, save for one word: "contrat" in the Quebec Civil Code text, "stipulation" in the Code of France, is, to all intents, a verbatim reproduction of art. 1121 of the French "Code Civil", which Quebec jurists still designate by its historical surname of "Code Napoléon" and it reads:

> Art. 1121. On peut pareillement stipuler au profit d'un tiers, lorsque telle est la condition d'une stipulation que l'on fait pour soi-même ou d'une donation que l'on fait à un autre. Celui qui a fait cette stipulation ne peut la révoquer, si le tiers a déclaré vouloir en profiter.

Since complete identity exists between the progenitor text and its offspring, it will be useful to consult French jurisprudence and to notice it unquestionably holds that the "stipulant" (actually the respondent) is relieved of juridical responsibility so soon as the third party, "le tiers", has assented for his part.

Henceforth, in the eyes of the law *"in conspectu legis"* the two sole contracting parties remain the "promettant" (originally the Connecticut and Passumpsic Rivers Ry. Co.) and, as stated, the accepting "third party", bondholders and shareholders.

A most frequent instance of such transactions is to be found in the realm of insurance, especially life insurance, about which, so far back as 1888, the "Chambre civile de la Cour de Cassation D.P. 88, part 1, 77, 193, the French tribunal of last resort, wrote that:

> Le bénéficiaire acquiert contre l'assureur un droit propre et direct, qui ne fait à aucun moment partie du patrimoine du stipulant . . . Et qui n'est donc pas rapportable à sa succession. [The sentence just preceding is a commentary added by Mr. Crépon, a jurist of the last century].

Planiol and Ripert, in their exhaustive treatise of "Droit Civil", (1930 ed. *Traité Pratique de Droit Civil Français,* tome VI, N° 362), under the caption of "Rapports juridiques nés de la stipulation pour autrui" and the sub-title of "Acquisition du bénéfice de la stipulation", profess that:

> 362. C'est le but et l'effet essentiels de la stipulation. Pour réaliser cette acquisition conformément à l'intention du stipulant qui normalement est d'en procurer au tiers le bénéfice à l'exclusion de tous autres, on a été amené à dire que le tiers a contre le promettant un *droit direct et personnel* [underlined in the text] remontant au jour du contrat.

The 1952 2nd edition of this authoritative work drops the above passage, simply to dilate more discursively on this topic and to a like effect.

Textual similitude and ensuing parity of motives prompted the Quebec Courts, as also the Supreme Court of Canada, to decide similarly. In 1908, the late Mr. Justice Cimon (*ad hoc*) speaking for the majority in re: *Baron v. Lemieux*[1] heard before the Court of King's Bench, quoting Defrénois, (1887 *Traité pratique du Contrat d'assurance sur la vie*), said:

> N° 318. Mais une fois que la stipulation a été acceptée par le bénéficiaire, elle devient irrévocable. L'assuré ne peut plus disposer du bénéfice, et le montant de l'assurance est définitivement acquis au bénéficiaire.

[1] (1908) 17 K.B. 177.

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Cette acceptation rétroagit au jour même du contrat, et par conséquent, le bénéfice est considéré comme n'ayant jamais fait partie du patrimoine de l'assuré.

I feel in duty bound to add that Defrénois, a Notary by profession, never achieved real eminence as a commentator; yet, in this instance, the Quebec Appeal Court was satisfied he felicitously expressed the purpose of the law.

Finally, the Supreme Court of Canada conferred its high approval on this interpretation in unambiguous words. Rinfret J., as he then was, giving judgment for the Court in *Hallé v. Canadian Indemnity Co.*[1], wrote:

> And in civil law a valid stipulation in favour of a third person creates a contract between the third person and the person who has agreed to be bound by the contract. It establishes a *vinculum juris* between the latter and the third person.
>
> Speaking particularly of the present case, the policy confers an independent right upon the third person who is insured under it.

Mr. Justice Rinfret then proceeds to cite from Planiol and Ripert the reference inserted some lines above.

It would be idle, I believe, to labour this point at greater length. The three contractual agreements of 1871, 1884 and 1912, admittedly subject-matter of Quebec's civil laws, are suitably analysed by attributing to each the genus of "innominate contract" and the species of a "stipulation for third parties", with necessarily, all correlative effects. I readily accede to respondent's submission, on page 9 of its "Notes and Authorities" that:

> The proper interpretation of the agreements under study pursuant to Article 1029 C.C. is, . . . sufficient in itself to defeat the claims of Appellant.

Unsuccessful in its counter submission that the transactions do not overstep the narrow bonds of "simple indications of payments" (C.C. art. 1174), the appellant next relied upon the applicability of ss. 16, s-s. (1-2), and 23, hereunder, of the 1948 *Income Tax Act*:

> 16. (1) A payment or transfer of money, rights or things made pursuant to the direction of, or with the concurrence of, a taxpayer to some other person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person, shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to him.

[1] [1937] S.C.R. 368, 377.

I omit s-s. (2), marginally labelled "undistributed payments or profits" which, clearly enough, does not apply.

23. Where a taxpayer has, at any time before the end of a taxation year (whether before or after the commencement of this Act), transferred or assigned to a person with whom he was not dealing at arms' length the right to an amount that would, if the right thereto had not been so transferred or assigned, be included in computing his income for the taxation year because the amount would have been received or receivable by him in or in respect of the year, the amount shall be included in computing the taxpayer's income for the taxation year unless the income is from property and the taxpayer has also transferred or assigned the property.

I will, to begin with, comment briefly on the latter section. The learned counsel for appellant insisted on the bracketed passage "whether before or after the commencement of this Act", stretching its implication and fiscal reach back to 1871, 1884 and 1912, or from five (1912) to 46 (1871) years before income taxation was ever thought of (1917) in Canada, and 77 before the Statute of 1948. The basic principles of British and Canadian legislation regulating rigorously, even frowningly, retrospective enactments are so well known that one concise "reminder" may suffice. Lord Justice Lindley in *Lauri v. Renaud*[1] restated, as under, some well settled maxims:

. . . It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.

Conformably to this last proposition is it "necessary" that the parenthetical clause ". . . or before the commencement of this Act" should refer not only to the Act immediately preceding, i.e. the *Income War Tax Act* (1927 R.S.C. c. 97 and amendments), but furthermore to an age and times when income taxation in this country remained an undreamt of burden? The affirmative would savour more of retrospective confiscation than retrospective taxation.

Other discrepancies preclude, in my opinion at least, the suitability of s. 23 to this set of facts, for instance:

a) A dealing at arms' length did occur, once and for all, between the respondent companies and their co-contractors: Connecticut and Passumpsic Rivers Railroad, and Canadian Pacific Railway.

[1] (1892) 3 Ch. R. 402.

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b) Merely for discussion's sake, assuming that s. 23 could obtain, then any amount the company had "transferred or assigned ... shall be included in computing the taxpayer's income *for the taxation year* unless the income is from property and the taxpayer has also transferred or assigned the property". Now, "taxation year", in the language of s. 127(2)(*a*) "is a fiscal period", itself defined in 127(1)(*q*) as meaning ". . . the period for which the accounts of the business of the taxpayer have been ordinarily made up and *accepted, for purposes of assessment under this Act* . . ." (italics not in text). I am incapable of conjecturing a legal approach to the problem of accounts of business "made up and accepted for purposes of assessment under this Act" . . . of 1948, in the years 1871, 1884, 1912, save through the instrumentality of the corresponding covenants. Even so, any amount supposedly transferred or assigned would become assessable, according to the directions of sec. 23, for "taxation years" in periods when no taxation of the kind existed.

The notes devoted to art. 1029 C.C., from which section the transactions herein, performed and perfected prior to the supervening of income tax, derive their legal identity, inferentially prevent a recourse to ss. 16(1) and 23 of the Act. I am in sufficient accord with the résumé given by respondent on pp. 8 and 9 of its Memorandum:

(*a*) that the agreements are governed by Article 1029 C.C.;
(*b*) that the payments by C.P.R. or rights to payments never entered the patrimony of Respondents;
(*c*) that there was no payment or transfer of any money or right by Respondents to their shareholders;
(*d*) that Respondents conferred no benefit because the amounts paid or rights thereto were never part of their patrimony, and were never theirs to confer. [This conclusion, I repeat, technically results from a fiction of law, particularizing art. 1029];
(*e*) that consequently neither Section 16-1 nor Section 23 of the Income Tax Act [1948] applies in the circumstances.

Another appropriate outline of the circumstantial and legal factors surrounding this unusual suit appears in volume 21 of the Canada Tax Appeal Board Cases[1], penned by Mr. Fordham, Q.C., the learned member of the Tax Appeal Board who first heard the case; I quote:

. . . Taxing statutes are to be strictly construed and unless a taxpayer comes squarely within their four corners, he cannot properly be held

[1] (1958-59) 21 Tax A.B.C. 1, 10.

liable. Whatever the appellant did in respect of these requirements, first made statutory in 1948, must have occurred in or about December, 1871. Since then, the appellant has been powerless, as regards exercising any control in the matter, and unable to alter in any way what has long been *a fait accompli*. What occurred in 1871? It was remarked earlier herein, that there was a once-and-for-all agreement executed in that year whereunder the appellant ceased to be any more than an inactive corporate entity and the various stockholders became the payees as long as they continued to hold the appellant's stock. This arrangement may have been convenient for the appellant, but was of no *benefit* to it, or to the stockholders. There was then no income tax legislation in force and if the payments had been made to the appellant first, no tax would have been exigible and the stockholders would still have received as much money, in the form of dividends, as if the payments had gone to a trustee for them, direct. It could be said that, at some time after 1948, the arrangement became beneficial to the stockholders in that the payments continued to reach them without first being taxed in the appellant's hands. But this situation was not, and could not be, foreseen by the appellant in 1871. . .

I concur in this exposition of fact and law. Extraordinary legislation indeed, of the most encompassing pointedness could alone achieve the dubious feat of superimposing the fiscal clock of 1948 on the musty hour-glass of 1871.

For the reasons stated, the decision appealed from is affirmed and the instant appeal dismissed with taxable costs against the appellant.

Judgment accordingly.

BETWEEN:

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Feb. 6, 7
Feb. 22

ANCASTER DEVELOPMENT COMPANY LIMITED .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 17(2), 139(5)—Transactions between persons not dealing at arm's length—Transaction between a corporation and a director—Fair market value—Appeal allowed in part.

Appellant company was incorporated in 1952 for the purpose, *inter alia,* of purchasing and selling real estate. Its issued capital stock consisted of 1,000 shares of which Y (the President) and R (Secretary-Treasurer) each held 450 shares and A (Vice-President) 100 shares. In April, 1952, Y sold 88 lots to the appellant company and at the same Directors' Meeting it was agreed to sell 26 of the lots to R at cost. At a Directors'

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Meeting on September 25, 1952, R abandoned his right to purchase the lots and Y agreed to purchase them at cost fixed at $500 each. In 1953, the appellant conveyed 16 lots to Y, the latter at once sold them to Nelmar Realty at $1,200 each, and that company then sold them at $1,500 each to Rolmac Construction Company, which company was solely owned by R. There was evidence that Y had made substantial gifts in money or bonds to R.

The Minister of National Revenue re-assessed appellant by adding to its declared income for 1953 the difference between what he considered a fair market value of the lots ($1,500 each) and the price paid for them by Y ($500 each). An appeal to the Tax Appeal Board was dismissed and from that dismissal a further appeal was taken to the Exchequer Court.

The Income Tax Act, s. 139(5) provides that a corporation and a person or one of several persons by whom it is directly or indirectly controlled shall . . . be deemed not to deal with each other at arm's length.

Held: That Y and R, holding sufficient shares in the appellant company to control it, were acting in concert in the transactions outlined; that they were not dealing with the appellant at arm's length; and that as the fair market value of the lots sold at wholesale in 1953 was $875 each, the appeal should be allowed in part by reducing from $16,000 to $6,000 the amount added in the re-assessment.

2. That the appeal from re-assessment for the taxation year 1954 should be dismissed, there being no "loss" in 1953 to carry forward to 1954.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Cameron at Hamilton.

E. D. Hickey and *D. M. Mann* for appellant.

W. D. Parker, Q.C. and *J. D. C. Boland* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (February 22, 1961) delivered the following judgment:

This is an appeal by the taxpayer from a decision of the Income Tax Appeal Board dated June 13, 1960[1] which dismissed its appeals from assessments made upon it for its taxation years ending December 31, 1953 and 1954. In 1953 the appellant sold 16 lots to John H. Young—then the president of the appellant company—for $8,000, and it is that transaction which gave rise to the dispute between the parties. Invoking the provisions of s. 17(2) of the *Income Tax Act,* the Minister, being of the opinion that the transaction was not one at arm's length and that the fair

[1] 24 Tax A.B.C. 353.

market value of the lots was $24,000, added to the declared income of the appellant the difference—namely, $16,000—thus turning what had been declared as a year of loss into one of substantial profit. The appeal for the year 1954 is taken because the re-assessment for the year 1953 prevented the appellant from deducting from its 1954 taxable income the "loss" which it claimed to have sustained in 1953.

In the Notice of Appeal it is alleged that the appellant and Young were dealing at arm's length in entering into and carrying out the transaction of purchase and sale; and, alternatively, if that is not so, that the fair market value of the lots sold was $8,000—the price paid by Young for them. The applicable provisions of the *Income Tax Act* in 1953 were as follows:

17. (2) Where a taxpayer carrying on business in Canada has sold anything to a person with whom he was not dealing at arm's length at a price less than the fair market value, the fair market value thereof shall, for the purpose of computing the taxpayer's income from the business, be deemed to have been received or to be receivable therefor.

139.(5) For the purposes of this Act,

(*a*) a corporation and a person or one of several persons by whom it is directly or indirectly controlled,

(*b*) —not applicable—

(*c*) —not applicable

shall, without extending the meaning of the expression "to deal with each other at arm's length", be deemed not to deal with each other at arm's length.

The following facts are clearly established. The appellant company was incorporated as a private company under the *Ontario Companies Act* on February 27, 1952, the instructions for its incorporation being given to Messrs. Martin and Martin, solicitors of Hamilton, Ontario, by Richard C. W. Rolka and John H. Young. Its authorized capital was divided into 4,000 shares without nominal or par value, but at all relevant times only 1,000 shares were issued, all at one dollar per share. Included in its purposes and objects was that of purchasing and selling real estate. Following the resignation of the provisional directors at a meeting on April 2, 1952 (Exhibit 4), Young owned 450 shares and was appointed a director and president, which offices he held until his death in August, 1953. Rolka had a similar number of shares and was appointed a director and secretary-treasurer, which offices he continued to hold at all relevant times; and M. G. Atkinson became the owner

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of 100 shares and was appointed a director and vice-president, which offices he retained until December 11, 1953, when his shares were transferred to Mr. Hubert Martin, the company's solicitor. At all relevant times, Rolka, Young and Atkinson were the only three shareholders and directors of the company and in that period their shareholdings were as follows:

Young	450	shares
Rolka	450	"
Atkinson	100	"
	1,000	"

I now turn to the evidence relating to the acquisition of the lots by the appellant company and the manner in which they were dealt with. As shown by the Minutes of the Directors' Meeting held on April 9, 1952 (Exhibit 10), Mr. Young stated that he was prepared to sell to the company "approximately 80 lots in Ancaster Heights Survey" for $25,000, of which $9,000 was to be paid by assuming two registered mortgages, and the balance by giving to Young a third mortgage bearing interest at 5 per cent. and payable five years thereafter. There were also certain provisions as to discharging the mortgages as to any lot sold by the appellant company. That offer was duly accepted, Mr. Young abstaining from voting because of his interest. At the same meeting, Mr. Atkinson was given the exclusive right to sell the lots and to receive a commission of 10 per cent. on such sales.

The following is an extract from these Minutes:

Mr. Rolka announced to the meeting that he would like to purchase from the Company between twenty and twenty-six lots in Ancaster Heights Survey. The said lots in which Mr. Rolka was interested front on Haig Road and Newburn Road, and the situation of these lots was discussed. Mr. Rolka stated that he was prepared to pay for these lots the full cost price to the Company of the said lots, being a proportionate share of the total purchase price of all the lots to be purchased by the Company from Mr. Young for $25,000.00, plus a proportionate share of the cost of providing roads and water to the survey, plus a proportionate share of overhead of the Company.

Mr. Rolka having disclosed his interest in the proposed purchased from the Company, he announced that he would not vote on the necessary resolution to authorize the sale of these lots to him by the Company.

Mr. Young and Mr. Atkinson fully discussed the proposed sale of lots, taking into consideration the value to the Company of a rapid development of a building programme on these lots by Mr. Rolka. Upon Motion duly made, seconded, and unanimously carried by the votes of Messrs. Young and Atkinson it was resolved that the Company sell to Mr. Rolka the

vacant lots referred to in these Minutes at cost price to the Company as defined in the said Minutes, and that the President and Secretary-Treasurer be directed and authorized to execute the necessary Conveyance of land from the Company to Mr. Rolka.

There followed a full discussion of a proposed Agreement between the Company and The Township of Ancaster for roads and providing the supply of water to the Survey. Mr. Rolka explained his negotiations with The Township of Ancaster officials, and a proposed draft of the Agreement was discussed and some alternative changes discussed. It was obviously in the interest of the Company that this Agreement be brought to a conclusion at the earliest possible date, and Mr. Rolka was authorized to carry on the negotiations and press for some satisfactory conclusion.

Exhibit 9 contains the Minutes of the Directors' Meeting held September 25, 1952. It was at that meeting that the company agreed to sell certain lots to Young and it is therefore advisable to set out the relevant parts in full.

All the Directors being present in person the meeting was declared duly constituted, and upon motion Mr. Young acted as Chairman and Mr. Rolka as Secretary of the Meeting.

Mr. Rolka referred to a previous meeting of Directors held on the 9th day of April, 1952 when it was agreed that the Company would sell to Mr. Rolka at cost price between 20 and 26 lots in Ancaster Heights Survey. Mr. Rolka advised the meeting that he did not want to exercise his rights to purchase these lots, and that he was satisfied to have Mr. Young purchase the said lots from the Company upon the same basis of cost price. Mr. Young confirmed that he was prepared to purchase the lots from the Company.

There followed a full discussion of the sale of these lots by the Company to Mr. Young. It was agreed by all present that taking into consideration money spent for bringing water services to the property, and roadway construction, the cost to the Company of the said lots was $500.00 per lot. Mr. Young stated that he was prepared to buy eight lots at once and arrange to have the same used at once for building purposes, and that he was prepared to buy the remainder of the lots by not later than 1st April, 1953.

Mr. Young having disclosed his interest in the proposed purchase from the Company, he announced that he would not vote on the necessary resolution to authorize the sale of these lots to him by the Company.

Mr. Rolka and Mr. Atkinson further discussed the proposed sale, and agreed on the sale price and the lots to be sold to Mr. Young.

Upon motion duly made, seconded and unanimously carried by the votes of Messrs. Rolka and Atkinson it was resolved that the Company sell to Mr. Young Lots 100, 101, 102, 103, 111, 112, 113 and 114 at a price of $500.00 per lot forthwith and that the Company sell to Mr. Young at the same price of $500.00 per lot, Lots 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 108, 109, 115, 116, 117, and 118, to be paid for against delivery of the appropriate Deeds at any time up to 1st April, 1953.

Upon motion duly made, seconded and unanimously carried it was resolved that the Vice-President and Secretary-Treasurer be authorized to execute the necessary Conveyances of land from the Company to Mr. Young, or his nominee.

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A large number of certified copies of registered deeds were put in evidence relating to 24 of the 25 lots which the appellant company had agreed to sell to Young.

By deed dated September 24, 1952 (which it will be noted is the day before the Directors' Meeting of September 25, 1952) and filed as Exhibit A, the appellant sold 8 lots to Young for $4,000; by deed dated October 17, 1952 (Exhibit C) Young sold the same lots to Nelmar Realty Ltd. for $9,600; and by deed dated October 21, 1952 (Exhibit B) Nelmar sold the same lots to Rolmac Construction Co. Ltd. for $12,000—or $1,500 per lot. These sales, made in 1952, are not directly in issue here.

By deed dated June 12, 1953, the appellant sold a further 8 lots to Young (Exhibit D) for $4,000; Young in turn conveyed the same lots to Nelmar Realty for $9,600 by deed dated June 16, 1953 (Exhibit E); and by deed dated June 30, 1953 (Exhibit F) Nelmar conveyed the same lots to Rolmac Construction Co. Ltd. for $12,000.

The same pattern was again followed in regard to a further 8 lots. The appellant conveyed 8 lots to Young by deed dated July 27, 1953 (Exhibit G) for $4,000; Young in turn conveyed them to Nelmar Realty Ltd. by deed dated August 18, 1953 for $9,600 (Exhibit H); and Nelmar conveyed them to Rolmac Construction Co. Ltd. on August 27, 1953 for $12,000 (Exhibit I).

It is these two sales of 8 lots each to Young in 1953 and made pursuant to the agreement arrived at at the Directors' Meeting on September 25, 1952, which resulted in the re-assessments now in question.

From these three sales by the appellant to Young a clear pattern emerges. Young purchased each lot at $500, sold it immediately for $1,200 to Nelmar, which in turn immediately sold it to Rolmac Construction Co. Ltd. for $1,500. There is no evidence that either Young or Nelmar expended any monies on the properties while they owned them. In every case, the ultimate purchaser was Rolmac Construction Co. Ltd.—a company engaged in the construction and sale of houses and of which Rolka—the secretary-treasurer of the appellant company—was the only shareholder.

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As stated in *Johnston v. M.N.R.*[1], the taxpayer must establish the existence of facts or law showing an error in relation to the taxation imposed upon him. In that case, which arose under the *Income War Tax Act,* Rand J., in delivering the judgment of the majority of the Court, said at p. 489:

> Notwithstanding that it is spoken of in section 63(2) as an action ready for trial or hearing, the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted. For that purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, but the onus was his to demolish the basic fact on which the taxation rested.

As I have said, the basic assumption of the Minister in making the assessment for 1953, now under appeal, was that the appellant company was not dealing at arm's length with Young when it agreed to sell him the lots at $500 each—September 25, 1952, and the onus is on the appellant to show that that assumption was erroneous.

It is true that Young's shareholdings in the company were then insufficient to give him control of the company. Rolka had an equal number of shares and between them they had control if they acted in concert. There are many facts in evidence which clearly suggest that they were in fact acting in concert throughout. It is possible that these facts could have been interpreted differently had the appellant called Rolka as a witness. He, above all others, must have been in a position to know all the facts and to explain the various transactions that took place. Young, of course, had died prior to the hearing, but it would appear that Rolka was available as he gave evidence before me in his own tax appeals just a few days previously. His absence at the trial was wholly unexplained.

It is important to note that Rolka, up to September 25, 1952, had a right to purchase the lots which later became the property of Young; that the price which Rolka was to pay was the cost to the company which therefore would make no profit; that the right which Rolka held was a

[1] [1948] S.C.R. 486.

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valuable right as the evidence discloses that similar lots in the same subdivision were sold at a much higher figure than $500, which was the agreed cost of the lots to the appellant company (including purchase price, installation of roads and sewers and overhead). Why, then, would Rolka without consideration release such a valuable right? The answer, I think, is found in the fact that at the same meeting at which Rolka surrendered his right, Young, with the approval of Rolka, was given exactly the same right, and that within a very short time after the respective sales to Young, all the lots which Young acquired were in the possession of Rolmac Construction Co. Ltd.—a company solely owned by Rolka. Rolmac in its operations would therefore be able to show a cost to it of $1,500 per lot instead of $500, thereby reducing its income tax. Coupled with these facts is the evidence that Young made very substantial gifts of money or bonds to Rolka on which the Young Estate paid gift tax. In this case, no explanation is forthcoming as to why such gifts were made.

In this case, also, there is no admissible evidence as to the precise role played by Nelmar Realty Ltd. in the transactions, or as to its shareholders, or why the various properties passed through its hands. There are, however, several indications that Rolka, at the time he surrendered his right to purchase the lots from the appellant, was fully aware of and approved of the entire plan to have the lots sold to Young who, in turn, would sell them to Nelmar Realty, which would then sell them to his own company, Rolmac Construction Company. I have already referred to the substantial and wholly unexplained gifts from Young to Rolka.

Then there is the evidence of Francis Wigle, a member of the legal firm of Christilaw, Gage and Wigle of Hamilton, which prepared all the conveyances to which I have referred and in so doing were acting for the appellant company, Young, Nelmar Realty and Rolmac Construction Co. Ltd. When Mr. Wigle's attention was directed to the fact that the first conveyance to Young was dated September 24, 1952—one day before the directors authorized the sale to Young and prior to the date when Rolka gave up his right to purchase the lots—he said that it was fair to infer that he had received instructions to execute the conveyance on September 24, or earlier; he added that his instructions for

that conveyance came from Young. It may, therefore, be reasonably inferred in the absence of other evidence that prior to the Directors' Meeting of September 25, 1952, Young was aware that Rolka was about to surrender his right to purchase and had consented to Young acquiring the same lots. In argument, counsel for the appellant conceded that from the evidence it was apparent that when each sale to Young was made, the subsequent sales to Nelmar and then to Rolmac were in contemplation.

Mr. Wigle prepared the deed from the appellant to Young for the last of the sales on July 27, 1953, and after he had it signed by Young, sent a letter to the appellant company on July 29, 1953, with a request that it be signed by Rolka as secretary-treasurer, the company's seal attached, and that it then be returned for registration. In the same letter (Exhibit J) the following appeared:

> We assume that we are to forward the Deed from Nelmar Realty Limited to Rolmac Construction Company Limited, to Nelmar Realty Limited for execution.
>
> Would you please confirm that the considerations of the three transactions are as follows:
>
> Sale by Ancaster Development Co. Ltd. to Young ......$ 500.00 per lot
> Sale by John H. Young to Nelmar Realty Limited ....$1,200.00 " "
> Sale by Nelmar Realty Limited to Rolmac Construction Company Ltd. ....$1,500.00 " "

From that letter it is abundantly clear that in respect of that sale, at least, a plan had been ararnged even before Young secured his deed by which the lots would be immediately sold by him to Nelmar Realty, which company, in turn, would sell them to Rolmac Construction Co. Ltd.

That letter, I think, was clearly intended to come to the attention of Rolka, and it did. In his reply, dated August 3, 1953, and written on the stationery of Rolmac Construction Co. Ltd. (Exhibit K), he stated:

> *Re: Your Letter of July 29, 1953*
>
> This is our confirmation that the prices set out in your letter are correct and we are enclosing the deeds to Mr. Young properly signed and sealed.

It was signed "Rolmac Construction Co. Ltd.—R.C.W. Rolka". From that letter it is apparent that Rolka was fully aware of the plan by which the lots, after passing through the hands of Young and Nelmar, would be conveyed to his own company--Rolmac.

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Several questions immediately arise in connection with these two letters. Why, for example, did not Mr. Wigle at the time Mr. Young signed the deed, as president of the appellant company, secure from him the amount of the consideration to be paid to the appellant company and by Nelmar to Young? Why was Nelmar Realty not questioned as to the consideration it was to pay to Young and to receive from Rolmac Construction Co. Ltd.? Why was Rolka in a position to state positively the price that was to be paid by Nelmar to Young and by Rolmac Construction Co. to Nelmar? In the absence of any other evidence, it seems reasonable to assume that the guiding hand in all these transactions was that of Rolka and that throughout he was acting in concert with Young and according to a plan conceived by Rolka, by which all the lots would eventually become the property of his company; and that in some unexplained way he was enabled to speak for and represent Nelmar Realty.

That inference satisfactorily answers the questions as to why Young made substantial and unexplained gifts to Rolka and why Young, who had sold the lots to the appellant company only a few months earlier, would wish to re-purchase a substantial part of them at cost and without profit to the company of which he was the president. It also serves to explain why the appellant company was willing on September 25, 1952, to sell lots to Young at a price substantially below that at which it sold other lots in the Survey.

Counsel for the appellant relied on *M.N.R. v. Sheldon's Engineering Ltd.*[1] That was a case involving a matter of capital cost allowances under s. 11(1)(*a*) and s. 20(2) of the 1948 *Income Tax Act,* and the question was whether or not the vendor and purchaser at the time of the sale of certain capital assets were dealing at arm's length. I do not think it necessary to state the facts in that well-known case. It is sufficient to say that the judgment was based on the finding that a certain bank was the registered owner of the majority of the shares in the old company at the date when that company sold its assets to the new company (Sheldon's Engineering Limited) and that the vendor and purchaser in the sale were in fact dealing at arm's length. The facts

[1] [1955] S.C.R. 637.

in that case are readily distinguishable from those now before me. If it be suggested that that case is authority for the submission made by counsel for the appellant herein that only the bare facts of the actual sale itself can be considered, I could not agree. In my view, the Court is entitled to consider all the surrounding facts and circumstances in order to determine whether or not the parties at the time of sale were in fact dealing at arm's length, and in *Sheldon's* case, did so.

Reference may also be made to *Miron & Freres Ltd. v. M.N.R.*[1]

My conclusions in this case have been arrived at solely by reference to the matters which I have mentioned above. Certain other documents were tendered in evidence by the respondent, namely, two certified copies of memoranda made by Mr. Martin, solicitor for the appellant company, Nelmar, Rolmac Construction Co. and Rolka, and marked as Exhibits L and M; and a further memorandum relating to Rolka and the appellant company, marked as Exhibit N. These documents were copies of documents secured respectively from Mr. Martin and Mr. Wright (accountant for Mr. Rolka, Nelmar and Rolmac Construction Co.) by the witness Atkinson, a duly appointed representative of the Minister acting under the provisions of s. 126 of the Act. Counsel for the appellant objected to their admissibility on a number of grounds.

In this case, I find it quite unnecessary to form any opinion on this matter which is an involved and difficult one. Counsel for the parties did not argue the matter in this case but were content to rely on their arguments in the personal appeals of Rolka which I heard a few days previously and in which the admissibility of the same documents was in question. The transcript of the proceedings and the argument in that case have not yet been received. In this case these exhibits, if admitted, would be of no assistance to the appellant, and, as above stated, the other evidence is sufficient, in my view, to warrant fully the conclusions which I have reached.

For the reasons which I have stated, I have come to the conclusion that the appellant has failed to demolish the basic assumption on which the re-assessment for 1953 was

[1] [1955] S.C.R. 679.

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made, namely, that at the time the appellant sold the lots on September 25, 1952 to Young, the latter was one of several persons by whom the appellant company was directly or indirectly controlled. In fact, the only reasonable inference from the evidence before me is that at the time of, and throughout that transaction, Rolka and Young, who admittedly by their combined shareholdings had control of the company, were in fact then acting in concert and exercising that control. The transaction is therefore within the provisions of s. 17(2) and of the then s. 139(5)(*a*) of the Act (*supra*). The appeal on that point therefore fails.

In view of that finding, I must now ascertain the fair market value of the lots on September 25, 1952—the date of the sale to Young. In the assessment, it was put at $1,500 per lot. Mr. A. L. Eyre, an assessor in the Department of National Revenue at Hamilton, stated that he had arrived at that value after searches in the Registry Office for sales in that Survey. He was influenced to a large extent by the fact that the appellant company in 1953 sold a substantial number of individual lots at prices averaging $1,400 per lot, and in many cases at $1,500 per lot; and by the fact that the sales by Nelmar to Rolmac, both in 1952 and 1953, were at the rate of $1,500 per lot. Mr. Eyre was a good witness, but he has had no experience in buying and selling real estate and he relied entirely on his searches of registered deeds. There are two matters which I think he failed to take into consideration, namely, that values in 1953 were substantially higher than they were in 1952; and that the market value of an individual lot may be somewhat more than the value per lot when a number of lots are purchased at the same time.

I find it unnecessary to review the whole of the evidence on this point. Mr. E. O. McKay, an experienced real estate agent and appraiser at Hamilton, stated that when a sale of a number of lots is made to a builder, the latter would try to purchase at a price which, after allowing for a profit of 30 per cent. to himself, would enable him to sell the lots at the going price for individual lots. I infer from this evidence that the objective is not invariably attained, that at times it may be less. I would fix that mark-up at 20 per cent. He also said that a purchaser of a block of lots would still further endeavour to reduce the cost to him by an

amount roughly equivalent to the taxes and carrying charges between the time of his purchase and a later sale, and this amount he estimated at one dollar per foot frontage. Again, I must find that this objective is not always reached and accordingly I fix that amount at something less, namely, fifty cents per foot frontage, or $50 per hundred foot lot.

Accepting the evidence that the fair market value of individual lots in 1952 was $1,100, I have come to the conclusion that the fair market value for lots when sold "wholesale", or in large groups as was done on September 25, 1952, was $875 per lot. A sale of a number of lots at that price to a wholesale purchaser would enable him to sell at the retail price of $1,100 per lot and to make a profit of 20 per cent. on his transaction, plus $50 per lot for carrying charges.

In the result, therefore, I find that the total market value of the 16 lots so sold to Young in 1953 was $14,000. It follows that the respondent was in error in adding $16,000 to the declared income of the appellant and should have added $6,000.

Accordingly, the appeal for the taxation year 1953 will be allowed, the decision of the Tax Appeal Board set aside, and the matter referred back to the Minister to re-assess the appellant for that year in accordance with my finding. It would appear from the records before me that when that re-assessment is made, the appellant will have no "loss" in 1953 to carry forward to the 1954 taxation year, and accordingly the appeal for the latter year will be dismissed.

After giving careful consideration to the question of costs, I have come to the conclusion that in the circumstances of this case, no costs should be awarded to or against either party. Success has been divided and while the appellant has succeeded in having its 1953 tax reduced somewhat, I cannot overlook the fact that the entire problem was created by the somewhat devious manner in which the then officers of the appellant company conducted their affairs. If full disclosure of all the surrounding facts had been made, no dispute would have arisen.

Judgment accordingly.

1960 Apr. 20, 21 — 1961 Jan. 26

BETWEEN:

CANIM LAKE SAWMILLS LIMITED ... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... } RESPONDENT.

Revenue—Income—Income tax—Whether expense in respect of aircraft used to transport executive incurred for purpose of earning income—Income Tax Act, R.S.C. 1952, ss. 11(1)(a), 12(1)(a), 20(5)(a), 20(6)(e)—Income Tax Regulations, s. 1102(1)(c).

The appellant, a British Columbia corporation, operates saw mills in the vicinity of 100 Mile House and maintains a sales office in Vancouver. Its president, who is also its sales manager, resides in that city and to permit his making weekly trips between the sales office and the mills with the greatest despatch the appellant in 1955 purchased a single-engined aircraft. Piloted by the president it was used as his means of transportation in 1955 and 1956. In 1957 with the object of increasing the safety factor, reducing the flying time, and to permit of more flights in marginal weather, this aircraft was traded in for a twin-engined model. In filing its income tax returns for the years 1955 and 1956 the appellant had claimed and was allowed a deduction of 85% of the expense of operating the single-engined aircraft and as capital cost allowance 85% of the purchase price. A claim to similar deductions with respect to the twin-engined aircraft made in the 1957 income tax return was disallowed. The Minister ruled that the expenditure had not been incurred for the purpose of gaining or producing income from the business. In an appeal from the re-assessment to this Court.

Held: That the appeal must be allowed as the evidence adduced established that the twin-engined aircraft had been used by the appellant company for the purpose of gaining or producing income from its business.

2. That since the appellant admitted a 15% personal use of the aircraft the deduction to be allowed should be 85% of the operating expenses and a proportionate deduction of the capital cost computed on the 40% annual exemption foreseen in Schedule B, Class 16 of the *Income Tax Regulations.*

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Dumoulin at Vancouver.

J. A. Clark, Q.C. and *J. C. MacDonald* for appellant.

J. G. A. Hutcheson, Q.C. and *T. E. Jackson* for respondent.

DUMOULIN J. now (January 26, 1961) delivered the following judgment:

This is an appeal from a decision rendered, August 19, 1959, by the Minister of National Revenue, dismissing appellant's Notice of Objection to a reassessment of its 1957 taxable income, which had thereby been raised from $105,055.19 to $124,054.42.

This increase, according to exhibit 4, a Notice of Assessment, and more explicitly to s-ss. (i) and (ii) of s. 8 in respondent's Reply to Notice of Appeal, was brought about by the disallowance,

> 8. . . .
>
> (i) as an expense the sum of $1,987.99 claimed in respect of the operation of the said Piper Apache aircraft, and,
>
> (ii) as a deduction the sum of $18,299.59 of the sum of $84,836.20 claimed as a capital cost allowance.

The grounds for such a decision are outlined in s-ss. (*a*) and (*b*) of the same s. 8, and would be:

> 8. . . .
>
> (*a*) that the Piper Apache aircraft was not acquired by the Appellant for the purpose of gaining or producing income from its business, and,
>
> (*b*) the expenses incurred by the Appellant in operating the said Piper Apache aircraft were not outlays or expenses incurred by the Appellant for the purpose of gaining or producing income from its business.

The framework of the case is quite simple. Canim Lake Sawmills Limited, as its trade name denotes, operates a saw and planing mill in the vicinity of 100 Mile House, Cariboo County, a vantage point of British Columbia's heavily wooded hinterland, some 240 air miles from Vancouver City.

I also understand this firm owns an assembly yard at Exeter, B.C.

The company's industrial and financial growth since its corporate inception, in 1943, and more so from 1950 up to the material year, 1957, may, aptly enough, be qualified spectacular.

Exhibit 8 uniformly traces a sustained climb towards the upper commercial brackets. Totals, out of this document's last row of figures, show that the sales footage, F.B.M. of 4,945,925, in 1950, had risen to 29,283,811 feet by 1957.

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One of the two witnesses heard, Mr. Rudolph Jens, Canim Sawmills' President, General Manager and half-owner of the enterprise with his brother, Theodore Jens, lucidly describes its extensive and steady expansion. I could do no better than quote from pages 22 and 23 of the official transcript.

Page 22:

I am Sales Manager of Canim Lake Sawmills Ltd. and in the year 1950 we sold some 5,000,000 board feet of lumber. In my capacity as Sales Manager I made numerous trips in 1950 to Vancouver to dispose of the production of Canim Lake Sawmills Ltd. In 1951 our production increased to approximately 7,000,000 board feet. In 1952 it again increased to approximately 11,000,000 feet. In 1953 it increased to some 16,000,000 feet and my trips to Vancouver at this time were becoming so numerous that I maintained an apartment in Vancouver for my convenience when I came to Vancouver to sell this production.

Page 23:

In 1954 we shipped approximately 18,000,000 feet. In 1955 we again increased our production to approximately 24,000,000 feet and my presence in Vancouver to handle this increased production was becoming so necessary that as a company we decided to establish our Sales Manager who was myself in Vancouver to look after the sales of the company's production.

The witness (page 23 of transcript) next proceeds to mark out the company's added sources of supply and also a particular aspect of its industrial activities; he says:

Now, our company's production is not derived from one sawmill but rather from 30 sawmills who ship their production to our assembly yard at Exeter, B.C. . . .

In order to keep the Sales Manager fully conversant with the production and the production capabilities of these various small mills it was decided that the Sales Manager would be in Vancouver weekly to attend to sales of this production and during this same week to be at 100 Mile House to have full knowledge of the production capabilities and the actual production of these various mills. This was necessary in order to obtain the most premium business that could be had for our production.

This business policy proved effective as evidenced in Mr. Rudolph Jens' own words reported at page 36:

. . . We discussed this with MacMillan & Bloedel [possibly the largest lumber concern in Canada, with Head Office at Vancouver] and as a result of these discussions an arrangement was arrived at between the two companies wherein Canim Lake Sawmills agreed to market its entire production through MacMillan & Bloedel. This production was to be increased to approximately 3,000,000' per month. MacMillan & Bloedel in turn agreed to handle this production for a flat sum of $2 per thousand and as opposed to the minimum five per cent commission charge which was the practice prior to this agreement.

To this exceptionally favourable rate of $2 per thousand feet F.B.M. marketed through MacMillan & Bloedel's contacts, Mr. Jens credits a large proportion of the 1957 "premium business" listed on exhibit 11, at no less than $66,250.

One can readily conceive that supervising the weekly output of 30 sawmills, spread over a broad extent of wooded territory, coupled with the essential obligation of ensuring constant selling facilities for 3,000,000 feet of lumber each month, through regular business trips to Vancouver, a distance of 240 air miles, would indeed require an unwonted degree of dispatch, made possible by a recourse to the speediest modes of transport available, obviously air travel.

Consequently, Canim Sawmills Ltd. acquired, in 1955, its first plane, a "Cessna 180", and another in 1957, a twin-engined "Piper Apache" craft, the latter at a price of $44,189.50, less a trade-in allowance of $13,000 for the older and slower "Cessna 180" (cf. ex. 9, dated July 15, 1957). Due to the manifold calls incumbent, as noted, upon the sales manager, one aeroplane could not suffice. On July 2, 1957, a "Cessna 182" was purchased, costing $17,076.75 (cf. ex. A), but exclusively detailed to a special purpose, namely, forestry work, which the witness describes thus (transcript, p. 31):

> . . . in 1956 the Forestry Department [of British Columbia] came out with a regulation that said all timber sales would in future have to be accompanied by a logging plan and to facilitate the making of these logging plans we used an aircraft and this aircraft has to be of a particular type, a high wing aircraft and slow flying aircraft, a very manoeuvreable aircraft and such an aircraft is the 182.

Jens also unhesitatingly corroborated the explanation hereunder vouchsafed by his learned counsel, that (transcript, p. 30):

> . . . The 182 . . . was used for another purpose entirely, not for the purpose of the trips from 100 Mile House to Vancouver to sell the production of these mills but for forestry work at 100 Mile House . . .

In order to sum up this aspect of the matter, I should say Mr. Jens testified his company obtained six (6) additional timber sales in 1956, and seven (7) others in 1957, thereby extending considerably those holdings over which it should exercise its surveillance as a legal requirement.

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We already know that the appellant's claim, in its 1957 income tax return, to an 85% capital and operating costs deduction, in relation to the Piper Apache plane, was disallowed under the pretext that such expenditures had not been incurred for the purpose of gaining or producing income, albeit similar deductions were granted for the Cessna 180 in 1955 and 1956.

The information conveyed in the preceding pages about the financial achievements of Canim Lake Sawmills surely indicates that a pursuit of this nature, to flourish as it did, is dependent upon both managerial skill and well suited material devices.

Did this Piper Apache plane, piloted by appellant's president and sales manager, afford a regular and practical contribution in securing vitally important contacts, or, in statutory wording, did it concur in "the purpose of gaining or producing income?" A comparable question could arise in relation to a country doctor's automobile.

Let us, to begin with, investigate the saving in man hours and in corresponding terms of dollars, consequent upon the utilization of aerial transport.

I will again resort to Rudolph Jens' evidence, citing at some length from the official transcript at pages 33 and 34:

> A. . . . I have had occasion to look at the logs of both aircraft [i.e. the Cessna 180 and Piper Apache] for 1955, 1956 and 1957. We purchased the twin-engined aircraft [Apache] in 1957, in August, and flew it until December of that same year [cf. ex. E]. In 1955 in the 180 [Cessna] we were able to make 22 trips from 100 Mile House to Vancouver or Vancouver to 100 Mile House and in 1956 we were able to make 19 such trips. In 1957 through the use of the twin-engined aircraft [Apache], we were able to make 33 such trips, this at a time when the same number of trips was required to be made each year and the trips that were not made by plane in 1955 and 1956 [previous to the acquisition of the Apache] had to be made by car.
>
> Q. What is the difference in the time involved between making the trip by car and making it by air?
>
> A. The use of a motor car for the trips in question would take approximately one-third of our working year on the road. I think it would be closer to two-fifths of our working year on the road driving time and to tie up the services of an executive and director of the company for two-fifths of the working year did not seem to be economic as far as the Canim Lake Sawmills Ltd. was concerned.
>
> Q. And your salary is what?
>
> A. My salary is $40,000 a year, sir.
>
> Q. And two-fifths of that would be $16,000?

A. That is correct.

Q. That would be the cost to the company of driving if you did it by automobile?

A. By working time lost that is the cost.

Q. And what proportion of your year's time would be taken up by flying?

A. The proportion of the time lost in using an aircraft for this trip would be 18 working days per year out of the total working year of 240 days.

Q. That would be about three-fortieths?

A. Yes.

Q. Or, a cost to the company for your time of about $3,000?

A. Yes.

These figures remained uncontradicted, thereby substantiating a $13,000 economy in travelling expenses, a result which assuredly does not run counter to any notion of "producing income".

However, there is better still, as a glance at the company's "Statement of Profit and Loss" (ex. 8) will prove. Comparing the company's net profit for the years 1950 and 1957, the latter a poor period in the lumber industry, we find a progression from $32,587.03 to $64,026.52. The year preceding, 1956, attested net profit gains in a sum of $118,120.10. Of greater significance, I presume, in respondent's appraisal, three columns of this audit sheet, (ex. 8) labelled "Provision for Income Taxes", read as follows: 1950: $17,616.27—1956: $94,559.34—1957: $43,975.94.

Even this last figure, although somewhat shrunk through cyclical regression, does not operate as an anti-climax to "the purpose of gaining or producing income from its business", as mentioned in s. 8, s-s. (*a*) of the Reply.

The witness at bar wound up this part of his testimony by stating that, for 1957, out of 111 nights, he spent 43 at 100 Mile House, and the remainder in Vancouver or elsewhere. It could go without saying that, since his people reside in this city, he naturally took his abode at the family home. Moreover, Jens' repeated assertions that imperative business needs urged his weekly attendance at MacMillan & Bloedel's offices, are enhanced by the fact that the frequency of such trips persist throughout the summer months, when his wife and children are absent from Vancouver, vacationing at Qualicum.

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The learned counsel for respondent, in cross-examination, drew the witness' attention to certain replies of his at an examination for discovery, held April 4, 1960. I now refer to excerpts of this evidence as read in Court, viz. questions 302-303-304-305 and answers thereto; the examining lawyer, Mr. J. G. A. Hutcheson, Q.C.:

302 Q. Putting the matter generally, first, without getting down to specific flights, I notice that from your logs there is a—running throughout it is local flying done in Vancouver?

A. Yes.

303 Q. Would it be fair or right to assume that that was pleasure flying?

A. In some instances, yes. In the bulk of it it would probably be right to say that.

304 Q. Was there any business at all for local flying in Vancouver?

A. Yes, there would be a business reason for local flying in Vancouver.

305 Q. What, for instance, would be the nature of a business reason which would call for local flights in Vancouver?

A. Well, there could be a check-out of the aircraft, for one thing; another was that we were interested in timber around Pemberton way.

The notion conveyed to my mind by the expression "pleasure flying" pales into vagueness after reading the deponent's explanatory commentaries. To be sure, engine testing flights, perilous chores at most times; the aerial inspection of timber lands around Pemberton, where no landing facilities exist, are hardly reconcilable with idle pleasure cruising. And again, the frequency of such flights remained unspecified. I cannot attach any significance to what assuredly is, in the light of unshaken evidence, an inaccurate expression.

Should any lingering doubt persist as to the compelling nature of the regular business attendance in Vancouver, of Canim's sales manager, the second and last witness, Mr. C. Bruce Campbell, would completely dispel it.

At the material time, Campbell was one of MacMillan & Bloedel's lumber buyers, since promoted to head buyer. He has checked the summary of appellant company's export shipments for 1957, as expressed in exhibit 11, and is satisfied with its accuracy. Furthermore, Mr. Campbell insists upon the all-important necessity of continued personal liaison between both firms, his and Canim Sawmills Ltd.,

so as to ensure a satisfactory expedition of their heavy industrial commitments, transacted on the before-mentioned premium basis. Business of such magnitude, says the witness, never could be secured "over the telephone".

A few excerpts of his evidence, in reply to quite a probing cross-examination, may shed conclusive enlightenment concerning the number and duration of those business conferences. At page 158 of the transcript:

> Q. How often or how frequently would Mr. Jens see you in the years, take first 1956 and then 1957?
>
> A. Certainly once a week at a minimum.
>
> On page 160:
>
> Q. These meetings you said on Mondays, how long would they last or take?
>
> A. It varies—two to three hours. If the business warrants they will go on longer and will be more frequent.
>
> Q. You mean more frequent on the Monday?
>
> A. Or Tuesday.
>
> Q. If he was here?
>
> A. Well, if there was business of that nature he would be here.

I now quote from pages 162 and 163; Mr. Hutcheson is pursuing the cross-examination:

> Q. Am I right in assuming . . . that practically all the meetings with Mr. Jens were on the Monday or, for instance, the Tuesday?
>
> A. In the main they would be in the early part of the week. However, we did meet on other occasions.
>
> Q. Well, in the two years [i.e. 1956 and 1957] I have spoken of were there any meetings which you recall which took place on Saturday?
>
> A. Yes.
>
> Q. What number would that be? Was it a frequent thing or seldom?
>
> A. During those years, it was fairly frequent that we met on a Saturday.
>
> Q. That would be by his being in and calling you . . . and then meeting you at the office, would that be it?
>
> A. No, perhaps we would meet at his place of residence to discuss the matter.
>
> Q. They were not merely phone conversations?
>
> A. No.
>
> Q. If you considered it was necessary for Mr. Jens to come down to Vancouver other than on a week-end . . . would you notify him?
>
> A. Yes, sir.
>
> Q. You have mentioned the mills for whom you act as the selling outlet, . . . Was Canim Lake Sawmills one of the larger?
>
> A. Yes, sir.
>
> Q. Was it the largest?
>
> A. Yes.

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The whole problem, I repeat, narrows down to a reversal, in 1957, of the respondent's erstwhile practice of allowing a 15% operating deduction for planes, plus a second one annually, equivalent to 40% of their capital cost, as would appear from exhibit 4.

Strangely enough, the underlying explanation of this "new departure" seems to be none other but the purely coincidental presence of the Rudolph Jens family in Vancouver, and the far from startling fact that appellant's president incidentally enjoys, during business trips, the comforts of his home.

It goes without saying that this grievance is not proffered in so flimsy a disguise, and that an attempt was made to clothe it in the more decorous raiment of legal phraseology, such as found in s-s. 1 of s. 11, s-ss. 1(*a*) and (2) of s. 12 of the *Income Tax Act,* and also s-s. 5 of s. 20.

In the instant case, the governing legal proposition is the oft quoted ss. 12(1) and 12(1)(*a*), reading:

12. (1) In computing income, no deduction shall be made in respect of

(*a*) General limitation.—an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer.

I entertain no doubt but that appellant successfully rebutted the presumption favouring *a priori* the Notice of Assessment. The evidence adduced, literal and oral, compellingly calls forth the conclusion that Canim Lake Sawmills Ltd. utilized this specific item of property, its Piper Apache aircraft, "for the purpose of gaining or producing income", and may therefore avail itself "of the exception to the prohibition".

A breakdown of 15% attributed to "personal use" of the plane fully corresponds to all similar purposes as revealed in Court.

Further authority, now, for the capital cost allowance of "depreciable property", defined in s-s. (5)(*a*) of s. 20, may be derived from s. 11, s-s. (1)(*a*) which refers to the Regulations for the proper ratio of such deductions, actually class 16 of Schedule B, permitting of a 40% deduction on aircrafts, as restricted again by s. 20(6)(*e*) of the Act.

I do not propose to reproduce so verbose a provision. If some meaning can be squeezed out of this pulpy jumble of words it would seem to imply that where property has been regularly used for the purpose of gaining or producing income and in part for some other purposes, as occurs here, the capital cost deduction allowed should be in a direct ratio to the numerical index of the unexempted use of such property. In the case at issue a 15% personal use of the Piper Apache being admitted by the appellant, then the proportionate ratio of capital cost deduction, for taxation year 1957, should be 85% of the statutory 40% (Class 16 of Schedule B).

The reasons above entitle the appellant company, for taxation year 1957, in connection with the Piper Apache plane, to 85% of the operating expenses and a proportionate deduction of the capital cost, computed on a 40% annual exemption foreseen in Schedule B, class 16.

Should the figures appearing in s. 8, s-ss. (i) and (ii) of the Reply be correct, then the respective deductions hereabove enjoined, translated in monetary exponents, would be, in the first instance 85% of $1,987.99, i.e. $1,689.79, in the second, 85% of $18,299.59, viz. $15,554.65.

Therefore I would allow the appeal with costs, set aside the said Notice of Assessment for the taxation year 1957, dated December 22, 1958, and direct the record of this case be returned to the Minister and a further assessment made pursuant to the findings above.

Judgment accordingly.

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Jan. 28, 29
Feb. 1

Dec. 9

BETWEEN:

CAMPBELL SOUP COMPANY LIMITED AND LIBBY, McNEIL & LIBBY OF CANADA LIMITED ... APPELLANTS;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE .... RESPONDENT.

Revenue—Customs Duty—Appeal on question of law from Tariff Board's decision—Meaning of "apparatus for cooking" when applied to certain food processing equipment—Customs Act, R.S.C. 1952, c. 58 as amended by S. of C. 1958, c. 26, s. 2—Customs Tariff, R.S.C. 1952, c. 60, Schedule A, Tariff Item 443 as amended by S. of C. 1956, c. 36, s. 1—Tariff Board Act, R.S.C. 1952, c. 261, s. 5(9).

The appellants appeal from a declaration of the Tariff Board affirming the Deputy Minister's classification for customs purposes of certain imported food processing equipment as "apparatus for cooking" within the meaning of Item 443 of the *Customs Tariff*, R.S.C. 1952, c. 60 as amended.

The importations in question involve two kinds of units described respectively as a pre-heater and a pressure cooker. Each consists of a chamber or tank equipped with mechanism by which sealed cans may be moved through the tank, and while being so moved, heated by hot water or steam or cooled by water or some other medium, the whole at controlled speeds, temperatures and pressures. The appellant contended that the Board in defining "cooking" as "preparing food for consumption by subjecting it to the application of heat" expanded the dictionary meaning and misdirected itself as to the meaning of "cooking" in Item 443.

Held: That the Tariff Board had correctly concluded that the word "cooking" is not used in Tariff Item 443 in any technical sense and that it should be given its ordinary meaning.

2. That no valid objection could be taken to the Board's definition and such definition did not expand the dictionary meaning of the word "cooking".

3. That the definition set out in the Board's declaration indicates that the Board "was properly instructed in law as to the construction of the statutory item".

4. That there was evidence upon which the Board properly instructed as to the law and acting judicially could reach the conclusion that the equipment in question was in fact apparatus for cooking within the meaning of that expression in Item 443. *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue* [1956] 1 D.L.R (2d) 497 referred to and applied.

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APPEAL from a declaration of the Tariff Board.

The appeal was heard before the Honourable Mr. Justice Thurlow at Toronto.

Stuart D. Thom, Q.C. for appellants.

H. D. Aylen for respondent.

THURLOW J. now (December 9, 1960) delivered the following judgment:

This is an appeal pursuant to s. 45 of the *Customs Act,* R.S.C. 1952, c. 58, as enacted by Statutes of Canada, 1958, c. 26, s. 2, from a declaration of the Tariff Board, whereby the Board upheld the classification for customs purposes made by the Deputy Minister of National Revenue for Customs and Excise of certain imported food processing equipment as "apparatus for cooking" within the meaning of Item 443 of the *Customs Tariff,* R.S.C. 1952, c. 60, Under s. 45 of *The Customs Act,* an appeal from the Tariff Board may be taken to this Court only "upon a question of law."

The five importations in question involved three kinds of units known or described respectively as a pre-heater, a pressure cooker and a cooler, the appeal being concerned only with the first two of these. Each of these units consists of a chamber or tank equipped with mechanism by which sealed cans may be moved through the tank, and while being so moved, heated by hot water or steam or cooled by water or some other medium, the whole at controlled speeds, temperatures and pressures.

On April 12, 1956, when the first of the importations in question was made, Item 443 of the *Customs Tariff* read as follows:

Apparatus designed for cooking or for heating buildings:—
(1) For coal or wood
(2) For gas
(3) For electricity
(4) n.o.p.

But the item was amended retroactively to March 21, 1956, by Statutes of Canada, 1956, c. 36, and has since read:

Apparatus, and parts thereof, for cooking or for heating buildings.

The French text of the amended item is:

Appareils, et leur pièces, destinés à la cuisson, ou au chauffage des bâtiments.

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the words «destinés à la cuisson» remaining unchanged from the earlier item.

Item 443 is one of a large group of items entitled "Metals, and manufactures thereof," and in this group the only other items having any likely application are Items 427 and 427*a*, dealing with

> All machinery composed wholly or in part of iron or steel, n.o.p. . . .

In making its declaration, the Tariff Board, after stating the problem and summarizing the evidence, said:

> When such a homely word as cooking is used in the tariff without qualification, it is difficult to avoid the conclusion that the legislators intend that it should convey its ordinary and well established meaning unless there appears some clear indication to the contrary—in the context, for example, or in well established commercial usage. In this appeal no such indication is apparent.
>
> In common and ordinary usage, to cook means to prepare food for consumption by subjecting it to the action of heating. On this matter the various dictionaries consulted are in unusually close agreement. For the purposes of Tariff Item 443, then, cooking should be understood to mean preparing food for consumption by subjecting it to the application of heat. There is no question but that the pre-heater and the pressure cooker are produced, advertised, sold and commonly used for applying heat as part of the process of preparing food for human consumption. This being the common and ordinary meaning of cooking, it follows that the pre-heater and pressure cooker are used for cooking. It is equally obvious from the sales literature and from the oral evidence of the appellant that they are commonly referred to as a cooker and also that they do cook.
>
> The Board finds that this equipment is apparatus for cooking within the meaning of Tariff Item 443.

The main contention on behalf of the appellant was that the equipment in question is designed to sterilize food for the purpose of preserving it, that it is not designed for cooking in the sense of preparing food for eating and that any cooking that may occur in the processing of food by this apparatus is merely incidental to the main purpose of sterilizing and is a disadvantage, rather than an advantage, in canning many of the products for which the apparatus can be used, that the Board, in defining "cooking" as "preparing food for consumption by subjecting it to the application of heat", has expanded the dictionary meaning sufficiently to embrace the sterilizing of food by the application of heat to preserve it for consumption, and accordingly has misdirected itself as to the meaning of "cooking" in Item 443.

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Counsel for the Deputy Minister contended that what the Board had in mind in defining cooking as "preparing food for consumption by subjecting it to the application of heat" does not differ from the dictionary meaning, that even if this definition is broad enough to include preparing food for consumption by applying heat to sterilize it the determination by the Board of the meaning of "cooking" in Item 443 was a finding of fact and not one of law, that the finding that the equipment in question was apparatus for cooking within the meaning of cooking as so found was also purely a finding of fact, and that since there is no appeal to this Court except on a question of law, the Court was without jurisdiction to review either of such findings. He also submitted that, even if the meaning of "cooking" in Item 443 is not broad enough to include preparing food for consumption by applying heat to sterilize and preserve it, but is limited to preparing food for eating, there is evidence upon which the Board could reach the conclusion that the equipment in question was apparatus for cooking within that sense of the word and that, accordingly, the finding should not be disturbed.

In *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue*[1], Kellock J., referring to the question upon which the appellant had been given leave to appeal, said at p. 498:

> The question of law above propounded involves at least two questions, namely, the question as to whether or not the Tariff Board was properly instructed in law as to the construction of the statutory items, and the further question as to whether or not there was evidence which enabled the Board, thus instructed, to reach the conclusion it did.
>
> While the construction of a statutory enactment is a question of law, and the question as to whether a particular matter or thing is of such a nature or kind as to fall within the legal definition is a question of fact, nevertheless if it appears to the appellate Court that the tribunal of fact had acted either without any evidence or that no person, properly instructed as to the law and acting judicially, could have reached the particular determination, the Court may proceed on the assumption that a misconception of law has been responsible for the determination; *Edwards v. Bairstow,* [1955] 3 All E.R. 48.

In my opinion, the Tariff Board has correctly concluded that the word "cooking" is not used in Tariff Item 443 in any technical or special sense and that it should be given its ordinary meaning. I also think that no valid objection

[1] [1956] 1 D.L.R. (2d) 497.

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can be taken to the Board's definition of the meaning of cooking as "preparing food for consumption by subjecting it to the application of heat."

In *The Shorter Oxford Dictionary*—to which the Board had been referred—among the meanings given for the word "cook" is: "To prepare (food); to make fit for eating by application of heat, as by boiling, baking, roasting, etc." One of the meanings given in the same dictionary for the word "prepare" is "to make ready (food, a meal) for eating."

The Board was also referred to definitions in *Murray's New English Dictionary*, 1893, of the word "cook" as

1. To act as cook, to prepare food by the action of heat.
2. To prepare or make ready (food); to make fit for eating by due application of heat as by boiling, baking, roasting, broiling, etc.

and of the word "cooked" as "Prepared by heat for eating."

In my opinion, the meanings so expressed would not embrace the application of heat for the mere purpose of sterilizing food, whether it be raw or cooked food to which heat is applied for that mere purpose. But I do not think that the Board, in defining the word "cooking" in Item 443, as "preparing food for consumption by subjecting it to the application of heat," has expanded the dictionary meaning to which they referred. While not every application of heat to food will necessarily be for the purpose of preparing it for eating, in the Board's definition the words "by subjecting it to the application of heat" are governed by and restricted to the purpose of "preparing food for consumption" which, in my opinion, is not different from "preparing (food) for eating." I also think it is manifest both from the transcript of the proceedings and the declaration that the Board was fully aware of the distinction between applying heat for the purpose of cooking food and applying heat for the purpose of sterilizing it. Accordingly, whether the question of what is the common understanding of the word "cooking" is purely a question of fact, as contended by counsel for the Deputy Minister, or purely a question of law, or is a mixed question of fact and law, I am of the opinion that the Board has reached and has set out in its declaration a correct understanding of the meaning of the word in the tariff item and that the definition set out in the declaration indicates that the Board "was properly instructed in law as to the

construction of the statutory item." Nor do I think it can be said that the Board has in fact applied a broader test in the sentence, "There is no question but that the pre-heater and pressure cooker are produced, advertised, sold and commonly used for applying heat as part of the process of preparing food for human consumption," for in this sentence, as well, the expression "applying heat" is limited to the process of "preparing" or making ready food for human consumption, and I do not think the sentence indicates that the Board had in mind the application of heat to food for the mere purpose of keeping it fit for consumption at some future time. It remains, therefore, to consider the second branch of the rule set out in the passage above quoted from the judgment of the Supreme Court in the *Canadian Lift Truck* case, that is to say, whether there was evidence upon which the Board, properly instructed as to the law and acting judicially, could reach the conclusion that the equipment in question was in fact apparatus for cooking.

In approaching this question, there are two matters of a general nature which should be kept in mind. The first is that, when one speaks of evidence on an appeal to the Tariff Board, the expression is not restricted to material which would be called evidence in any strict or technical sense in a court of law, for by s. 5(9) of the *Tariff Board Act,* R.S.C. 1952, c. 261, the Board is authorized to use and act upon information that, in its judgment, is authentic, even though such information may not be under the sanction of an oath or affirmation. The other is that, when an appeal from a decision of the Deputy Minister comes before the Tariff Board, the onus is upon the person appealing to demonstrate that the decision is wrong.

In the present case, on the appeal to the Tariff Board, Mr. Henry C. Vacketta, a food technologist employed by the manufacturers of the equipment in question, gave evidence that the purpose of the equipment was to sterilize, rather than to cook food, and three other witnesses gave evidence indicating that, save in the processing of canned kernel corn by the appellant Libby, McNeill & Libby of Canada Limited, the purpose for which all of the equipment in question in the appeal has been used in Canada has been to sterilize food and that any cooking which has resulted from the application of heat to the food while in the

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machines has been unnecessary and in some cases undesirable from the point of view of turning out the most acceptable product. In addition to the processing of kernel corn, the machines in question have been used in processing soups and cream-style corn, both of which products are cooked before being filled into the cans, and in processing canned milk, the cooking of which is unnecessary and undesirable. Had there been nothing more in the evidence, it might well have left the Board with the impression that this equipment was indeed apparatus designed for sterilizing food and not for cooking at all. That, however, was not the case, for the evidence also shows that the apparatus is capable of being used to process, and is used to process, many different products, some of which are not entirely cooked to the state desired for eating before being put into the cans and which can be cooked as well as sterilized by the heat applied in this equipment. There was evidence that vegetables when sold in cans are invariably in a cooked state, a condition which they could not attain from the mere blanching process to which they are subjected before being put into the cans, that some varieties of fruits require cooking, as well as sterilizing, after being put into the cans, and that, in the case of some of these fruits, as well as in the case of pork and beans, the cooking time goes beyond that required to achieve commercial sterilization of the can and its contents. In these cases it is obvious that the apparatus serves the dual purpose of cooking and of sterilizing.

It may also be noted that the evidence does not show clearly the relative importance in commerce of the use of this type of equipment for such fruits and vegetables as compared with the use of the equipment for processing products which are already cooked or which require no cooking, and in this situation, while the Board may have been satisfied that the sterilizing of food is always one of the objects of the machine, it may at the same time have felt unsatisfied that cooking of food in cans was not also an object of equal importance for this machine in the canning industry taken as a whole.

Nor is it a necessary conclusion from the evidence to say that no one would ever purchase this apparatus for cooking. No doubt the cost of the apparatus is much greater than that of the older retort type of equipment, but the newer

type, in providing agitation and consequent basting action, as well as greater speed of heat penetration, offers advantages over the older type of equipment for cooking, as well as for sterilizing.

Moreover, in the course of giving his evidence, Mr. Vacketta produced and the Board received as exhibits a number of advertising pamphlets in which the equipment is pictured and described. In one of these (Exhibit A1), entitled The Sterilmatic Story, after referring to the in-can sterilizing provided by the equipment, the following appears:

> With the in-can method most products require little or no pre-cooking other than blanching. Further the FMC agitating process reduces the sterilization period to a minimum. For products processed by the in-can method, cooking in the home is reduced simply to a matter of heating prior to serving.
>
> Various styles and packs of corn, peas, soups, evaporated milk, fruit, meat, and a wide variety of other mealtime favourites are continuously and automatically processed at speeds unheard of only a few decades ago. All of the wonderful natural flavour, nutrients, colour and texture are protected and preserved. Today's housewives are quickly recognizing the true quality of properly processed canned foods. They want foods that are uniformly cooked with every can processed exactly alike. The quality must last too, for it is important to the housewife that her store of canned foods retains a maximum amount of the original quality and goodness when the can is opened and its contents served.
>
> Sterilmatic continuous pressure cookers and coolers, developed and perfected to assure these end results, have become standard equipment in more and more progressive canneries throughout the land.

The following statements also appear in the same brochure:

> Canned goods, therefore, which have been properly processed under appropriate control measures, come to the consumer with full-bodied, cooked-in flavour and goodness. As a result, all the user should do is "heat and eat" rather than "boil and spoil."
>
> FMC Sterilmatic continuous pressure cookers and coolers are built to take sealed cans from the closing machine and advance them through the shell in a spiral mechanism, subjecting them to steam under pressure which cooks and sterilizes the contents.

There is also reference in the same brochure to the agitation of the food in the can while being processed in the equipment and to the "basting" action provided in the course of the processing.

The following is from Exhibit A2, p. 4:

> The FMC pressure cooker is designed to cook and sterilize various food products in sealed containers—automatically and continuously.

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The cans enter the cooker shell direct from the closing machine through a valve which prevents the loss of pressure and steam within the cooker. Cans are indexed into a revolving wheel which is synchronized with the feed mechanism of the valve. They are advanced through the cooker shell by means of the spiral reel mechanism, while being subject to steam which cooks and sterilizes the contents of the can.

On this evidence, in my opinion, it was open to the Board to reach the conclusion that the equipment in question was designed for processing food, that the processing for which the equipment was designed included both sterilizing and cooking, that cooking was no less important an object of the equipment than sterilizing, and that the equipment was accordingly properly classified as "apparatus for cooking" within the meaning of that expression in Item 443. I am accordingly unable to say that there is no evidence sufficient in point of law to sustain their finding or that the Board, properly instructed as to the law and acting judicially, could not reach the conclusion which the Board in fact reached.

It was also submitted that the Board erred in using as evidence that the equipment was designed for cooking, certain expressions in which the word "cooked" and "cooking" appeared in the various advertising pamphlets produced by Mr. Vacketta. The word "cook" and its derivatives, it was said, have a technical or special usage in the canning industry and often refer to sterilizing.

In the declaration, the Board said:

While the canners distinguish between sterilizing and cooking, they admitted, and indeed it is obvious, that the heat applied in sterilizing occasions certain chemical and physical changes which resemble those that occur in food cooked in an ordinary kitchen.

A witness for the Appellant, familiar with the production and sale of Sterilmatic equipment, introduced sales literature descriptive of his product as Exhibits A-1 and A-2. In this literature a Sterilmatic line is advertised "for every cooking requirement"; the equipment is said to secure "controlled and continuous cooking" and is called "pressure cooker and cooler". These Exhibits also contain the following references: "Every can evenly cooked, and cooked exactly alike"; "Sterilmatic processing avoids loss from over or under-cooked batches"; "Texture, taste, colour and nutrients are preserved as with no other cooking method."

This evidence clearly shows that the pre-heater and pressure cooker are described and offered for sale as equipment for cooking, though the capacity to sterilize is mentioned in several places and is implied by the trade name of the product. The witness explained the use of the word "cook" in the Exhibits by saying that the word had been used with a

broad meaning in earlier days when it was thought that foods were preserved by cooking. Nowadays, he contended, it was proper to distinguish between cooking and sterilization and he referred the Board to a scientific treatise on sterilization, Exhibit A-4.

Assuming for this purpose that the word "cook" has a special usage in the canning industry and is broad enough in that usage to include and to refer to the sterilizing process, I think it is clear from the use in the literature of expressions such as "cooks and sterilizes the contents of the can" that the word is used in the industry to refer to cooking in the ordinary sense as well. And if it be accepted that, in the expressions cited by the Board, the word is not used in its ordinary sense but rather in the broader or special sense said to be common in the industry, in such expressions it appears to me to refer to both cooking in the ordinary sense and to sterilizing as well. The advertising literature leaves me with the impression that, in general, the word "sterilize" is used whenever sterilizing alone is intended, that "cook" is used whenever cooking alone is intended, as well as whenever a single word is desired to refer to both cooking and sterilizing, and that calling the apparatus a cooker, rather than a sterilizer, serves to convey the impression that its purpose is not confined to sterilizing but includes cooking as well. I think, therefore, that the Board was entitled to regard the use of the words "cooked" and "cooking" in such expressions as some evidence that the pre-heater and pressure cooker were in fact designed for cooking in the ordinary sense, whether or not such use of the words in these expressions also indicated that the equipment was also designed to sterilize. I would not therefore conclude from the fact that the Board did so regard these expressions that the Board misdirected itself as to their effect as evidence.

The appeal therefore fails and it will be dismissed with costs.

Judgment accordingly.

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Jan. 26, 30
Feb. 23

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

SUNBEAM CORPORATION (CANADA) LIMITED .... RESPONDENT.

Revenue—Income—Income tax—Income Tax Act 1948, s. 37 enacted by Statutes of Canada 1952, c. 29, s. 13—The Income Tax Act, R.S.C. 1952, c. 148, s. 40—Income Tax Regulations 400, 401, 402, 411(1)(a)(b), (2)—Provincial tax credit—"Permanent establishment"—Requirements to constitute a permanent establishment—"Warehouse"—"Use of substantial machinery or equipment"—Appeals allowed.

In its income tax returns for the years 1952, 1953 and 1954 respondent deducted from the tax otherwise payable by it, an amount in respect of the taxable income earned by it in those years in the Province of Quebec. It claimed that it was entitled to do so for 1952 by virtue of s. 37 of the 1948 *Income Tax Act* and for 1953 and 1954 under the provisions of s. 40 of the *Income Tax Act* R.S.C. 1952, c. 148. Sections 400, 401 and 402 of the *Income Tax Regulations* are applicable to the 1952 and subsequent taxation years and provide *inter alia* that the Province of Quebec is the province prescribed for the purpose of s. 40 of the Act and that "where, in a taxation year, a corporation had no permanent establishment outside the province, the whole of its taxable income for the year shall be deemed to have been earned in the province" and "where, in a taxation year, a corporation had no permanent establishment in the province, no part of its taxable income for the year shall be deemed to have been earned in the province". Section 411(*a*) of the Regulations defines "permanent establishment" and section 411(*b*) provides "where a corporation carries on business through an employee or agent who has general authority to contract for his employer or principal or has a stock of merchandise from which he regularly fills orders which he receives, the said agent or employee shall be deemed to operate a permanent establishment of the corporation".

The Minister re-assessed respondent for its income tax for the taxation years in question by adding the amount which it had deducted.

Respondent is a company incorporated under the laws of Canada with its head office in Toronto, Ontario, where it manufactures a number of electrical appliances which are sold throughout Canada, including the Province of Quebec. In each of the taxation years in question it was within the prescribed class of corporation referred to in the Regulations and in each year paid taxes to the Province of Quebec. Its sales are made exclusively to wholesale distributors throughout Canada and during the years in question employed four full-time sales representatives at Vancouver, Winnipeg, Toronto and Montreal. It had goods stored in a public warehouse in Quebec and also hired an agent there who established an office of his own in his residence in a residential section of the city, received a stock of displays and mechanical adver-

tising devices, and stored them in the part of his home set aside for office use. He was paid a commission on net shipments made into Quebec with a guaranteed minimum annual amount. He was under no contractual obligation to establish such an office, the telephone directory did not list the employee's own residential telephone under the name of the corporation and there was no business sign on any part of the premises, nor did the agent pay business tax. He had no general authority to contract for his employer or to accept purchase orders.

Held: That the appeal must be allowed.

2. That the office established by the employee or agent was merely the office of the employee or agent and not that of the taxpayer respondent.
3. That for a warehouse to constitute a permanent establishment as per the Regulations it is necessary that the warehouse be in some manner under the control of the taxpayer and respondent had no control over the placement of its goods in the warehouse nor any control over the warehouse itself other than delivering goods to it and ordering goods shipped from it; therefore respondent did not have a "warehouse" within the province as provided in Regulation 411(1)(*a*) and therefore had no "permanent establishment".
4. That the provision in Regulation 411(2) that "the use of substantial machinery or equipment in a particular place at any time in the taxation year shall constitute a permanent establishment in that place for the year" refers to the "use" of heavy or large machinery or equipment by such persons as contractors or builders and placing samples of a total value from $4,000 to $11,000 with the sales representative who used them in live demonstrations to wholesalers and in retail stores and in training demonstrators did not constitute a use of substantial machinery or equipment by respondent.

APPEAL from the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Cameron at Toronto.

E. A. Goodman, Q.C. and *J. D. C. Boland* for appellant.

J. A. F. Miller, Q.C. and *J. A. Langford* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (February 23, 1961) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board dated June 19, 1958, which allowed the appeals of the respondent from re-assessments made upon it for its taxation years ending on December 27, 1952, December 26, 1953, and March 27, 1954. In its returns for those years, the respondent deducted from the tax otherwise payable by it, an

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amount in respect of the taxable income earned by it in the said years in the province of Quebec. The respondent claimed that it was entitled to make such a deduction for its 1952 taxation year under the provisions of s. 37 of the 1948 *Income Tax Act*; and for the 1953 and 1954 taxation years under the provisions of s. 40 of the *Income Tax Act,* c. 148, R.S.C. 1952.

Section 37 of the 1948 *Income Tax Act,* as enacted by s. 13 of c. 29, Statutes of Canada, 1952, and made applicable to the 1952 and subsequent taxation years, is as follows:

> 37. (1) There may be deducted from the tax otherwise payable by a corporation under this Part for a taxation year an amount equal to 5% of the corporation's taxable income earned in the year in a province prescribed by a regulation made on the recommendation of the Minister of Finance.
>
> (2) In this section, "taxable income earned in the year in a province" means the amount determined under rules prescribed for the purpose by regulations made on the recommendation of the Minister of Finance.

Section 40, c. 148, R.S.C. 1952, as amended by Section 59(1), c. 40, of the Statutes of Canada for 1952-53 and made applicable to the 1953 and subsequent taxation years, reads as follows:

> 40. (1) There may be deducted from the tax otherwise payable by a corporation under this Part for a taxation year an amount equal to
>
> (*a*) in the case of a corporation of a class prescribed by a regulation made on the recommendation of the Minister of Finance for the purposes of this paragraph, 5%, and
>
> (*b*) in the case of any other corporation, 7%, of the corporation's taxable income earned in the year in a province prescribed by a regulation made on the recommendation of the Minister of Finance.
>
> (2) In this section, "taxable income earned in the year in a province" means the amount determined under rules prescribed for the purpose by regulations made on the recommendation of the Minister of Finance.

In the re-assessments now under consideration, the Minister wholly disallowed the deductions claimed on the ground that the respondent did not have a permanent establishment in the province of Quebec in any of the taxation years in question. In so doing, the Minister relied, as he now does, on the *Income Tax Regulations.*

Sections 400, 401 and 402 of the *Income Tax Regulations,* as applicable to the 1952 and subsequent taxation years, were enacted by PC 1953-255 of February 19, 1953. Those sections were later amended by PC 1953-1773 of November 19, 1953, mainly in order to substitute references to

s. 40 of c. 148, R.S.C. 1952, for the original references to s. 37 of the 1948 *Income Tax Act*. These sections, as amended, are in part as follows:

400. (1) The Province of Quebec is the province prescribed for the purpose of section 40 of the Act.

(2) For the purpose of paragraph (*a*) of subsection (1) of section 40 of the Act, the following classes of corporations are prescribed:

(*a*) corporations that are taxable under the provisions of section 3 of the Quebec Corporation Tax Act and that are not taxable under the provisions of section 6 of the Quebec Corporation Tax Act, and

(*b*) —(not applicable)—

401. For the purpose of subsection (2) of section 40 of the Act, the amount of taxable income earned in a taxation year in a province shall be determined as hereinafter set forth in this Part.

402. (1) Where, in a taxation year, a corporation had no permanent establishment outside the province, the whole of its taxable income for the year shall be deemed to have been earned in the province.

(2) Where, in a taxation year, a corporation had no permanent establishment in the province, no part of its taxable income for the year shall be deemed to have been earned in the province.

Subsections (3) and (4) are rules for determining the amount of the taxable income earned in the year in the province (Quebec) where a corporation had a permanent establishment in that province and a permanent establishment outside that province. It is unnecessary to refer to them in detail as the parties are agreed that the deductions claimed by the respondent in each of the years in question have been computed in accordance with such rules.

The respondent is a company incorporated under the laws of Canada, having its head office at Toronto, in the province of Ontario. It manufactures there a number of electrical appliances which are sold throughout Canada, including the province of Quebec. During each of the years in question, it was within the prescribed classes of corporations referred to in s-s. 2(*a*) of Regulation 400 (*supra*), and in each year paid taxes to the province of Quebec.

The sole question for determination in this appeal is whether the respondent for the years in question had, or had not, a "permanent establishment" in the province of Quebec. If that question is answered in the negative, then by s. 402(2) of the *Income Tax Regulations* "No part of its taxable income for the year shall be deemed to have been earned in the province", and it follows that the deductions claimed must be disallowed.

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Section 411 of the Regulations reads in part as follows:

> 411. (1) For the purpose of this Part,
>
> (a) "permanent establishment" includes branches, mines, oil wells, farms, timber lands, factories, workshops, warehouses, offices, agencies, and other fixed places of business;
>
> (b) where a corporation carries on business through an employee or agent who has general authority to contract for his employer or principal or has a stock of merchandise from which he regularly fills orders which he receives, the said agent or employee shall be deemed to operate a permanent establishment of the corporation;

The facts are not in dispute, the only evidence adduced being that of Leo Fitzpatrick (sales-manager of the respondent during the years in question) and that of C. H. Dyke (a former salesman of the respondent who no longer is in its employ). The respondent manufactures electrical appliances, animal clipping and shearing machines, garden and lawn equipment, and parts thereof, at its Toronto plant. Its sales are made exclusively to wholesale distributors throughout Canada and during the years in question it employed four full-time sales representatives at Vancouver, Winnipeg, Toronto and Montreal.

Exhibit 2 is the contract entered into on March 31, 1952, with J. B. Comtois, its salesman at Montreal. His territory included the province of Quebec and all four Maritime provinces. The contract was to run from March 31, 1952, to December 27, 1952, but was subject to renewal, and Comtois remained as the respondent's sales representative in that area until February 10, 1953. By the terms of the contract he was to be paid a commission "on net shipments into your territory" on the basis set out, but by the terms of the yearly guarantee, "You will be guaranteed $7,000 per annum out of which you will pay all of your own expenses". Other terms of the agreement were as follows:

> All demonstrations involving Company expense must be approved by us before arrangements are concluded. In the event any demonstrators are employed with our approval in the above territory, we will pay such demonstrator expense ourselves. However, in the event the total of such demonstration expense in the fiscal year exceeds one-half of 1% of the net shipments into the above territory, we will charge you for the excess cost beyond one-half of 1%. It is understood that the cost of any merchandise given away by you is to be charged, at distributor prices, one-half to ourselves and one-half to you; and that such charge will be deducted from such commissions due you. It is understood that the giving of such merchandise must meet with our approval in each case. All arrangements for such demonstrations and their carrying to conclusion are to be attended to by you, after approval has been given.

Should any junior salesmen be employed in your territory, they will be employed only on our authorization, and we will pay such junior men a stipulated weekly salary and a fixed expense allowance which we may, however, from time to time increase or diminish. Should such juniors be required by you to do any special work which incurs expenses beyond those authorized and fixed by us, such expenses are to be paid by you.

You agree to devote your entire time, best effort, and full and undivided attention to the sale of our products as specified, in the territory outlined above; you further agree to follow our instructions and expressed wishes in carrying out this work.

Exhibit 1, dated April 10, 1953, is a copy of the contract of employment between the respondent and the witness, Colin Dyke, who followed Mr. Comtois as sales representative at Montreal. But for the differences in dates and the amount of the guaranteed income, it is in the same form as Exhibit 2. His employment commenced on April 12, 1953, and while the contract expired on December 26, 1953, it was continued to July, 1956.

Mr. Dyke stated that there was no agreement with the respondent by which he was required to set up an office, but he found it convenient to do so as "I had to have an office to conduct business". Immediately after his appointment, he purchased at his own expense desks, filing cabinets, a typewriter, etc., and put them in the basement of his residence at 35 Riverside Drive, St. Lambert—a municipality to the south of the St. Lawrence River and opposite the city of Montreal. This equipment remained his property throughout and he received no compensation for it. The respondent paid him no rent for the use of any part of his home. It did, however, supply him with company stationery and literature, price sheets, catalogues, sales promotion material, and inter-office memoranda. He also was supplied with substantial quantities of samples of the respondent's products to be used in demonstrations and in promoting sales, the value of which samples varied from $4,700 to $11,000. His home was in a residential part of St. Lambert and no business tax was paid by anyone in respect of the operations carried on there. The telephone directory did not list Dyke's residence as the respondent's place of business and there was no business sign of any sort on the premises. The respondent did supply him with calling cards showing that he was their representative.

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About 20 to 25 per cent. of the total sales of the respondent were to distributors in the province of Quebec, including Montreal. The main duty of Mr. Dyke was to call on some twenty-five wholesalers in that province, demonstrate his samples and endeavour to secure orders. When an order was received, he had no authority to accept it; he merely forwarded it to Toronto and, if accepted there, the goods were shipped direct to the purchaser. Other duties of Mr. Dyke were to secure and train demonstrators and to arrange for and supervise live demonstrations of the respondent's goods at department and hardware stores. The demonstrators were interviewed and trained at his residence and at times Mr. Dyke took orders for goods at his home. He was responsible for the telephone charges except for long distance calls.

Mr. Comtois was not called as a witness, but it is apparent from the evidence of Mr. Fitzpatrick that there was no essential difference between his duties and operations and those of Mr. Dyke, except that Mr. Comtois used part of his residence on Twenty-Third Avenue, Rosemount, near the city of Montreal, and that the maximum value of the samples he had on hand was about $4,000.

Mr. Fitzpatrick also stated that in June, 1953, the respondent placed large quantities of its goods, valued at about $120,000, in the warehouse of Consolidated Warehouse Corporation in Montreal, and that orders for Quebec Province were regularly filled from that source from June, 1953 until November, 1953 when all had been shipped. Exhibit 3 is the invoice of that warehouse company to the respondent for storage space. Mr. Fitzpatrick stated that his company had no employees at that warehouse, but the handling of goods there was carried out by the warehouse personnel; that the respondent had no control over any part of the warehouse, its goods being placed as desired by the warehouse company, and that the public would have no knowledge that the respondent's goods were stored there. The goods of many other persons were also stored in the same warehouse.

The onus of proving that the assessments under appeal are incorrect either in fact or in law is upon the taxpayer (see *M.N.R. v. Simpson's Ltd.*[1]).

[1] [1953] Ex. C.R. 93.

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The first submission is that on the facts which I have stated, it should be found that the respondent had "a permanent establishment" in the province of Quebec because it had "a branch . . . office . . . agency . . . warehouse . . . or other fixed place of business" there (s. 400(1)(*a*) of the Regulations). It is suggested that as the deductions were authorized in order to limit somewhat the effect of double taxation, those words should be construed liberally. In *Lumbers v. M.N.R.*[1]—a decision of the President of this Court—it was held:

> That the exemption provisions of a taxing act must be construed strictly and a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions of some exemption section of the Income War Tax Act; he must show that every constituent element necessary to the exemption is present in his case and that every condition required by the exempting section has been complied with.

That judgment was affirmed by the Supreme Court of Canada[2].

In my opinion, the respondent did not have a branch, office, agency or other fixed place of business (excluding for the moment consideration of the word "warehouse") in the province for any of the years in question. All that was done by the contracts (Exhibits 1 and 2) was to appoint a sales representative and provide for his duties and remuneration. There was no provision that the respondent would provide an office for the sales representative. It was entirely a matter for him to decide whether or not he would have an office and where it would be located. Each of the two agents did establish an office in his own home, but that was his office, equipped with his own furniture and maintained entirely for his own use and at his own expense. Had he so desired, the sales representative could have moved his office to any other suitable location without the consent of the respondent. The contracts of employment permitted either party to terminate the agreement arbitrarily by giving two weeks' notice to the other party. The offices so established by the sales representatives for their own convenience were in reality their offices and not those of the respondent.

[1] [1943] Ex. C.R. 202. [2] [1944] S.C.R. 167.

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Reference may be made to *Grant v. Anderson & Co.*[1] The headnote is in part as follows:

> Order XLVIII. A., r. 1, provides that persons liable as co-partners and carrying on business within the jurisdiction may be sued in their firm name, and rule 3 of the same order provides for service of the writ in such cases at the principal place within the jurisdiction of the business of the partnership upon any person having the management of the business there.
>
> The defendants were a firm of manufacturers carrying on business in Glasgow, all the members of which were domiciled and resident in Scotland. They employed an agent in London to procure orders for them on commission. For that purpose he occupied an office in London, the rent of which he paid himself, and at which he kept samples of the defendants' goods. His duty was to receive and transmit orders to the defendants at Glasgow, and he had no authority to conclude contracts for the defendants, except upon express instructions. A writ was issued against the defendants in the name of their firm, and served upon the agent at the above-mentioned office:—
>
> *Held,* by the Court of Appeal (affirming the Queen's Bench Division), that the defendants did not carry on business, and had no place of business, within the jurisdiction, and therefore the writ and service must be set aside:—

In addition to the facts stated above, it seemed that the London agent (McCallum) occupied an office consisting of two small rooms (one of which was his sample room), the rent of which he paid himself. The name of his employer (the defendant) appeared on a brass plate at the entrance to the buildings and on a board on the stairs leading to the office (in each case with the agent's name underneath) and on the windows of the office.

All the learned Judges in the Court of Appeal agreed that the defendant had no place of business in London. At p. 116, Lord Esher M.R. said in part:

> The defendants, who are Scotchmen, and who reside in Scotland and not in England, are manufacturers of flannels in Glasgow. The whole of their manufacturing appears to be done in Scotland. They are also of course sellers of the flannel which they manufacture. They employ a man named McCallum to obtain orders for them in London. For what he does, he is paid by them a commission, not on the orders obtained, but on the business done. If he gets an order which they accept, he gets a commission; but if they do not accept it, he gets no commission. When he gets an order, he has no power himself to accept it; all he has to do is to send it on to Scotland, that the defendants may say whether they will accept it or not; and in most cases, if they do accept it, they deal directly with the person giving the order. Again, the agent does not appear to deliver the goods, if the order is accepted. The goods are not always to be delivered in London. In the present case, the delivery of the goods was not in London, and McCallum had nothing to do with the matter except

[1] [1892] 1 Q.B.D. 108.

as regards sending on the order. His business is to obtain orders which are in law and in fact mere proposals. The defendants then consider whether they will accept them. If they do, they make a contract with the principal. McCallum, no doubt, has a good deal to do in this way for the defendants. He does not, in fact, obtain orders for other people, and it may very well be that by the terms of the arrangement he cannot and ought not to do so—at any rate for other flannel manufacturers. The amount of the commission he earns I dare say makes it worth his while to act only for the defendants. He cannot get orders without shewing samples; he therefore has taken two rooms in Milk Street, one of which he uses as an office, and the other as a small room in which he keeps the samples. The samples are the only things which are kept there. He pays the rent in respect of the rooms. It does not appear that it is essential that he should have an office at all. For aught we know he may keep the samples at his residence, or he may take an office where he pleases. What is the inference to be drawn from these facts? I agree with the view taken by the Divisional Court that this office is not the office of the defendants, but of McCallum only. Consequently the defendants have no place of business in London, and it follows that the writ could not be served at this office, and therefore the service is bad and must be set aside. Then, do the defendants carry on business in London? The only thing done for them in London is this obtaining of orders by McCallum. Is that carrying on business in London? It is doing an act which goes towards carrying on business. But we must deal with the expression "carry on business" as used in the rules in the ordinary business sense. One might as well say that the defendants carry on business in any place through which their goods pass while being sent to their customers. The same considerations, which shew that the office is not their office, go to shew that they do not carry on business in London. Therefore the writ was improperly issued, and must be set aside, as well as the service.

The respondent does not come within the provisions of s. 411(1)(*b*) of the Regulations (*supra*). It is therein provided that when a corporation carries on business through an employee or agent, the said agent or employee shall be deemed to operate a permanent establishment of the corporation, subject, however, to the requirements that such agent or employee must have general authority to contract for his employer or principal, or have a stock of merchandise from which he regularly fills orders which he receives. The evidence is clear that neither of these requirements was met at any time by the respondent's employees or agents, Comtois and Dyke.

A further submission on behalf of the respondent was that in any event it qualified for the deduction in its 1953 taxation year since in that year it had a warehouse in the province of Quebec and hence had a permanent establishment in that province (s. 411(1)(*a*) of the Regulations—*supra*). The salient facts on this point have already been

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—

stated. There can be no doubt that in that year the respondent did place a very substantial quantity of its goods in storage in a warehouse in the province of Quebec and paid the customary storage charges. But in order to qualify for the deduction thus claimed, the respondent must have "*had* a permanent establishment", namely, a "warehouse" in the province.

It seems to me that "to *have* a warehouse" implies having some measure of control over the warehouse. Here the exclusive control of the warehouse was by its owner—Consolidated Warehouse Corporation—the respondent having no control whatever over it. It will be recalled that the corporation could place the respondent's goods in any part of the building it desired or move them about in the building from time to time, and that all the work of storing, handling and shipping there was done by the Consolidated Warehouse Corporation personnel. As stated by Mr. Fitzpatrick, the respondent's only requirement was that the storage space to be used for the respondent's goods should be "good and dry". The only control held by the respondent was in respect of the goods stored, in that it retained ownership thereof and could direct the warehouse corporation to forward or deliver them from time to time to addresses furnished by the respondent. To use the facilities of another's warehouse for the storing of goods in the manner I have mentioned is, in my opinion, quite a different thing from "having a warehouse". In view of these findings, I am unable to agree with the submission that the respondent in its 1953 taxation year had a warehouse in the province.

Finally it is submitted that the respondent falls within s-s. (2) of s. 411 of the Regulations, which reads:

> 411. (2) The use of substantial machinery or equipment in a particular place at any time in a taxation year shall constitute a permanent establishment in that place for the year.

It is urged that the placing of samples ranging in value from $4,100 to $11,000 with the sales representatives and the use made of them in showing them to the wholesalers, and in live demonstrations to wholesalers and in retail stores, and in training demonstrators, was "the use of substantial machinery or equipment in a particular place at any time in a taxation year", and therefore constituted a "permanent establishment in that place in that year".

In my opinion, that section cannot be found to apply to the facts of this case. While some of the samples of the goods manufactured by the respondent and supplied to the sales representatives may perhaps fall within the category of "machinery and equipment", I do not think that they constitute "substantial machinery or equipment" or that their use for training demonstrators or for live demonstrations, or for exhibition to possible purchasers, of like goods, is such a "use" as is contemplated by the section. It seems to me that the section refers rather to the "use" of heavy or large machinery or equipment by such persons as contractors or builders who, as is well known, may move such equipment from one province to another in carrying out their normal operations.

For the reasons which I have stated, the appeals of the Minister for each of the years in question will be allowed, the decision of the Income Tax Appeal Board set aside and the re-assessments made upon the respondent will be affirmed. The appellant is also entitled to his costs after taxation.

Judgment accordingly.

1961
Mar. 13
Mar. 23

BETWEEN:

PARLAM CORPORATION ....APPELLANT;

AND

CIBA COMPANY LIMITED ....RESPONDENT.

Trade Marks—Confusing—Opposition—Appeal dismissed—Trade Marks Act, S. of C. 1952-53, c. 49, ss. 12(1)(b) and (c), 37(2)(b) *and (c).*

Held: That the word "MIKEDIMIDE" when sounded in English is deceptively misdescriptive of the character of wares in association with which it is used and is therefore within the class of marks excluded from registration by s. 12(1)(*b*) of the *Trade Marks Act.*

APPEAL from a decision of the Registrar of Trade Marks upholding an opposition filed by the respondent and refusing the appellant's application for registration of the word "MIKEDIMIDE" as a trade mark for use in association with a pharmaceutical preparation.

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The appeal was heard before the Honourable Mr. Justice Thurlow at Ottawa.

J. C. Osborne, Q.C. and *Norman Shapiro* for appellant.

M. B. K. Gordon, Q.C. for respondent.

THURLOW J. now (March 23, 1961) delivered the following judgment:

This is an appeal from a decision of the Registrar of Trade Marks, by which he upheld an opposition filed by the respondent and refused the appellant's application for registration of the word "MIKEDIMIDE" as a trade mark for use in association with "a pharmaceutical preparation effective as an antagonist to reduce or overcome toxicity of a sedative and/or hypnotic drug."

The grounds of opposition set forth in the statement of opposition filed by the respondent with the Registrar pursuant to s. 37 of the *Trade Marks Act,* S. of C. 1952-53, c. 49, were as follows:

(*a*) The generic term NIKETHAMIDE is used in association with a pharmaceutical product discovered by the Ciba Company many years ago and still actively marketed by Ciba in all countries of the world. The said generic term appears in the British Pharmacopeia, 1953 Edition, Pages 363 and 364.

(*b*) The word MIKEDIMIDE is similar to the generic term NIKETHAMIDE and therefore should not be registered, since confusion will be caused by the use of this term in association with a pharmaceutical product.

In his decision, the Registrar stated his reasons for refusing the appellant's application as follows:

I am of the opinion that the word "MIKEDIMIDE" and the generic term "NIKETHAMIDE" are confusing.

Accordingly, the application for registration of the word "MIKEDIMIDE" is refused pursuant to Section 37(2)(*b*) and (*d*) of the *Trade Marks Act.*

Clauses (*b*) and (*d*) of s. 37(2) of the *Trade Marks Act* merely state two grounds on which an opposition to registration of a trade mark may be based. The ground stated in clause (*b*) is that the trade mark is not registrable, that in clause (*d*) that the trade mark is not distinctive. Both grounds were argued on the hearing of the appeal.

The eligibility of trade marks for registration is provided for in s. 12, which provides, *inter alia,* that, subject to s. 13, a trade mark is registrable if it is not

(*b*) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French languages of the character or quality of the wares or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin;

(*c*) the name in any language of any of the wares or services in connection with which it is used or proposed to be used;

As a matter of first impression, the word "nikethamide," by reason of its ending, suggests to me that it is the name of a substance and that the ending is a reference to its chemical character. The evidence discloses that the word is in fact a generic term used in association with a pharmaceutical product. The *Shorter Oxford Dictionary* gives the following definitions of the word "amide":

1. *orig.* A name given to derivatives of ammonia (NH_3) in which one atom of H was exchanged for a metal or organic radical, acid or basic, these being viewed as compounds of the *metal,* etc. with *amidogen* (NH_2). 2. *Mod. Chem.* Generic name of the compound ammonias in which one or more atoms of hydrogen are replaced by an *acid* radical.

Moreover, the letters "eth" in "nikethamide" appear to be a contraction of "ethyl." Though it is itself used as a name, "nikethamide" is thus, if not in any other ways, descriptive of the composition of the substance itself, which from a label exhibited to one of the affidavits filed on behalf of the appellant appears to be pyridine-B-carboxylic acid diethylamide. Accordingly, the word "nikethamide" would not be registrable as a trade mark for use in association with that substance, not only because it is in common use as the name of the substance and thus unregistrable because of s. 12(1)(*c*), but also, in my opinion, because it would be clearly descriptive of the character of the wares in association with which it was to be used and thus unregistrable because of s. 12(1)(*b*). Moreover, it would not be registrable as a trade mark for use in association with any other drug, for if so used it would, to anyone familiar with the substance known as "nikethamide," I think, be deceptively misdescriptive of the wares in association with which it was to be used and thus unregistrable because of s. 12(1)(*b*).

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I turn now to the word "MIKEDIMIDE," of which registration is sought as a trade mark for use in association with a pharmaceutical product. This word, when used in association with chemicals or drugs, is also, in my opinion, a descriptive word, for it appears to me to indicate by its ending that it is a substance and that it is a particular kind of substance, as well. The *Shorter Oxford Dictionary* gives as the meaning of "imide":

> *Chem.* A name for derivatives of ammonia (NH_3), in which two atoms of hydrogen are exchanged for a metal or organic radical; these being viewed as compounds of the metal, etc. with a hypothetical radical Imidogen, NH.

The word "MIKEDIMIDE" accordingly appears to me to indicate that the substance in association with which it is used is a type of ammonia derivative (which in fact it appears to be) and the word is thus, in my opinion, descriptive of the character of the wares in association with which it is used. Whether it is "clearly" descriptive of such wares within the meaning of s. 12(1)(*b*) and therefore unregistrable on that account I do not pause to consider, for it is equally unregistrable because of that clause if it is "deceptively misdescriptive" of the character of such wares when depicted, written or sounded in the English or French languages.

Now the word "MIKEDIMIDE" when printed or typed, in my opinion, bears no close similarity to the word "nikethamide," but when sounded in English the two words, I think, are so similar as to be difficult to distinguish from each other. It may be accepted that a druggist familiar with nikethamide, on seeing "MIKEDIMIDE" on a package, would not assume that it contained nikethamide but, if the word "MIKEDIMIDE" were simply spoken to him without his being previously aware that the word was a trade mark, I am of the opinion that he would be not unlikely to interpret it as referring to the ammonia derivative known as nikethamide and, since the substance in association with which the word "MIKEDIMIDE" is used is not nikethamide, he might well be deceived. The same interpretation may, I think, be expected whenever any person more or less versed in the terminology of drugs and chemicals and being familiar with nikethamide hears the word "MIKEDIMIDE" spoken in English without

any further indication of what is intended. "MIKEDIMIDE", when sounded in English, is accordingly, in my opinion, deceptively misdescriptive of the character of the wares in association with which it is used, and it falls, therefore, within the class of marks excluded from registration by s. 12(1)(*b*).

In view of this conclusion, it is unnecessary to deal with any of the other sections of the Act which were discussed on the argument of the appeal. I may add, however, that s. 37 gives to "any person" the right to oppose a registration, and it does not appear to me to be necessary that he be able to show the likelihood that he himself might be harrassed or otherwise adversely affected in his business in order to support his opposition to the registration of an unregistrable mark.

The appeal will be dismissed with costs.

Judgment accordingly.

1960
May 9
1961
Mar. 24

BETWEEN:

THE MOTOR VESSEL *DONNACONA II* AND HER OWNERS (*Defendants*) .... APPELLANTS;

AND

MONTSHIP LINES LIMITED, OWNERS OF THE MOTOR VESSEL *MONTROSE* (*Plaintiffs*) .... RESPONDENTS.

Shipping—Appeal from judgment of District Judge in Admiralty—Collision in Quebec Harbour—Negligence of officers of both ships—Failure of both ships to comply with Regulations for Preventing Collisions at Sea—Apportionment of blame—Regulations for Preventing Collisions at Sea, rules 25(a), 28 and 29.

In an action and counterclaim for damages resulting from a collision in the Harbour of Quebec between the M.V. *Montrose* downward bound and the M.V. *Donnacona II* upward bound, the District Judge in Admiralty found that the *Donnacona II* was solely responsible for the collision. On an appeal from the judgment

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Held: That those in charge of the *Donnacona II* were blameworthy for the reasons given by the trial judge, that the collision would not have happened had not *Donnacona II* failed to keep to starboard as required by Regulation 8 of the *St. Lawrence River Regulations.*

2. That one factor that brought this about was the failure of *Donnacona II* to keep a proper look-out as required by rule 29 of the *Regulations for Preventing Collisions at Sea.*

3. That another fault was her failure immediately before the collision to slacken speed in the face of obvious danger instead of proceeding at full speed ahead.

4. That the admissions of those in charge of the *Montrose* showed that contrary to the *Regulations for Preventing Collisions at Sea,* rule 28(a), the *Montrose* two minutes before the collision altered course without signaling on her siren, and that she was not, as required by Rule 29 of the Regulations, maintaining a proper look-out.

5. That the violation of rules 28 and 29 by the *Montrose* constituted negligence which contributed to the collision.

6. That there was common fault of which 75% was attributable to the appellants and 25% to the respondents.

APPEAL from the judgment of the District Judge in Admiralty for the Quebec Admiralty District.

The appeal was heard before the Honourable Mr. Justice Kearney at Quebec.

Leopold Langlois for appellants.

Jean Brisset, Q.C. for respondents.

KEARNEY J. now (March 24, 1961) delivered the following judgment:

This is an appeal from a judgment of the Honourable Arthur I. Smith, District Judge in Admiralty for the District of Quebec, rendered on November 6, 1958.

The action is for damage sustained by collision between the M/V *Montrose* and the M/V *Donnacona II* which occurred within the limits of the Harbour of Quebec. The litigation comprises an action and counterclaim. By the aforesaid judgment the appellants were held solely responsible for the collision; their counterclaim was accordingly dismissed and the respondents' action maintained, with costs in each instance; and reference was made to the registrar for determination of said damages in the usual manner.

The *Montrose* is a steel single screw cargo motor vessel registered at the port of London, England, of 915.36 gross tons and 402.14 tons net register, 225.5 feet in length,

36 feet in breadth, geared by one direct-acting internal combustion diesel engine developing 1,500 I.H.P., maximum speed 13 knots, and manned by a crew of 20 all told.

The *Donnacona II* is a steel twin screw vessel registered at the port of Quebec, of 329.52 tons gross, 239.87 tons net register, 140.9 feet in length and 30.3 feet in breadth, fitted with two Fairbanks-Morse diesel engines of 160 horse-power brake, and manned by a crew of 6 all told.

On August 3, 1956, prior to the collision the *Donnacona II,* as she rounded Point Levis and was proceeding upstream somewhere north of midchannel, sighted four vessels downbound. The leading one proved to be the outbound *Homeric* proceeding somewhat south of midchannel; the second and third were two tugs which had serviced the *Homeric* and were navigating one behind the other at about 500 feet from the north shore wharves; and lastly what proved to be the *Montrose,* destined for Lisbon, somewhat north of midchannel where she was changing pilots. *Donnacona II* passed the *Homeric* red to red; the tugs turned into their berths before meeting her and at 0131 E.D.S.T., almost opposite the customs reporting station at Quebec and a little south of the middle of the river, the collision occurred when the bluff bows of the *Donnacona II* struck the port side of the *Montrose* in the way of hatch No. 2 at an angle of approximately 80°.

The parties in holding each other solely responsible for the collision reciprocally attributed almost identical acts of negligence: failure to keep a good look-out, or any look-out at all; to pass each other as they should have done in the circumstances; failure to navigate on the proper side of the channel; to give proper signals; to maintain a moderate and appropriate rate of speed; the whole contrary to good seamanship and the *Regulations for Preventing Collisions at Sea* and the *St. Lawrence River Regulations.*

Counsel for the parties filed a stipulation agreeing there was a flood tide of two knots favouring *Donnacona II* and that the sworn statements signed by the following officers and ratings of the *Montrose* concerning the circumstances of the collision, and which were also filed, are to form part of the evidence in this case:

Captain William Urquhart, Master of the ship;
Edward Kempton, Second Mate;
John J. Nevin, A.B.;

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Kenneth Cameron Galbraith, Third Engineer;
Peter Fox, A.B., Wheelsman.

The following facts are uncontested by the parties; at the time of the collision full darkness of night had fallen; the weather was calm; the wind was nil; just prior to the collision both ships were travelling at full speed.

The learned trial judge dealt with the evidence given on behalf of the respective parties as follows:

The proof shows that both vessels were carrying regulation lights. It is established that the *Montrose* had been steering on the Sillery Range Course of 039° True, but that on approaching the northern limits of Quebec Anchorage her course was altered to 024° Gyro. At 0119 the vessel's engines were ordered at half speed and at 0122 stop. At 0125 the *Montrose's* engines were put to slow ahead and the ship was brought slightly around to port to the pilotage ground.

The evidence adduced on behalf of the *Montrose* as to her position in the river as pilots were changed and her speed and the various courses steered by her thereafter was not contradicted. This evidence shows that the *Montrose* was approximately one to one and a half cables length North of midchannel when change of pilots was effected and that from that position she was, at 0128½ hours, ordered full speed ahead on a course of 024° True, which course was altered about ½ minute later to 035° True. Just prior to this the pilot on the *Montrose* had seen the white lights of a ship over a mile away, but shortly thereafter he sighted the green light of this vessel at a distance of some 3 or 4 cables. At first he thought that this might be merely a "shear" on the part of the approaching vessel, but then this ship continued to come to port, whereupon the pilot of the *Montrose* ordered hard-to-starboard, the vessels being at that moment approximately 2 cables apart. The order hard-a-starboard was almost immediately followed by the order full astern, but the vessels came into collision at approximately 0131 hours, the bow of the *Donnacona II* colliding with the portside of the *Montrose* and at an angle of approximately 80° from the stern. At the time of the collision the *Montrose* was swinging sharply to starboard and the *Donnacona II* was astern of the *Montrose* heading downriver.

The testimony of those on board the *Montrose* as to the position of the vessel when pilots were changed and as to her speed and to the courses steered by her thereafter is not merely uncontradicted, but is at least to some extent corroborated by the testimony of the witness Langlois, Pilot on the *Homeric*.

Three witnesses were heard on behalf of the *Donnacona II;* Thériault who was on watch at the Marine Signal Service Station located at Quebec, immediately opposite the place where the collision occurred; Piché, a 21 year old sailor, who was in the wheelhouse of the *Donnacona II* at the time of the collision, and Roland Beaudette, Mate of the Vessel, who was at the wheel.

The testimony of the witness Thériault, who stated that the collision occurred at the place where the *Montrose* changed pilots just as the Pilot Launch left her, is clearly unreliable. Not only is it contradicted by the witnesses heard on behalf of the *Montrose,* but it is inconsistent with the

fact, admitted by Mate Beaudette of the *Donnacona II*, that the collision occurred actually slightly to the South of midstream and considerably East of the place where the Pilots were changed.

The witness Piché testified that the *Donnacona II* as it navigated upriver passed within 500 to 600 feet of the wharves on the Quebec shore. His evidence is that he saw two tugs and the *Montrose* slightly to starboard coming down, the *Montrose* being astern of the other two vessels, and that the *Donnacona II* met the first two vessels green to green at a distance of 200 feet, but that the *Montrose* appeared to crowd the *Donnacona II* somewhat and then to veer more to starboard, whereupon the *Donnacona II* sounded two blasts and came hard-to-port, but in doing so was struck by the *Montrose*.

According to these witnesses, it was when the *Montrose* thus veered to starboard that her red light was seen by them for the first time. The *Donnacona II* had been coming at full speed, but just prior to collision her left motor was stopped.

According to Mate Beaudette, the *Donnacona II* passed Buoy 138M (should read 138B) at a distance of about 500 feet. He did not consult his compass but on leaving this position took a visual bearing and steered a course to bring his vessel within 550 feet of the breakwater. From that point he continued parallel to the shore and at about the same distance from it. He saw three vessels coming down, the first two of which he met green to green. As he approached the third, which was a little closer to shore than the first two, this vessel appeared to be crowding the *Donnacona II* whereupon he went to 6° to port, but the other vessels continued too close with his and fearing a collision he sounded two short blasts and went hard-to-port, but the *Montrose* was across his bows and too close to avoid the collision. The *Donnacona II* continued to go hard-to-port, sounded another signal and stopped her motor. Beaudette testified that he heard no signal from the *Montrose* prior to the signal given by the *Donnacona II*. It was only a matter of seconds before the impact when the *Montrose* was across her bows that Beaudette heard a signal from her and at the same moment saw her red light for the first time. It appears that at no time relevant to the collision was a compass bearing taken by the *Donnacona II* and all evidence given on her behalf as to her position and the courses steered by her appear to have been mere estimates based on observation of land marks. Mate Beaudette testified that he remembered meeting the *Homeric* abreast of the breakwater and that the vessels met red to red at a distance of about 300 feet.

The defence of the *Donnacona II* briefly stated is that proceeding upriver on a course parallel with and at a distance of approximately 550 feet from the Quebec shore she met and passed the two tugs green to green and was about to meet and pass in similar fashion (obviously the word *Montrose* was left out) when the latter proceeding on the wrong side of the channel, came to starboard in such a manner as to cut across the bows of the *Donnacona II* and thereby bring about the collision.

The trial judge then stated:

The undersigned has no hesitation in concluding that this version of the collision is not supported by the proof.

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The pith and substance of the judgment appealed from are contained, subject to the undermentioned amendment, in the following paragraph:

> The fact that the *Donnacona II* allowed herself to get to the point at which she was when the collision occurred has not been satisfactorily explained. I am convinced however that had she kept to starboard, as she could and ought to have done, the collision would not have happened and it was the failure of the *Donnacona II* to observe Rule 12 of the Regulations which occasioned the disaster.

I might here insert that I think it could be said with equal force that, had *Montrose* remained on her proper side of the channel, the collision would not have occurred. In written argument counsel for the respondents submitted that regulation 12 was clearly inapplicable in the present instance and had undoubtedly been inserted through a clerical error, and that the trial judge intended to refer to regulation 8. This was contested by counsel for the appellants and I referred the case back to the trial judge to settle the disputed question. By judgment rendered on March 7, 1960, he ruled that this error was purely and simply due to a clerical or typographical oversight, and that what he intended to hold was that the collision would not have happened had not *Donnacona II* failed to keep to starboard, as she was required to do by regulation 8 of the *St. Lawrence River Regulations*. This regulation reads as follows:

> Vessels drawing nine feet of water or less and barges and rafts shall at all times keep to the proper side of the fairway and away from the established steamer track between Quebec and Father Point, except when crossing the steamer track at right angles.

The case again came before me and on re-argument the appellants, while conceding that *Donnacona II* with her shallow draft came within its provisions submitted that the trial judge had erroneously invoked regulation 8 since it had no practical application within the limits of Quebec Harbour for the following reasons. It was enacted to prevent smaller vessels cluttering up restricted parts of the dredged channel between the eastern limits of Quebec Harbour and the western extremity of Father Point when with their shallow draft they could easily navigate outside it. There is no need of dredging a channel in the Quebec Harbour as,

owing to its natural depth, vessels having a maximum draft can use the full width of the river. In addition, that with wharves on both sides and ships crossing in various directions it cannot be said there is an established track in the port of Quebec.

That regulation 8 was meant to apply within the limits of the harbour readily appears from regulation 2 which states:

> These regulations apply to the St. Lawrence River between Victoria Bridge at Montreal and Father Point including the harbours of Montreal, Three Rivers and *Quebec.* (Emphasis supplied)

I do not think it can be said that there is a well defined single track for upbound vessels and another single track for downbound vessels because of deep water docking facilities on both sides of the river, particularly on the Quebec side, which are used by both up and downbound vessels. This makes the practical application of regulation 8 difficult. Under the circumstances, this regulation, in my view, should be interpreted broadly and to signify that ships of light draft like *Donnacona II* should keep on their starboard side of midriver or midchannel and as close to shore as circumstances permit. I think that this is what *Donnacona II* allegedly intended to do but failed to carry out. I will first direct my attention to the causes and consequences of such failure.

Three witnesses were called on behalf of the appellants. The trial judge rejected the evidence of Mr. Thériault, who testified as to the location of the accident, and gave little credance to seaman Piché and mate Beaudette who described the manner in which the accident occurred. It is well established that where a question of credibility of witnesses arises its determination should be left to the trial judge.

I consider that those in charge of the *Donnacona II* were blameworthy for the reasons given by the trial judge, in support of which I would add the following.

I think those in charge of *Donnacona II* misjudged their true position which was farther from shore than they imagined, and one factor which brought this about was the

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failure to keep a proper look-out as required by rule 29 of the *Regulations for Preventing Collisions at Sea,* which states:

> Nothing in these Rules shall exonerate any vessel or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Seaman Piché, who was on watch with mate Beaudette, did not understand what his duties were as look-out. When mate Beaudette first sighted the green lights of two small vessels which were about 500 feet from shore and which he anticipated meeting, I think he was entitled to set a course calculated to meet them green to green instead of attempting to pass between them and the shore red to red. Had seaman Piché and mate Beaudette kept a sharp look-out, they would have realized they would not be required to meet the two small vessels. The wharf where the tugs were berthed and to which they were returning is upstream from Pointe-à-Carcy where the collision occurred, and the Canada Steamship Line wharf is more so, and it was clearly proved that at the time of the collision the first tug had reached the above-mentioned wharf. Indeed the two above witnesses erroneously testified that *before* the collision they had passed the two small vessels green to green, which was an impossibility, as there is abundant proof that the two tugs had not and never did reach the point where the collision occurred. Thus *Donnacona II* had enough leeway to veer, if necessary, to starboard and pass the *Montrose* red to red as she had passed the *Homeric* instead of changing course 6° to port in an attempt to pass her green to green.

Immediately before the collision *Donnacona II* was proceeding at nine knots over the ground and another fault, in my opinion, of a most serious character, commited by her, was her failure to take a precaution required by the most rudimentary principles of good seamanship, namely, to slacken her speed in the face of obvious danger instead of proceeding at full speed ahead. By contrast, Captain Edmond Plante, master of the tug *Château,* testified that because of the density of the traffic he reduced his speed to 4½-5 knots while keeping about 500 feet from the wharves in order to interfere with navigation as little as possible.

Since because of darkness those in charge of *Donnacona II* could not identify the oncoming vessels and could not be certain of the destination of the small vessels, or whether what proved to be the *Montrose* intended to dock on the north shore, or veer to starboard and proceed to sea, their failure to slacken speed was exceedingly imprudent.

Mate Beaudette by going hard-to-port when the collision was imminent brought his ship on the wrong side of the channel, thus serving to make the accident inevitable, but I do not think much importance should be attached to ill conceived manoeuvres made after a situation has become desperate.

The next issue is whether the *Montrose* was blameless or whether she was in whole or in part responsible for the collision. I think it is with very little justification that the appellants complain of the specific findings of fact made by the trial judge, as far as they went. Nevertheless, in my opinion, there is merit in the submission that the trial judge failed to consider and pass upon important elements of proof emanating not from the appellants' witnesses but from the admissions of those in charge of the *Montrose,* which allegedly clearly showed that, quite apart from having, contrary to rule 25(*a*) of the *Regulations for Preventing Collisions at Sea,* changed pilots on the north side of the channel, her officers committed other acts of negligence in violation, more particularly, of regulations 28 and 29, which were the cause of or contributed to the collision.

The appellants also took exception to the manner in which the trial judge dealt with the failure of the *Montrose* to remain on the south side of midchannel when changing pilots and I will first deal with this issue.

Rule 25(*a*) of the *Regulations for Preventing Collisions at Sea* reads as follows:

> In a narrow channel every power-driven vessel when proceeding along the course of the channel shall, when it is *safe* and *practicable,* keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel. (Italics are mine.)

To say that it would have been safe to stay on the starboard side of midchannel when changing pilots is, I think, an understatement. There is no suggestion in the record that it was in any way impractical for the pilot boat to meet the *Montrose* south of midchannel, although to do so might

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have entailed a little loss of time to the pilot concerned. The trial judge found that the change of pilots was at the place and in the manner which is usual. Jean-Paul Blouin, pilot of the *Montrose,* testified that the change is normally made a little north of the center line, but not much. The respondents, by effecting this change, particularly at night and in a busy narrow channel, at a point about one cable to a cable and a half (600 to 900 feet) north of center, were, I think, taking liberties with a so-called custom which has no official sanction, especially since by doing so they were violating rule 25(*a*) of the *International Rules of the Road,* as the *Regulations for Preventing Collisions at Sea* are generally known. A custom established by downbound pilots for their own convenience should, in my opinion, give way to the requirements of public safety. Circumstances alter cases and what might be done with relative impunity in broad daylight and during periods of light traffic could become dangerous in conditions such as existed in the instant case.

The trial judge expressed the opinion that the fact of changing pilots somewhat north of midchannel cannot be considered to have been a cause contributing to the collision. If this were the only fault and there were no other subsequent acts of negligence ascribable to the *Montrose,* I would not be disposed to interfere with the above-mentioned finding.

It is, however, a well recognized principle in maritime collision cases that a vessel guilty of initial negligence has to establish that she did everything she could to prevent the consequences of such negligence before she can claim that the other vessel is the sole cause of the accident. Lord Moulton, in *S.S. Alexander Shukoff v. S.S. Gothland. S.S. Larenberg v. S.S. Gothland*[1], stated:

> The ship guilty of the initial negligence remains bound to do everything that she can to prevent the consequences of that negligence, and the burden upon her is to show that she has done so before she can claim that the negligence of the other ship is the sole cause of the accident.

Rule 28(*a*) of the *Regulations for Preventing Collisions at Sea* reads in part as follows:

> When vessels are in sight of one another, a power-driven vessel under way, in taking any course authorized or required by these Rules, shall indicate that course by the following signals on her whistle, namely:—
>
> One short blast to mean "I am altering my course to starboard."

[1] [1921] 1 A.C. 216, 246.

That the *Montrose* two minutes before the collision altered her course from 024° to 035° without signalling on her siren is not contested. The evidence of those in charge of her clearly shows she failed to do so. *Montrose* on first sighting the green light of *Donnacona II,* when the latter was still three or four cables away, should have immediately signalled and slackened her speed. It is interesting to note that mate Beaudette said in his testimony that, if he had heard the *Montrose's* signal when he was lower down river, he would have taken other action than he did. With another vessel in sight bearing down on her, the failure of the *Montrose* to signal promptly increased the risk of collision and constituted, I think, a serious fault.

The respondents alleged that a sharp look-out was being maintained on the *Montrose* but the admissions of those in charge of her show that no proper look-out was being maintained as required by rule 29 of the *Regulations for Preventing Collisions at Sea.*

According to Captain Urquhart, the master, immediately after the pilot's launch had cleared the ship's side, because it was a clear night he left the bridge and went to his room and two minutes later he felt the impact of the collision which appeared to be heavy and the ship shuddered.

Pilot Blouin who stated that he first sighted the white light of what proved to be the *Donnacona II* at a distance of approximately a mile suddenly saw her green light when she was only a few cables away. I might here interpose that pilot Blouin's statement that he took no action because he thought that the appearance of the green light was due to a sheer is irreconcilable with his statement that at no time did he see her red light.

Edward Kempton, during whose watch the collision occurred, testified that he was not in the wheelhouse; he was busy making entries in the deck engine movement book and, until he suddenly heard the pilot exclaim hard-a-starboard and order one sharp blast, he had not seen the green light of the *Donnacona II* and at this time she was about 100 yards away.

Seaman Nevin, who was supposed to be acting as look-out, instead of being on the bridge, according to his own evidence, was busy putting away the pilot's luggage and preparing tea for the officers.

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Only wheelman Fox's evidence remains to be considered and he stated he did not see the masthead and green light of the *Donnacona II* until just before the collision and after the *Montrose* had blown a short blast signal.

Marsden's Collisions at Sea, 1953, Tenth Edition, at page 566, states:

> If a ship is proved to have been negligent in not keeping a proper look-out she will be held answerable for all the reasonable consequences of her negligence.

An infringement of a regulation having no possible connection with the collision must be disregarded and there is no presumption that a breach of the rules constitutes a contributory cause of the collision; but here the breaches complained of and clearly proved had the effect of materially increasing the danger and risk of collision. It is worth adding that admittedly the *Donnacona II* was navigating with a flood tide current of two knots and that on account of this she was entitled to receive preferred consideration at the hands of the *Montrose.*

Leaving aside the fact of the *Montrose* being north of midchannel, which the trial judge considered did not contribute to the collision, I am convinced as are my two assessors, whose assistance I very much appreciate, that the faults above described, and particularly the violation of rules 28 and 29 by those in charge of the *Montrose,* constituted negligence which in a measure contributed to the collision.

For the foregoing reasons, with respect and reluctance I find that there was common fault of which I would attribute 75% to the appellants and 25% to the respondents. The appeal is allowed with costs, and the judgment appealed from will be varied accordingly.

The costs in the Admiralty District Court will be apportioned in the same manner as the liability, so that the solicitors for the plaintiffs-respondents shall be entitled to 75% of their costs and the solicitors for the defendants and counter-appellants to 25% of their costs. The amount of the damages suffered by the respective parties is referred to the district registrar for assessment.

Judgment accordingly.

BETWEEN: 1961 Mar. 27 Apr. 13

WORLD WIDE AIRWAYS INC. ....SUPPLIANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Practice—Contested inscription on confession of judgment—Exchequer Court General Rules and Orders, rule 104.

Held: That judgment may be entered according to a confession of judgment filed under rule 104 of the General Rules and Orders of this Court only if such confession has been accepted by the plaintiff. The so-called confession is nothing more than an offer to confess judgment, which upon the plaintiff's refusal becomes of no avail and works no change in the ordinary mode of procedure.

MOTION to inscribe judgment for that part of the suppliant's claim confessed to under Exchequer Court General Rules and Orders, rule 104, without prejudice to suppliant's right to proceed against the respondent for the balance claimed in the Petition of Right.

The motion was heard before the Honourable Mr. Justice Dumoulin at Montreal.

J. M. Schlesinger for the motion.

P. M. Ollivier contra.

DUMOULIN J. now (April 13, 1961) delivered the following judgment:

A twofold motive impels me to depart from the customary practice of summarily deciding motions such as the instant one without adding any notes.

Firstly, the matter of opposing an inscription on confession of judgment has very seldom if ever arisen before this Court.

Secondly, when hearing the argument raised by respondent's counsel, I expressed, in somewhat unambiguous terms, serious doubts concerning its legal soundness. A subsequent analysis of rule 104 leads me to a different conclusion.

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——
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Briefly put, suppliant having sued the Crown in an amount of $110,195.30, was served, on respondent's part, with the following confession of judgment:

The Deputy Attorney General of Canada, on behalf of Her Majesty the Queen, the Respondent herein, confesses judgment for the sum of $5,495.56, together with the costs of an action of that amount, to be taxed.
Ottawa, this 13th day of February A.D. 1961.

E. A. Driedger,
Deputy Attorney General.

Within the fortnight prescribed by rule 104, suppliant notified respondent that the confession of judgment was refused, filing on February 21 an inscription for judgment in the amount confessed, viz: $5,495.56, without prejudice to its right to proceed for the balance.

Apparently, the learned counsel for suppliant interpreted the relevant rules of this Court as identical with those of the Quebec *Code of Civil Procedure,* specially the fourth paragraph of Article 530, reading:

When the confession is not accepted, the plaintiff, without waiting for the result of the trial, may nevertheless obtain judgment for the amount mentioned in the confession, and may proceed to the execution of such judgment within the legal delays, and the action for the balance is proceeded with in the ordinary manner.

Under this procedural system a confession of judgment even though refused is final, irrevocable, beyond the trial judge's amending reach. I previously indicated my initial, albeit guarded impression, that our particular rules were of like effect. In the light of Rule 104, such an opinion now appears untenable and I quote:

104 The defendant may at any stage of the proceedings in an action, file in the office of the Registrar a confession of judgment either for a part or the whole of the plaintiff's claim; and the plaintiff may, at any time within fifteen days after he has received notice of such confession, file a statement in writing of his acceptance or refusal of such confession of judgment, *and in the event of acceptance the Court or a Judge may order that judgment be entered accordingly* (italics are mine throughout).

In the event of the plaintiff giving notice within the time limited to the defendant of his refusal of *the offer to confess judgment* the case shall proceed to be heard and determined in the ordinary way.

In the latter context, two propositions are clearly set out:

(*a*) that judgment may be entered according to the confession of judgment only if the latter has met with plaintiff's acceptance, and,

(*b*) the so-called confession, far from having any degree of finality, is nothing more than *"an offer to confess judgment"*, which upon plaintiff's refusal, becomes of no avail and works no change in the ordinary mode of procedure.

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For the reasons above the inscription is dismissed with costs against suppliant in all issue of the case.

Judgment accordingly.

HER MAJESTY THE QUEEN ....PLAINTIFF;

AND

FOREST PROTECTION LIMITED ....DEFENDANT.

1960 June 20, 21, 22, 29

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Crown—Action to recover damages for loss of fish caused by spraying operations to kill bud worms—Negligence of defendant's employees in carrying on spraying operations—Volenti non fit injuria—Crown not bound by estoppel—Consent of Minister lacking—No evidence to warrant application of doctrine of estoppel in equity—Damages—No direct damage to plaintiff though inconvenience to public—Agreement between Province and Dominion—The Fisheries Act, R.S.C. 1952, c. 119, s. 33(2).

The action is brought by the Crown to recover from the defendant damages in the sum of $5,674.01 alleged to have been caused by the negligence of employees or servants of the defendant in spraying from an aircraft the Miramichi hatchery located on property of the plaintiff, and the headwaters of a brook which runs through the owner's property, with a substance poisonous to fish, resulting in the poisoning and death of a number of small trout and salmon. Plaintiff also pleads contravention of the *Fisheries Act*, R.S.C. 1952, c. 119, s. 33(2) prohibiting the pollution of waters containing fish, or the escape of a dangerous thing.

The spraying was carried out in an endeavour to extinguish bud worms which were causing heavy damage to the timberlands of New Brunswick. The Government of New Brunswick and the Government of Canada entered into an agreement which provided for the allocation of certain expenditures for carrying out the spraying operations which were carried out by the defendant company, incorporated by the Province of New Brunswick, under the direction of its manager. The agreement also provided that the Province would indemnify and keep harmless the Dominion from all claims of whatsoever nature arising from and out of anything done under the agreement. It also provided that if any question arose as to whether the Province is entitled to payment of the whole or any part of an amount claimed by it under the agreement the Minister of Resources and Development of Canada shall determine the question.

The Court found that the fish had died as a result of eating food thrown in the pools which had become saturated with the insecticide used in the spraying operations.

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Held: That there was no evidence to indicate that the spraying of the area, including the hatchery and plaintiff's property had taken place with the knowledge and consent and the collaboration and support of the Dominion Minister, and in the absence of such consent given by the Dominion Minister with the full knowledge of the risk involved and the area to be sprayed the plaintiff cannot be bound.

2. That the Crown is not estopped from taking the action as asserted by defendant because it had paid the Province its share of the cost of the spraying operations as there is no evidence that payment had been made and on the facts disclosed there is no foundation for the application of the doctrine of estoppel in equity.

3. That since the fish lost had no commercial value and no loss of profit was involved, the destruction of the fish being a source of inconvenience to the public only and not to the plaintiff, the damages would consist only of the cost of the wasted food of the destroyed fish and a certain amount for the disturbance and inconvenience suffered by the plaintiff's employees resulting from the strong and disagreeable odor of the insecticide and the removal of the dead fish.

INFORMATION exhibited by the Attorney General of Canada to recover damages for loss of fish.

The action was tried before the Honourable Mr. Justice Kearney at Fredericton.

H. A. Hanson, Q.C. and *C. T. Gilbert* for plaintiff.

J. F. H. Teed, Q.C. and *A. B. Gilbert* for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

KEARNEY J. now (February 17, 1961) delivered the following judgment:

This is an action in tort instituted by way of information wherein the Crown in the right of Canada seeks to recover damages amounting to $5,674.01. Allegedly these damages were caused by the negligence of the employees or servants of the defendant who, on June 9, 1956, while acting within the scope of their employment, sprayed from aircraft with a substance, which is poisonous to fish, the Miramichi hatchery, located on the property of the plaintiff, as well as its headwaters known as Stewart Brook which flows through the owner's property. As a result small trout and salmon were poisoned and died.

The plaintiff claims the above-mentioned damages on the alternative grounds of a contravention of the *Fisheries Act*, R.S.C. 1952, c. 119, s. 33(2), which prohibits the pollution of waters containing fish; or the escape of a dangerous thing.

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The defendant denies that the spraying in question caused the damages sought and submits that, in any event, it was carried out as part of a program to control the infestation of budworms which were destroying timberlands, particularly in the northern counties of New Brunswick; and asserts that, by a contract which was later renewed, the plaintiff agreed to share with the Province the cost of carrying out the program, and that the defendant which was incorporated at the instance of the Province which, with the approval of the plaintiff, employed it to undertake and manage the operation. Allegedly, the plaintiff was also aware that these operations involved some risk of injury to fish; it assumed such risk and is thereby precluded from claiming damages; finally it is inconsequential whether the spraying caused the destruction of a certain number of fry, as such destruction entailed no monetary loss to the plaintiff, the only possible loss being sustained by a section of the public who in later years might have caught these fish.

According to the evidence, lumbering is the main industry of the province of New Brunswick, rich in timberlands largely consisting of spruce and fir trees which are manufactured by various corporations into pulp, paper and lumber. About 1949 several such corporations within the province observed that their timber holdings were suffering from insects known as the spruce budworms, which destroyed the trees by feeding on their foliage.

In the course of the year 1952, one or more of the corporations, with a view to controlling the infestation, conducted apparently with success experimental spraying of the infested portions of their timber limits with an oil solution of DDT. The Province which owns some 10,000 square miles of timberlands later agreed to join the pulp and paper companies in a more extensive spraying project. The federal government was requested to lend aid and, after an exchange of correspondence between the then Minister of Resources and Development of Canada and the then Minister of Lands and Mines of the province of New Brunswick, the Government of Canada, subject to the conclusion of a mutually satisfactory written agreement, consented to lend financial assistance to the extent of one third of the cost of the operation on the understanding

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that the Province, which was assured of assistance from interested pulp and paper companies, would assume the other two thirds of the cost. The two Ministers concerned, being duly authorized by appropriate Orders in Council, signed a memorandum of agreement (Ex. B), dated April 28, 1953, wherein the Government of Canada was referred to as "Canada," and the Government of the province of New Brunswick as the "Province." This agreement provided *inter alia* that the contribution of Canada, not exceeding $3,000,000, applied to spraying expenditures between September 13, 1952, and March 31, 1956, both dates inclusive; that in connection with the spraying the Province was to furnish the federal Minister with such plans, programs and other information as he might require and afford him every facility for inspection and examination of work.

The concluding paragraphs of the agreement read as follows:

> 4. Where any question arises as to whether the Province is entitled to payment of the whole or any part of an amount claimed by it under this Agreement, the Minister shall determine the question.
>
> 5. This Agreement shall not be construed so as to vest in Canada any proprietary interest in any project.
>
> 6. The Province will indemnify and save harmless Canada of, from and against all claims of whatsoever nature arising from and out of anything done under this Agreement.

In September 1952 the Province proceeded to incorporate the defendant company under the *New Brunswick Companies Act*, R.S.N.B. 1952, c. 33, for the purpose of undertaking and managing thereafter the proposed aerial spraying operations. Of the 100 shares of the defendant's capital stock, 92 were issued to Her Majesty in the right of the Province or to nominees in her employ in order to qualify them as directors, and the remaining 8 shares were issued to the nominees of certain corporations interested in the operation.

During the years 1953, 1954, 1955 and a short period in 1956, the defendant caused spraying and respraying operations to be carried out in the northern sector of New Brunswick, over an area of approximately 4,000 square miles, as appears in color on a hazard map (Ex. G) and a later edition thereof filed as exhibit 17.

During these spraying seasons no controversy arose between the plaintiff and the defendant or the Province. In the summer of 1955 it was observed that the infestation had spread south beyond the limits of the area covered by the 1953 agreement, and the Province requested the plaintiff to extend the limits of the area to be sprayed, as well as the expiry date of the said agreement which would otherwise have been terminated on March 31, 1956.

In a letter dated May 3, 1955, included in exhibit F, and addressed to then Minister of Lands and Mines, Fredericton, N.B., the then Minister of Northern Affairs and National Resources stated that, subject to cabinet approval, he was favourably disposed to extend the agreement for a period of three years, provided the total cost to the federal government for past and future spraying did not exceed the original amount of $3,000,000. As appears by further letters exchanged between the two above-mentioned Ministers, the federal cabinet approved the proposed extension and it was mutually agreed to set no limits on the area to be sprayed, on the understanding that the program for each year would be subject from time to time to the approval of representatives of the two governments concerned.

The new agreement dated August 24, 1955, was filed as exhibit D, and it is on this agreement that the defendant relies. There is an essential difference, expressed it is true in very few words, between the two contracts: the second contains a provision to the effect that the aerial spraying operation was to be carried out "on such areas in New Brunswick as may be agreed upon from time to time by Canada and the Province."

The defendant also raised the question whether the death of the fish was due to their contact with the insecticide or to such other factors as overcrowding and natural causes. I will deal with this question before examining the defence of prior consent and knowledge which I regard as the main issue.

The Miramichi hatchery is located on a relatively long and narrow strip of land consisting of some 275 acres, owned and occupied by the plaintiff in the name of the Minister of Fisheries. It is situated in the parish of South

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Esk, Northumberland County, and fronts on the Northwest Miramichi River, at a point where Stewart Brook running through the property from south to north empties into the river. The property is shown between red lines on an aerial photograph (Ex. 11) and on an enlargement thereof (Ex. 15). The large photograph also shows clearly the hatchery dam which creates a pond, twelve feet deep, from which a fourteen inch intake pipe and smaller separate pipes run to the hatchery proper and rearing ponds. A large salmon pond, in which no loss of fish occurred, may be seen near the mouth of the brook. A close-up of the dam is shown on exhibit H-1; and the rearing ponds, the hatchery and other buildings are similarly shown on exhibit H.

The defendant had by contract (Ex. 5) engaged the services of Wheeler Airlines Ltd., including planes and pilots, but the operation was under the direct supervision and control of Mr. B. W. Flieger, manager of the defendant company. Since the operation in issue involved new territory, it was necessary to construct a new airstrip called Dunphy (Ex. 3). The spraying on June 9 which was a continuation of the operation commenced on June 6 was carried out by a fleet of 16 to 18 airplanes working in pairs. The blocks sprayed on June 9, numbered 455 to 460 inclusive, are shown on a large scale detailed map filed as exhibit 4. The areas marked in yellow, one of which was immediately east and another immediately west of the hatchery, were not to be sprayed. It will be seen that the Miramichi hatchery, designated by the words "Fish Hatchery," and a section of Stewart Brook constitute the dividing line between blocks 459 and 460 and fall within the area to be sprayed. In each of the four blocks two spray planes operated simultaneously during the course of a single morning, spreading a mixture of one pound of DDT to one gallon of heavy lubricating oil. Consequently Stewart Brook, from where it takes its rise at Crocker Lake to its mouth at the hatchery, including that part of the course which lies within the 275 acres belonging to the plaintiff, was subjected to concentrated spraying of a mixture which the evidence shows was unquestionably deleterious. The team in block 460 testified that they sprayed the

headwaters right up to the hatchery but that they refrained from flying directly over the hatchery. There is proof that a film of oil lay on the pond above the dam.

According to the evidence a strong wind can cause the spray to drift up to two or three miles. It is true that on June 9 the wind was light but it was sufficient to waft the spray onto the roofs of automobiles stationed at the hatchery and the surface of the outdoor pools notwithstanding that these were partly covered by wooden sun shades. Rain which fell later in the day washed the insecticide off the sun shades and it dripped into the pools. It is proved that prior to the spraying fish food had been thrown into the pools and, as it floated on the water, it became saturated with insecticide, and that the fish then fed upon it and died in great numbers. The casualties among fish a year old, or more, were light. The younger the fry, the heavier was the loss. The hatchery was completely enclosed and no spray fell on its waters, but contaminated water reached it through the intake pipe.

Mr. M. N. Jordan, superintendent of the hatchery for twelve years, and his assistant, Mr. T. I. Mullin, Dr. Miles Keenleyside and Dr. C. J. Kerswill, scientists with the Fishery Research Board of Canada, described the method employed in counting the casualties and they attributed the cause of death to insecticide poisoning.

I have no hesitancy in concluding that the spraying operation carried out by the defendant on June 9 caused the death of a large number of fingerlings. As a matter of fact counsel for the defendant, while claiming that other causes played their part, conceded that a considerable number of small fry died as a result of the spraying.

I will now deal with the defence that the spraying took place with the knowledge and consent, and indeed with the collaboration and support of the plaintiff which was aware of the risks and dangers involved. If there is sufficient evidence to substantiate this defence, then in my opinion the maxim *volenti non fit injuria* is applicable and the information should be dismissed.

The plaintiff submitted that any consent given by anyone except the Minister of Northern Affairs and National Resources who signed the agreement (Ex. D) would not suffice to bind Canada. Certainly there is no suggestion in

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the evidence that the Minister of Lands and Mines who signed exhibit D for the Province sought in writing or otherwise the consent of the first mentioned Minister to spray the area including the plaintiff's property; and Mr. Flieger admitted that he never sought or attempted to seek such consent. Evidence is also lacking that the Minister of Northern Affairs and National Resources knew what particular areas were to be sprayed and that, included therein, were Stewart Brook and the hatchery.

Leaving aside the question of consent at ministerial level, I think that, even if it were proved that a lesser official such as Dr. Webb had power to give a binding consent, the defendant would have to establish that such official did so with full knowledge of the risk and danger entailed. It is stated in *Clerk and Lindsell on Torts,* 11th edition, p. 57, with respect to the doctrine *volenti non fit injuria*:

> The maxim must not be taken literally, and like other Latin maxims is apt to mislead. The question primarily is whether the plaintiff knew of a risk and then submitted himself to it. The emphasis, therefore, is upon the knowledge of the plantiff: "if the defendants desire to succeed on the ground that the maxim *volenti non fit injuria* is applicable they must obtain a finding of fact that the plaintiff voluntarily and freely with full knowledge of the nature of the risk he ran impliedly agreed to incur it." Therefore, there must be both knowledge and consent.

The defendant submitted that the spraying operation of June 9 was not exclusively under its control and that representatives of the plaintiff, more particularly Dr. Webb and Mr. Elwin Doyle who is attached to the Department of Northern Affairs and National Resources, agreed to the spraying in issue. Chief among the witnesses called by the defendant in support of this submission were Mr. Kenneth B. Brown, acting Deputy Minister of Lands and Mines of New Brunswick, Dr. Webb (Mr. Doyle was ill and was not called) and Mr. Flieger. Mr. Brown testified that prior to 1956 it was the custom of the Province to accept the recommendations of officers of the Department of Agriculture as to the areas which were to be sprayed; and that at a meeting of officials of the defendant held in Fredericton on August 17, 1955, and called for the purpose of discussing the spraying program for 1956, Dr. Webb recommended that it should include new scattered high hazard areas south of the Northwest Miramichi, the limits of

which are indicated by a pencilled red line extending from Bramsfield to the figure 66-00 on exhibit G which had been prepared under the direction of Dr. Webb. The locations of Stewart Brook and the hatchery are not indicated by name on exhibit G, but they appear clearly on exhibit 4 which was prepared by the defendant company and used on June 9, 1956. Dr. Webb, in his capacity of entymologist and research officer, testified in substance that each year his department carries out surveys of forest insect conditions across Canada, and that extra work and extra attention were given to the outbreak of budworm infestation in New Brunswick; that his department voluntarily furnished to the Province and the defendant company the results of his observations of the intensity of the infestation; that neither he nor anyone in his department was in a position to give any permission or consent to spray the plaintiff's property and, as might be expected, he was never asked for such consent. He acknowledged that at the meeting of August 17, in the course of a verbal report, he informed those present that there were high hazard stands of timber south of the Northwest Miramichi which, he suggested, should be sprayed in 1956; but that at the time the large scale map (Ex. G), on which were later marked the boundary lines of light hazard patches in the new area beginning on the south shore of the Northwest Miramichi, the South Esk area, Stewart Brook, and the hatchery, was not available, much less a detailed map such as exhibit 4 which included such information; that although he expected to receive it, at no time, save immediately prior to the spraying on June 9, 1956, did he see any map such as exhibit G; and that until then he was unaware of the existence of the hatchery.

Laches cannot be set up against the Crown and, even if Dr. Webb should have known, or did know, that the hatchery lay within the new area to be sprayed, as indicated on exhibit G, and consented to its spraying, in my opinion such consent could not bind the plaintiff. Ritchie, C.J., in *The Queen v. Bank of Nova Scotia*[1], said:

> As the Crown cannot be prejudiced by the misconduct or negligence of any of its officers, so neither can an officer give consent that shall prejudice the rights of the Crown.

[1] (1885) 11 Can. S.C.R. 1, 11.

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I think that the defendant has failed to prove that any representative, whether qualified to do so or not, gave a consent, with knowledge of the risk entailed, to spray an area which included the plaintiff's property. I consider it was an act of negligence on the part of the defendant to carry out, in the absence of this consent, such heavy and concentrated spraying on a narrow stream like Stewart Brook, near such a vulnerable object as a hatchery. Mr. Flieger failed to procure the prior consent of the Minister of Northern Affairs and National Resources to spray Crown property possibly because he did not realize that exhibit D, unlike exhibit B, contained a provision requiring the prior consent of Canada; or because he thought such consent unnecessary, being convinced that the operation could be carried out with impunity. He testified in this respect, both on discovery and at trial, that according to his experience the spraying of the plaintiff's property could be done without appreciable damage to fish at the hatchery or in the brook. While Mr. Flieger's lack of knowledge, or mistake, would negative any suggestion that mischievous "buzzing" of the hatchery took place, yet it could not serve to exculpate the defendant.

I might here interpose that, in my opinion, the evidence indicates that there was a lack of coordination and foresight on the part of various officers of the plaintiff who usually attended directors' meetings of the defendant company. It is noteworthy that in 1954 it was well known (Ex. 12) that a fishery belonging to the Crown was sprayed by the defendant with ensuing heavy fish mortality, yet it was not until after the June 9, 1956, spraying that the plaintiff required from the Province an undertaking that thenceforth spraying of hatcheries and their headwaters would be discontinued. I think the plaintiff was entitled to rely on the provision in exhibit D, which required the Province to seek the plaintiff's prior approval from time to time to spray certain areas; but, had the plaintiff taken the same precaution in 1955 as was taken two years later, it is unlikely that the damages now claimed would have arisen.

In argument, counsel for the defence raised the plea of estoppel, based on the fact that the plaintiff paid the Province for its share of the South Esk spraying operation.

There is no evidence as to when payment was made; but if it took place after November 2, 1956 when the present information was filed the defence of estoppel could not be raised. Paragraph 4 of exhibit D unquestionably gave to the plaintiff a very wide discretionary power to pay only such part of any spraying bill as it might determine. I think it could have refused to contribute anything towards the cost (which must have been considerable) of the June 9 spraying operation. Because the plaintiff refrained from using this very wide power, I do not think the defendant suffered any prejudice and that the reverse is probably true. In any event, there is no evidence of prejudice before me. It is well established that estoppel by deed cannot be invoked against the Crown; and I do not think that on the facts of the case there is any foundation for the application of the doctrine of estoppel in equity, or in pais as it is often called.

The *quantum* of damages remains to be assessed. Mr. F. Stapleton, administrative officer of the Department of Fisheries, testified (Ex. 10) that the stock of fish on hand June 9, 1956, totalled 3,638,137; that 979,179 deaths were recorded between June 10 and June 17, of which 7,179 can be ascribed to natural causes; that therefore 972,000 fish, or 26.7% of the total number, died because of the budworm spraying. The witness then stated that the plaintiff's total 1955-56 expenditures at the hatchery, less $4,274.13 spent in connection with the salmon pond where no losses had occurred, amounted to $20,368.96; and that by taking 26.7% of this amount, he arrived at the figure of $5,438.51 which in his opinion, represented the monetary loss suffered by the plaintiff.

By their very nature the circumstances of this case are, in my view, such that they limit the extent of any monetary loss suffered by the plaintiff to a relatively negligible amount. The fish that were lost had no commercial value to the plaintiff : they were not for sale and there could be no loss or profit involved. The small fry serve to restock the streams and rivers, and the destruction of nearly one million of them could cause loss or inconvenience, not to the plaintiff, but to the public, and only to those persons who years later might have caught them.

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The reasoning applied in *Gartland Steamship Co.* v. *The Queen*[1] is, I think, applicable in this case. Judson, J., in delivering the judgment of the majority, said:

> To me this item of damage for which the Crown seeks compensation is better described as public inconvenience rather than loss of use. For a short time, until the so-called temporary span was put in, pedestrian and vehicular traffic suffered inconvenience but the Crown *suffered no monetary loss*. The same may be said of loss of use of the north channel. If it had been thought wise to replace the span, the work would have taken one year. There was, therefore, a theoretical loss of use of the north channel for shipping during this period. But the loss of use is again really *public inconvenience and not monetary loss to the Crown*. . . . .
> The Crown has been fully compensated for all its loss without this item. (Emphasis supplied)

The plaintiff does not claim the replacement value of the stock which was allegedly lost and there is no evidence in the record which would support such a claim. The plaintiff's entitlement to the amount claimed depends on the proof that less expenditure would have been entailed with 900,000 fewer fry at the hatchery. There is no suggestion that fewer men would have been employed or that employees would have been paid less. I consider that, had there been approximately one million fewer fingerlings to feed, there would have been a saving on food costs; and Mr. Stapleton filed as exhibit 9 reports showing the age of the young fish, and the weekly cost of feeding as $28. I have calculated that the average age is 7.26 weeks and that wasted food represents some $120 in round figures.

There is also proof that during a fortnight the strong and disagreeable odor of the insecticide and the removal of dead fish in large quantities imposed a messy task and an unusual burden on the plaintiff's employees, and as compensation for the disturbance and inconvenience thus suffered I would allow $380.

I think that the two above-mentioned sums constitute the only monetary losses which the plaintiff has proved, and for the foregoing reasons I consider that the defendant should be required to pay to the plaintiff $500 and costs.

Judgment accordingly.

[1] [1960] S.C.R. 315, 327.

BETWEEN:

1960 June 9

IRA D. ARCHIBALD ....APPELLANT;

1961 Mar. 30

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income or capital profits—Income Tax Act R.S.C. 1952, c. 148, s. 139(1)(e)—"Business"—Taxability of profits made on disposal of land acquired in exchange for a capital asset instead of cash—Appeal dismissed.

Appellant, a lumberman, in 1954 traded a tractor used by him in his lumbering operations for a tract of land situated in a newly opened district on the outskirts of a town, which was held until it increased in value four-fold. In 1956 he subdivided the land and sold one lot, the proceeds of which sale were added to his taxable income for the year 1956 by a reassessment made by the Minister. An appeal to the Tax Appeal Board from such reassessment was dismissed from which decision appellant now appeals to this Court.

Held: That the appellant had the realisation of profits in mind when he acquired the property and at the time of acquisition he had the intention of subdividing it and selling the lots.

2. That the appellant exchanged a piece of machinery forming part of his working capital for land which had no relation to his regular business and could not be used for the purpose of producing income by any other means than sale, and the transaction, while outside the scope of appellant's regular business, nevertheless constituted an adventure in the nature of trade.

3. That the fact that appellant instead of paying cash for the land gave a tractor in exchange for it does not constitute the resultant profit a capital gain not subject to taxation.

4. That the appeal must be dismissed.

APPEAL from the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Kearney at Halifax.

H. B. Rhude for appellant.

E. S. MacLatchy for respondent.

The facts and question of law raised are stated in the reasons for judgment.

KEARNEY J. now (March 30, 1961) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board dated June 18, 1959[1] which affirmed a reassessment made by the respondent dated October 7, 1957, whereby

[1] (1959) 22 Tax A.B.C. 196.

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the appellant was required to add to his taxable income for the year 1956 the proceeds from a sale of land amounting to $3,000 which he had failed to include therein.

The appellant submits that the amount in question constitutes a capital gain and is consequently non-taxable and the respondent contends that it is taxable income under ss. 3 and 4 of the *Income Tax Act,* R.S.C. 1952, c. 148, because it was derived from a "business" within the meaning of s. 139(1)(*e*) which states:

In this Act,

"business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment.

The facts are not in controversy and the issue depends upon the manner of their appreciation and the inferences to be drawn from them. The appellant for more than fifteen years has carried on his business for his own account as a lumberman and a lumber manufacturer. In 1951 he purchased an Allis-Chalmers HD-5 tractor for $11,599, mainly for the purpose of road building and logging operations. In 1954 he traded the tractor for a piece of property which was susceptible of being divided into about a dozen ordinary lots, forming part of a new residential development project on the outskirts of the town of Dartmouth, N.S., which was being undertaken by Frank M. Leaman Limited.

According to the appellant he wanted to quickly realize cash and, as there was no ready market for his tractor on a cash price basis and he no longer required it in his business, he thought it advisable to trade it for the lots. The cash value of the tractor was $4,000 and the appellant's auditor, who was also the auditor of Frank M. Leaman Limited, placed the same value in the appellant's balance sheet on the lots acquired in exchange. According to the appellant's evidence, he made no effort through advertising, or listing the property with a real estate broker, or otherwise, to dispose of it.

In the spring of 1956 the appellant received an offer of $16,000 for the entire tract of land payable according to his own statement $5,000 or $6,000 in cash and the balance prorated over an unspecified term. The offer was refused because the purchaser was unable or unwilling to pay the entire purchase price in cash. In the summer of 1956 the

appellant engaged a surveyor to subdivide part of the property into three residential building lots and procured the approval thereto from the Planning Board of the town of Dartmouth. The appellant in effecting the above subdivision declared that he had the following facts in mind: his land was in the centre of the Leaman Company's subdivision; the Leaman Company was developing and selling the lots in its subdivision as residential building lots; the appellant had agreed with the Leaman Company to sell the land for residential purposes only; the best method of disposing of his land was to subdivide and sell it as residential building lots. The last mentioned state of mind is the only one in which the appellant makes any inferential reference to the profit motive.

In 1956 the appellant received an unsolicited offer from his brother-in-law to purchase one of the building lots for $3,000 cash, on which he made a profit of $2,629.67, and it is the above transaction which forms the basis of this appeal. It is also in evidence that in 1957 he sold the two remaining lots for $3,500.

Counsel agreed that the evidence taken before the Tax Appeal Board would form part of the record in the present appeal, subject to the appellant's right to offer further evidence during the hearing. On June 9, 1960, the appellant testified before me that he had decided not to subdivide the remaining portion of his lands and had arranged to dispose of them *en bloc* for an undisclosed figure.

A somewhat new issue is raised in this case inasmuch as the appellant acquired the instant land by exchange instead of purchase, but otherwise, except perhaps in degree, it is much like other cases involving speculation in real estate which have come before this court with increasing frequency.

Counsel for the appellant in argument realized that in a case of this type, in order to succeed, the appellant must discharge the burden of proof which the assessment or reassessment made by the Minister casts upon him. He also recognized that to do so he must first convince the court that it was not the appellant's original intention to acquire the property in order to dispose of it at a profit; secondly,

regardless of his original intention, that he did not in fact do those things which in themselves constitute carrying on a business.

Dealing first with the profit motive, it is true that at no time did the appellant declare or admit that he acquired the property with the intention of realizing a profit on it quickly or otherwise.

The appellant testified that his main if not his only purpose in acquiring the land was to realize cash and to put himself in the same position as if he had sold the tractor for cash in the first place. Actions speak louder than words, and it has frequently been held that in circumstances similar to those with which we are concerned the initial declaration of intent should be accepted with caution and close scrutiny made of how far the subsequent deeds of the taxpayer were consistent with such declaration. See the judgment of the learned President of this court in *Minister of National Revenue v. Louis W. Spencer*[1]. One would expect that the appellant, when he apparently thought that his chances of securing cash for vacant land in a new development were brighter than by attempting to sell his tractor, would have taken all reasonable means at his command to effect such a sale. The proof shows he made no effort whatsoever to do so and that apparently with deliberation he refrained from soliciting sales and declined to advertise the property or put it in the hands of real estate agents for disposal.

The offer of $16,000 for his property *en bloc,* which he received in 1956, if he had accepted it, would have placed him in a position to realize eventually four times the value of the tractor and to obtain immediately $1,000 more than if he had sold it for $4,000 cash. His reason for declining the above offer was that the subdivision of his lots, or some of them, allowed him to sell his property to still better advantage. In my opinion, the circumstances described indicated that, far from being indifferent to a realization of profits, the appellant had this purpose in mind when he acquired the property, and at the time of acquisition he had the intention of subdividing it and selling the lots.

[1] (1961) 61 D.T.C. 1079; [1961] C.T.C. 109.

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The appellant admittedly never had any intention of keeping the lots which yielded no revenue and were certainly not an ordinary investment. The speculative nature of the transatcion appears from the fact that the land was situated in a newly opened district on the outskirts of a town and, if the subdivision met with public favour, afforded prospects of extraordinary profit.

The next and, I think, the most difficult aspect of the case is to determine whether the transaction bore sufficient of what Ritchie J., in *Chutter v. Minister of National Revenue*[1], quoting Lord Radcliffe, described as "the badges of trade." If, instead of going through the process necessary to create a subdivision, the appellant, figuratively speaking without lifting a finger, had accepted the $16,000 offer for his property, the transaction in my opinion would have been shorn, to say the least, of an important "badge of trade."

It would be exaggeration to say that, when the definition of "business" was extended to include "an adventure or concern *in the nature* (emphasis mine) of trade," it provided a catch-all clause but it certainly encroached on the field of tax free capital gains. See *Minister of National Revenue* v. *Louis W. Spencer* (*supra*), p. 16; also *Minister of National Revenue v. Taylor*[2]. It is also a well established principle that, in endeavouring to determine whether a transaction constitutes a non-taxable realization or change of investment, or is taxable gain made in carrying out a scheme of profit-making, each case must be considered according to its facts and that it is impossible to lay down a test to meet all circumstances. See the *Spencer* case (*supra*), pp. 22 and 23 and the other cases therein cited.

I think the instant transaction can be regarded in respect of *previous* transactions as an isolated one. It is true that on two or three previous occasions the appellant had engaged in real estate transactions. In 1956 he sold his farm which he had owned and operated for fifteen years. In 1954, in the course of his lumbering business, he acquired a piece of land for the purpose of cutting Christmas trees. When the cut was completed he deeded it to a man who had helped with the cutting in exchange for his services.

[1] [1956] Ex. C.R. 89, 92. [2] [1956] C.T.C. 189, 210.

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He observed that in 1953 he acquired some other timber lands which he retained after the trees had been removed. It would be futile to suggest that these transactions were in the nature of a real estate speculation or did not occur in the ordinary course of the appellant's lumbering operations.

As stated by Ritchie J. in *Rosenblat v. Minister of National Revenue*[1], in judging the appellant's course of action, transactions subsequent to the one in issue may be considered. The evidence shows that a subsequent sale similar to the one made in 1956 took place in 1957. Hence the instant sale is removed from the single case category. The appellant was asked before the Tax Appeal Board if, apart from the subdivision he had made of three lots, he intended to subdivide the balance of the property; and he stated that before deciding he would have to reconsider the question. The fact that in 1960, after his transaction in 1956 had been made subject to tax, he decided not to subdivide the remainder but sell *en bloc,* in my opinion occurred too long after the transaction in issue to have any bearing on the present case.

It can be said in favour of the appellant that there is no evidence which proves that he himself built roads, installed water service and sewers, or built and sold finished houses; and there is proof that, instead of initially subdividing the whole of the property, two years after he bought it he made a subdivision of only three lots, and in 1960 arranged to sell the remainder unsubdivided and *en bloc.* On the other hand the proof shows that, just prior to the time the three lots were municipalized, the Leaman Company had installed water and sewage pipes close to three of the appellant's lots, which made it practical for him to subdivide them, and no doubt the piping and cost of connecting-up these and like facilities were included in the price paid by the appellant for the lots, or in taxes, or in both.

The appellant himself arranged for the preparation of a plan of subdivision and had three lots staked out by a surveyor and procured the necessary approval thereof from the municipal authorities. I might add that the appellant's inconsistent and unconvincing explanation of why he made no effort to sell his properties prompts me to examine the

[1] [1956] Ex. C.R. 4, 12.

circumstances with a view to ascertaining if they gave rise to a reasonable presumption which would explain this apparent inconsistency. The circumstances are such as one might reasonably presume that there was little need for the appellant to spend money in advertising. The Leaman Company owned hundreds of lots in the neighbourhood of the appellant's property and carried on an extensive sales campaign by advertising and the appellant received benefit from it because the greater the sales made by the company, the fewer were the lots remaining available to purchasers, and the appellant's chances of effecting a sale were improved.

If the appellant had a tacit understanding with the Leaman Company, not to put his lots on the market while the company had hundreds of its own for sale, which seems logical, this presumption would furnish a likely explanation for what otherwise appears to be an incongruity, namely, that the appellant while needing cash refused to make any effort to raise it by selling his property.

The appellant placed a good deal of reliance on the judgment of Hyndman J. in the case of *McGuire* v. *Minister of National Revenue*[1], wherein the learned trial judge held that it did not matter whether the appellant sold his property as a whole or as a half in fifty pieces because in any event the transaction was not subject to tax. It should be noted, however, that McGuire had purchased the property for a home, had lived there nine years and, while continuing to live on it, decided to sell a corner of his property which he did not need, only to find that the municipality would not permit the sale unless the piece to be sold was subdivided. Hyndman J. clearly stated he was satisfied that when McGuire purchased the property, it was for his own use and benefit, and not as a venture or a speculation, and consequently constituted a capital gain. If the appellant in the instant case had subdivided a portion of the farm where he was born and which he had operated for fifteen years, the McGuire case might possibly have some application. Fournier J., in the recent case of *Algoma Central and Hudson Bay Railway Co.* v. *Minister of National Revenue*[2] held that certain governmental land

[1] [1956] Ex. C.R. 264, 266. [2] [1961] C.T.C. 9.

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grants received by the appellant should be considered as income and not as true capital gain. I consider that his reasons for judgment are in many respects herein applicable.

The Act does not define a capital gain but I do not think that, because the appellant instead of paying cash for the block of land, which he later sold at a profit, gave a tractor in exchange for it, the resultant profit was a capital gain and not subject to taxation. The appellant exchanged a piece of machinery forming part of his working capital for land which had no relation to his regular business and could not be used for the purpose of producing income by any other means than sale. The appellant declared that he never intended to retain the vacant property and it was not acquired simply as a realization of or change in investment, which could characterize it as a capital gain. Because of the manner already described in which he disposed of the property, the transaction, although outside the scope of the appellant's regular business, nevertheless constituted an adventure in the nature of trade.

In order to succeed, the appellant must bring the evidence which will nullify the assessment made by the Minister, as Rand J. said in *Johnston v. Minister of National Revenue*[1] ". . . the onus was his to demolish the basic fact on which the taxation rested" and this together with the inconsistency of his own explanation of intention, leaves me far from satisfied that he has done so.

For the foregoing reasons I consider that this appeal should be dismissed with costs.

Judgment accordingly.

[1] [1948] S.C.R. 486, 489

BETWEEN:

1960 May 9 — 1961 Mar. 23

UNITED GEOPHYSICAL COMPANY OF CANADA .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Non-resident company—Subsidiary rented equipment in United States from parent company for use in Canada—Whether parent company carrying on business in Canada—Whether subsidiary its agent—Whether equipment payments "rent for use in Canada of property"—The Income Tax Act, R.S.C. 1952, c. 148, ss. 2(2), 31(1), 106(1)(d), 108(9), 109(1), 123(8)(10), 139(7), Income Tax Regulation 805(1).

The appellant company was incorporated in California in 1955 as a wholly-owned subsidiary of the United Geophysical Corporation, another California corporation which supplies geophysical services to oil companies. In May 1955 the appellant assumed the Canadian portion of the Corporation's assets in Canada and assuming its liabilities there. Equipment items of United States origin were not sold but by the terms of a written agreement the Corporation agreed to "rent" to the appellant necessary equipment for use in its Canadian operations. The rental was to be determined in California and to start on equipment leaving any place in the United States. Pursuant to the agreement the appellant in 1955 and 1956 paid the Corporation the sums agreed on as rental for the equipment supplied it by the Corporation. The Minister pursuant to s. 123(10) of the *Income Tax Act* assessed the appellant for the amount of tax he contended it should have under s. 123(8) withheld and paid to the Crown out of the sums it paid its parent company, a non-resident corporation. In an appeal from the assessment the appellant contended that the Corporation carried on business in Canada in 1955 and 1956 and was therefore subject to tax under Part I rather than Part III of the *Income Tax Act*. It submitted that the business carried on in Canada was the Corporation's business and that the appellant acted only as its agent, or in the alternative, that the Corporation itself carried on business in Canada by putting its equipment to use there and deriving income therefrom.

Held: That during the material period the business carried on by the appellant was its own and not that of the Corporation.

2. That the "rental" for the equipment was income from that part of the Corporation's business carried on in the United States and could not be reasonably attributed to any part of the business which may have been carried on in Canada and therefore was not taxable under Part I but under Part III of the *Income Tax Act*.

3. That s. 106(1)(*d*) of the *Income Tax Act* refers to and includes a fixed amount paid as rental for the use of personal property for a certain time and the sums in question were amounts of the kind referred to in the section.

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APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Thurlow at Ottawa.

K. E. Eaton and *R. H. McKercher* for appellant.

G. W. Ainslie and *J. M. Bentley* for respondent.

THURLOW J. now (March 23, 1961) delivered the following judgment:

These are appeals from assessments made pursuant to s. 123(10) of the *Income Tax Act,* R.S.C. 1952, c. 148, against the appellant in respect of the 1955 and 1956 taxation years. By that subsection the Minister is empowered to assess any person for any amount that is payable under that section, and by s-s. (8) of the same section it is enacted that any person who has failed to deduct or withhold any amount as required by the Act or a regulation from a non-resident is liable to pay to Her Majesty the whole amount that should have been deducted or withheld with interest. The assessments under appeal were raised under these provisions in respect of tax which the Minister contends should have been deducted or withheld and paid to the Crown by the appellant on sums of $194,075 and $298,830 paid by the appellant in 1955 and 1956 respectively to its parent company, United Geophysical Corporation, a non-resident corporation.

In order to point out the issues, it will be convenient to refer to some of the relevant provisions of the statute. By s. 106(1), an income tax of 15% is imposed on every non-resident person in respect of every amount that a person resident in Canada pays or credits to him for, *inter alia,* "rent, royalty or a similar payment, including, but not so as to restrict the generality of the foregoing any such a payment for the use in Canada of property." By s. 109(1), when a person pays or credits to a non-resident person an amount of this nature he is required to deduct or withhold therefrom the amount of the tax and remit it to the Receiver-General of Canada on behalf of the non-resident person on account of the tax. One of the issues in the appeals is whether the sums in question were payments of the nature referred to in s. 106(1).

Sections 106 to 110 inclusive form Part III of the Act and, in general, deal with tax on non-residents in respect of their Canadian income of particular specified kinds, including dividends, interest, income from estates or trusts, rents, royalties, etc. In Part I, however, by s. 2(2) income tax is imposed as well on any non-resident person who was employed in Canada or carried on business in Canada at any time in the year in respect of his taxable income earned in Canada.

By s. 108(9) the Governor-in-Council is authorized to make regulations for the purposes of Part III prescribing, *inter alia*:

> (*c*) where a non-resident person carries on business in Canada, what amounts are taxable under this Part [Part III] or what portion of the tax under this Part is payable by that person.

Prior to 1955, the following regulation had been made, and it remained in force and unaltered throughout 1955 and 1956.

> 805. (1) Where a non-resident person, other than a registered non-resident insurance company, carries on business in Canada he shall be taxable under Part III of the Act and all amounts otherwise taxable under that Part except such amounts as are included in computing his income for the purpose of Part I of the Act.

It will be observed that both s. 108(9) and Regulation 805(1) are limited in their application to cases where the non-resident person carries on business in Canada but that, when that situation obtains, by virtue of the regulation, the taxpayer is not taxable under Part III in respect of amounts which are to be included in computing his income for the purposes of Part I. A second issue in the appeals is whether the appellant's parent, United Geophysical Corporation, carried on business in Canada at the material times. If so, a third issue is whether the amounts in question fall within the meaning of the expression "such amounts as are included in computing his income for the purpose of Part I of the Act." This in turn depends on whether the amounts were "income earned in Canada," for it is only in respect of such income that tax under Part I is imposed on a non-resident, and such income alone is included in computing a non-resident's income for the purposes of Part I.

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Two additional provisions of the statute bearing on the last-mentioned issues are s. 31(1) and 139(7), which were as follows:

31. (1) For the purposes of this Act, a non-resident person's taxable income earned in Canada for a taxation year is

(a) the part of his income for the year that may reasonably be attributed to the duties performed by him in Canada or the business carried on by him in Canada,

minus

(b) the aggregate of such of the deductions from income permitted for determining taxable income as may reasonably be considered wholly applicable and of such part of any other of the said deductions as may reasonably be considered applicable.

* * *

139. (7) Where, in a taxation year, a non-resident person

(a) produced, grew, mined, created, manufactured, fabricated, improved, packed, preserved or constructed, in whole or in part, anything in Canada whether or not he exported that thing without selling it prior to exportation, or

(b) solicited orders or offered anything for sale in Canada through an agent or servant whether the contract or transaction was to be completed inside or outside Canada or partly outside Canada.

he shall be deemed, for the purposes of this Act, to have been carrying on business in Canada in the year.

The appellant is a California corporation incorporated in April, 1955 and is a wholly-owned subsidiary of United Geophysical Corporation, another California corporation which is engaged as a contractor supplying geophysical services to oil companies in the United States and which has subsidiary or affiliated companies engaged in offering similar services in various other countries. United Geophysical Corporation (which will be referred to as the "Corporation") was incorporated in August, 1954 and on September 1 of that year acquired the undertaking of two earlier related corporations, one of which had been engaged in the same business in the United States and the other in Canada. Thereafter, the Corporation itself carried on business in the United States and in Canada until May 1, 1955, when the appellant assumed the Canadian portion of the operation. At that time, by an agreement not committed to writing, the Corporation's assets in Canada which had been acquired from Canadian suppliers, plus the Canadian accounts receivable and other cash assets of the Canadian operation, were sold by the Corporation to the appellant. The equipment items of United States origin were not sold to the

appellant but "rented" to it upon the terms of a written agreement by which the Corporation agreed to "rent" to the appellant necessary equipment for use in its Canadian operations, the rental to be determined in Pasadena, California, giving due consideration to reasonableness and total cost of each item of equipment. The agreement contained no undertaking on the part of the Corporation to service or repair the equipment, but it did provide that "rental" should start on the equipment leaving Pasadena or any other place in the United States. At the same time, the appellant assumed the Corporation's liabilities arising from the Canadian operations, and the employees of the Corporation who were resident in Canada became employees of the appellant. The Corporation continued its registration under Part VIII of the *Companies Act* of the Province of Alberta, but after May 1, 1955, it had no office or workshop or bank accounts or other assets (except the equipment "rented" to the appellant) in Canada. Its head office, as well as that of the appellant, was in California, where most of the directors of both companies lived and where all meetings of the shareholders and directors of both companies were held. Within the board of directors of the Corporation, an executive committee consisting of all of its members had been constituted to which various members of the committee reported from time to time in respect of particular phases of the Corporation's operations for which they were responsible. No such committee was organized by the board of directors of the appellant. As occasion required, consultations took place between the manager of the appellant's Canadian operations, who was a director or officer of both companies and lived in Calgary, and various members of the boards of directors, depending on the nature of the matter and the director responsible for it, and reports on operations in Canada were systematically rendered to the same members. In each case, however, the member concerned was an officer or director of the appellant and, though he was employed and paid by the Corporation, the appellant was charged each month a portion of the Corporation's administrative expenses, which included the salaries of such officers.

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On several occasions during the period in question, work of a kind which the appellant was not equipped to handle, involving the evaluation of information and the preparation of reports and charts therefrom, was solicited by the appellant's manager in Canada and, on being ordered, was referred to Pasadena, where the work was done, the result being forwarded to the client either directly or through the appellant. An invoice for such work would then be submitted by the Corporation to the appellant, who would pay it and collect the amount from the Canadian client. The appellant's manager, who was paid by the appellant, also at times solicited clients in Canada for orders for work to be done by the Corporation in the United States.

Over the period from May 1, 1955 to December 31, 1956, several persons who were in the employ of the Corporation and who, with one exception, were also directors or officers of both the appellant and the Corporation came to Canada on several occasions for various purposes connected with the Canadian operations. Among others, those purposes included observing the operation of the equipment, with a view to designing improvements, making improvements to such equipment, assisting in servicing and repairing the equipment, and contacting persons requiring services of the kind offered, with a view to satisfying their requirements and promoting the business. The travelling expenses in connection with these visits were paid by the Corporation and subsequently charged to and paid by the appellant. The salaries of these persons were also paid by the Corporation, and with the possible exception of the employee who was not a director, were included in the Corporation's administration expenses, a portion of which was charged each month to the appellant.

The sums of $194,075 and $298,830 in question were paid by the appellant to the Corporation in 1955 and 1956 respectively, pursuant to the agreement, as "rental" for equipment the ownership of which was retained by the Corporation and for additional equipment "rented" to the appellant in those years. In each case, the "rental" was approximately the amount of the depreciation of the equipment estimated on a straight line basis, so as to write off the cost of the equipment over its expected life. No "rental" was charged or paid on equipment the cost of which had been

completely written off or recovered as "rental", even though some such equipment may have remained in use by the appellant.

The appellant's contention that the Corporation carried on business in Canada during 1955 and 1956 and was, therefore, subject to taxation on the sums in question under Part I of the *Income Tax Act,* rather than under Part III, was put in two ways. It was submitted first that the whole business activity carried out in Canada was the Corporation's business and that the appellant was but the Corporation's agent in all that it did. Alternatively, it was submitted that the Corporation itself carried on business in Canada by putting its equipment into use in Canada, keeping it in use through repairing and servicing it in Canada, and deriving income from its use there. It was said that the Corporation's business was a composite one comprising all its activities which were carried out for the purpose of putting and keeping its equipment in operation in Canada and elsewhere to its profit, that it is artficial to attempt to split up the business and not realistic to describe any of its results as income from property, that the supplying of the equipment in the United States was but the beginning of what the Corporation did to gain the income in question, since only its personnel knew how to service and repair the equipment and thus keep it in use, which servicing and repairing was done by the Corporation in Canada, and that these activities fall within the statutory definition of carrying on business in s. 139(7) of the Act, even if they might not otherwise be sufficient to amount to carrying on business.

In my opinion, the contention that the appellant was merely an agent for the Corporation and that the business carried on in Canada by the appellant was in reality the Corporation's business is not borne out by the evidence. While it is clear that a business can be carried on by a company as agent for a disclosed or an undisclosed principal, unless the company which carried on the business is nothing but a sham the mere fact of ownership by a person of all the shares of that company will not make the company's business that of the owner of the shares, nor will complete and detailed domination by that owner of every move the company makes be sufficient to make the company his agent or

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the business his own, for the company, if legally incorporated, has a legal existence and personality of its own, distinct from that of the owner or owners of its shares. The same applies where the owner of the shares is itself an incorporated company. Here the Corporation prior to May 1, 1955, was engaged in carrying on business both in Canada and elsewhere, and its purpose in having the appellant incorporated was to have it take over the Canadian operations then carried on by the Corporation itself. This was done because it was considered desirable for the purpose of obtaining a tax advantage in the United States. Mr. Malmgren, the assistant secretary of both companies, explained this as follows:

> The incorporation of the appellant was primarily to obtain a United States tax advantage as regards the earnings of the companies in the United States. In other words, each corporation—that is, United States corporation—is subject to a tax on a graduated basis, the first $25,000 of earned income being subject to a 30 per cent tax, all earnings over that being subject to a 52 per cent tax. With the operations, both in the United States and in Canada, being conducted by one corporation, there was only one $25,000 lower-bracket tax benefit there. With two corporations, we would then have the United States tax benefit on the first $25,000 wholly within the United States and receive this 30 per cent tax benefit, and therefore we formed this corporation to receive this additional $25,000 lower tax bracket benefit in Canada, so that the Canadian earnings would not dissipate the earned income in the United States which would be subject to this 30 per cent tax rate.

To my mind, this does not indicate an intention that the Corporation should continue the operations in Canada on its own account, nor was it suggested by any witness that it was considered sufficient in order to gain the desired advantage to have the Corporation keep that business as its own and have it carried on through an agent in Canada. To carry out its purpose, the Corporation in April, 1955, sold certain of its assets in Canada to the appellant and arranged to provide it with equipment at a "rental", and the appellant assumed the Corporation's liabilities which had arisen in connection with its Canadian operations. These facts, while not necessarily inconsistent with an intention that the appellant should be a mere agent or that the business to be carried on by it should continue to belong to the Corporation, strike me as indicating that the intention was that the business thereafter would be that of the appellant itself and in this context may be considered the fact that no resolution was ever passed by the Corporation

to appoint the appellant its agent or by the appellant to accept appointment as such an agent, nor was any agency agreement made between them. Next, it appears that at the end of its first and second fiscal periods the appellant's accounts were made up so as to show the profits of its operations as its own and nowhere to indicate or even suggest that the appellant was under liability to account to the Corporation for these profits as its agent, and this even though the appellant's liability to the Corporation for money loaned or credit extended is clearly shown. Moreover, the appellant, which was throughout completely dominated by the Corporation, in both years reported and paid income tax on such profits as income of the appellant and in its first income tax return stated that it had been "formed as a wholly owned subsidiary of United Geophysical Corporation and assumed its Canadian operations on May 1st, 1955."

Taken together, these facts, in my opinion, point strongly to the conclusion that the business carried on by the appellant was its own and nothing in the rest of the evidence points even weakly to the other conclusion. Accordingly, I am of the opinion that, during the material period, the business carried on by the appellant was its own and not that of the Corporation.

I turn now to the appellant's alternative submission, that the Corporation itself carried on business in Canada during the material times. This appears to me to depend to a great extent on just what the Corporation's business consisted of, since on the facts there obviously were activities of one sort or another carried on by or on behalf of the Corporation in Canada during the material period. There are, to my mind, at least two possible views of the scope of the Corporation's business. In the narrower of them, the Corporation from its inception had but one business, which embraced the supplying of geophysical services to clients and which was carried on by the Corporation in both the United States and Canada until May 1, 1955, when the Corporation discontinued carrying on in Canada the portion thereof which the appellant then assumed. In this view, the Corporation at that time discontinued using in its business the equipment which it then rented to the appellant, and the income therefrom received thereafter in the form of rentals was not income

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from the appellant's business but was income from property. It would thus become immaterial for the present purpose whether any part of the business was carried on in Canada during the period in question for, in any case, the "rentals" in question would not be income of that business and, having regard to ss. 2(2) and 31(1), would not be taxable under Part I of the Act and would not be included in computing the Corporation's income for the purposes of that Part.

The other and wider view of the scope of the Corporation's business is that it embraced the supplying of geophysical services to clients but included as a sideline after May 1, 1955, the providing at approximately cost to the appellant, its wholly-owned subsidiary, of administrative, supervisory and other services, as well as equipment for the appellant's use. This, I think, is the correct view, and in it, having regard to the English cases cited in the course of argument, including *Smidth v. Greenwood*[1], *Weiss, Biheller and Brooks v. Farmer*[2], *and Firestone Tyre Co. Ltd. v. Lewellin*[3], and to s. 139(7) of the Act, I find it impossible to say that the Corporation carried on none of its business in Canada during the material period for the services provided by the Corporation to the appellant, *ex hypothesi*, were such as it was part of the Corporation's business to provide and they were rendered in Canada, and the soliciting by the appellant's manager in Canada of orders for work to be carried out by the Corporation in the United States appears to me to fall within the definition, as well. Accordingly, I shall assume for this purpose that the Corporation to some extent did carry on business in Canada, from which assumption it would follow by virtue of s. 108(9) and Regulation 805(1) that the Corporation was not taxable under Part III in respect of any of its income which was taxable under Part I, and the further question would arise whether the sums in question were amounts which would be included in computing the corporation's income for the purposes of Part I.

Under s. 31(1) as it was in 1955 and 1956, a non-resident person's taxable income earned in Canada (which is what is taxable under Part I pursuant to s. 2(2)) is defined as the

[1] 8 T.C. 193.

[2] [1923] 1 K.B. 226; 8 T.C. 381.

[3] [1957] 1 All E.R. 561.

"part of his income for the year that may reasonably be attributed to . . . the business carried on by him in Canada." In this subsection, the word "business" appears to me to refer to the income- or profit-earning activities carried on by the non-resident person in Canada, and the question to be answered thus depends on whether or not the sums in question may reasonably be attributed to the business carried on by the appellant in Canada.

Now, the facts with respect to the "rental" are, first, that the governing agreement was made in the United States. By itself, this fact does not carry the matter far (*vide* the comments of Lord Radcliffe in *Firestone Tyre Co. Ltd. v. Lewellin, supra*), but it can be of no help to the appellant on whom the onus of proof lay. Next, the agreement provides that the rental is to be determined in the United States, where on the evidence it was in each case in fact determined. It is also provided that the rental shall start when the equipment leaves Pasadena or some other place in the United States. Though the agreement is silent on the question as to where delivery of the equipment is to be made, it would seem to flow from these provisions that the intention was that the equipment would be supplied in the United States and that the appellant would take possession of it there, but in any case, save for the equipment which was already in Canada on May 1, 1955, I see no reason on the evidence to think that delivery to the appellant of any of the equipment took place anywhere but in the United States. Nor is it established that payment of the rental was received anywhere but in the United States. Nor do I think it can be said that the "rental" resulted in any proximate sense from the servicing or repairing of the equipment in Canada. In my view, the rental came to the Corporation not from the actual use made of the equipment by the appellant, which had no effect on the amount or any other feature of it, but from the hiring of the equipment by the Corporation to the appellant upon the terms of the written agreement, a matter which on each occasion was, I think, arranged in the United States. Accordingly, in this view, as well, of the scope of the Corporation's business, I am of the opinion that the "rental" for the equipment was income from that part of its business which was carried on in the United States and could not reasonably be attributed to any

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part of the business which may have been carried on by the Corporation in Canada. Such rental would not, therefore, be taxable under Part I of the Act or be included in computing the Corporation's income for the purposes of that Part.

The appellant's submission that the Corporation was taxable in respect of the "rentals" under Part I of the *Income Tax Act*, rather than under Part III, accordingly fails.

There remains the question whether the sums in question are income of the kind in respect of which tax is imposed by s. 106(1). By clause (d) of this subsection, tax is imposed in respect of

rent, royalty or a similar payment, including, but not so as to restrict the generality of the foregoing, any such a payment

(i) for the use in Canada of property,

(ii) in respect of an invention used in Canada, or

(iii) for any property, trade name, design or other thing whatsoever used or sold in Canada,

but not including

(A) a royalty or similar payment on or in respect of a copyright, or

(B) a payment in respect of the use by a railway company of railway rolling stock as defined by paragraph (25) of section 2 of the *Railway Act*;

The assessments are founded on the assumption that the sums in question were "rent . . . or a similar payment including but not so as to restrict the generality of the foregoing, any such a payment for the use in Canada of property" within the meaning of this subsection.

On behalf of the appellant, it was submitted that the word "rent" is a technical term used to refer to a profit issuing from real property, that the words "or any similar payment including any such a payment for the use of property" which follow "rent" in s. 106 are to be construed as meaning payments having the characteristics of rent and that the payments in question do not have such characteristics, there being no certainty in the agreement as to the amount to be paid or as to the time when payment is to be made.

It is, I think, apparent from the use in the section of the wording which follows the words "rent" and "royalty" that Parliament did not intend to limit the type of income referred to in the subsection to either what could strictly be called "rent" or "royalty" or to payments which had all

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of the strict legal characteristics of "rent" or "royalty". Nor does the scope of the section appear to be restricted to payments of that nature in respect of real property for the word "property" appears in the section and that word is defined in very broad terms in s. 139(1)(*ag*) as including both real and personal property. It seems to me, therefore, that s. 106(1)(*d*) includes any payment which is similar to rent but which is payable in respect of personal property. Moreover, in its ordinary usage, as opposed to its technical legal meaning, the word "rent", besides referring to returns of that nature from real property, is broad enough to include a payment for the hire of personal property. Thus the *Shorter Oxford Dictionary* gives as one of the meanings of the word, "The sum paid for the use of machinery, etc. for a certain time." In this definition, there are but two characteristics of the sum, namely it is for the use of machinery, etc. and it is paid for that use for a certain time. See also the usage of the word in *Brooks v. Beirnstein*[1] and *National Cash Register Co. Ltd. v. Stanley*[2]. Without attempting to determine just how wide the net of s. 106(1)(*d*) may be, I am of the opinion that the subsection does refer to and include a fixed amount paid as rental for the use of personal property for a certain time.

Now it goes without saying that the mere use of the words "rent" and "rental" in the agreement between the Corporation and the appellant is not necessarily conclusive on the question whether the payment so provided for is in fact a rent or other payment of the kind referred to in s. 106(1), but their use in the agreement, to my mind, affords some indication that the payment which was to be determined, having regard to reasonableness and the cost of each item to be "rented", was to be a payment in the nature of rent for the equipment. The fact that the amount of the rent was not set in the written agreement is, to my mind, entirely immaterial, for the document was only an agreement on some points, and it was open to the parties to set, as in practice I think they did, the rent for each item when it was hired by the appellant pursuant to that agreement. Moreover, the fact that it was agreed that the "rental" was to commence in each case at a time settled by the agreement

[1] [1909] 1 K.B. 98. [2] [1921] 3 K.B. 292.

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and the fact that the amount was, as stated by Mr. Malmgren, "at a monthly rate per item," in my view show that it was an amount in respect of a certain time. I am, accordingly, of the opinion that the sums in question were amounts of the kind referred to in s. 106(1).

The appeals, therefore, fail, and they will be dismissed with costs.

Judgment accordingly.

1960 Oct. 12, 13

1961 Mar. 23

BETWEEN:

CLEVITE DEVELOPMENT LIMITED ..APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Foreign business corporation—Royalties received from licenses of European patents—No active business effort by licensor—Whether "business operations" carried on—The Income Tax Act, R.S.C. 1952, c. 148, s. 71(1) and (2)(c)(i)(ii)(iii).

The appellant is the wholly-owned subsidiary of an Ohio corporation. Prior to 1957 it carried on business in Canada as a manufacturer of engine bearings and had acquired from its parent corporation a number of British and European patents pertaining to engine bearings. The British patent was subject to a licensing agreement made by the parent the benefit of which was transferred to the appellant. Under it royalties were payable by the licensee and the parent agreed to supply technical and other assistance to the licensee. The appellant licensed a German company to manufacture and sell products under the German patents and undertook to furnish the latter with technical information and other aid and to allow the licensee's technicians to visit the plant of the appellant in Canada and those of its parent in the United States to study methods and techniques. In 1956 the appellant ceased manufacturing and sold its plant and Canadian patents to an affiliated corporation but retained its British and European patents. Under the British patent licensing agreement the appellant was under an obligation to its parent to supply the services required by the licensor although in practice they had been rendered by the parent. There was no clear evidence that anything was required or done in 1957 by either corporation. As to the German licensing agreement, in 1957, if not in most other years as well, nothing was done by the appellant and, so far as anything was required, the obligations were carried out by the parent corporation.

The appellant claimed exemption for the year 1957 under s. 71 of the *Income Tax Act* as a foreign corporation. The Minister ruled that it did not so qualify. On an appeal from the assessment.

Held: That s. 71 of the *Income Tax Act* is an exempting provision and must be strictly construed. To qualify under clause (c)(i) of s-s. 2 thereof a corporation's business operations must be of an industrial, mining, commercial, public utility or public service nature and its operations must have been carried on entirely outside of Canada.

2. That prior to the sale of its plant the appellant's business included the development and manufacturing of bearings and the licensing of patents and servicing of the agreements was part thereof and the income received therefrom part of the income of the business which might have been carried on in Canada and elsewhere.
3. That after the sale the holding of the patents and licensing agreements and doing what was necessary to perform them continued to be a business of a commercial nature within the meaning of s. 71(2)(c)(i) of the Act and the royalties received by the appellant in 1957 should be regarded as income from its business rather than income from property.
4. That in using the expression "business operations" however the statute contemplates more than a situation in which nothing of an active nature is done in the material period by the party by whom the business is carried on.
5. That here after the sale of its manufacturing plant the role of the appellant was essentially passive. No "business operations" were carried on by it anywhere and accordingly it was not entitled to exemption as a foreign business corporation. *Inland Revenue Commissioners v. Desoutter Brothers Ltd.* [1946] 1 All E.R. 58; *Tootal Co. Ltd. v. Inland Revenue Commissioners* [1949] 1 All E.R. 261, referred to.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Thurlow at Toronto.

G. D. Watson, Q.C. for appellant.

Terence Sheard, Q.C. and *J. D. C. Boland* for respondent.

THURLOW J. now (March 23, 1961) delivered the following judgment:

This is an appeal from an assessment of income tax for the year 1957, the issue between the parties being whether the appellant was during that year a foreign business corporation and thus entitled to exemption from taxation pursuant to s. 71 of the *Income Tax Act,* R.S.C. 1952, c. 148.

The material part of s. 71 is as follows:

(1) No tax is payable under this Part upon the taxable income of a corporation for a taxation year when it was a foreign business corporation.

(2) In this Part, a "foreign business corporation" is a corporation that during the whole of the taxation year in respect of which the expression is being applied

(*a*) [not in issue]

(*b*) [not in issue]

(*c*) complied with one of the following conditions:

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(i) its business operations were of an industrial, mining, commercial, public utility or public service nature and were carried on entirely outside Canada (except for management and the designing, purchasing and transportation of goods if the goods were not acquired for resale in the course of trading and were acquired for the operations so carried on outside Canada) either directly or through ownership of shares in or control of subsidiary or affiliated corporations and its property, except securities and bank deposits, was situate entirely outside Canada,

(ii) it was the wholly-owned subsidiary of a corporation that complied with the conditions in subparagraph (i) and was wholly engaged in carrying on business outside Canada, or

(iii) its business was of an investment or financial nature and was carried on entirely outside Canada, its shares had been offered for public subscription or were listed on a recognized stock exchange in Canada or elsewhere and its property (except bank deposits and shares of other corporations that were entitled to exemption under this section) were situate entirely outside Canada; . . .

(*d*) [not in issue]

The appellant is an Ontario corporation incorporated in 1949, under the name of Clevite Limited, and is a wholly-owned subsidiary of Clevite Corporation, an Ohio corporation with its head office in Cleveland. The head office of the appellant is at St. Thomas, Ontario, but only one of its directors lives in Canada. The others live in the United States, where all directors' meetings and shareholders' meetings are normally held.

Prior to 1957, the appellant had carried on business in Canada as a manufacturer of automobile-type bearings, principally engine bearings, and had acquired from its parent a number of British and European patents pertaining to bearings or bearing metals. When acquired by the appellant, the British patent was subject to a licensing agreement made in 1933 by the parent corporation with O & S Bearings Limited, the benefit of which was also transferred to the appellant. Under this licensing agreement, royalties were payable by the licensee and the parent had agreed to supply the licensee with technical information, drawings, specifications, and other data to enable the licensee to manufacture and sell its products, to supply the licensee with samples, duplicates of plant tools, dies, fixtures or equipment, and complete bushings or bearings or any component part thereof. By an agreement made in

1954, the appellant also licensed a German company to manufacture and sell products under its German patents. In this agreement, it was recited that the appellant

> for a period of many years has been engaged in the development and manufacture of metal bearings, particularly strip type bearings, and has acquired extensive technical information with respect to such products and their manufacture

and by paragraphs 3, 4, and 6 the appellant undertook to furnish the licensee with technical information concerning bearings then and thereafter manufactured by the appellant and its parent corporation, to assist the licensee in securing necessary metals and equipment to enable it to manufacture strip type bearings, and to send, upon the licensee's request, competent technicians to the plant of the licensee for the purpose of advising and assisting the licensee in its bearing operations, the salaries of such technicians to be paid by the appellant. By paragraph 7, it was also agreed that the licensee might cause its technicians or representatives to visit the plants of the appellant in Canada and those of the parent corporation in the United States from time to time for the purpose of observing, studying and being trained in the methods, equipment and technique used by the appellant in the manufacture of bearings.

In 1956 the appellant sold to Paxol Limited, later renamed The Clevite Limited, a sister or affiliated corporation, for approximately two and a half million dollars, its manufacturing plant and Canadian patents, together with its other physical assets, and thereupon discontinued its own manufacturing and selling operations. It retained, however, its British, German and other foreign patents and the licensing agreements pertaining thereto.

Subsequently, in August, 1957, the appellant was reorganized under the name of Clevite Development Limited. Following the agreement of 1933, shipments of material, equipment and machinery were made from time to time to O & S Bearings Limited by the parent corporation, but there is no clear evidence that any shipment pursuant to the contract was ever made by the appellant, or that any shipment was made by anyone in 1957. It was, however, stated in evidence that no shipment was made from Canada in 1957.

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Nor is the evidence clear as to what, if anything, was done in 1957 under paragraphs 3 and 4 of the German patent licence. A witness called on behalf of the appellant stated that none of the services provided for in these paragraphs were performed in Canada in 1957 and that what was required to perform them was done in Ohio or in Germany, but he was unable to say that anything had been required in 1957.

He did, however, say that personnel came from Germany two or three times each year, including 1957, to visit the plant of the parent corporation in Cleveland pursuant to paragraph 7 of the agreement and that personnel of the parent corporation visited the German plant two or three times a year, including 1957, pursuant to paragraph 6.

During 1957, the appellant's assets in Canada consisted entirely of bank deposits, a demand note of The Clevite Limited, dated October 31, 1956, for $2,525,982.34 bearing interest at 4 per cent per annum, given in payment of the selling price of the manufacturing plant and assets, and two short-term notes bearing 5 per cent interest, dated in November and December, 1957. Besides the President, who was resident in Canada and was treasurer of The Clevite Limited, there was one employee in Canada engaged on a part-time basis in working on the appellant's books and records, which were kept in St. Thomas, and the President's secretary was sometimes used to type letters in connection with the appellant's affairs. Neither in Cleveland nor anywhere else was there any other person employed by the appellant.

On these facts, it was contended that for 1957 the appellant was qualified as a foreign business corporation since, throughout that year, its business operations, namely, the holding of the patents and licensing agreements and the performing of the obligations of the licensor under these agreements, were of a commercial nature within the meaning of clause (*c*) of s. 71(2), that such business operations were carried on entirely outside Canada, and that the appellant's property was situate outside Canada except for the bank deposits in Canada and the three promissory notes which were securities within the meaning of s. 71(2)(*c*)(i). It was not suggested that the appellant could qualify under any other part of this subsection. In support of the assessment,

counsel for the Minister submitted that s. 71 is an exempting provision which is to be strictly construed and that the appellant did not qualify as a foreign business corporation within the definition in s. 71(2), first because its business operations were not of commercial but of a financial or investment nature, secondly because whatever the nature of the appellant's business was, no part of that business was carried on outside Canada, and thirdly because the three promissory notes held by the appellant in Canada were not securities within the meaning of s. 71(2)(*c*)(i).

In my opinion, s. 71 is an exempting provision and must be strictly construed. *Toronto General Trusts Corporation v. City of Ottawa*[1], *Lumbers v. Minister of National Revenue*[2]. The section in question appears to me to define and apply to a narrow class of corporations which carry on business operations outside Canada but to whom (but for the exemption) Part I of the *Income Tax Act* would apply on the basis of their being resident in Canada. Clause (*c*)(i) of s-s. (2) is peculiar. To qualify under it, the corporation's business operations must be first of an industrial, mining, commercial, public utility or public service nature and, second, they must have been carried on entirely outside Canada. Nowhere, however, is it expressly stated that the corporation must be one that has "business operations." That feature is left to be implied, as I think it must be, for I can see no scope for the application of the section to a corporation which is resident in Canada and derives income from property but engages in no business operations anywhere. Such a corporation could readily be said to carry on no business in Canada, but it would not seem to comply with the requirement that its business operations be of an industrial, etc., nature and that they be carried on entirely outside Canada.

In the present case, the scope of the appellant's functions became so restricted following the sale of its manufacturing plant that it becomes necessary to consider, first, whether what was left can be regarded as a business at all, as opposed to a mere holding of property and receipt of revenue therefrom.

[1] [1935] S.C.R. 531. [2] [1943] Ex. C.R. 202.

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The problem whether royalties received through holding and licensing patents and performing patent licensing agreements should be regarded as profits of a trade was considered by the Court of Appeal in England in *Inland Revenue Commissioners v. Desoutter Brothers Ltd.*[1] There the problem was twofold; first, whether the royalty was profit from the trade, and second, whether the royalty was income from an investment within the meaning of a particular statutory provision which would conceivably have applied even though the receipts in question were part of the profits of a trade. Lord Greene M.R. said at p. 61:

> To my mind, it is obvious that a patent in the hands of a manufacturer is quite a different type of property, both in the business and in the practical sense, to a patent in the hands of somebody who is a mere passive owner of the monopoly right. For instance, a member of the Bar, who was fortunate enough to have bequeathed to him a patent, or who had purchased a patent, the validity of which had been established by the court, might continue, without any active participation in manufacturing himself, merely to exploit that monopoly by granting licences. He would then be merely passive; he would be the passive recipient of income from that particular piece of property. In such a case it might very well be, and I strongly suspect it would be, held, if members of the Bar were subject to excess profits tax, that the income from that patent could properly be described as income from an investment. But directly the patent is held by a manufacturer of the patented article, it seems to me that the situation is entirely changed. When you have a manufacturer who is exploiting his monopoly right, not merely by excluding all competitors, but by letting one competitor in on terms, to say that the profits so derived are profits from an investment seems to me to be a misuse of language. It is contrary to what one may call the popular conception of the word "investment," which is not a word of art, but has to be interpreted in a popular sense. The contrast, I venture to think, is brought out exactly in the two examples I have put. One is that of a private individual not concerned with manufacture at all, but merely holding a patent, as he might hold a copyright in a book, and simply drawing the income from the royalties payable under the copyright. He would merely be a passive person drawing the income which flows from that particular chose in action. That is one example. The other example is the manufacturer who can, if he likes at any moment, exploit his monopoly in a number of different ways—either by manufacturing himself, or by vending himself, or by allowing somebody else to manufacture and vend or manufacture but not vend, or to vend but not manufacture. The mere granting of such licences does not seem to me to take the income out of the category of income of the business.
>
> I have said that what I was proposing to say on this argument would dispose also of the second argument, namely, the question whether the income is profits of the business. It will be seen that the considerations which I have mentioned, if they are right, answer that question just as much as they answer the question whether or not it is to be regarded as income from an investment.

[1] [1946] 1 All E.R. 58.

At pp. 62-3, he also said:

I have dealt with this question so far without reference to the special argument which counsel for the respondents put forward in connection with the particular agreements under which the income is derived in this case . . . The argument is this. The profits derived by the company in the present case cannot be said to be derived entirely from the mere ownership of the patents, but are attributable also to certain other obligations which the company undertakes under these agreements.

The first agreement of June 3, 1937, recites the granting of a sole and exclusive licence, and goes on to say that:

> . . . it is witnessed that in consideration of the royalties hereinafter reserved and of the mutual promises of the parties hereto, the owners agree . . .

The first paragraph of the undertakings given by the owners is:

> To grant to the licensee sole and exclusive licence and authority to manufacture and sell [in a number of countries] the drills made in accordance with the inventions of the patentees.

Then comes this obligation of the owners:

> To supply to the licensee drawings of the drills and of any tools used by them in the manufacture of drills or component parts thereof, and to give to the licensee information of their manufacturing methods, and to permit a representative of the licensee to inspect the manufacture of the drills and their component parts at their works at Hendon.

That undertaking could only be given by a company which itself was manufacturing in accordance with this invention. No mere passive holder of the patent could give an undertaking of that kind. Although it is a type of undertaking extremely common in patent licences, it is none the less an undertaking which the owners of the patent are giving, and can only give, by virtue of the fact that they are manufacturing and can give to the licensee valuable manufacturing information and experience which would otherwise not be available to them. That also brings out the difference between exploitation of a patent in the hands of a mere passive owner and the exploitation of a patent in the hands of a manufacturer.

* * *

The effect of these agreements in these respects is purely a matter of construction of the agreements. In my opinion, that circumstance alone, even if I were wrong on the major proposition which I discussed a moment ago, would be sufficient to justify, and, indeed, compel, the court to say that the profits in question are not income from investments, but they are the income of the trade or business, and are not excluded as being income from investments under para. 6 of the Schedule.

In *Tootal Co. Ltd. v. Inland Revenue Commissioners*[1], the question was whether "income described as royalties received by the appellant company under three separate agreements relating to patent rights, and admittedly part

[1] [1949] 1 All E.R. 261.

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of the appellant's business profits, [were] also" income from investments "within the meaning of" a particular statutory provision. Lord Simonds said at p. 264:

It is possible, as was pointed out in the *Desoutter* case by *Lord Greene*, M.R., that a particular kind of asset might in the hands of one trader be, and in the hands of another not be, an investment, though a less likely form of investment for any trader to make than a patent cannot readily be imagined.

Lord Normand said at p. 266:

It is conceivable that an ordinary trading company as well as an individual might enjoy an income from investments in the form of royalties under patent licences, but it would be a rare occurrence, and a company claiming to be in the enjoyment of such an income must satisfy the income tax commissioners, or the court on appeal, that it is not merely a profit of the business but truly of the nature of an income from investment.

Lord Morton of Henryton said at p. 267:

I agree with the views expressed by LORD GREENE, M.R., in *Inland Revenue Comrs. v. Desoutter Bros., Ltd.* that the word "investment" in this context is not a word of art, and that the question whether or not a particular piece of income is "income received from an investment" must be decided on the facts of each case. I think that the question must be approached from the standpoint of an intelligent man of business, and, in my view, such a man, being informed of the facts set out in paras. 3, 4(*a*) and 5 of the Stated Case, and being shown the agreement which is exhibit A, would not think that the royalties received under that agreement were aptly described as "income received from investments." I think he would rightly say that the royalties were income received from a commercial agreement, conferring advantages on each of the parties to it, and entered into as a part of the company's business.

Lord Macdermot also said at p. 268:

My Lords, I do not think any business man would describe the income so obtained as "income received from investments." He would be bound to admit that the purpose of the agreements was a trade purpose, but I do not think he would look on this alone as conclusive against so describing the income, and in that, I apprehend, he would be right, having regard to the decision of this House in *Gas Lighting Improvement Co., Ltd. v. Inland Revenue Comrs.,* [1923] A.C. 723. He would, no doubt, find difficulty in giving a precise definition of "investments" as the word is used in the relevant enactment, but I think he would be prepared to go the length of saying something like this: "If, in the course of carrying on my business, I make active use of a business asset—be it my factory building, a piece of machinery, a patent, or my working capital—that asset is not an investment. Whatever else a business investment may have to be, it is an asset for the time being held intentionally aloof from the active work of the business. It is none the less an asset of the business and may have great business value. For instance, it may enable me to survive bad times and take advantage of good, or it may help me to control supplies or

competition. And if it produces income that is income of the business. But I do not earn that income by my business efforts. The part I play there is essentially passive. I cannot, of course, afford to neglect my investment. I may have to preserve it and, on occasion, change its form, but normally I just hold it and receive what it brings in.

Following the reasoning of the passages cited and having regard also to the meaning of the word "business", which is broader than that of the word "trade", which in turn is itself a very wide term, I have come to the conclusion that in this case the holding, licensing and performing of the patent licensing agreements can be regarded as a business. Prior to the sale of its manufacturing plant, the appellant had a business which included the development and manufacture of bearings, and I should have thought the holding and licensing of the patents and the servicing of the agreements then was clearly a part of that business and that the income received therefrom was not merely income from property but part of the income of the business. So far as I can tell from the evidence, this was also a part of the business which might have been carried on both in Canada and elsewhere for, even assuming that all other obligations arising under the agreements would be discharged elsewhere, the German agreement refers to visits to be made to the appellant's plant in Canada. Nor do I think that the sale of the plant and discontinuance of the appellant's manufacturing operations would necessarily change the character of the remainder of what had been the appellant's business to a mere matter of property holding. After the sale of the manufacturing plant, the holding of the patents and licensing agreements and doing whatever was necessary to perform them was all that was left of the appellant's business, but the purpose of the agreements and of the performing of them did not change, and in my view that purpose throughout was to obtain revenue in the form of royalties by licensing the use of the patented inventions and by assisting the licensees to exploit them by doing the things provided for in the agreements. This, I think, is an enterprise or business and is one of a commercial nature within the meaning of "commercial" in s. 71(2)(*c*)(i). I do not think it should be regarded as a mere property holding and

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receipt of revenue therefrom, nor do I think it would be properly classed as a business of a financial or investment nature, as submitted by counsel for the Minister. Accordingly, I think that the appellant should be regarded as having had a business in 1957 and that the royalties received by the appellant in that year should be regarded as income from its business, rather than as income from property.

It does not, however, necessarily follow that what the appellant did in 1957, even though capable of being characterized as a business, amounted to "business operations," for I think it is readily conceivable that one may carry on a commercial business and yet for an appreciable time do no act whatever which can be characterized as a "business operation." In using the expression "business operations" the statute appears to me to contemplate something more than a situation in which nothing of an active nature is done in the material period by the party by whom the business is carried on. In the present case, the appellant's activities, if not entirely non-existent, were at a low ebb throughout 1957, and the questions thus arise whether there was anything at all in what the appellant did in 1957 which should be regarded as "business operations" and, if so, whether such business operations were carried on entirely outside Canada.

Now during this period there were no manufacturing or selling activities on the part of the appellant, nor is there evidence of anything whatever being done with respect to its Italian or French patents.

With respect to the British patent, as previously mentioned, there is no clear evidence that anything was required or done in 1957 by either the appellant or its parent to fulfil the licensor's obligations under the licensing agreement. And while, as between the appellant and its parent, the appellant was under an obligation to render the services therein provided for, these services when required were in practice rendered by the corporation, and on the evidence I see no basis for a finding that any of them was ever carried out by the appellant. Moreover, in 1957, if not in most other years as well, the appellant's obligations under the

German licensing agreement, so far as anything was required, were carried out not by the appellant but by the parent corporation. No charge was made by the parent to the appellant for such services, and I do not think it is a fair conclusion on the facts that the appellant procured the rendering of such services by its parent. Rather, I think the correct inference is that the appellant had nothing to do and did nothing in 1957 in performance of the agreement or to assist or promote the business of the licensee, because the parent went ahead and did everything that the contract required the appellant to do or which was considered desirable or advantageous. No doubt, if the parent had not done what was required, the appellant might have been called upon to perform its agreement or might have regarded it as in its interest to assist the licensees in the ways referred to in the agreements, and if this had occurred what was done might well have been characterized as business operations. But the evidence leaves me unsatisfied that the appellant at any material times did anything in performance of the licensor's obligations under the agreements or that anything that was done by the parent corporation was done on behalf of the appellant as its agent or at its instance. It is not established that the parent corporation did not itself have a contract with the German licensee pursuant to which the services were performed, and, in my opinion, the parent cannot be regarded as an affiliated corporation under the control of the appellant within the meaning of s. 71(2)(*c*)(i). In my view, the situation during the material time was in some respects similar to that referred to by Lord Macdermott in the passage cited above. The appellant may be regarded as having had a business, and the royalty income may be regarded as income from that business. But the royalties were not earned by active business efforts on the part of the appellant. After the sale of the manufacturing plant, the role of the appellant was essentially passive. It simply held the agreements and received the income, doing nothing to perform the agreements or to enhance the royalties so long as all that was necessary for that purpose was being effectively done by its parent. I do not think this

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falls within what is meant by "business operations" in s. 71(2)(c)(i), nor do I think it can be said to follow from the fact that nothing of an active nature capable of being described as a business operation was done in Canada during the material time, that the appellant's "business operations" were entirely carried on outside Canada within the meaning of s. 71(2)(c)(i), for the fact is that during the material time no "business operations," as therein referred to, were carried on by the appellant anywhere.

Apart from this view, however, it appears to me that, if in this passive situation anything can be described as "business operations," the receipt of the royalties (a feature which in more active situations might well be disregarded) is as important a part of them as is anything else, and it was not disputed that the royalties were received from the licensees by the appellant in Canada. In addition, the situation may, I think, be viewed as one in which the appellant had carried on its business operations in Canada, and the evidence, while indicating that no business operations took place in Canada during the material period, fails to establish that business operations were carried on anywhere else. There is thus nothing to establish any change in the locality in which the appellant's "business operations," when it has any, are carried on.

I am, accordingly, of the opinion that the appellant was not entitled to exemption as a foreign business corporation and that its appeal fails. In view of this conclusion, it is not necessary for me to deal with the further point as to whether the promissory notes held by the appellant were "securities" within the meaning of s. 71(2)(c)(i).

The appeal will be dismissed with costs.

Judgment accordingly.

BETWEEN:

1960 Apr. 4 — 1961 May 9

MONTREAL TRUST COMPANY (Trustee of LODESTAR DRILLING COMPANY, a bankrupt) ... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Sale of mineral rights by oil drilling company—Whether proceeds income or capital—Charter powers—Amended tax return not filed within statutory delay—Discretionary power of Minister—The Income Tax Act, S. of C. 1948, c. 52, ss. 3, 4, 20(1)(d), 40(1)(a) and 42(4A) as enacted by S. of C. 1951, c. 51, s. 14—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 46(5).

The Lodestar Drilling Co. which carried on the business of drilling by contract, was empowered by its charter to acquire and sell mineral rights. In 1952 it sold a one-half interest in an oil lease for $27,500 and treated the sum received as a capital receipt. In filing its income tax return for its taxation year ending March 31, 1952 the company declared a profit of some $114,900 and for 1953 a loss of some $3,500. On September 30, 1953, it filed an amended tax return and claimed as a deduction from its income for 1952 the loss suffered in 1953. By notice of re-assessment dated April 28, 1955 the Minister added the $27,500 to the declared income for 1952 and allowed less than one-third of the loss claimed. In October 1953 the company made an assignment in bankruptcy and the Trustee after revising the company's accounts to provide for additional capital cost allowance not previously claimed, on June 2, 1955 filed amended tax returns for 1952 and 1953 in which a loss of some $53,000 alleged to have been incurred in 1953 was claimed as a deduction from the 1952 income. Subsequently the Trustee filed a notice of objection to the assessment in respect of 1952 and the Minister by notice dated August 28, 1956 confirmed the assessments. In an appeal from a decision of the Income Tax Appeal Board upholding the assessment, the appellant contended that the $27,500 payment constituted a capital receipt which should not have been included in its income, and that by reason of the increased capital cost allowance now reflected in its books, the deduction in respect of loss incurred in 1953 should be increased accordingly.

Held: That the $27,500 payment was properly assessed as income since it was a gain made in the operation of a business in carrying out a scheme for profit-making which the company by its charter had power to undertake.

2. That since the amended tax return filed by the Trustee was not, as required by s. 42(4A) of the *Income Tax Act, 1948,* filed within one year from the day on or before which the taxpayer was required by s. 40(1) of the Act to file the original return, it was within the discretionary powers of the Minister to refuse to re-assess beyond the allotted delay.

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APPEAL from a decision of the Income Tax Appeal Board[1].

The appeal was heard before the Honourable Mr. Justice Dumoulin at Calgary.

R. A. MacKimmie, Q.C. and *F. R. Mathews* for appellant.

R. L. Fenerty, Q.C. and *T. E. Jackson* for respondent.

DUMOULIN J. now (May 9, 1961) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board[1] dated February 6, 1958, affirming the income tax re-assessment, on April 28, 1955, of Lodestar Drilling Company Ltd., for taxation year 1952.

Lodestar Drilling Company Ltd. (formerly of Calgary, Alta., hereinafter called the Company) was incorporated on March 17, 1949, and, since that date, carried on, as a contractor, the business of drilling petroleum and natural gas wells for owners of petroleum and natural gas rights.

This Company, for the fiscal years ending March 31, 1952 and 1953, declared its income to be:

Year ended March 31, 1952 (ex. 1) ....$114,916.05 Income
Year ended March 31, 1953 (ex. 2) ....$ 3,516.00 Loss.

Lodestar's T2 return for 1952 shows that this global income of $114,916.05 comprises a provision of $51,185.24 for tax liability to the Dominion Government (Cf. ex. 1).

In February, 1952, the Company ceded to another western concern, Realty Oils Ltd., at a price of $27,500, an undivided one-half interest in presumably oil bearing properties it had acquired from Trans Empire Oils Ltd. (through the nominal intermediary of its own President and agent, Mr. William Ford) the same month and year, also for a consideration of $27,500. These three transactions are related in exhibits 7, 8 and 9.

In computing its income for the 1953 fiscal year, the Company did not include this 1952 receipt of $27,500 from Realty Oils, nor, and this omission is more readily understandable, did it make any mention of its purchase from Trans Empire Oils Ltd.

[1] 18 Tax A.B.C. 18; 58 D.T.C. 131.

By September 1953, the Company's financial condition had precariously deteriorated, and on September 30, it filed an amended return for 1952 (ex. 3) pursuant to s. 46(5) of the Act, claiming, as a deduction from income for that year, a loss of $3,516 incurred during the 1953 period, thereby reducing the taxable income of $114,916.05 reported on the original return, (ex. 1) to $111,400.05.

Notices of re-assessment in respect of years 1952-1953 were sent the Company on April 28, 1955, one of two crucial dates in the determination of the instant case, and the taxable income was then set out as hereunder:

Taxation year 1952

Taxable income previously assessed:	$114,916.05
Add: Proceeds of sale of interest in Farmout from Trans Empire Oils:	27,500.00
Revised assessed income:	$142,416.05
Deduct: 1953 loss applied	1,073.15
Revised taxable income:	$141,342.90

This re-assessment allowed less than one third of the $3,516 loss to which the Company laid claim for 1953, and inserted as a revenue item the full amount, $27,500, received by appellant from Realty Oils Ltd.

No further steps were taken about the matter until practically two years later. Meanwhile, the Company, on October 22, 1953, made an assignment under the provisions of the *Bankruptcy Act* appointing Northern Trust Co. Ltd. as Trustee, to be replaced in such capacity with the bankrupty Company by Montreal Trust.

Appellant next alleges that in June 1955, the Trustee revised the accounts of the defunct Company for its 1953 fiscal year "to provide for an additional provision for depreciation of $51,885.42 and caused revised financial statements to be prepared . . ." reflecting this heretofore undisclosed provision for depreciation.

Conformably to this revision, and I now quote s. A (i) of Appellant's Notice of Appeal:

"The Trustee '*then prepared and filed an amended return*' (italics are mine throughout) of the Company's income for the 1953 fiscal year reflecting the above adjustment, and '*at*

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the same time' the Trustee filed a revised amended return for the Company's income for the 1952 fiscal year", detailed as follows:

	1952 Income	1953 Loss
Taxable income or loss as assessed	$141,342.90	$ 1,073.15
Add additional provision for depreciation recorded in the Company's accounts		$ 51,885.42
	Income	Loss
	$141,342.90	$ 52,958.57
1953 loss applied	52,958.57	
Revised income:	$ 88,384.33	

The italics are intended to emphasize that expressions such as "then" and "at the same time" must necessarily relate to the preparation and filing of the amended 1952-1953 returns at some undisclosed date of June 1955, since, in the paragraph preceding A (*h*), appellant avers it revised the Company's accounts "in June 1955". Later still, the exact date remaining unspecified, the Trustee "filed Notice of Objection to the assessment in respect of the 1952 fiscal year and by notification by the Minister, *dated August 28, 1956*, the assessment was confirmed".

The appellant, then, bases its appeal on two grounds, namely: (cf. Statement of Facts). B.(1) (*a*) that "the proceeds of sale of one-half of the Company's interest in the Farmout Agreement above mentioned in the sum of $27,500 added to the Company's income in the said assessment represents a capital receipt which should not be included in its income", and; 2. "The deduction allowed in respect of loss incurred in the 1953 fiscal year should be increased by $51,885.42 to $52,958.57 by reason of the increased capital cost allowance now reflected in the books of the Company and as disclosed in the amended Return for the 1953 fiscal year filed by the Trustee".

Regarding its first objection, appellant argues that the $27,500 obtained for the assignment of a one-half interest in the petroleum leases to Realty Oils Ltd. (ex. 9) ". . . represents a capital receipt, properly excluded from income for the 1952 fiscal year . . .", that the asset derived by the Company via the Farmout Agreement of February, 1952 (ex. 7), is ". . . an income producing property which would be a capital asset held for investment"; finally, that

the Company not being in the business of buying and selling natural gas leases or rights to acquire the same, any such rights obtained or sold by it "... were not trading assets".

The "Reply to Notice of Appeal" could well have endured more explicitness. Perfunctory denials are mostly vague and seldom helpful or convincing. It so happens, however, that paragraph "13" of the Reply raised in clear enough terms a point which, if well taken, would preclude the appellant from successfully prosecuting its twofold complaint. Respondent contends that the Company is disentitled to any of the redresses sought for "... by virtue of s-s. (4A) of s. 42 of *The Income Tax Act* (1948) ... in respect of the further 1953 loss claimed in the amended tax return for its 1952 taxation year, which was filed by it *in the month of June 1955, since that return was not filed within one year from the day on or before which the Appellant was required by subsection (1) of section 40 to file its return for the 1952 taxation year*".

In the closing paragraphs of these notes, reasons for considering this objection a peremptory one will be dilated upon. Even so, I had as well afford appellant the melancholy comfort of holding that none of his claims on their merits, or more precisely demerits, could otherwise be allowed.

The recent case of *Western Leaseholds Ltd. v. Minister of National Revenue*[1] decided by Mr. Justice Cameron of this Court, dealt with problems very closely allied to the instant matter arising from the assignment of a one-half interest in the drilling of natural gas wells to Realty Oils Ltd. Large sums of money received in 1949 and 1950 by Western Leaseholds Ltd. from Imperial Oil and Barnsdall Oil under options exercised and also for leasing agreement were held to be "... income from a business and therefore within the definition of income in s. 3(1) of the *Income War Tax Act*".

A comparison, which it suffices to suggest, between Western Leaseholds' Memorandum of Association, reproduced on page 287 of the official report, and our Lodestar Drilling Company's own memorandum (ex. A), especially

[1] [1958] Ex. C.R. 277 at 287.

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paragraph 3(*d*), would reveal a striking similarity in both these empowering covenants. In the former case, page 292, Cameron J. wrote as follows:

> In my view, no distinction can be drawn between the five items of profit now under consideration. They are all gains which fall within the test laid down in *Californian Copper Syndicate v. Harris*, 5 T.C. 159, namely whether the amount in dispute is "a gain made in an operation of business in carrying out a scheme for profit-making".

The Supreme Court of Canada[1] unanimously affirmed this decision, Mr. Justice Locke approvingly quoting, *inter alia*, this passage of the judgment appealed from:

> Generally speaking, a business is operated for the purpose of making a profit and the pursuit of profits may be carried on in a variety of ways and by different operations. In the instant case, it seems to me that the business of Leaseholds was carried out in two stages and involved two different operations. While the purpose of ultimately developing its own resources may have been kept in mind throughout, the first operation necessarily consisted of the acquisition and disposition of mineral rights so as to acquire funds with which to enter into the second stage, namely, the drilling for and operation of oil and gas wells on its own account. The possibility of disposition of the mineral rights had been contemplated since the company was formed. In dealing with its mineral rights in this fashion, it did not do so accidentally but as part of its business operations, and although possibly that line of business was not of necessity the line which it hoped ultimately to pursue, it was one which it was prepared to undertake, and, by its charter, had power to undertake.

The above analysis fits in to a nicety with the particular transactions performed by Lodestar Drilling Company and Realty Oils Ltd.

Coming now to the second element in dispute, the increase to $52,958.57 of the allegedly permissible deduction in respect of loss incurred during the 1953 fiscal year, only meagre material was adduced in support.

Donald Archibald MacGregor, the sole witness, who commented on this moot point, is a member of an important Calgary firm of chartered accountants. Mr. MacGregor prepared the Company's annual returns, both the regular and amended ones, viz. exhibits 1, 2, 3, 4, and 5 for fiscal years 1952-1953. He expresses the opinion that "a drilling company is allowed to deduct its normal business expenditures, plus depreciation on drilling equipment, and drilling performed on its own account". Deductions for 1953, would consist in a $1,073.15 loss allowed by respondent, plus a

[1] [1960] S.C.R. 10 at 21.

$51,885.42 depreciation. All of this too summary information might otherwise be correct, if it did not suffer from overconciseness that deprives it of probative weight unless and until reasonably particularized. Assertions that drilling costs, pursuant to the Farmout Agreement (ex. 7), "amounted to $51,800 in 1952 and $10,900 in 1953", or, again "that a 20% depreciation instead of a 30% one was entered for the Company's fiscal year terminating March 31, 1953", surely require some elaboration. "The reason for omitting to claim the entire 1953 depreciation ratio of 30%, pursues the witness, was the Company's intention to pay a dividend for that year, an impossible policy had it asked for this full $52,000 depreciation". We already know that 1953 was the year of the Company's financial discomfiture, officially declared on October 22. Nonetheless, by October 30, 1952, a $30,000 dividend issued to shareholders of record on October 17, same year, prompted apparently by highly wishful but equally dubious assumptions.

My somewhat copious notes are silent on the topic of coupling this subsequent charge for depreciation with any correspondingly specific expenditures. A similar observation qualifies the five income tax returns of record, wherein a "wealth" of entries is offset by a dearth of suitable identifications. This deficiency was not remedied by the evidence of the Company's past president and manager, the last witness to testify, Mr. William Ford.

Since the appellant must rebut the statutory presumption, then, at best, the decision might well reside in a Scotch verdict of "Not proven".

I expatiated at greater length than I intended on aspects devoid of objective significance, since the language of the *Income Tax Act,* in s. 42 (4A), added by c. 51, s. 14 of 1951, seems to justify respondent's plea of prescription.

So as to reach this opinion, one should minutely review the chronological sequence of the Company's filing of its regular and amended income tax returns for fiscal years 1952-1953 (exhibits 1 to 5 inclusive), and the statutory steps thereupon taken by respondent. Although tedious, such a task cannot be avoided. Section 42 (4A) reads thus:

> Where a taxpayer has filed the return of income required by section 40 for a taxation year and, *within one year from the day on or before which he was required by section 40 to file the return for that year,* has filed an

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amended return for the year claiming a deduction from income under paragraph (*d*) of subsection (1) of section 26 in respect of a business loss sustained in the taxation year immediately following that year, the Minister shall reassess the taxpayer's tax for the year.

A twelve-month period being thus extended, from the date of the prescribed annual report, to produce an amended return of which the Minister "shall" take due cognizance, let us inquire whether the taxpayer at bar complied with this requirement.

Exhibit "1", the Company's return for its taxation year ending March 31, 1952, was received at the Calgary National Revenue office *on October 1, 1952,* according to the day-stamp affixed. It acknowledges a taxable income of $114,916.05.

Exhibit "2" is the 1953 return listing a loss of $3,516; it reached the Calgary office *on September 30, 1953.*

Exhibit "3", also dated the same day, viz. *September 30, 1953,* purports to be an amended return for 1952, intended to bring about a re-assessment of this latter year and have deducted therefrom a 1953 deficit ($3,516) as permitted by ss. 26(1)(*d*) and 42 (4A).

Paragraph A(*f*) in Appellant's "Statement of Facts" recites that "on April 28, 1955, Notices of Re-Assessment were mailed to the Company in respect of years 1952 and 1953 . . ."

Exhibit "5" should be summarized before exhibit 4, since it is the amended report *for 1953,* but dated *June 27, 1955, precisely two (2) months after the Minister's Notice of re-assessment of April 28, 1955.* This "corrected" statement increases to $52,958.57 the former loss of $3,516 appearing on exhibit 2, and would have it deducted from the 1952 profits (ex. 1).

Exhibit "4" is a second revised return for taxation year 1952 (the first 1952 amended report being exhibit 3), *dated June 27, 1955.* An attempt is made to set at $61,957.48 the 1952 taxable income which, in exhibit 1, reads $114,916.05. In the instant occurrence, as for exhibit 5, the day of filing, *27th June, 1955,* exceeded by two months the official re-assessment notification of *April 28.*

When the Minister re-assessed on April 28, 1955, in respect of the years 1952-1953, the only returns in his possession at that time were:

(a) exhibit 1, received October 1, 1952

(b) exhibit 2, received September 30, 1953 and,

(c) exhibit 3, also received September 30, 1953.

We know that exhibits 4 and 5 reached the respondent after June 27, 1955.

Therefore, one must conclude that, *as of April 28, 1955*, the re-assessment date, the only loss about which respondent had any information was, and could be, no other than the $3,516 one disclosed in exhibit 2.

Subsequently to June 27, 1955, the re-amended returns, exhibits 4 and 5 being received, the Minister, by notification dated August 28, 1956, took a negative attitude, simply adhering to his assessment of April 28, 1955.

Such are the facts; now, appellant strives, in law, to have the ministerial decision rescinded and obtain a second re-assessment.

Section 42 (4A) does not give rise to any ambiguity; amended income tax returns must be forwarded at the latest one year after the statutory mailing date of each annual statement (cf. Ch. 52, 1948, s. 40 (1) (*a*)).

September 30, 1953, appearing on exhibits 2 and 3 as the time of receipt, the Company had until October 1, 1954, and not up to June 27, 1955, to submit for appraisal its re-amended returns, exhibits 4 and 5.

It possibly lies with the Minister to excuse a bar of limitations due to tardiness, but this does not constitute my problem. Requested to compel the respondent, no convincing argument was suggested whereby the Court could coerce the Minister to re-assess beyond the allotted delay, if, for motives within his discretionary powers, he deems fit to refuse.

For the reasons above, this appeal is dismissed, with taxable costs against the Appellant Company.

Judgment accordingly.

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Jan. 16, 17
Apr. 21

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

MAURICE TAYLOR ....RESPONDENT.

Revenue—Income War Tax Act, s. 55 as enacted by S. of C. 1944-45 c. 43, s. 15 and Income Tax Act 1948, S. of C. 1948, c. 52, s. 42(4)—Limitation period for re-assessment of taxes—Burden of proof on Minister to prove misrepresentation or fraud—"Any misrepresentation" in Act includes both innocent and fraudulent misrepresentation—Appeal allowed.

Respondent taxpayer in filing his income tax returns for the taxation years 1948 and 1949 failed to report debenture interest received by him, gifts made to his wife, and in filing his return submitted a balance sheet which in effect was a net worth statement and in which he failed to include certain debentures which were held by him as part of his personal assets, not connected with his business. In July, 1956, the appellant re-assessed the respondent for these two years from which re-assessment the respondent appealed to the Tax Appeal Board which allowed the appeals. The Minister now appeals from the decision of the Tax Appeal Board to this Court.

Respondent contends that the right of the Minister to re-assess after the lapse of the statutory period of limitation should be confined to cases in which the taxpayer has made a fraudulent misrepresentation or has committed a fraud.

Held: That in every appeal under the Act regarding a re-assessment made after the statutory period of limitation has expired and which is based on fraud or misrepresentation the burden of proof lies on the Minister to first establish to the satisfaction of the Court that the taxpayer has "made any misrepresentation or committed any fraud in filing the returns or in supplying any information under this Act", unless such is admitted by the taxpayer.

2. That the words *any misrepresentation* used in the section of the Act mean any representation that was false in substance and in fact at the material dates and includes both innocent and fraudulent misrepresentations.

3. That in each of the three matters mentioned the respondent made misrepresentations with respect to matters which were material at the times they were made and as the appellant has established that misrepresentations were made in the original returns for both 1948 and 1949 the re-assessments made by him and now under appeal could be made at any time.

APPEAL from the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cameron at Windsor, Ontario.

G. L. Mitchell, Q.C., C. G. S. Dawson and *F. J. Dubrule* for appellant.

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Keith Laird, Q.C. for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (April 21, 1961) delivered the following judgment:

This is an appeal by the Minister from a decision of the Tax Appeal Board dated January 29, 1958[1] which allowed the respondent's appeals from re-assessments made upon him for the taxation years 1948 and 1949. Each re-assessment was dated July 10, 1956, more than six years after the dates of the original assessments, and the main question for determination is whether such re-assessments were out of time. The Minister relies as to the year 1948 on the provisions of s. 55 of the *Income War Tax Act* and as to the year 1949 on s. 42(4) of the *1948 Income Tax Act*. These sections were as follows:

> 55. Notwithstanding any prior assessment, or if no assessment has been made, the taxpayer shall continue to be liable for any tax and to be assessed therefor and the Minister may at any time assess any person for tax, interest and penalties and may
>
> (*a*) at any time, if the taxpayer has made any misrepresentation or committed any fraud in making his return or supplying information under this Act, and
>
> (*b*) within six years from the day of the original assessment in any other case,
>
> re-assess or make additional assessments upon any person for tax, interest and penalties.
>
> 42.(4) The Minister may at any time assess tax, interest or penalties and may
>
> (*a*) at any time, if the taxpayer or person filing the return has made any misrepresentation or committed any fraud in filing the return or supplying information under this Act, and
>
> (*b*) within 6 years from the day of an original assessment in any other case,
>
> re-assess or make additional assessments.

In the Notice of Appeal to this Court it is stated that the re-assessments were made on the assumption that the respondent in filing his returns for these years had made a misrepresentation as to his income, particulars of which were given and will be stated later. At the hearing of the

[1] 18 Tax A.B.C. 403.

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appeal, the Minister applied for leave to amend such notice so as to allege that the re-assessments were made on the assumption that the respondent, in filing his returns, "had made a misrepresentation and/or committed a fraud", and counsel for the respondent not objecting, the amendment was made.

At the commencement of the hearing of the appeal, counsel for the respondent submitted that as the re-assessments under appeal were made more than six years after the date of the original assessments (which I shall hereafter refer to as the statutory period of limitation), the Minister must first establish to the satisfaction of the Court that the taxpayer (or person filing the return) had "made any misrepresentation or committed any fraud in making his return or in supplying information under the Act". So far as I am aware, this is the first occasion on which this question has been before this Court. The general principle in appeals from assessments is that the onus of proving the assessment to be incorrect in fact or in law is on the taxpayer and in this Court that onus is on the taxpayer whether he be appellant or respondent. That principle has been uniformly followed in this Court since the case of *M.N.R. v. Simpson's Ltd.*[1]

After giving the matter the most careful consideration, I have come to the conclusion that in every appeal, whether to the Tax Appeal Board or to this Court, regarding a re-assessment made after the statutory period of limitation has expired and which is based on fraud or misrepresentation, the burden of proof lies on the Minister to first establish to the satisfaction of the Court that the taxpayer (or person filing the return) has "made any misrepresentation or committed any fraud in filing the return or in supplying any information under this Act" unless the taxpayer in the pleadings or in his Notice of Appeal (or, if he be a respondent in this Court, in his reply to the Notice of Appeal) or at the hearing of the appeal has admitted such misrepresentation or fraud. In re-assessing after the lapse of the statutory period for so doing, the Minister must be taken to have alleged misrepresentation or fraud and, if so, he must prove it.

[1] [1953] Ex. C.R. 93.

In Kerr on *Fraud and Mistake*, Seventh Ed., it is stated at p. 669:

> A man who alleges fraud must clearly and distinctly prove the fraud he alleges.

Again in *Halsbury*, Third Ed., vol. 26, at p. 838, it is stated:

> 1558. Since in every form of proceeding based on misrepresentation a misrepresentation of some kind must be established, it follows that the burden of alleging and proving that degree of falsity, which is required for the representation to be a misrepresentation, rests, in every case, on the party who sets it up.

At the hearing of the appeal I intimated that my view of the matter was as I have just stated, and on consideration, I find no reason to change it. Indeed, counsel for the Minister, in answer to a direct question, frankly admitted that he could not argue otherwise.

A further question arose as to the standard of proof applicable in considering the evidence as to whether a fraud had been committed or a misrepresentation made. In my opinion, the standard to be applied is not that applicable in criminal proceedings, namely, proof beyond reasonable doubt, but that applicable in civil proceedings, namely, the standard of balance of probability.

Reference may be made to *Halsbury*, Third Ed., vol. 26, p. 845, where, under the general heading of "Misrepresentation and Inducement", it is stated:

> 1572. In determining whether a representation alleged to have been fraudulent was so made, the standard of proof applicable is the civil standard of balance of probability and not the criminal standard of proof beyond reasonable doubt, but the degree of probability required to establish proof may vary according to the gravity of the allegation to be proved. The question, whether there is any evidence to support an allegation that a representation made was fraudulent, is a question of law. Subject to this, the question whether a false representation was actually fraudulent is, in every case, a question of fact.

As authority for the first proposition, reference is therein made to *Hornal v. Neuberger Products, Ltd.*[1], a decision of the English Court of Appeal, in which it was held:

> In determining the question of fact, viz., whether the representation had been made, the same standard of proof should be applied whether the cause of action was contractual warranty or fraud, and, the standard

[1] [1956] 3 All E.R. 970.

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of proof applicable was the civil standard of a preponderance of probability, which, however, was not an absolute standard, since within it the degree of probability required to establish proof might vary according to the gravity of the allegation to be proved;

In that case Denning L.J., at p. 977, referred to his own judgment in *Bater v. Bater*[1], where at p. 459 he said:

A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

Finally, on this point I think that when the Minister has satisfied the Court that "any fraud has been committed or any misrepresentation made", he has done all that he is then required to do. He will thereby have fulfilled the statutory requirement which alone authorizes him to make a re-assessment beyond the statutory period of limitation. Thereafter, the onus of proof that there is error in fact or in law in the re-assessment falls on the taxpayer.

Before leaving this part of the case, I must refer to a recent decision in the English courts which is here of special interest. In *Amis v. Colls*[2], Cross J. considered and dismissed an appeal of a taxpayer from a decision of the General Commissioners relating to assessments made more than six years after the fiscal year to which the respective assessments related. The assessments were made under the proviso to s. 47(1) of the *Income Tax Act* 1952, which section was as follows:

47. *Time limit for assessments, additional* assessments and surcharges.—(1) Subject to the provisions of this section and to any provision of this Act allowing a longer period in any particular class of case, an assessment, an additional first assessment or a surcharge under any Schedule may be amended or made, as the case may be, under the preceding provisions of this Chapter at any time not later than six years after the end of the year to which the assessment relates or the year for which the person liable to income tax ought to have been charged:

Provided that where any form of fraud or wilful default has been committed by or on behalf of any person in connection with or in relation to income tax, assessments, additional assessments and surcharges on that person to income tax for that year may, for the purpose of making good to the Crown any loss of tax attributable to the fraud or wilful default, be amended or made as aforesaid at any time.

[1] [1950] 2 All E.R. 458 at 459. [2] [1960] T.R. 213.

It will be noted that additional assessments could be made after the lapse of six years only where there had been fraud or wilful default and in that respect the section differs from that now under consideration. In that case, Cross J. stated at p. 214:

> It is clear that the onus of establishing that a case falls within the proviso lies on the Revenue authorities.

Then, in reference to the standard of satisfaction necessary in such a case, he said at p. 215:

> A point has been raised as to the standard of satisfaction necessary in such a case as this. Mr. Karmel argued that as the conduct alleged might have formed the subject of criminal proceedings, the proper standard is not satisfaction on the balance of probabilities, as is the normal test in civil proceedings, but satisfaction beyond reasonable doubt, the test in criminal cases. I should have thought that, as these are civil proceedings, the civil standard was the proper one to adopt, but I am prepared to assume for the purposes of argument that the General Commissioners had to be satisfied beyond reasonable doubt.

This is the first occasion in which this Court has had to consider the meaning of the phrase "If the taxpayer has made any misrepresentation or committed any fraud in making his return or in supplying information under the Act". Section 55 of the *Income War Tax Act* (*supra*) was enacted by s. 15 of c. 43, Statutes of Canada, 1944-45, and made applicable on passing. Prior to that date there was no limitation on the right of the Minister to re-assess or make additional assessments at any time, as will appear from the former s. 55, enacted by s. 8 of c. 14, Statutes of Canada, 1932-33, which was made applicable to income of the 1917 taxation period and all subsequent periods, and which read as follows:

> 55. Notwithstanding any prior assessment, or if no assessment has been made, the taxpayer shall continue to be liable for any tax and to be assessed therefor and the Minister may at any time assess, re-assess or make additional assessments upon any person for tax, interest and penalties.

The effect of the new s. 55, enacted in 1944, was to limit the right of the Minister to make a reassessment more than six years after the date of the original assessment, to cases in which there was misrepresentation or fraud. The six-year period remained in effect until it was reduced to four years by s. 11 of c. 39, Statutes of Canada 1956, and effective January 1, 1957.

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At no time have the Canadian income tax acts defined either "fraud" or "misrepresentation". Those acts are not, in my opinion, matters of technical legislation and it follows, therefore, that the words are to be given their ordinary meaning.

It is to be noted at once that the section authorizes the Minister to re-assess or make further assessments at any time if the taxpayer (or, now, the person making a return) has either "made any misrepresentation" or "committed any fraud". While, therefore, the Minister may re-assess at any time if fraud has been committed, he may also do so if a misrepresentation has been made as provided in the section. I cannot agree with the submission of counsel for the respondent that the words "made any misrepresentation" are to be disregarded and that the commission of something in the nature of fraud alone authorizes the Minister to re-assess at any time, since a construction which would leave without effect any part of the language of the statute will normally be rejected. Reference may also be made to Maxwell on *Interpretation of Statutes,* Tenth Ed., p. 321, where it is stated: "Where analogous words are used each may be presumed to be susceptible of a separate and distinct meaning, for the legislature is not supposed to use words without meaning." For the purpose of this case, it is unnecessary to determine whether fraud has been committed since, in my opinion, the Minister has established that in each of the years the respondent made a misrepresentation in filing his returns or in supplying information under the Act.

Misrepresentations may be either fraudulent or innocent. A fraudulent misrepresentation is a false representation made with the knowledge that it is false, or without an honest belief in its truth, or recklessly without caring whether it is true or false. An innocent misrepresentation is one which is not fraudulent; it is a false statement made in the honest belief that it is true. (*Derry v. Peek*[1] per Lord Herschell)

[1] [1889] 14 A.C. 337.

In Halsbury's *Laws of England*, Third Ed., vol. 26, the nature of a misrepresentation, what constitutes its falsity, and the distinction between innocent and fraudulent misrepresentations, are stated as follows:

1556. *What constitutes falsity.* A representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. For the purpose of determining whether there has or has not been a misrepresentation at all, the knowledge, belief, or other state of mind of the representor is immaterial, save in cases where the representation relates to the representor's state of mind; though his state of mind is of the utmost importance for the purpose of considering whether the misrepresentation was fraudulent.

1557. *Standard for determining falsity.* The standard by which the truth or falsity of a representation is to be judged has been thus expressed. If the material circumstances are incorrectly stated, that is to say, if the discrepancy between the facts as represented and the actual facts is such as would be considered material by a reasonable representee, the representation is false; if otherwise, it is not. Another way of stating the rule is to say that substantial falsity is, on the one hand, necessary, and, on the other, adequate, to establish a misrepresentation. It results from the foregoing statement that where the entire representation is a faithful picture or transcript of the essential facts, no falsity is established, though there may have been any number of inaccuracies in unimportant details. Conversely, if the general impression conveyed is false, the most punctilious and scrupulous accuracy in immaterial minutiae will not avail to render the representation true.

1575. *Misrepresentation innocent if made with honest belief in its truth.* A misrepresentation must be either fraudulent or innocent. It cannot be both. Fraud and innocence, just as much as falsity and truth, are mutually exclusive categories. It follows, therefore, from the definition already given of a fraudulent misrepresentation, as a misrepresentation made in the absence of actual honest belief in its truth, that the essential characteristic of an innocent misrepresentation is the presence of such actual honest belief; and that, in neither case, is anything more than this absence, or presence, required to constitute fraud or innocence respectively.

1576. *Effect of negligence or incompetence in forming belief.* It is well established that a misrepresentation which was founded on a belief in its truth, if that belief really existed, and was genuinely and honestly entertained, is not deprived of its character of innocence by reason of the mere fact that the belief resulted from want of care, skill, or competence, or lapse of memory, though such conduct, in other aspects, may have been of a most culpable character. Negligence is not dishonesty; indeed, it is its direct antithesis. It has been stated that, though negligence does not amount to fraud, it may constitute evidence of it; but the true meaning of this statement is that there may be cases in which the want of care is such that the tribunal appointed to determine the question of fact would be justified in preferring the alternative hypothesis of want of honesty. Carelessness or stupidity in arriving at a genuine conviction must, however, be distinguished from that moral recklessness or callousness, already referred to, which prompts the putting forward of a misrepresentation as to which the representor has no belief at all. Similarly, absence of reasonable grounds for the representor's belief, if in fact it was a real and genuine belief, does not of itself constitute, or indicate fraud; though,

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here again, there may be cases where the alleged belief must have been based on grounds so utterly preposterous as to compel the inference that in fact it never did exist. On the same principle actual failure to recollect a fact, the omission of which renders the representation false, does not of itself render it fraudulent also.

Counsel for the respondent submits that on a true interpretation of the section a mere innocent misrepresentation by a taxpayer is not a ground for authorizing the Minister to re-assess at any time. If it were, he says that the general intention of Parliament to restrict the authority of the Minister to make re-assessments to a period of six years from the date of the original assessment would be so cut down as to be almost completely nullified. In effect, he submits that the right of the Minister to re-assess after the lapse of the statutory period of limitation should be confined to cases in which the taxpayer has made a fraudulent misrepresentation or committed a fraud. If that submission were correct, it would mean that the words "has made any misrepresentation" would be totally redundant and unnecessary since "to make a fraudulent misrepresentation" is to commit a fraud. If Parliament had intended to exclude innocent misrepresentation, it would have been a simple matter to have used the phrase "made any fraudulent misrepresentation".

The principles to be applied where the language of the statute is plain are summed up in a statement in Maxwell's text (and in the cases therein cited) at p. 4:

> When the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. It is not allowable, says Vattel, to interpret what has no need of interpretation. Such language best declares, without more, the intention of the lawgiver, and is decisive of it. The rule of construction is "to intend the legislature to have meant what they have actually expressed". It matters not, in such a case, what the consequences may be. Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced, even though it be absurd or mischievous. The underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expressions used therein rather than from any notions which may be entertained by the court as to what is just or expedient. The words cannot be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should be excluded or embraced. However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. When once the meaning is plain, it is not the province of a court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words.

The author then refers to *Sutters v. Briggs*[1], where at p. 8 Lord Birkenhead said:

> Where, as here, the legal issues are not open to serious doubt, our duty is to express a decision, and leave the remedy (if one be resolved upon) to others.

It is to be noted also that the section refers to "*any* misrepresentation" and it would be improper, therefore, to construe that term as excluding a particular sort of misrepresentation such as an innocent misrepresentation. I have reached the conclusion that the words "any misrepresentation", as used in the section, must be construed to mean any representation which was false in substance and in fact at the material date, and that it includes both innocent and fraudulent misrepresentations.

With these considerations in mind, I now turn to the particular facts of this case. The respondent was born in Latvia about sixty-nine years ago, came to Canada in 1903, and, after selling goods from door to door for a few years, established the Sarnia Bargain House in Sarnia, Ontario, selling workmen's clothing. He was the sole proprietor of that business from its inception until it was sold in 1955 and, as the tax returns indicate, the business has been a prosperous one. At all relevant times, he had a current account for his business at the Bank of Nova Scotia in Sarnia. He also had substantial dealings with the Lambton Loan and Investment Company of Sarnia (hereinafter called Lambton Loan) where he had a saving account and in whose debentures or bonds he appears to have invested a large part of his savings.

In the Notice of Appeal to this Court, the particulars of the alleged fraud or misrepresentation are stated to be as follows:

For 1948:

(*a*) That full bond interest was not reported.

(*b*) That two bonds having a combined face value of $5,000 did not appear on the Respondent's balance sheet for this year.

(*c*) That the amount opposite "Cash on Hand & in Bk." on the said balance sheet was improperly stated.

(*d*) That a savings account with the Lambton Loan and Investment Company was omitted from the said balance sheet.

For 1949:

(*a*) That two bonds having a combined face value of $5,000 did not appear on the Respondent's balance sheet for this year.

[1] [1922] 1 A.C. 1.

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(*b*) That the amount opposite "Cash on Hand and in Bank less outstanding Drafts" on the said balance sheet was improperly stated.

(*c*) That a savings account with the Lambton Loan and Investment Company was omitted from the said balance sheet.

(*d*) That the Respondent failed to indicate, in the space provided on his income tax return, that he had made gifts which were required to be reported on the income tax return.

As to Item (*a*) of 1948, the evidence of the appellant's witnesses established (indeed, it is now admitted) that in August, 1948 the respondent cashed four coupons, each of a value of $48.75 ($195 in all), representing interest on $2,000 of debentures of the Lambton Loan (Exhibit 2) purchased by him in March 1946, and which debentures he renewed in 1951 for a further period of five years. No part of that income was reported in his 1948 return.

Items (*b*), (*c*) and (*d*) for 1948, and Items (*a*), (*b*) and (*c*) for 1949 all relate to omissions from or misstatements in the "balance sheet" which formed part of the tax returns. The respondent employed W. L. Smith, a certified public accountant of Sarnia, to prepare his annual tax returns, and, while these were made on the T-1 General form, Smith did not follow the usual practice of completing the respondent's business income by using the form found on p. 4 thereof, entitled "Income from business, professional fees, commissions". In each year, he prepared a typewritten statement consisting of (1) a computation of profit for the business; and (2) a statement of assets and liabilities which is referred to in the Particulars as the "balance sheet". Since the assets specified include such items as the respondent's residence and another building from which he obtained rent, as well as the assets of his business, it was obviously intended to represent all the assets of the respondent, whether in the business or not; and the "surplus", which is the difference between the stated assets and liabilities, apparently refers to his total net worth.

The evidence adduced by the Minister clearly established (and it is now admitted) that the respondent (1) at December 31, 1948, owned (*a*) bonds or debentures of Lambton Loan to the value of $5,000, and (*b*) had a savings account at the Lambton Loan amounting to $823.81, and that neither of these items appeared in the balance sheet attached to the return for that year; and (2) that as

of December 31, 1949, the respondent owned (*a*) debentures or bonds of that company to the value of $8,000 (not $5,000 as stated in the particulars), and (*b*) had a savings account with that company amounting to $838.45 and that neither of these items appeared in the balance sheet forming part of his return for that year. The allegations of fact in Items (*b*) and (*d*) for 1948 and in Items (*a*) and (*c*) for 1949 of the particulars are therefore established.

Item (*c*) for 1948 and Item (*b*) for 1949 are of a similar nature, the former referring to "cash on hand and in bank" and the latter to "cash on hand and in bank less outstanding drafts". There is no evidence as to what cash was on hand at the end of either year, but the actual bank balances at the Bank of Nova Scotia are shown to have been respectively $15,179.81 and $15,439.03, instead of $12,329.81 and $13,439.03 as stated in the returns. In the absence of any evidence as to what drafts and/or cheques were in fact outstanding at the year end, I am unable to find that these items were improperly stated.

As to Item (*d*) for 1949, the appellant has established that in that year the respondent, out of his own monies, purchased $11,000 in debentures of the Lambton Loan in the name of his wife and it is now frankly admitted that these were gifts to her. It is also proven that the respondent in his return for that year did not complete in any way the questionnaire contained on p. 2 thereof, relating to "gift tax" and which was as follows:

> *Gift Tax.*
>
> Did you transfer any property, securities or cash of a value in excess of $1,000 to any person in 1949?
>
> (Yes or No)
>
> If yes, what was the total value of such gifts? $..................
>
> If the total value of such gifts exceeded $4,000, complete and file a gift tax return on or before 30th April, 1950. The form may be obtained from your District Income Tax Office.

These questions remained unanswered, and no gift tax return was filed or gift tax paid thereon.

I must now determine if

(1) The failure of the respondent to include in his 1948 return the income of $195 from the Lambton Loan debentures;

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(2) The omission from the 1948 and 1949 balance sheets of $5,000 and $8,000 in debentures of Lambton Loan, and of the savings account with that company; and

(3) The failure to complete the questionnaire relating to gift tax in his 1949 return,

are "misrepresentations" within the meaning of the section.

It is to be observed that all these matters have nothing to do directly with the respondent's business operations and would be known to an accountant preparing the respondent's income tax returns only if they were communicated to him by the respondent. The evidence is that Mr. Smith prepared the respondent's returns for some thirty-three years, that the respondent annually turned over to him his Liberty Book, current bank account, cheque book, bank statements, as well as a statement of unpaid drafts. A Liberty Book was supplied annually by Smith and was in the simplest possible form, consisting only of a daily record of receipts for goods sold and all disbursements for purchases, wages and other business expenses, with a place at the end for an annual summary. No records for 1948 and 1949, except for the bank account, were produced, and it was suggested that they may have been destroyed by a tornado in 1953. Smith died before the appeal was heard and a search in his office failed to disclose the records for these years.

Now the respondent gave evidence and, while he says he told Smith to go to the Lambton Loan to ascertain the amount of his bonds, income therefrom and the details of his savings account, I find it difficult to believe that he did so. While the evidence is that Smith was extremely careless in preparing income tax returns and not fully conversant with the *Income Tax Act* or rulings made thereunder, it is difficult to believe that he would omit from the returns of income and the statements of the respondent's assets any mention of such bonds or savings account if he had any knowledge of them or had been instructed to look for them. In later years, the returns prepared by Smith did show very substantial holdings of the respondent in Lambton Loan debentures, but not in the proper amounts.

Moreover, I was not convinced that the respondent was entirely worthy of belief. He first swore positively that in purchasing the bonds of Lambton Loan, he invariably paid

for them in cash (not cheques) from surplus money out of the business. After an adjournment, however, he was recalled and he said that all bonds had been paid by cheques on the Bank of Nova Scotia, but a perusal of that bank account for 1948 and 1949 shows no cheques payable to the Lambton Loan. Further, he said that at all times his cash drawings at the store for his own use, and amounting to $50 to $75 per week, were listed in the Liberty Books, but it was found that no such entry was made in any of the later Liberty Books that were produced by the witnesses. It seems reasonable to infer, therefore, that all of these items were omitted from the returns and the balance sheets because the respondent had deliberately refrained from telling Smith about them. The appellant had full knowledge of all the bonds purchased, whether for himself or for his wife, and also of the savings account at the Lambton Loan, and could have given the necessary information to Smith or could have shown him the securities themselves.

It was undoubtedly the duty of the respondent, under the provisions of both the *Income War Tax Act* for 1948 and the *1948 Income Tax Act* for 1949 to make returns of his total income and in cases where the gift tax provision applied, to disclose the amounts of such gifts and pay tax thereon. Under s. 21(1) of the latter Act, the income from the $11,000 in debentures transferred by the respondent to his wife in 1949 was deemed to be his income. An examination of Exhibit 6 (the debenture for $10,000 purchased for his wife on March 25, 1949) indicates that a half year's interest thereon was due on September 25, 1949.

Then in each year the respondent signed the certificate on p. 1 of the return. It reads:

> I hereby certify that the information given in this return and in any document attached, is true, correct and complete in every respect, and fully discloses my income from all sources.

That certificate was untrue and the representations in the returns which related to matters entirely within the knowledge of the respondent and were intended to be accepted and acted upon by the Minister, were in a material sense false and therefore misrepresentations. For the year 1948 full bond interest was not reported, although the respondent had full knowledge that it should have been reported as income. For both the years 1948 and 1949,

the balance sheets attached to and forming part of the returns and which purported to list all the assets and sources of income of the appellant were not "complete in every respect" in that they omitted all reference to his debenture holdings and his savings account at the Lambton Loan. While it may not have been necessary in a strict sense to furnish full details of all securities held, a balance sheet which purports to state all the assets of a taxpayer and all his sources of income is incorrect and constitutes a misrepresentation when it omits entirely substantial assets such as was the case here.

I think, also, that the failure to complete the gift tax questionnaire for 1949 was a misrepresentation since silence may in some cases constitute falsity. Reference may be made to Halsbury, Third Ed., vol. 26:

> 1562. There are two main classes of cases in which reticence may contribute to establish a misrepresentation, namely, (1) where known material qualifications of an absolute statement are omitted; and (2) where the circumstances raise a duty on the representor to state certain matters, if they exist, and where, therefore, the representee is entitled as against the representor to infer their non-existence from the representor's silence as to them.

Here there was a duty on the respondent to complete the questionnaire relating to gift tax since it would affect the amount of his own personal income tax and would involve a payment of gift tax as well. The respondent alone knew of the gifts to his wife. I think, therefore, that the Minister was entitled in the circumstances to infer from the respondent's silence as to the gifts having been made, that no such gifts had in fact been made.

Counsel for the respondent submitted that the Court should take into consideration the comparative illiteracy of the respondent and his misplaced reliance on his accountant, Smith. The respondent's evidence is that he relied entirely on Smith, that he personally had no knowledge of the provisions relating to gift tax; and that when Smith had completed the returns, including the balance sheet, they were brought to him and on the assurance of Smith that the computations were correct, he signed them without checking them in any way, made out his cheque for the tax as computed and gave them to Smith to file.

It is urged that in these circumstances the respondent was at the most negligent and careless and that there was no evidence that he had wilfully misrepresented anything.

I am not satisfied that the respondent was as illiterate or as ignorant of income tax law as he pretended to be. He had made a success of his own business, had been paying income tax for many years, and I gained the impression that he was a shrewd business man. His own evidence was that he had referred Smith to Lambton Loan to secure particulars of his assets and income, and while I disbelieve that statement, it at least suggests that he was aware of what information had to be supplied in his returns. Before certifying as to the accuracy and completeness of the returns (even if he could not read them), he could have had Smith explain each item and thereby have assured himself that they were true and complete. Here there was at least gross negligence, and, while mere negligence is not dishonesty, the representations were false and therefore misrepresentations.

My conclusion, therefore, is that in each of the three matters above mentioned, the respondent made misrepresentations with respect to matters which were material at the time they were made. It follows, therefore, that as the Minister has established that misrepresentations were made in the original returns for both 1948 and 1949, the re-assessments here under appeal could be made "at any time".

No other problem arises in these appeals. Counsel for the respondent agreed at the trial that there was no error in the re-assessments as such.

Accordingly, for the reasons stated, the appeals of the Minister will be allowed, the decision of the Tax Appeal Board set aside, and the re-assessments made upon the respondent affirmed. The appellant is entitled to his costs after taxation.

Judgment accordingly.

1960 Oct. 14

1961 Apr. 7

BETWEEN:

HERBERT WILLIAM PURCELL ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, and 139(1)(e)—Capital profits or income—Profits obtained from trading in syndicate interests and vendor stock constitute income—Appeal dismissed.

Appellant from 1946 to 1949 was a shareholder and employee of a brokerage company which underwrote and marketed shares of oil producing companies. In 1949 he disposed of his holdings in the brokerage company and joined with two others in a partnership or syndicate operating in the natural gas and oil field, and acquired a working interest in an oil property that came into production. In 1950 and 1952 he sold parts of his working interest and the profits resulting therefrom were assessed as income. In 1950 he and another member of the syndicate transferred to a company which he organized certain oil properties for one million shares of stock which were disposed of at a profit in 1952. The profit on the sale of these shares was also assessed as income. An appeal from such assessment to the Tax Appeal Board was dismissed and appellant now appeals to this Court.

Held: That the appellant was engaged in the business of dealing in oil interests and oil leases in any way through which a profit might be obtained and in promoting companies having the same objectives, and the syndicate of which he was a member entered into agreements with lease owning and drilling companies in the hope of obtaining profit from the percentages of revenue production to which they were entitled under the terms of such agreements.

2. That in the course of his activities as a promoter the appellant had organized the company of which he became managing director at no salary to which certain leases were transferred for a return of shares which were placed in escrow from the sale of which he hoped to realise a profit when the escrow terminated, and such escrow shares were part of his stock in trade and not an investment.

3. That the appellant was rightly assessed for income tax on the profits resulting to him from all these transactions and the appeal is dismissed.

APPEAL from the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Ritchie, Deputy Judge of the Court, at Vancouver.

D. T. B. Braidwood for appellant.

T. Z. Boles for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

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RITCHIE D.J. now (April 7, 1961) delivered the following judgment:

This appeal from a July 13, 1959 decision of the Tax Appeal Board concerns a re-assessment of income tax made on December 21, 1956 in respect of amounts added by the Minister to the income of the appellant for the taxation years 1950 and 1952.

The appellant, now residing in Calgary, was resident in Vancouver during both of the taxation years involved herein. From 1946 to 1949 he was a shareholder and employee of H. J. Bird and Company, Limited, a Vancouver investment and stock brokerage company which, as part of its regular business, underwrote and marketed shares of oil producing companies. In the latter part of 1949 he disposed of his holdings in the Bird company and, early in 1950, joined with two others in a partnership or syndicate operating in the natural gas and oil field.

As I understand the evidence, the syndicate agreement was not reduced to writing until, on March 22, 1950, an assignment from Leduc Calmar Oil Company Limited of a farmout agreement with Imperial Oil Limited had been obtained. The syndicate agreement then entered into between the appellant and his two associates is headed " P. C. M. Syndicate No. 2," is dated June 2, 1950 and provides all expenses and profits of the syndicate shall be borne and divided share and share alike and that the syndicate shall be governed by a majority vote of the members.

Under the terms of the farmout assignment from Leduc Calmar, the syndicate assumed an obligation to drill a petroleum exploratory well to a depth sufficient to test all zones down to and including the D-2 zone of the Devonian. To fulfill this obligation an agreement was negotiated with an organization known as McRae Developments. The terms of this agreement included, *inter alia,* provisions that:

(*a*) McRae, at its own expense, should drill a well to the producing zone in the D-2;

(*b*) if production in commercial quantities should be obtained, the cost of completion would be borne in the ratio of 57 by McRae and 20 by the syndicate;

(*c*) five per cent of the revenue from production of the first well, after payment of proper charges and operating expenses, would be paid to the syndicate;

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(*d*) seventy-seven per cent of the revenue from production of the first well would be paid to the Royal Bank of Canada, until funds sufficient to defray the cost of drilling and completing a second well were accumulated;

(*e*) after accumulation of funds sufficient to defray the cost of drilling and completing a second well, 41% of the revenue from the first well would be paid to the syndicate until they had received 20% of the total production revenue from that well;

(*f*) when the 41% of revenue payments to the syndicate totalled an amount equivalent to 20% of the total production revenue, the syndicate thereafter would be paid 20% of the production revenue from the first well; and

(*g*) revenue from production of the second well would be paid to the Royal Bank of Canada until funds sufficient to defray the costs of drilling and completing a third well were accumulated and thereafter a like procedure as to distribution of revenue from the first well would be followed.

The syndicate, at a cost of approximately $75,000, fulfilled all its obligations under the McRae agreement.

One branch of the appeal rests largely on a distinction the appellant draws between the 5% of revenue payable to the syndicate under the above clause (c) and the 20% of revenue they were to receive under clauses (f) and (g) above. He refers to the former as a "net royalty" and to the latter as a "working interest." For convenience I shall use the designations employed by the appellant. He was allotted a 4½% share of the working interest.

The appellant defines a net royalty as a royalty payable to parties who do not contribute to the cost of drilling, exploration or development of a well but, in the event of it proving successful, do contribute to operational and marketing costs but have no equity, or interest, in the equipment.

A "working interest" is described by the appellant as an interest arising from an agreement between an owner of an oil property and a developer under the terms of which the developer undertakes to drill an exploratory well and both the owner and developer assume obligations and liabilities in respect of:

(*a*) the drilling of the well;

(*b*) the completion of the drilling;

(*c*) in the development; or

(*d*) in all three of the phases involved in bringing a well into commercial production.

If the well proves successful, those who hold a working interest participate in the revenue remaining after payment of the operational and marketing expense to which they contribute in proportion to the interests they hold. The appellant also says that holders of a working interest own an equity, or interest, in the equipment necessary to secure production.

The McRae drilling operations were successful. At least two wells came into production. No "net royalties," however, accrued to the syndicate. They had disposed of the right to receive the initial 5% of the distribution of production revenue to which they were entitled. The proceeds of the disposition of the net royalty were, after payment of expenses, distributed among the three partners in the syndicate.

The Minister, under the designation "Net P. C. M. Royalty," added $8,931.46 to the appellant's 1950 income as his share of the proceeds of the sale of the net royalty. Tax was paid without objection on such addition to income.

The appellant declared as income and paid tax on the monies paid to the Royal Bank of Canada or to the Prudential Trust Company and credited to him in respect of his 4½% share of the working interest.

In July of 1950 the appellant sold to a Mr. Fox, for a consideration of $3,487.75, one-half of one per cent of his working interest. In 1952 he sold a further one per cent to a Mr. Reid for the price of $6,500. The Minister has assessed the proceeds of the two sales and the appellant has appealed from such assessment. He continues to pay tax on the monies received in respect of his remaining 3% of the working interest.

In December 1950 the appellant and another member of the P. C. M. syndicate organized Calbrico Petroleums Limited, an Alberta company, to which, for a consideration of 1,000,000 shares in its capital stock, they transferred certain oil properties and oil interests they had acquired at a cost of $14,240, of which the appellant had contributed $7,120. No income tax was assessed against him in respect of the portion of the 1,000,000 which he received.

The appellant became the vice-president and managing director of Calbrico. His duties consisted of supervising drilling activities, acquiring oil interests and raising capital

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through brokerage houses. The company reimbursed him for out-of-pocket expenses but he received no remuneration by way of regular salary.

The 1,000,000 Calbrico shares allotted to the appellant and his partner were deposited in escrow with the Prudential Trust Company Limited. After bonusing the brokerage offices which underwrote a public issue of Calbrico shares, the appellant retained a balance of 445,500 escrow shares. He and his partner also subscribed for 187,000 shares at 18¾ cents per share.

Calbrico Petroleums participated in a number of drilling operations but met with no success. The treasury became depleted and the company dormant. In January 1952 Maynard J. Davies, representing a group of shareholders who wished to gain control of Calbrico, approached the appellant with a view of purchasing his shares. On January 24, 1952 the appellant and Davies entered into an agreement which, after reciting the appellant is the owner of 76,266 free shares and 445,500 escrow shares of Calbrico, provides, *inter alia,* that:

(*a*) on payment of a consideration of $10,000 the appellant will transfer 395,500 of his Calbrico escrow shares to Davies;

(*b*) forthwith after payment of the $10,000, the appellant will transfer ten Calbrico free shares to Davies and appoint him as proxy, until such time as the escrow shares are delivered to the parties entitled thereto or default made by Davies, to vote all his (the appellant's) escrow and free shares at all general meetings of Calbrico;

(*c*) Davies shall have the right to purchase, on or before April 23, 1952, at 18¾ cents per share, all or any of the appellant's free shares in Calbrico;

(*d*) Davies shall pay the appellant the sum of $1,000 in full settlement of all his claims as a creditor of Calbrico; and

(*e*) Davies shall use his best endeavours to obtain from Calbrico a release of any claim it may have against the appellant.

As a result of this agreement the Davies group obtained control of Calbrico. This transaction is the third item involved in the appeal.

The appellant had engaged in oil ventures other than the two above described. In 1948 he was a member of the Red Deer Oil Syndicate from which he derived a profit and on which he paid tax. He also purchased a royalty interest in a well being drilled by a company known as Trans-Empire. The well did not prove successful and his loss of $3,515.64 was allowed as a deduction from income.

Another loss was incurred through the purchase of a royalty interest in a well known as the Big Valley. In 1950 or 1951 he acquired an interest in the Lone Mountain—Murray River Syndicate, then developing oil acreage in British Columbia.

In 1952 the appellant and another member of the P. C. M. syndicate incorporated Basco Petroleums Limited. He became the president and managing director of that company and retained both offices until December 1959. While Basco had its principal operations in the north-eastern sections of British Columbia, it also acquired interests in oil properties situated in Alberta and Saskatchewan.

On his 1950 income tax return the appellant listed his occupation as "Leasing (oil rights)" and his employer's name as Edward P. Lamar. On the 1952 return the occupation is shown as "Oil Management" and his employers are listed as "Various". The appellant says that during the two years he was employed by different parties to obtain leases of petroleum and natural gas rights and that the basis of his remuneration was a per diem fee plus a bonus for every acre leased.

The Minister added to 1950 income the $3,487.75 received by the appellant on the sale to Fox of one-half of one per cent of the working interest under the agreement with McRae Developments but identified it as arising from the sale of "½ of 1% of P. C. M. Royalty."

The $6,500 received on the sale of a further one per cent of the working interest was added to 1952 income, under the description "P. C. M. Royalty." Also added to the 1952 income of the appellant was the sum of $10,000 received on the sale of the escrow shares. From this addition, however, the Minister deducted $7,120 being the cost to the appellant of acquiring the oil properties and interests, the transfer of which was the consideration for the allotment and issue of the escrow shares. The net addition to income in respect of the Calbrico transaction was, therefore, $2,880.

Objections to the $3,487.75 addition to 1950 income and to $9,380 of the additions to 1952 income were filed by the appellant. The Minister confirmed both re-assessments.

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The appellant then appealed to the Tax Appeal Board. The Board dismissed the appeal, holding there was no material difference between the facts herein and in *Shedday v. Minister of National Revenue.*[1]

The appellant maintains that what he calls his "working interest" in the wells brought into production by McRae Developments was a capital asset; that in order to obtain the benefit of the working interest the syndicate was obligated to pay their share of the exploration and operating cost; that while he was engaged both as a principal and as an agent in handling the sale of oil and gas properties he was not engaged in the business of selling securities or in dealing with working interests; that working interests are a separate and specialized branch of the oil business; that the only working interest the syndicate acquired was in the Imperial Oil—Leduc Calmar farmout; and that the two sales of part of his share in the farmout working interest were isolated transactions.

In respect of the Davies transaction the appellant submits the sale of the Calbrico shares was also the sale of a capital asset and that the $10,000 consideration which he received covered not only the purchase of the 395,000 escrow shares but applied also to the right given Davies to vote his free shares, to the right to purchase his free shares and to the acquisition of Calbrico control. He contends control of the company was the most valuable asset which Davies purchased.

The Minister contends the three transactions in question were part of the occupation in which the appellant was engaged and from which he derived his livelihood and that, so far as liability to income tax is concerned, no distinction can be drawn between the receipts derived from what the appellant terms a net royalty and that which he terms a working interest.

The relevant paragraphs of the agreement between the syndicate and McRae Developments relating to the net royalty and working interest are:

The cost of drilling the first well shall be borne as follows:—

(*a*) McRae Developments at its own expense shall drill or cause to be drilled the said well to the producing zone in the D-2.

[1] [1959] Ex. C.R. 272; [1959] C.T.C. 132; 59 D.T.C. 1073.

(*b*) Thereafter and if production of the leased substances is obtained in commercial quantities, the parties shall bear the cost of completion in the ratio of 57 by McRae Developments and 20 by the Syndicate.

The cost of drilling the second and all subsequent wells shall be paid out of production in the manner hereinafter prescribed.

McRae Developments shall be the Operator of the said well if it is brought into production and of any other well or wells drilled upon the lands described in the said Farmout Agreement, subject to the approval of Leduc Calmar Oil Company Limited and of Imperial Oil Limited first had and obtained to McRae Developments so acting.

The revenue from production of the first well after payment of the royalty reserved in the original lease, the payment of crude oil to Imperial Oil Limited as reserved in the Farmout Agreement and operating expenses, shall be paid to Prudential Trust Company, 800 Lancaster Building, Calgary, Alberta, and the parties hereto shall instruct the said Trust Company to make payments therefrom as follows:

(*a*) To Leduc Calmar Oil Company Limited	Ten (10%) Per Cent
(*b*) To A. E. Silliker	Three (3%) Per Cent
(*c*) To the Syndicate	Five (5%) Per Cent
(*d*) To W. R. McRae	Five (5%) Per Cent
(*e*) To the Royal Bank of Canada, Main Branch, Calgary, Alberta, until funds sufficient to defray the cost of drilling and completing the second well are accumulated	Seventy-Seven (77%) Per Cent
(*f*) After Clause (*e*) hereof has been complied with, to the Syndicate until it shall have received Twenty (20%) per cent of production from the commencement of production	Forty-One (41%) Per Cent
(*g*) After clause (*e*) hereof has been complied with to McRae Developments until clause (*f*) has been complied with	Thirty-Six (36%) Per Cent
(*h*) And finally after clauses (*e*) and (*f*) have been complied with, to the Syndicate	Twenty (20%) Per Cent
and to McRae Developments	Fifty-seven (57%) Per Cent

Revenue from production from the second well as in paragraph 5 hereof shall be assigned and paid to the Royal Bank of Canada as aforesaid until funds sufficient to defray the costs of drilling and completing the third well are accumulated and the same procedure shall apply to the third and all subsequent wells, and in each case the distribution of revenue from production shall be distributed as in paragraph five (5) hereof.

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The word "royalty" appears in the agreement only in paragraph 5 when reference is made to "the royalty reserved in the original lease." The term "working interest" is not used in the agreement. The receipts of which the syndicate was entitled to a share are described as "The revenue from production."

The appropriate meaning of "royalty" found in the *Shorter Oxford Dictionary* is:

a payment made to the landowner by the lessee of a mine in return for the privilege of working it.

While I assume the payment to be made by Imperial Oil to the original lessor (landowner) may properly be termed a royalty, I doubt if the term can properly be applied to the share of the production revenue the syndicate was to receive. That share is, in no way, related to the number of gallons of oil that may be pumped or the number of cubic feet of natural gas that may flow from any well drilled on the farmout. The syndicate had no title to the land involved. They merely had the right to drill and deal with any oil production resulting from such drilling. That right was assigned to McRae Developments. If, as and when a well came into production, McRae Developments and the syndicate became partners. They shared in the same proportions in both the payment of expenses and in the distribution of profits.

The five per cent of revenue to be paid the syndicate under clause (*c*) of paragraph 5 is subject to payment of the royalty reserved in the original lease, to the payment of crude oil to Imperial as reserved in the farmout agreement and to operating expenses. The additional 20% of revenue to be paid under clause (*f*) is subject to the same prior charges, but payment of it to the syndicate is deferred until there has been accumulated in the Royal Bank of Canada sufficient funds to defray the cost of drilling and completing a second well. That is the only difference I find in the payments under clauses (*c*) and (*f*).

The right to receive 20% of future revenue is not a capital asset. It represents merely the right to receive possible future income. There is no evidence the sales of part of the working interest included a transfer of any percentage ownership in equipment. If the appellant did acquire

an equity interest in any equipment used in the operation, a write off, or capital cost allowance, would be included in the operating costs payable out of gross revenue.

The language of the agreement between the appellant and Davies does not support the submission the $10,000 paid by the latter was intended to apply to other than the purchase of 395,000 escrow shares. The relevant paragraphs of the agreement with Davies read:

WITNESSETH IN CONSIDERATION of the mutual covenants and conditions hereinafter mentioned, the parties hereto agree as follows:

1. As and when the whole or any part of the said escrow shares are released from the restrictions imposed by the said escrow agreement, the Grantor shall transfer the said shares to the Grantee for his sole use and benefit, SAVE AND EXCEPT 50,000 of the said shares which shall remain the property of the Grantor.

2. IN CONSIDERATION of the above-mentioned agreement to sell the said escrow shares, the Grantee shall pay to the Grantor the sum of TEN THOUSAND ($10,000) DOLLARS of lawful money of Canada within a period of fifteen days from the date hereof.

No consideration is expressed for the appellant's covenants to transfer ten of his free shares to Davies, to appoint him as proxy to vote all the escrow and free shares, and to grant him the right to purchase all or any of the free shares. I must look at the agreement in the language in which it is drawn. It contains no provision on which to base an apportionment of the $10,000 consideration paid by Davies to other than the price of the escrow shares.

The appellant was engaged in the business of dealing in oil interests and oil leases in any way through which a profit might be obtained and in promoting companies having the same objectives.

The syndicate obtained an assignment of the Imperial Oil—Leduc Calmar farmout and entered into an agreement with McRae Developments in the hope of obtaining a profit from the percentages of revenue production to which they were entitled under the terms thereof.

In the course of the promotional aspect of his activities, the appellant organized Calbrico. In consideration for his promotional work and the oil leases the syndicate assigned to the company, the appellant received shares in the capital

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stock of Calbrico which were placed in escrow. The usual expectation of a promoter such as the appellant is to realize a profit from the sale of escrow shares when the escrow terminates. The appellant was paid no salary as managing director of the company. The escrow shares were part of his stock in trade, not an investment.

Sections 3, 4 and 139 (1)(*e*) of the *Income Tax Act,* as they read in 1950 and 1952, are:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

127. (1) In this Act,

* * *

(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

In my view the appellant comes within the three above quoted sections of the Act. The amounts realized on the three transactions were income, as contemplated by section 3, derived from a business of the appellant, as contemplated by section 4 and defined by section 127(1)(*e*) to include an adventure or concern in the nature of trade.

The appeal will be dismissed with costs. The re-assessments of income tax made upon the appellant by the Minister will be confirmed.

Judgment accordingly.

BETWEEN:

1960
Apr. 7
1961
May 16

UNITED TRAILER COMPANY LIMITED .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(e)(i), 12(1)(e) and S. of C. 1952-53, c. 40, s. 28 enacting s. 75 B(1)(d)—Deductibility of doubtful debt reserves—No deduction allowed where no account owing to taxpayer—Absolute assignment by taxpayer—Appeal dismissed.

Appellant assigned all of its accounts receivable to a finance company allegedly as security for a loan. The appellant then set up an account as a reserve for doubtful debts and deducted that amount from its income for the years 1952 and 1953. These deductions were disallowed by the Minister and an appeal from his re-assessment to the Tax Appeal Board was dismissed. Appellant now appeals from that decision to this Court.

The Court found that the assignments to the finance company were absolute even though the payments by the customers to the finance company were guaranteed by the appellant and that there was no account receivable by the taxpayer.

The taxpayer contends that the amounts set up as a reserve against doubtful debts were deductible from income by virtue of s. 11(1)(*e*)(*i*) of the *Income Tax Act* R.S.C. 1952, c. 148, or that it was entitled to a deferred revenue reserve under s. 75B(1)(*d*), S. of C. 1952-53, c. 40, s. 28.

Held: That as the accounts were not assigned to the finance company as security for a loan but were absolute and hence no account was receivable by appellant, no reserve against doubtful debts could be taken.

2. That no deferred revenue reserve could be set up with respect to accounts that were paid in full, and since the finance company had paid the appellant in full s. 75B(1)(*d*) was not applicable.

3. That since s. 12(1)(*e*) of the Act limits the deduction of a contingency reserve appellant could not deduct any amount which would represent its contingent liability to the finance company with respect to bad debts accruing from the receivable accounts assigned to it.

APPEAL from the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Calgary.

S. J. Helman, Q.C. and *R. R. Neve* for appellant.

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R. L. Fenerty, Q.C. and *T. E. Jackson* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

DUMOULIN J. now (May 16, 1961) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board, dated April 10, 1957[1], affirming income tax re-assessments of United Trailer Co. Ltd., for taxation years 1952 and 1953.

The Company just mentioned, a body corporate, with registered office at Calgary, Province of Alberta, carries on business of manufacturing mobile homes, also referred to as "residential trailers", for subsequent sales to people engaged in road construction work, digging natural gas or oil wells and other transient operations.

For taxation years 1952 and 1953, United Trailer Ltd., took upon itself to set up reserves for "bad or doubtful debts", these reserves amounting to $20,232.14 in 1952, and to $19,036.72 in 1953. Both these contingent provisions were disallowed by the Minister and included in the appellant's taxable income for the material times.

The customary and well known mechanics of this line of trade consist of two connected steps: first, a vendor-purchaser contract of sale, second, an assignment of the latter by the vendor to some finance company with the purchaser's consent. It is trite to add that after payment of the balance price to the vendor concern, the payer, i.e. the financing corporation, becomes entitled to each and every right vested in the original vendor, plus a substantial rate of interest until fully reimbursed.

Such were, in broad outline, the practice followed by the actual appellant as suggested, though with questionable accuracy, in parts of paragraph 7 and 8, hereunder, of the Statement of Facts:

> 7. In each year in question, in order to obtain additional operating capital for its business, the appellant obtained a loan from Industrial Acceptance Corporation Limited, to secure the repayment of which the

[1] (1957) 17 Tax A.B.C. 156.

appellant assigned to said lender as security a number of the said lien notes which it had received from its customers . . .

8. In the alternative, the appellant discounted the said lien notes with Industrial Acceptance Corporation Limited (hereinafter referred to as the "corporation"), but, by the terms of assignment by which the lien notes were so discounted, the appellant was made at all times primarily liable to the corporation as a principal debtor and not as a surety for the full balance owing under such lien notes . . .

In the appellant's view of the matter, there would be no difference "in substance (para. 7) between the relationship of the appellant to Industrial Acceptance Corporation Limited and what appellant's position would be if the money had been borrowed from a bank and the lien notes assigned as collateral security . . . and for this purpose the appellant set up a reserve for doubtful debts . . ." supposedly permitted by s. 11(1)(*e*)(i) of the *Income Tax Act*.

What preceded partakes not only of a recital of facts, but also of argument, possibly tinged with a dash of wishful thinking.

A perusal of the documentary evidence filed, might lead one to a different, and from the company's standpoint, less optimistic conclusion.

On this first objection to the ministerial re-assessment, based upon the propriety of a contingent reserve, the respondent's attitude may be summarized in paragraph 7 of its "Reply to Amended Notice of Appeal" reading thus:

7. Says that the sums of $20,232.14 and $39,268.86 (according to the department's computation) claimed by the Appellant as part of its reserve for doubtful debts in the 1952 and 1953 taxation years were in respect of debts which were not owing to the Appellant.

Hence the initial issue raises the oft-recurring distinction between an absolute assignment of debts due or accruing due under a contract, and a charge or mortgage whether disguised or not.

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The evidence of the sole witness heard, Mr. Albert James Hill, United Trailer's manager until November, 1959, lays out the facts that serve as a preamble to the written exhibits.

Mobile homes, says Mr. Hill, sold at prices ranging from four to eight thousand dollars, the six-thousand-dollar model being the best seller. Cash payments of 20% to 33%, in keeping with individual circumstances, attached to each sale, the balance price secured through the usual conditional contract of sale, exhibit 5, actually. Monthly instalments generally spread over a period of 24 months until 1943, when hardened trade conditions required an 18-month extension.

Industrial Acceptance Corporation, a well known organisation throughout the land, upon formal assignment of this purchaser's contract, pursues Mr. Hill, "would immediately pay to United Trailer the outstanding balance due by client on that contract. The I.A.C. (for short) then acted as collecting agents (in the witness' interpretation) in pursuance of these assigned contracts. When legal proceedings, or re-possession were resorted to, this was done by and in the name of United Trailer Co. Ltd. I.A.C. would not expose themselves to litigation. Of course, in the event of bad sales remaining unpaid, United Trailer's liabiltiy to I.A.C. persisted for any amount owing. Each assignment to the Corporation, continues Mr. Hill carried with it a right of redemption by United Trailer Co. against payment by it to I.A.C. of the unsatisfied balance on a particular contract: the deed of sale would then be handed back to United Trailer". Under the conditions above an appropriate synonym for "redemption" could possibly be "guarantee".

Exhibit "5", a copy of appellant's "conditional sale contract", should provide the clue.

On this document's reverse side appear the stipulations of two separate contracts:

a) A "conditions of Sale Contract", between purchaser and vendor, viz. United Trailer Co. Ltd., and;

b) A "Vendor's Assignment" made by United Trailer Co. to Industrial Acceptance Corporation Limited.

Out of the ten clauses in the contract of sale, number 8 only is pertinent to the matter under consideration; I quote:

8. Purchaser takes notice that this agreement, *together with Vendor's title to property in and ownership of said goods,* (all italics are mine) and said note are *to be forthwith assigned and negotiated by Vendor to Industrial Acceptance Corporation Limited, and that said Corporation shall be entitled to all of the rights of Vendor free from all equities existing between Vendor and Purchaser.* Purchaser hereby accepts notice of such transfer and further accepts notice that Vendor is not an agent of said Corporation for any purpose *and that said Corporation will accept no evidence of payment other than its official receipt.*

Section (*b*) is the interlocking covenant, herein intituled "Vendor's assignment" most of whose context bears reproduction; its terms enacting that:

For Value Received *the undersigned vendor does hereby sell, assign and transfer* to Industrial Acceptance Corporation Limited *his right, title and interest in and to the within contract* and promissory note therein referred to. *Vendor does also hereby sell to said Corporation the goods referred to in the within contract,* subject to the rights of the Purchaser as set out therein.

. . . .

Vendor guarantees the performance of said contract and jointly and severally with Purchaser agrees to pay the Corporation on demand the entire amount unpaid under said note and/or contract and any deficiency arising out of the repossession and resale of said goods as provided therein. Vendor agrees that his liability hereunder shall not be affected by any settlement, extension of credit or variation of terms of said contract, nor additional security taken by the Corporation . . . and that nothing but full payment in cash to the Corporation of the amount owing by Purchaser shall release Vendor from his liability hereunder.

If said goods be repossessed Vendor agrees to store same safely for the account of said Corporation without charge *and Vendor agrees not to sell or use said goods except upon written instructions from the Corporation.* In the event of resale, all moneys, goods and securities paid or delivered on such resale shall be the property of said Corporation and Vendor shall hold same in trust at Vendor's risk and shall promptly pay over and deliver same to the Corporation.

A last paragraph foresees an automatic reassignment to Vendor of all rights and title to the contract and property thereby sold, upon full payment to Industrial Acceptance of the pecuniary obligations; such repossession, in compliance with clause "2" of the sale contract, eventually vesting Purchaser with definitive ownership.

Notwithstanding the plain language of exhibit "5", reiterating an intended assignment and sale of the deed with, should I repeat, all rights attaching, it is the appellant's contention that it retained a perfect title against the

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purchaser, and simply obtained a loan from the Corporation, secured by the lien notes as collateral security, or, alternatively, discounted those customer's notes with Industrial Acceptance, contingencies that might authorize the constitution of a reserve fund.

The proposition at issue does not require an attempt to ear-mark in exhibit 5 the several characteristic traits of its effective sale, factual and legal, transacted between appellant and Industrial Acceptance Corporation. A few instances will suffice. Added to repetitious mentions of outright sale to the Corporation of the contract and goods included, the Purchaser agreeing (clause 8), it is explicitly stipulated (clause 8, last line) "that said Corporation will accept no evidence of payment other than its official receipt".

If then, United Trailer Co., still remains a creditor, it is shorn of a creditor's essential right and correlative duty of giving the debtor, upon payment of the debt, a full and valid receipt. And, on the other hand, highly imprudent would seem that debtor-purchaser who, assenting to clause 8 of the contract (ex. 5), should be satisfied with a receipt issued by United Trailer Co., in despite of his previous agreement that Industrial Acceptance alone could indite the requisite acquittal.

Referring anew to Mr. Hill's evidence, this official fully substantiated the above interpretation, when he asserted that: "to his personal knowledge the appellant company's books contained no mention of amounts receivable from any particular client during the period in question", a policy or mode of operation hardly consistent with any creditor-debtor notion.

Another indication might be found in the appearance at the left hand side, on exhibit "5", of those initials I.A.C., well known to the business community, and which are not those of United Trailer Co. Ltd.

Disguised forms of mortgages are not new to the trading world; to this effect text writers concur, and Falconbridge, *The Law of Mortgages of Land* 1942 Ed. at pp. 47 and 48, for one, comments on this dubious device; quotation:

In order to prevent a mortgagor's equity of redemption from being defeated by the ingenuity of conveyancers, the Court of Chancery was obliged sometimes to enquire whether a transaction in the form of an absolute conveyance or in the form of a conveyance with an option to repurchase was really a disguised mortgage, and as early as the seventeenth

century conveyancers seem to have been aware of the danger that a conveyance might be held to be a mortgage. If a conveyance absolute in form is intended to be a mortgage, the vendor will have the usual equitable right of a mortgagor to redeem; but the absence of evidence that the transaction is a disguised mortgage or of fraud . . . the vendor will receive no assistance from equity. *The evidence that the transaction is really a mortgage must be clear and conclusive, especially if it is contradicted by the recitals in the document* (italics are mine).

Indeed, quite our case, where redemption can be exercised only *in trust* for the Corporation.

The New Brunswick Supreme Court, in the matter of *Bank of Nova Scotia v. LeBlanc et al.*[1] dealt with an assignment to the Bank of all debts due or accruing due under a contract. For all purposes the latter assignment, in its effective tenor, can be assimilated with the present one, and on this point, the Court's pronouncement was as follows:

The assignment by its terms purports to be absolute and not by way of charge. In the case of *Hughes v. Pump House Hotel Co.*, [1902] 2 K.B. 190, the English Court of Appeal held that the assignment in question given to a bank by a contractor as security for the contractor's account, including a continuing security for monies due or to become due to the bank was an absolute assignment. Cozens-Hardy L.J. in that case said at pp. 197-8: "If, on the construction of a document, it appears to be an absolute assignment, though subject to an equity of redemption, express or implied, it cannot in my opinion be material to consider what was the consideration for the assignment, or whether the security was for a fixed and definite sum, or for a current account. *In either case the debtor can safely pay the assignee* . . . nor does it matter that the assignee has obtained a power of attorney and a covenant for further assurance from the assignor". And continues: "The real question, and, in my opinion, the only question is this: Does the instrument purport to be by way of charge only?" . . . *In my opinion that document is an absolute assignment, and does not purport to be by way of charge only. It assigns all moneys due or to become due under the contract.*

Were it not for a three years' hiatus, I could truly use the expression of "twin" causes in reference to the instant one and that of *Home Provisioners (Manitoba) Limited v. The Minister of National Revenue*[2], decided in 1958 by Mr. Justice Thurlow of this Court. Instead of Industrial Acceptance, the assignee then was Traders Finance Corporation Ltd., and the form of assignment, though much more concise, conveyed the selfsame rights, remedies and guarantees to the assignee that are conferred time and again by

[1] [1954] 2 D.L.R. 579 at 584-585. [2] [1959] Ex. C.R. 34 at 35-42.

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our own instrument (Cf. official report at p. 38 for text of deed). After thoroughly scrutinizing facts and arguments submitted, the learned Judge held that:

The transactions with the finance company were not loans on the security of the conditional sales contracts but outright sales since the appellant had no right to repay the finance company and demand the return of the property assigned.

2. That since the appellant was not the owner of the unpaid purchasers' accounts . . . it was not entitled to a reserve in respect of any portion of that amount.

On page 42, Thurlow J. continues:

It was argued that the fact that the finance company would return a contract, *when requested and repaid,* indicates that the appellant had a right to redeem the contracts, *but in my view, this fact is consistent with other explanations* as to why the finance company would return a contract, and in the absence of evidence of a term of the arrangement giving the appellant a right of redemption, I do not regard it as indicative of such a right.

The financial operations entered into by the appellant and Industrial Acceptance invariably were absolute assignments and "guaranteed" sales of customers' contracts to the assignee. Thereafter, appellant's status passed from that of a creditor to that of assignee's warrantor, and I do not conceive of a surety setting aside a reserve for the payment of its own contingent indebtedness. This first section of the appeal fails.

When the case was called, October 7, 1959, the appellant moved for and obtained leave to amend its Statement of Facts, presumably in the expectation that s. 75B(1)(*d*) of the *Income Tax Act,* R.S.C. 1952, as enacted by Statutes of Canada 1952-53, c. 40, s. 28, might afford a "further alternative" or second ground of appeal. The amendment is worded in these terms:

6. In the further alternative, the Appellant says that there has been included in its income in respect to the taxation years 1952 and 1953 amounts in respect of property sold in the course of business that are not receivable until a day more than two years after the day on which the property was sold and after the end of the respective taxation years, and the Appellant is accordingly entitled to deduct a reasonable amount as a reserve in respect of that part of the amount so included in computing such income that can reasonably be regarded as a portion of the profit from such sales pursuant to section 75B(1)(*d*).

Effectively, the section just invoked permits of a reserve fund in the material conditions of paragraph "6", which, as shown throughout these notes, differ, in fact and law, from those revealed by the oral and written evidence.

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The regular practice was to have United Trailer's purchasers assent, practically with the one stroke of the pen, to an assignment and sale of the contract, ex. 5, unto Industrial Acceptance Corporation against "immediate payment to United Trailer of the outstanding balance due by the customer on that contract (Manager J. A. Hill dixit)". How then can the appellant, *fully paid,* and who, understandably so, did not take the trouble of entering in its ledgers "the amounts receivable from any particular customer", lay any claim to the provisions of s. 75B(1)(*d*).

The appellant never negotiated loans nor obtained discounts from the Corporation, but sold and assigned to it outright conditional sales indentures, guaranteeing their fulfilment.

Any reserve funds accumulated during taxation years 1952-53 were purportless, since United Trailer's clients passed on at once to Industrial Acceptance as contractual debtors. This other ground cannot succeed.

For the reasons outlined, this appeal should be dismissed with all taxable costs allowed to the respondent.

Judgment accordingly.

BETWEEN:

1961
Apr. 12, 13
June 1

WILBERT L. FALCONER .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income or capital gain—Valuation of securities received in satisfaction of a debt—No evidence that valuation of Minister wrong—Appeal dismissed.

Appellant was a member of a syndicate formed to develop an oil property. The syndicate sold its working interest in the property to a corporation, receiving escrow stock of the corporation in satisfaction of its liability for the purchase price, the payment being

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made after the flotation of the company as a public company. The shares received by the appellant for his interest in the syndicate were valued by the respondent at twenty cents per share and their value was added to appellant's income for the taxation year 1951, as being a receipt of an income nature. An appeal from the assessment so made was dismissed by the Income Tax Appeal Board and a further appeal to this Court was taken.

Held: That the appeal must be dismissed.

2. That on the evidence the value of the shares fixed by the respondent at about one-half the price at which shares not subject to escrow were sold to the public had not been shown to be excessive.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Thurlow at Calgary.

J. H. Laycraft for appellant.

Michael Bancroft and *C. S. Bergh* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THURLOW J. now (June 1, 1961) delivered the following judgment:

This is an appeal from a judgment of the Income Tax Appeal Board[1], by which the appellant's appeal from a re-assessment of income tax for the year 1951 was dismissed. In making the re-assessment, the Minister included in the computation of the appellant's income a sum of $66,400 as the value of certain shares of Ponder Oils Limited to which the appellant became entitled in 1951 and which the Minister considered to be a receipt of an income nature. Following notice of objection by the appellant, the Minister undertook to reduce the amount to $33,200 but in other respects confirmed the re-assessment as made, and the appellant then appealed first to the Income Tax Appeal Board and later to this Court. The issue in the present appeal is whether the sum of $33,200 is properly included in computing the appellant's income.

In his reply to the notice of appeal to this Court, the Minister pleaded that, in re-assessing the appellant, he acted on the assumption that the appellant had performed services for one Paul Moseson and that the shares in question were received by the appellant as remuneration for such services.

[1] 23 Tax A.B.C. 114.

This assumption is disproved by the evidence, and it therefore fails as a basis for including the value of the shares in the computation of the appellant's income. The Minister, however, also pleaded in the alternative that the appellant acquired the shares through a venture in the nature of trade and that their value must therefore be brought into the computation of his income. The position taken by the appellant is that, even if the shares were acquired through a venture in the nature of trade, no profit was realized from the transaction in which they were acquired and that, in any event, such profit was less than $33,200.

The appellant is a geological engineer. For two years after he came to Alberta in 1941 he was employed by a company concerned with the development of Athabaska oil sands and for the following five years by Imperial Oil Limited, at first as an exploration geologist and later as assistant superintendent of the Leduc oil field. In 1948 he became operations manager of Pacific Petroleums Limited, and in 1950 assistant general manager of that company. At that time Imperial Oil Limited held many leases in the Leduc oil field and was following a practice of putting together several locations and offering them on terms to persons interested in drilling for oil on them. The contracts made pursuant to such arrangements were known as farmout contracts. Early in 1951 Paul Moseson, a lumberman and the president of an oil well drilling company, who had examined a number of farmout proposals, offered by Imperial, brought a particular one to the attention of the appellant and a Dr. Nauss, the latter a partner in a firm of consulting geologists known as Link and Nauss.

For some time the appellant and Dr. Nauss, for geological reasons which it is unnecessary to relate, were not impressed with the prospects of obtaining oil on the particular locations, but subsequently they conceived a theory which indicated that the locations had sufficient prospects to warrant drilling operations, and a syndicate consisting of Mr. Moseson, Dr. Link, Dr. Nauss, and the appellant took up the farmout contract offered by Imperial.

The contract was taken in the name of Mr. Moseson. By it, Imperial agreed to sell to him a producing oil well known as Imperial Leduc No. 253, together with the well

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equipment and the mineral and surface rights in connection therewith, for $40,000 and further agreed to sub-let to him the mineral and surface rights in connection with any producing well which he might drill on five additional locations, reserving, however, to Imperial 5,000 barrels of oil from five per cent of the production of each such well. Moseson, on his part, and in fact on behalf of the syndicate, undertook to drill wells on each of the five locations.

As the drilling of these five wells would entail expenses likely to approach half a million dollars, the syndicate, in order to spread the risk, arranged two further contracts, by one of which Central Explorers Limited in effect purchased a one-half interest in Imperial Leduc No. 253 for $30,000 and for a 40 per cent interest in the first and a 50 per cent interest in the other wells to be drilled undertook to contribute half the cost of the drilling operations with the right to withdraw from participating in the expense of drilling and the production of any well. By the other contract, Banff Oil Limited in effect purchased approximately a quarter interest in Imperial Leduc No. 253 for $15,000 and obtained the right to contribute to the extent of about one-quarter to the cost of drilling of each well in succession and to share accordingly in the production of any well so obtained.

The syndicate used $40,000 of the $45,000 so realized to pay for the well known as Imperial Leduc No. 253 and deposited the other $5,000 in a bank account in trust for a company to be incorporated to take over the syndicate's undertaking. The farmout contract was dated May 25, 1951 and that between Mr. Moseson and Central Explorers Limited, May 17, 1951. The contract between Moseson and Banff Oil Limited was not committed to writing until October 2, 1951, but it is clear on the evidence that the agreement was in fact made at or about the same time as the farmout contract itself. It is apparent therefore that, as a result of these proceedings alone, the syndicate had secured for itself without any cash outlay assets consisting of $5,000 in cash and approximately a quarter interest in the well known as Imperial Leduc No. 253 and in the well-drilling undertaking. It was also committed to proceed

with the drilling required by the farmout contract. The explanation given as to how it transpired that the syndicate could realize 50 per cent more than Imperial's price for the one-half and one-quarter interests in the well and contract was that, since they were experienced men, each expert in his own particular phase of the oil business, and were interested on their own behalf in this undertaking, confidence in their management of it was generated to the point where the other participants were eager to have a share in the undertaking. Moreover, the knowledge that they, after examining the prospects, considered the locations to have sufficient merit to warrant drilling rendered it unnecessary for the participants to incur the expense of obtaining expert opinions on their own as to the merits of the locations.

When the members of the syndicate arranged to take the farmout agreement or prior thereto, they had agreed among themselves to have the undertaking carried out by a corporation, and pursuant to this arrangement Ponder Oils Limited was incorporated on June 15, 1951 as a private company with an authorized capital of 1,000,000 no-par-value shares to be issued for not more than $240,000. The directors of the company were Mr. Moseson, a solicitor, and the solicitor's secretary until August 23, when the appellant replaced the solicitor's secretary. In the meantime, the $5,000 trust account had been transferred to the company, and the company received the proceeds of the syndicate's share of the production of Imperial Leduc No. 253. On or about July 27, the company also undertook the drilling of the first well pursuant to the farmout contract, and in the course of the operation called upon Central Explorers Limited and Banff Oil Limited for their respective shares of the drilling costs. The drilling resulted in a producing well being brought in on September 3, whereupon the syndicate's theory as to the geological formation was established as correct for that location and the prospects of their theory being right as to the other locations brightened as well. The market for oil company shares at the time was extremely buoyant and subscriptions for 251,997 shares of Ponder at forty cents

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each were privately obtained in a very short time early in September from 30 to 35 acquaintances of the syndicate members.

The number of shares for which subscriptions were so taken is of some interest, for it was all that would remain of the authorized share capital of the company after allowing for three incorporators' shares and 748,000 shares which the members of the syndicate had at or before the incorporation of the company arranged among themselves to take in exchange for the $5,000, the farmout agreement, and certain other assets to be transferred to the company by Mr. Moseson and by Dr. Link and Dr. Nauss. None of these shares had, however, been formally allotted when on September 12 the company became a public company and its share capital was increased to 4,000,000 no-par-value shares.

Subsequently, by agreement dated September 25, 1951, Moseson transferred the farmout contract and other assets to Ponder in consideration of 748,000 fully paid shares, which at his direction and pursuant to a written agreement between the members of the syndicate were later allotted to them, the appellant's portion being 166,000 shares. In the agreement between Moseson and the company, it was provided that the shares to be issued pursuant to it should be held in escrow by the transfer agent and registrar of the company and should be released only in accordance with the directions of the Registrar under the Securities Act of the Province of Alberta. It was also agreed that the document should be effective as and from June 15, 1951 as if it had been executed and delivered on that date.

According to the appellant, the members of the syndicate had arranged among themselves in May of 1951 that they would take 750,000 of the shares of the company to be incorporated in consideration of the assets to be transferred to it, of which Moseson was to have 250,000 and the other three members, one-third each of the remainder, which they rounded off at 498,000 to give each 166,000 shares. They also knew then that, in order to raise capital to carry out the drilling program which they had undertaken, it would be necessary to have their shares held in escrow at the discretion of the Registrar. The appellant also said that these arrangements were carried out from the time of the company's incorporation, though the agreement is dated later

because Ponder had no one to press on with the documentation of the arrangements until after the beginning of September. He himself entered the employ of Ponder on September 1, 1951 and presently holds the position of President of the company. He also still holds the 166,000 shares so acquired, the same having been released from escrow during 1953.

It may be added that in October, 1951, an isue of 200,000 shares was privately sold at sixty cents a share and in January, 1952 another issue of 300,000 shares was sold publicly at $1.50. Before the sale of the shares in October, however, Mr. Moseson, on behalf of the syndicate, had executed an agreement further restricting the rights attaching to their shares in the event of a dividend or winding up to parity with the number of shares sold to the public or the number of their shares released from escrow, whichever should be greater, and by January the company had brought in at least one more producing well and had acquired another farmout involving eight more locations to be drilled. Ultimately, the drilling of all five of the locations of the original farmout agreement resulted in producing wells.

The Minister's submission in support of the assessment was that the farmout contract was taken in carrying out a scheme for profit making, that in furtherance of that scheme the contract was transferred to Ponder in consideration of shares, but not until September 25, 1951, at which time the appellant realized profit from the enterprise in the form of a right to shares the value of which at that time must accordingly be brought into the computation of the appellant's income.

Counsel for the appellant, while not conceding that the appellant's right to the shares represented profit from a venture in the nature of trade, did not argue the contrary or put his case on the ground that the right to the shares was not so acquired. His submission was that the appellant's right to 166,000 shares arose immediately upon the incorporation of Ponder or at any rate prior to the commencement by it of drilling operations, that if the value of the 166,000 shares must be brought into the computation of his income as having been realized through a venture in the nature of trade the value at that time should be taken and, as it was no greater than that of his interest in the assets

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transferred to Ponder, which was all that Ponder then possessed, and since no one but the four members of the syndicate was interested in Ponder at the time, there could be no profit realized from the transaction. Alternatively, he took the position that the sales of one-half and one-quarter interests respectively in the Imperial farmout contract for $30,000 and $15,000 respectively indicated a value of not more than $20,000 for the shares above what had been paid to Imperial in connection with the farmout contract, and that, accordingly, the profit for the whole syndicate did not exceed $20,000, of which his share at two-ninths was $4,445, rather than $33,200.

The principle so relied on by the appellant is one of the grounds of the judgment of the Privy Council in *Doughty v. Commissioner of Taxes*[1]. There Lord Phillimore said at p. 336:

> The other ground on which the appellant's case may rest is that the transaction which led to the claim for tax was not a sale whereby any profit accrued to the two partners. The case of *Craig (Kilmarnock)*, 1914 S.C. 338, just referred to is an authority for saying that the Crown is not entitled to take a mere bookkeeping entry as conclusive evidence of the existence of a profit. The two partners made no money by the mere process of having their stock in trade valued at a high rate when they transferred to a company consisting of their two selves.
>
> If they overestimated the value of the stock the value of the several shares became less. The capital of the company would be to this extent watered. As already observed, they could not, by overestimating the value of the assets, make them more.

The principle is one of narrow application and, in my opinion, simply means that no profit arises from a mere transaction whereby an owner transfers property to a company in which he alone is interested. On the facts, that does not appear to me to be the situation in the present case. As I view it, the scheme for profit making in which the members of the syndicate were engaged included the taking up of the farmout contract with Imperial, the promotion of a company and sale of its shares to the public, and the realization of gain by the syndicate members by obtaining for their participation in the scheme and for the assets which they would transfer to the company a considerable interest in the company represented by shares of its capital

[1] [1927] A.C. 327

stock. The question to be answered is what was the value of the right to the shares at the time when the syndicate became entitled to them.

Now Ponder Oils Limited came into existence on June 15, 1951, and from its inception or shortly afterwards appears to have obtained possession of the assets and rights of the syndicate and to have discharged the syndicate's obligations under the farmout contract. But it did not pay for the assets immediately, nor does the consideration for them appear to have been agreed upon between the syndicate and the company. Since Ponder was then a private corporation in which no one but the members of the syndicate was beneficially interested, it may be assumed that the syndicate could have dictated as the consideration to be paid by Ponder whatever they wished, whether in terms of money or shares. It might have been a very high consideration or a very low one or a reasonable one in either money or shares, but whatever it might be, to my mind it could at that time be worth no more than the value of what Ponder had. But while the members of the syndicate had in fact agreed among themselves, even before the incorporation of Ponder, to take a particular number of shares as the consideration, on the evidence I can discover nothing prior to the contract of September 25, 1951 from which any obligation of the company to issue such shares or any right of the syndicate or the members to demand them of the company can be held to have arisen. And even adopting the appellant's contentions to the point that the company was between June 15 and September 25 under an enforceable obligation to pay for what it had acquired from the syndicate, I am unable to find on its part any undertaking to pay in shares. If a contract between the company and the syndicate is to be inferred from the circumstances, including the receipt by Ponder of the production from the well, the carrying on by Ponder of the drilling and the collection by Ponder of the contributions of the participants, the inference I would draw is that Ponder took over the contract in circumstances from which a promise to pay would be implied, but to pay a reasonable sum rather than to issue shares, for I see nothing in what the company did from which a promise to issue shares may be inferred. And even if the receipt of $5,000 in cash as part of what was transferred be regarded as inconsistent

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with a contract to pay in money and, therefore, suggestive that the consideration was to be something else and probably shares, there was still no promise by the company to pay in shares to the exclusion of any other kind of payment. In my view, the syndicate's right to be paid by Ponder in shares arose for the first time on September 25, when their right to payment for what Ponder had acquired from them was converted from a right to be paid in some form to a definite right to shares. By this time, however, as a result of the drilling which had been done, the company assets had increased in value, the value of its shares had grown accordingly, and other persons besides the syndicate members had become interested in the company. The shares in the company to which the syndicate then became entitled were undoubtedly worth more than they would have been if the contract to issue shares had been made in June, and they may also have been worth more than any money payment which might have been recoverable by the syndicate in the meantime, but this is, I think, immaterial. The material fact, in my opinion, is that, through carrying out their scheme, the syndicate became entitled to shares on September 25, but not until then, and thereby realized profit from their scheme in the form of a right to shares. September 25, in my opinion, is accordingly the date at which the right to the shares to which the appellant became entitled should be valued. It was not contended by either party that the valuation of the shares should be made at the end of the year.

It remains then to assess the value of the appellant's right to such shares on September 25, 1951. The principles applicable to such an assessment were discussed as follows by Viscount Simon in *Gold Coast Selection Trust Ltd. v. Humphrey*[1] at p. 472:

In my view, the principle to be applied is the following. In cases such as this, when a trader in the course of his trade receives a new and valuable asset, not being money, as the result of sale or exchange, that asset, for the purpose of computing the annual profits or gains arising or accruing to him from his trade, should be valued as at the end of the accounting period in which it was received, even though it is neither realized nor realizable till later. The fact that it cannot be realized at once may reduce its present value, but that is no reason for treating it, for the purpose of income tax, as though it had no value until it could be realized. If the asset takes the form of fully paid

[1] [1948] A.C. 459.

shares, the valuation will take into account not only the terms of the agreement but a number of other factors, such as prospective yield, marketability, the general outlook for the type of business of the company which has allotted the shares, the result of a contemporary prospectus offering similar shares for subscription, the capital position of the company, and so forth. There may also be an element of value in the fact that the holding of the shares gives control of the company. If the asset is difficult to value but is none the less of a money value, the best valuation possible must be made. Valuation is an art, not an exact science. Mathematical certainty is not demanded, nor indeed is it possible. It is for the commissioners to express in the money value attributed by them to the asset their estimate, and this is a conclusion of fact to be drawn from the evidence before them.

In the present case, as previously mentioned, during the first week of September some 30 to 35 acquaintances of the members of the syndicate had subscribed for 251,997 shares of the company at 40 cents each. And during October an additional 200,000 shares were privately sold at 60 cents each. These shares, however, were not subject to escrow arrangements as were those of the syndicate when they became entitled to them on September 25. A witness called on behalf of the appellant stated that, while escrowed shares could be disposed of subject to the escrow arrangements, they could not be expected to bring the same price as free shares and the discount would be in the order of 50 per cent, depending on the particular features of the escrow arrangements. This would suggest that the Minister's estimate of the value of the appellant's shares at 20 cents is not incorrect. Having regard to the restrictions which the escrow arrangements place upon the marketability of the shares in question, I should have thought that a preferable approach to the estimation of their value at the material time would lie in considering the value of the assets of the company which would be distributable to the appellant on a winding up at that time, but no evidence was offered as to the extent of the increase in value of the company's assets resulting from the success of the drilling of the first well, and after a lengthy consideration of the evidence, I have come to the conclusion that it has not been established that the assets that would have been available for distribution to members of the syndicate on a winding up at that time would not have been equal to 20 cents a share.

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As mentioned earlier, by an agreement dated October 18, 1951 made with the company by Mr. Moseson on behalf of the syndicate in connection with the sale of a further 200,000 shares of the company at 60 cents, all of which were privately subscribed in the latter part of October, 1951, the syndicate agreed that in the event of a winding up of the company or any capital distribution or dividend being made or declared by the company the syndicate should rank or participate only to the extent of the number of their shares released from escrow or the number of treasury shares sold to the public, whichever should be the greater. This, according to the witness, would further depreciate the sale value of the appellant's shares at the time so that the total discount from market price would be in the order of 75 per cent. In my view, however, the shares to which the appellant became entitled on September 25 were not subject to this agreement, which was made later, but even if it had been tentatively arranged earlier between the members of the syndicate, I do not think it could be regarded as binding them or as affecting the value of their shares prior to October 18, 1951. It therefore has no effect on the value of the shares on September 25, 1951. It might well have had an effect on their value at December 31, 1951, which might be regarded as the end of the accounting period, but as previously mentioned neither party sought to have the value of the shares at that date used in computing the appellant's profit from the venture for the year, and in any case the evidence suggests that the shares were increasing in value and does not indicate that the value at the end of the year was less than 20 cents even after taking this agreement into account.

On the whole, therefore, I am of the opinion that the appellant has not shown that the $33,200 or any part of it was erroneously included in the computation of his income for the year in question. His appeal accordingly fails, and it will be dismissed with costs.

Judgment accordingly.

BETWEEN:

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Apr. 24, 25, 26, 27, 28
May 1, 2, 3, 4

May 30

ALEX PASHOVITZ ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ....RESPONDENT.

Revenue—Income tax—Penalties—Wilful evasion of tax—Preponderance of evidence sufficient to disprove intention to evade—Evidence of ignorance of taxpayer—No intent to wilfully evade tax—Appeal allowed.

The appellant, a farmer with little knowledge of accounting, made incorrect income tax returns for several taxation years, and the Minister, following an investigation, added to what the appellant had declared in his returns certain unreported income from the operation by the appellant of a farm in partnership with his father and disallowed certain expenses which the appellant claimed as deductions and thereupon assessed tax and penalties under s. 51(1) of the 1948 *Income Tax Act* for late filing of returns, and under s. 51A of the same Act for wilfully evading or attempting to evade payment of tax. On appeal from the judgment of the Tax Appeal Board, which allowed the appellant's appeal in part

Held: That on an appeal to this Court from an assessment of penalties made by the Minister in the exercise of the power to assess penalties conferred on him by s. 42 of the 1948 *Income Tax Act* (now s. 46) the onus is on the taxpayer to show that the assessment is wrong.

2. That on the evidence the appellant was entitled to deductions in respect of some of the disputed items and that the assessments of tax and penalties under s. 51(1) should be varied accordingly.

3. That save in respect of one item the appellant has satisfied the onus of showing that he did not wilfully attempt to evade payment of tax and that the assessments of penalties under s. 51A should be discharged except in respect of the item as to which the onus had not been satisfied.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Thurlow at Saskatoon.

Andrew Hawrish for appellant.

E. N. Hughes and *C. S. Bergh* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THURLOW J. now (May 30, 1961) delivered the following judgment:

These are appeals from a judgment of the Income Tax Appeal Board, allowing in part appeals from assessments of income tax and penalties in respect of the taxation years

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1950, 1951, and 1952. The matters in issue are, first, the right of the appellant to certain deductions in computing his income and, second, whether he has incurred any of the penalties so assessed.

The appellant is a farmer and lives at Struan, Saskatchewan, where, in partnership with his father, Nick Pashovitz, he operates a farm consisting of nine quarter sections. On this farm he grows grain and raises cattle. He is now 38 years of age. He has a Grade VII education, and he speaks English plainly enough, but his vocabulary is limited, and he is slow in understanding anything but plain and simple words. On the other hand, once he thinks he understands a question, he does not seem to be lacking in either mental agility or candour. He knows little, if anything, of income tax law or accounting and knew even less of those subjects before the assessments in question were made. His father is 77 years of age and appears to have taken no very great part in the activities of the partnership even as far back as 1950 to 1952. He was not called as a witness.

The appellant filed an income tax return for 1947 but filed none thereafter until 1953, when he filed a return for the year 1952. He did not consider that he had any taxable income in the intervening years. Subsequently, in August, 1953, at the Minister's request he filed returns for the years 1950 and 1951. All three returns showed no taxable income. Some time later the appellant was requested to send in his records and vouchers, which he did, and ultimately, on January 6, 1956, the assessments giving rise to these appeals were made.

He thereupon filed notices of objection, raising a number of contentions respecting the computations of his income for the years in question and challenging the assessments of the penalties. He subsequently found some further vouchers and records of expenditures which he transmitted to the Department, and he arranged to have Mr. John Antonenko, a merchant who had supplied merchandise and repair services, prepare a summary (Ex. 1) of such purchases and services for the years in question. Some time later, at the request of the Department, Mr. Antonenko delivered to an officer of the Department his copies of the bills for such

merchandise supplied and services rendered. None of these vouchers or records have been in the appellant's possession since they were delivered to the Department in 1956. In January, 1958, the Minister by notification undertook to allow some further capital cost allowance in respect of each of the three years but otherwise confirmed the assessments, whereupon the appellant appealed to the Income Tax Appeal Board. The matter came before the Board on two occasions, the first in November, 1958, when, after a number of witnesses had been heard, it was adjourned without day, and the second in May, 1959. Following the latter hearing, the judgment now appealed from was rendered. By it, the appellant's appeals were allowed in part to reflect a revision of the net income of the partnership as follows:

	Net Income Assessed	*Revised Net Income*
1950	8,165.00	8,810.94
1951	6,313.80	5,464.39
1952	15,048.41	14,266.12

The appellant thereupon appealed to this Court, and the Minister cross-appealed, though the cross-appeal was abandoned at the opening of the trial.

As the appellant's return for the year 1952 was the first of the returns for the three years in question to be filed and the question of liability for penalty under s. 51A of the *Income Tax Act,* S. of C. 1948, c. 52, as amended by S. of C. 1950, c. 40, s. 19, arises first in connection with that year, it will be convenient to deal with it first.

In his return for 1952, the appellant reported the revenue of the partnership for the year as follows:

Crops and seeds—wheat	5,405.37
Participation certificates	3,405.40
Livestock sales cattle	1,035.41
	9,846.18

From this, there was deducted a total of $7,575.42 for expenses, including capital cost allowance of $2,494.24, to leave a net profit from the operation for the year of $2,270.76, of which the appellant's share was one half.

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In making the assessment, the Minister added to the computation of the partnership income for the year the following:

1. Omitted grain sales	10,073.89
2. Omitted Wheat Board payments	1,381.06
3. Rent expense claimed and not included in income	521.54
4. Overstatement of expenses	127.10
5. Capital cost allowance adjustment	424.06

and he assessed tax accordingly, together with a penalty of $58.23 pursuant to s. 51(1) of the Act for late filing of the return and a further penalty of $358.45 pursuant to s. 51A of the Act. So far as liability for tax is concerned, no issue is raised in this appeal with respect to the inclusion of items 1, 2 and 3 in computing the income of the partnership, though they enter into the question of liability for the penalty under s. 51A. With respect to item 5, the Minister in his notification undertook to allow an additional amount of $212.03 as a deduction in respect of capital cost allowance and, by an amendment to his reply made at the opening of the trial, conceded the right of the appellant to deduct in respect of capital cost allowance the whole sum claimed in his return. No issue, therefore, arises on this item as well, but the appellant is entitled to have the assessment varied so as to reflect this concession.

The real issue as to the tax assessed for 1952 revolves around item 4. No particulars were given in the reply, nor do they appear to have been demanded, as to what among the whole mass of items of expenses making up a total of over $4,000 the Minister had singled out for disallowance, the plea being simply that, in making the assessment, he assumed that in the "Statement of Income and Expenses" contained in the appellant's income tax return there was included as operating expenses of the partnership amounts aggregating in the sum of $127.10, which were not outlays or expenses made or incurred by the partnership for the purpose of gaining or producing income. On examination for discovery, however, an officer designated to answer for the Minister stated that what was disallowed was $190.55 out of a total sum of $880.27 which had been charged in the appellant's return as Repairs and Maintenance and Auto and Truck Expenses. The disallowance had, however, been

reduced by $63.47 because operating expenses of farm machinery (except repairs), which had been stated at $845.92, had been allowed at an amount higher to that extent, thus reducing the disallowance to $127.18. He further stated, however, that the Minister had since found vouchers for $879.57 for repairs, as well as vouchers for $933.15 for operating expenses for which only $845.92 had been claimed under the heading "Farm Machinery Expenses" (gas, oil, etc.—except repairs) and vouchers for $357.75 for fertilizer and spray, of which only $131.25 had been claimed. It is, therefore, obvious that the disallowance of $129.10 of the expenses claimed by the appellant in his return cannot stand.

The matter, however, does not end there, for the appellant by his notice of appeal claims the right to further deductions of $2,516.76 for what are referred to therein as additional operating expenses and $750 for livestock purchased in the year. Here again the record contains no particulars of the sum of $2,516.76, though the right to such deductions was not admitted.

On the evidence, including the admissions by the officer examined for discovery, I find that expenditures were made in respect of which the appellant is entitled to deductions as follows:

Repairs and maintenance, including repairs to buildings and machinery and auto and truck expense	2,023.00
Farm machinery operating expense	933.15
Fertilizer and spray	431.20
Livestock purchased	1,785.41

in place of the amounts claimed in respect of these items in the appellant's income tax return. The evidence leaves me unsatisfied that the appellant is entitled to further deductions in respect of any other items and deductions in respect of the remaining items other than capital cost allowance will stand as dealt with by the Minister in making the assessment.

The appellant's income for 1952 will be computed accordingly and the assessment of tax for the year varied as indicated.

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I turn now to the question of the penalty of $358.45 assessed by the Minister under s. 51A of the Act. That section read as follows:

> Every person who has wilfully, in any manner, evaded or attempted to evade payment of the tax payable by him under this Part for a taxation year or any part thereof is liable to a penalty, to be fixed by the Minister, of not less than 25% and not more than 50% of the amount of the tax evaded or sought to be evaded.

No particulars of what the appellant did to incur this penalty or of how it was calculated were given in the notice of assessment or in the Minister's reply. On the examination for discovery, however, it was stated that the Minister had "no factors other than the understatement of income and the overstatement of expenses", and at the trial it was not argued that the penalty had been incurred in any other manner.

The Minister's authority to assess such a penalty arose under s. 42, now s. 46 of the Act, by s-s. (1) of which he was required, with all due dispatch, to "examine each return of income and assess the tax for the taxation year and the interest and penalties, if any, payable". By s-s. (4) of the same section, as it then read, he was also authorized to assess tax, interest or penalties at any time and within the times limited by clauses *(a)* and *(b)* to re-assess or make additional assessments.

Section 53 (now 58) provided that a taxpayer who objected to an assessment under Part I might serve a notice of objection on the Minister, who was thereupon required to reconsider the assessment and vacate, confirm, or modify it or reassess and to notify the taxpayer. By s. 54 (now s. 59) a right was given to the taxpayer who had served a notice of objection to an assessment to appeal to the Income Tax Appeal Board to have the assessment vacated or varied, and by s. 55 (now 60) both the taxpayer and the Minister were given rights to appeal to this Court. By s. 91 (now s. 100), after prescribing the material to be filed in this Court, it was provided in s-s. (3) that, upon the filing of such material, "the matter shall be deemed an action in the court and, unless the court otherwise orders, ready for hearing".

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When assessments of tax are made, they are made pursuant to s. 42 (now s. 46), and it has been held under similar provisions contained in the *Income War Tax Act* that, on an appeal to this Court from such an assessment, the onus of proof that there is error in it falls on the taxpayer.

In *Johnson v. Minister of National Revenue*[1], Rand J., speaking for the majority of the Supreme Court, said at p. 489:

> Notwithstanding that it is spoken of in section 63(2) as an action ready for trial or hearing, the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted. For that purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, but the onus was his to demolish the basic fact on which the taxation rested.
>
> * * *
>
> The allegations necessary to the appeal depend upon the construction of the statute and its application to the facts and the pleadings are to facilitate the determination of the issues. It must, of course, be assumed that the Crown, as is its duty, has fully disclosed to the taxpayer the precise findings of fact and rulings of law which have given rise to the controversy. But unless the Crown is to be placed in the position of a plaintiff or appellant, I cannot see how pleadings shift the burden from what it would be without them. Since the taxpayer in this case must establish something, it seems to me that that something is the existence of facts or law showing an error in relation to the taxation imposed on him.

Kellock J. said at 492:

> As I read the provisions of the statute commencing with section 58, a person who objects to an assessment is obliged to place before the Minister on his appeal the evidence and the reasons which support his objection. It is for him to substantiate the objection. If he does not do so he would, in my opinion, fail in his appeal. That is not to say, of course that if he places before the Minister facts which entitle him to succeed, the Minister may arbitrarily dismiss the appeal. No question of that sort arises here, and I am deciding nothing with respect to it.
>
> I further think that that situation persists right down to the time when the matter is in the Exchequer Court under the provisions of section 63. I regard the pleadings, which may be directed to be filed under subsection 2 of that section, as merely defining the issues which arise on the documents required to be filed in the court without changing the onus existing before any such order is made. In my opinion therefore the learned judge below was right in his view that the onus lay upon the appellant.

[1] [1948] S.C.R. 486.

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It was submitted that the rule was otherwise where a penalty has been assessed and that, in this instance, the onus of proving liability for the penalty rests on the Minister. In my opinion, a taxpayer upon whom an assessment of penalty is made is entitled as a matter of course to particulars of what the Minister has assumed as facts giving rise to the taxpayer's liability for the penalty assessed, but I can see no sufficient reason for making any distinction as to the onus of proof, and the reasoning of Rand and Kellock JJ. in the passages quoted appears to me to apply in the case of an assessment of a penalty just as forcibly as in the case of an assessment of tax. I am, therefore, of the opinion that it falls on the taxpayer appealing such an assessment to "demolish the basic fact" on which his liability for the penalty rests.

The proceedings are, however, of a civil nature, and a preponderance of evidence is sufficient. Moreover, the essential facts giving rise to liability for penalty under s. 51A are not the same as those which give rise to liability for tax. For example, errors in the taxpayer's returns, whether made intentionally or otherwise, have no effect on his liability for tax. Under s. 51A, however, the intention to evade taxation is of the first importance, and a taxpayer's ignorance of what is required of him, rather than an intention to evade, may account for the errors and absolve him from liability. To take another example, for purposes of liability for tax a taxpayer, failing to keep adequate records, may find himself in the unfortunate position of being unable to disprove the correctness of an assessment. But the failure to keep records is not necessarily accompanied by an intention to avoid payment of tax and by itself leads to no conclusion on the question of liability for penalty under s. 51A. It is also to be observed that liability for the penalty provided by s. 51A arises only from conduct by which a person "wilfully evades or attempts to evade payment of the tax payable by him for a taxation year or any part thereof", and the penalty is fixed at a percentage of the tax so evaded or sought to be evaded. This, in my opinion, directs the enquiry to particular years and particular tax, rather than to the picture that may be presented by viewing a taxpayer's conduct in respect of several years together, though the latter may be of assistance in determining the material questions.

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Turning now to the allegation that the appellant understated his income for the year 1952, there is the fact that in the year 1952 to his knowledge the partners sold grain to the extent of $10,073.89 which was not included in the computation of the partnership income for the year. There is also, for what it is worth, the fact that the addition of this sum, as well as of $1,381.06 of Wheat Board payments, in the computation by the Minister is not now contested. The grain so sold, however, was undoubtedly part of a considerable stock of grain grown in earlier years which was on hand at the beginning of 1952. Moreover, the appellant had not filed returns for the years 1948 to 1951 and had established no method of computing income for income tax purposes from the partnership operations for those years, nor was he under any necessity to adopt a cash received method for computing the partnership income for 1952. He was obliged to compute the income by a method which would accurately reflect the profit from the operation for the year, but it was only that year that was being dealt with at that time, and to include in the computation the receipts from the sale during the year of grain held at the beginning of the year without deducting its value at the beginning of the year would have given a distorted result unless by chance the quantity of grain remaining on hand at the end of the year were the same as at its beginning. At the trial, the appellant stated that when, some years earlier, he filed an income tax return for 1947, he did so according to his understanding of the answer to a question set out in a Department of National Revenue publication entitled *Prairie Farmers Income Tax Guide* and that he followed the same principle in computing the partnership income for 1952, the principle being that only the crop grown in the year is regarded as income for the year. He figured out the acreage under cultivation for the year and the yield per acre and reported as receipts from grain only what he realized from the sale of that quantity of grain. There are no details in the record as to the year when the grain represented by the Wheat Board payments totalling $1,381.06 was grown, but the appellant said he followed approximately the same method in reporting Wheat Board payments. In this, he is borne out to some extent by the fact that, in his return for 1950, filed some months later, he included Wheat

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Board payments received in 1951 for 1950 crops, and it may be noted that this, while not consistent with a cash received method of accounting, was not challenged by the Minister in making the assessment for that year. In the circumstances, I would infer that the Wheat Board payments added by the Minister to the 1952 income were for wheat grown in an earlier year or years and received in 1952. The appellant was subjected to a searching cross-examination, extending over more than a full day of the trial, but, while conceding that there are errors in his returns, he stoutly maintained that he had not intentionally misrepresented anything, and in my judgment his evidence on this question remained unshaken. It is not surprising that his memory should be poor on matters of detail after a period of eight years, and particularly so in view of the fact that he has not had possession of his documents or records for most of that time. Nor did he or his counsel have them for the purpose of preparing and organizing the presentation of his case. On the whole, though I think his evidence is subject to some discount on matters of detail, I regard it as generally credible, and I find that he did not wilfully evade or attempt to evade the payment of tax by not including the sums in question in the partnership income reported in his income tax return for 1952.

It is also apparent from what has been said that, instead of overstating the partnership expenses, the appellant considerably understated them in the return, a result which, in my opinion, flowed from his unorganized method of keeping account of the expenditures, rather than from an intention to mislead. No explanation was given as to how the $521.54 charged for rent expense, the disallowance of which by the Minister is not now in issue, came to be included in the expenditures, but, having regard to the appellant's evidence that he made up the return to the best of his ability and did not intentionally misrepresent anything, I regard this as having been done through ignorance, and I find that he did not wilfully seek to evade payment of tax for the year by including the $524.54 in the deductible expenses of the partnership. The assessment of penalty under s. 51A will accordingly be vacated.

I turn next to the penalty of $58.23 for late filing of the return. The provision by which such a penalty was imposed was s. 51(1), which read as follows:

> Every person who has failed to make a return as and when required by subsection (1) of section 40 is liable to a penalty of
>
> (*a*) an amount equal to 5% of the tax that was unpaid when the return was required to be filed, if the tax payable under this Part that was unpaid at that time was less than $10,000, and
>
> (*b*) $500, if at the time the return was required to be filed tax payable under this Part equal to $10,000 or more was unpaid.

In the case of this section, as well, I am of the opinion that the onus of demolishing the basic fact on which the assessment rests is on the appellant.

The appellant on or about April 8, 1953 employed a Mr. Henderson, an insurance agent and income tax consultant, to make up the return, which Mr. Henderson did on the same day. At the appellant's request, he also made up a return for Nick Pashovitz, and the appellant took it to his father for signature, after which he returned it to Mr. Henderson. There is, however, no evidence that the returns were sent to or filed at the District Taxation Office on or before April 30, 1953, as was required by s. 40(1). The onus is, accordingly, not discharged, and the appellant is liable for a penalty under s. 51(1), but in view of the findings which I have made as to the appellant's income for the year the amount of the penalty must be varied so as not to exceed what s. 51(1) provided.

The appellant's returns for the years 1950 and 1951 were both dated August 25, 1953. In them he reported the income of the partnership as follows:

	1950	*1951*
Crops and seeds—wheat	5,383.03	3,262.82
Participation certificates	2,884.45	1,333.11
Livestock and livestock products		
5 head cattle		1,100.00
	8,267.48	5,695.93
Less total expenses	4,968.52	5,891.47
	3,298.96	deficit 195.54

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In the assessments for these years, the Minister added to this income the following:

	1950	1951
1. Omitted grain sales	1,508.07	4,116.08
2. Omitted cattle sales	1,722.68	1,011.04
3. Rent expense claimed not paid	300.00	
4. Overstatement of operating expenses	800.79	812.22
5. Capital cost allowance not allowed	235.00	270.00

and he assessed tax accordingly, together with penalties of $16.78 and $8.31 respectively, under s. 51(1) for late filing of the returns and $76.96 and $26.82 respectively pursuant to s. 51A of the Act.

So far as liability for tax is concerned, no issue is now raised as to the inclusion of items 1 and 2 in the computation of income though, as in the case of the 1952 assessment, these items are involved in the question of liability for penalties under s. 51A. With respect to item 5, the Minister by his notification undertook to allow a portion of the disallowed capital cost allowance and now concedes the appellant's right to deduct the full amount claimed in the returns. The assessments must, accordingly, be varied so as to reflect these concessions.

Issue does arise, however, over items 3 and 4. With respect to item 3, I am not satisfied that the partnership paid rent otherwise than by delivery of grain for which payment was made by the purchaser directly to the landlord or that the amount of the rent paid was included in what was accounted for as receipts. The disallowance of the deduction claimed will, accordingly, stand.

With respect to item 4, it will be convenient to deal separately with each year. The officer examined for discovery stated that the expenses disallowed were as follows for 1950.

			Claimed	Disallowed
Insurance			30.00	30.00
Repairs & Maintenance		159.91	650.91	486.89
Auto	126.00			
Truck	265.00	391.00		
Operating expenses of farm machinery (except repairs) ...			1,011.11	283.90
				$ 800.79

The officer admitted, however, that he had vouchers which the Minister would allow under the item headed "Operating Expenses" amounting to $1,209.79 and $28.15 in excess of

what had been claimed in respect of small tools. The disallowance of $283.90 of the sum claimed as operating expenses of farm machinery is, therefore, not justified, and from these admissions alone it would appear that the total amount disallowed should be reduced by $510.73. The appellant, on the other hand, not only disputes the whole of the disallowance of $486.89 under the item "Repairs, etc." but claims the right to further deductions of $1,284.74 for what are referred to in his notice of appeal simply as additional expenses. The right to make such deductions was not admitted. On the evidence, including the admissions made by the officer examined for discovery, I find that expenditures were made in respect of which the appellant is entitled to deductions as follows:

Repairs and Maintenance (including repairs to buildings), Auto and Truck expenses	1,048.65
Operating expenses of farm machinery (except repairs)	1,209.79
Fertilizer and Spray	211.15
Small tools	58.15

in place of the amounts claimed in respect of these items in the appellant's income tax return. The evidence leaves me unsatisfied that the appellant is entitled to further deductions in respect of any other items, and deductions in respect of the remaining items other than capital cost allowance will stand as dealt with by the Minister in making the assessment.

The appellant's income for 1950 will be re-computed accordingly and the assessment of tax for the year varied to the extent indicated.

With respect to the year 1951, the officer examined for discovery stated that the expenses disallowed were as follows:

			Claimed	*Disallowed*
Taxes			459.25	70.00
Insurance			30.00	30.00
				[Fwd. 100.00]
Repairs and Maintenance		295.11	676.31	326.93
Auto	123.20			
Truck	258.00	381.20		
Operating expenses of farm machinery (except repairs) ...			950.76	293.29
Containers and twine			128.00	32.00
Fertilizer and spray			60.00	60.00
				812.22

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He also admitted, however, that the Minister had found that the expenses of maintenance and repairs had amounted to $386.35 and the auto and truck expenses to $476.24, the latter two totalling $862.59, and the fertilizer and spray expenses to $524.48. The disallowance of $326.93 of the amounts claimed under the items for repairs and maintenance and auto and truck expenses and $60 as claimed for fertilizer and spray is, therefore, not justified, and from these admissions alone it appears to me that not only should nothing have been disallowed under these items but that the deductions claimed by the appellant under them should have been increased. Again, however, the matter does not end there, for the appellant not only disputes the disallowances but claims the right to further deductions of $2,074.81 for what are referred to in his notice of appeal simply as additional expenses and $460.00 for livestock purchased. The right to make such deductions was not admitted. On the evidence, including the admissions made by the officer examined for discovery, I find that expenditures were made in respect of which the appellant is entitled to deductions as follows in place of the amounts claimed in respect of these items in the appellant's income tax return.

Repairs and maintenance (including repairs to buildings), auto and truck expenses	1,677.00
Operating expenses of farm machinery (except repairs)	942.34
Livestock purchased	481.25
Fertilizer and spray	524.48

The evidence leaves me unsatisfied that the appellant is entitled to additional deductions in respect of any other items and deductions in respect of the remaining items other than capital cost allowance will stand as dealt with by the Minister in making the assessment.

The appellant's income for 1951 will be re-computed accordingly and the assessment of tax for the year varied to the extent indicated.

I come now to the question whether the appellant incurred penalties under s. 51A by understating his income or overstating his expenses in his returns for 1950 and 1951. It is obvious from what I have found that, speaking generally, the operating expenses of the partnership for these years were understated rather than overstated, and while I am not satisfied on the evidence that the appellant is entitled to

a deduction in respect of the $300.00 rent expense claimed in 1950, I am satisfied that the appellant believed when making the return and still believes that it is a deduction to which he is entitled. Nor am I satisfied that the other expenses claimed which have not been allowed were not in fact incurred, even though the appellant has not succeeded in establishing them. It is a long step from this position to say that, by including them, he wilfully sought to evade tax and, while he sets out with a presumption to that effect against him and with the onus upon him of disproving it, his evidence satisfies me that he did not wilfully evade or attempt to evade the tax payable by including them. I am also satisfied that he knew nothing about the basis for computing capital cost allowances and that such errors as were shown to exist in the computations contained in his returns were not made for the purpose of evading tax. In respect to capital cost allowance claims, I am of the opinion that he relied on Mr. Henderson, whose integrity is unquestioned, and I do not think that he understood the computations which Mr. Henderson made or that he knew what information they were or ought to be based upon.

The most troublesome questions with respect to the penalties relate to the income from grain and cattle which the Minister added in making the assessments for 1950 and 1951. The grain sales so added were $1,508.07 in 1950 and $4,116.08 in 1951. That the partners made these sales is not in doubt, and the appellant had no hesitation in admitting that there were errors in his returns. His explanation of how these errors occurred was that, before making up the returns, he went to a Mr. Tetarenko, an elevator agent who had purchased grain from time to time for his employer from the appellant and his father, and had Tetarenko calculate the amount of his grain sales for each of these years. Tetarenko made the calculations and marked the result in the Wheat Board permit books of the appellant and his father, and the appellant copied these figures on a piece of paper and used them in compiling the information for his returns. From his knowledge of the number of acres under cultivation in the year and the yield per acre, it seemed to him to work out to the amount of the crop for the year. The permit books

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were always kept at the elevator, rather than at the appellant's home, and the entries therein were made by the elevator agent who purchased the grain. And though it was the producer's responsibility, as well as that of the agent, to see that all sales were entered, in practice this was left to the agent. In truth, all the sales of grain were not entered in the permit books, and it is the omitted sales which the Minister had added in making the assessments.

After a lengthy consideration of the evidence and bearing in mind that the appellant was a novice in these matters at the time, I have come to the conclusion that his explanation is sufficiently plausible to support his evidence that he did not intentionally misrepresent his income by not accounting for the sales which the Minister has added. I find it more difficult, however, to take this view of his omission to report for 1950 cattle sales amounting to $1,722.68. He said that, in reporting cattle sales, he reported only the excess of selling price over what they had cost him, but this affords at best only a partial explanation, since in 1950 he reported no proceeds at all from cattle sales. Moreover, the size of the amount is such that I find it difficult to believe he would entirely forget about it. If a satisfactory explanation of his failure to report this sum, or at least some portion of it, existed, it was not given in evidence, and in this instance his evidence has not tipped the scale in his favour or persuaded me that his returns from sales of livestock were not intentionally omitted. On the other hand, for 1951 he reported proceeds from the sale of cattle, and while his method of computing the amount was inadequate, I am satisfied by his evidence that he did not wilfully omit what the Minister added for the purpose of evading tax. The assessment of penalty under s. 51A for the year 1950 must, accordingly, be referred back to the Minister for reconsideration and reassessment, having regard to the tax payable by the appellant in respect of the $1,722.68 so omitted. The assessment of penalty under s. 51A for the year 1951 will be vacated.

On the evidence, the appellant's returns for 1950 and 1951 were clearly late, and penalties under s. 51(1) were, accordingly, incurred. The assessments of such penalties

will, however, be varied so as not to exceed five per cent of the tax payable in respect of those years, based on the appellant's income computed in accordance with this judgment.

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The appeals will be allowed to the extent indicated in these reasons, and the assessments varied, referred back or vacated, as stated therein. The appellant will have the costs of the appeals.

Judgment accordingly.

BETWEEN:

1960
Sept. 23
1961
June 2

ANJULIN FARMS LIMITED ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act, S. of C. 1952, c. 148, ss. 46(2)(4) and 57(1)—Nil assessment—A notice of assessment must be treated as an assessment even though no tax levied—Appeal allowed.

Appellant on April 29, 1955, filed its income tax return for 1954. On June 7, 1955, the Minister forwarded to appellant a Notice of Assessment showing the tax levied for 1954 as "nil". On July 16, 1959, the Minister forwarded to appellant a Notice of Re-Assessment by which a tax and interest were levied. The appellant appealed to this Court.

Held: That the "nil" assessment made in 1955 must be treated as an assessment made at that time and a re-assessment in July, 1959, is invalid as being out of time. *Vide* s. 46(4) of the *Income Tax Act* as it was in 1959.

2. That in construing s. 46(4) of the Act as it was in 1959, the word "assessment" therein includes an assessment of "nil" dollars and therefore the original assessment herein was that of June 7, 1955, and the assessment dated July 16, 1959, stated to be a "re-assessment" and being more than four years after the original assessment, was invalid and of no effect.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Cameron at Calgary.

Edward E. McNally for appellant.

C. E. Smith, Q.C. and *G. W. Ainslie* for respondent.

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The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (June 2, 1961) delivered the following judgment:

This is an appeal in respect of the appellant's taxation year ending October 31, 1954. In its return dated April 29, 1955, it showed a profit for the year of $8,386.40, but after deducting certain amounts for depletion on royalties as well as for losses incurred in previous years, showed no taxable income. That return was apparently accepted as correct and on June 7, 1955, a "Notice of Assessment" (Exhibit 4) was forwarded to the appellant showing the tax levied as "nil". More than four years later and on July 16, 1959, the Minister forwarded to the appellant a "Notice of Re-assessment" (Exhibit 7) by which a tax of $1,755.31 and interest thereon was levied. Attached thereto and forming part of Exhibit 7 was the form T7W-C, showing the adjustments to the declared income and indicating a revised taxable income of $8,776.56. Then followed a Notice of Objection by the appellant dated August 31, 1959. Up to the date of the trial, no action was taken by the Minister following the receipt of the Notice of Objection under the provisions of s. 58(3), but at the trial on motion of his counsel and counsel for the appellant consenting, the time for filing his reply was extended to that date. In the meantime, after more than six months had elapsed from the date of serving the Notice of Objection, the appellant, under s. 60(2), served a Notice of Appeal to this Court on March 7, 1960, to which the Minister replied on July 21, 1960.

The onus is on the taxpayer-appellant and he must establish the existence of facts or law showing an error in relation to the taxation imposed upon him (*Johnston v. M.N.R.*[1]).

The first point raised by the appellant is a legal one, namely, that the purported "re-assessment" of July 16, 1959, is invalid as being out of time. Certain objections on the facts are also raised in the alternative, but if the legal objection now raised is correct, the others need not be considered.

[1] [1948] S.C.R. 486.

It is submitted that the appellant was first assessed on June 7, 1955 (the date of the Notice of Assessment Exhibit 4) and that that was therefore the original assessment; that as the "Notice of Re-assessment" (Exhibit 7) is dated July 16, 1959, that "re-assessment" was made on that date and being more than four years from the date of the original assessment, was invalid under the provisions of the then s. 46(4) of the *Income Tax Act*.

Section 46(4) as it was in 1959 reads:

> 46. (4) The Minister may at any time assess tax, interest or penalties and may
>
> (*a*) at any time, if the taxpayer or person filing the return has made any misrepresentation or committed any fraud in filing the return or supplying information under this Act, and
>
> (*b*) within 4 years from the day of an original assessment in any other case,
>
> re-assess or make additional assessments.

The parties are in agreement that no question of fraud or misrepresentation arises in this case.

For the sake of brevity and to avoid confusion between the words "assessment" and "original assessment" and "re-assessment", I shall hereinafter refer at times to the assessment of which notice was sent to the appellant on June 7, 1955, as "assessment X" and that of which notice was sent on July 16, 1959, as "assessment Y", without attaching any significance to the word "assessment" therein, but merely for purposes of identification.

Counsel for the Minister submits that as no tax was levied or claimed by "assessment X", it was not an assessment and that therefore the original assessment was "assessment Y". He relies on *Okalta Oils Ltd. v. M. N. R.*[1], in which the unanimous judgment of the Supreme Court of Canada was delivered by Fauteux J.

It becomes necessary to examine that decision carefully. In that case, the appellant-taxpayer was originally assessed for $1,000 in respect of the taxation year ending December 31, 1946. Pursuant to s. 69A of the *Income War Tax Act*, it served a Notice of Objection on the Minister who, upon re-consideration, re-assessed the company at "nil" dollars. An appeal purporting to be taken under s. 69B(1) to the Income Tax Appeal Board was dismissed and that

[1] [1955] S.C.R. 824.

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decision was affirmed by the judgment of this Court[1]. The taxpayer then appealed to the Supreme Court of Canada and it was held that in the circumstances there was no right of appeal from the decision of the Minister to the Board, nor therefrom to the Exchequer Court.

In that case, Fauteux J. said at p. 825:

A right of appeal is a right of exception which exists only when given by statute. Under section 69c(1) of the *Income War Tax Act*, a right of appeal to the Exchequer Court is given from the decision of the Income Tax Appeal Board; and under section 69*b*(1), a taxpayer who has served a notice of objection to an assessment under s. 69*a* may, after "the Minister has confirmed the assessment or re-assessed", appeal to the Income Tax Appeal Board "to have such assessment vacated or varied."

It is the contention of the respondent that, construed as it should be, the word "assessment", in sections 69*a* and 69*b*, means the actual amount of tax which the taxpayer is called upon to pay by the decision of the Minister, and not the method by which the assessed tax is arrived at; with the result that if no amount of tax is claimed, there being no assessment within the meaning of the sections, there is therefore no right of appeal from the decision of the Minister to the Income Tax Appeal Board.

In *Commissioners for General Purposes of Income Tax for City of London and Gibbs and Others*, [1942] A.C. 402, Viscount Simon L.C., in reference to the word "assessment" said, at page 406:—

The word "assessment" is used in our income tax code in more than one sense. Sometimes, by "assessment" is meant the fixing of the sum taken to represent the actual profit for the purpose of charging tax on it, but in another context the "assessment" may mean the actual sum in tax which the taxpayer is liable to pay on his profits.

That the latter meaning attached to the word "assessment", under the Act as it stood before the establishment of the Income Tax Appeal Board and the enactment of Part VIIIA—wherein the above sections are to be found—in substitution to Part VIII, is made clear by the wording of section 58(1) of the latter Part, reading:—

58(1). Any person who objects to the *amount* at which he is assessed . . .

Under these provisions, there was no assessment if there was no tax claimed. Any other objection but one ultimately related to an amount claimed was lacking the object giving rise to the right of appeal from the decision of the Minister to the Board. Under section 69*a*(1), there is a difference in the wording, as it was in prior section 58(1), but not one indicative of a change of view as to the substance in the matter. In Part VII, which deals with "assessment", a similar meaning is implied in section 54(1) providing that "the Minister shall send a notice of assessment to the taxpayer verifying or altering the amount of the tax. . . ." and in section 55, providing that notwithstanding any "prior assessment, or if no assessment has been made, the taxpayer shall continue to be liable for any tax and to be assessed therefore, and the

[1] [1955] Ex. C.R. 66.

Minister may, at any time, assess any person for tax, interest and penalties. . . ." In *Case No. 111 and Minister of National Revenue*, 8 C.T.A.B.C. 440, a similar objection was made and maintained. No argument was advanced by the appellant herein to justify the adoption of a contrary view in this case.

It was conceded by counsel for respondent—and with this view, we agree—that the action of the Minister in modifying the tax return submitted by the appellant, would have no future binding effect.

The appeal, as indicated, is dismissed with costs.

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It is to be noted that that decision was made under the provisions of the *Income War Tax Act* and related to the taxation year 1946; and that the single question before the Court was whether an appeal lay under s. 69B(1) of the *Income War Tax Act* to the Income Tax Appeal Board in cases where no tax was claimed or levied by the assessment. It undoubtedly was influenced by the wording of s. 58(1) of Part VIII—"Any person who objects to the *amount* at which he is assessed . . ." although, as pointed out, Part VIII of the Act did not apply for the 1946 and subsequent taxation years (s. 69F). The Court also held that while the wording of s. 69A(1) differed somewhat from that found in s. 58(1), that difference was not indicative of a change of view as to the substance in the matter. In view of the fact that the sole question for determination was whether an appeal in the circumstances could be brought under s. 68B(1), it may perhaps be argued that the statement "Under these circumstances there was no assessment if there was no tax claimed" may have been unnecessary to the decision, and in any event that statement clearly refers to s. 58(1) of the *Income War Tax Act* which was of no effect after 1945.

In addition there are other changes and sections in the Act as it was in 1959 which are of importance in determining the question as to whether a "nil" assessment might then be an original assessment. Section 69A(1), referred to in the *Okalta* case, is identical to s. 59(1) of the Act as it was in 1959 and confers on the taxpayer a right of appeal to the Tax Appeal Board when he has served a Notice of Objection to an assessment—not, it will be noted, to the *amount* of the assessment. Section 54(1) of Part VII of the *Income War Tax Act*, which

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provided that "The Minister shall send a Notice of Assessment to the taxpayer verifying or altering the *amount of the tax*" has been succeeded by s. 46(2):

46.(2) After examination of a return the Minister shall send a Notice of Assessment to the person by whom the return was filed.

That provision, it seems to me, requires the Minister to send a Notice of Assessment to every person who has filed a return. Section 44 requires that a return of income be filed by (*inter alia*) all corporations, by individuals who are taxable, and at the written request of the Minister, by an individual whether he be taxable or not. Section 45 states that all persons required by s. 44 to file a return of income shall in the return estimate the amount of tax payable. I would think that a non-taxable person who does file a return would be entitled to estimate his tax at "nil" dollars, since he is required to estimate the amount of the tax. Section 46(2) does not appear to limit the duty of the Minister in sending a Notice of Assessment to those cases in which a tax is payable since it directs the Minister to send such notice "to the person by whom the return was filed". Since the Minister has the power in cases of fraud or misrepresentation to re-assess or make additional assessments at any time, I find great difficulty in interpreting s-s. (4) as meaning that the Minister may assess *at any time* after he has sent out a "Notice of Assessment" stating that the return has been assessed and that the tax levied is fixed at "nil" dollars (as in Exhibit 4); whereas under that subsection, if a tax of one dollar had been originally levied, he could not re-assess more than four years thereafter. In the instant case, also "assessment Y" is called a "Notice of Re-assessment" and states "A further examination has been made of your income tax return for the taxation year indicated. The resulting re-assessment in tax is shown above. . . .".

Then s. 57(1) seems to indicate that a Notice of Assessment may be an assessment at "nil" dollars. It reads:

57.(1) If the return of a taxpayer's income for a taxation year has been made within four years from the end of the year, the Minister

(*a*) may, upon mailing a notice of assessment for the year, refund, without application therefor, any overpayment made on account of the tax, and. . . .

There are doubtless many cases in which taxpayers have paid instalments of taxes or their employers have deducted tax and remitted it to the taxing authorities, when, in fact, it is found at the end of the taxation year that no tax is payable. The taxpayer then files his return and if the assessor agrees with his computation that no tax is payable, the Minister may "upon mailing the *notice of assessment* for the year refund . . . . any overpayment" which, in such a case, would be the total amount paid in. Unless the Minister in such a case is prevented entirely from making such a refund—which clearly is not intended—such a Notice of Assessment would of necessity be a "nil" assessment.

The word "assessment" is not defined in the Act except that it includes a re-assessment (s. 139(1)(*d*)). For the reasons above stated, however, I have come to the conclusion that in construing s. 46(4) as it was in 1959, the word "assessment" therein includes an assessment at "nil" dollars and that therefore the original assessment in this case was that of June 7, 1955. It follows that under the law as it was in 1959, the "assessment Y" dated July 16, 1959, stated to be a "re-assessment" and being more than four years after the original assessment, was invalid and of no effect.

I should state here, in case the matter goes further, that in the alternative claim of the appellant on the merits, it was agreed that in the event that I should find that the assessment under appeal was a valid assessment (*a*) the deduction for wages of Linda Graburn and Judith Graburn for $1,000 each should be dropped; and (*b*) that as claimed by the appellant in its appeal and admitted by the Minister in his reply, the appellant was entitled to an additional deduction of $1,644.72 for capital cost allowance pursuant to s. 11(1)(*a*) of the Act and an additional amount of $1,129.71 as an allowance pursuant to s. 11(1)(*b*) of the Act. In view of my finding, it is unnecessary to consider the other alternative claim of the appellant that in the circumstances it is entitled to deduct losses of prior years from its 1954 income.

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In view of my finding, it becomes unnecessary to consider the alternative submission of counsel for the appellant that the appellant is entitled to succeed under the provisions of the new s-s. (4) of s. 46, as enacted by s. 15 of c. 43, Statutes of Canada, 1960, and which came into force on August 1, 1960.

Accordingly, the appeal will be allowed and the re-assessment of July 16, 1959, set aside. The appellant is entitled to be paid its costs after taxation.

Judgment accordingly.

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BETWEEN:

RIBBONS (MONTREAL) LIMITED .....PLAINTIFF;

AND

BELDING CORTICELLI LIMITED .....DEFENDANT.

Trade-Mark—Industrial design—Industrial Design and Union Label Act, R.S.C. 1952, c. 150, ss. 7, 12(1), 14, 21, 25—Presumption of validity of registration—Onus of proving invalidity—Failure to discharge onus—Proof of ownership—Sufficiency of subject-matter—Publication—Date of first publication—Marking of articles.

Plaintiff, the registered owner of an industrial design known as a transparent acetate blister used for the ornamental display of its contents consisting in the instant case of bows and ribbons for tying and decorating wrapped articles, brings this action against defendant for the alleged infringement of such design. Defendant admits the infringement and pleads that the plaintiff's registration is invalid. The Court found for the plaintiff.

Held: That in virtue of ss. 7(3) and 25 of the *Industrial Design and Union Label Act,* R.S.C. 1952, c. 150 the onus of proving that the plaintiff was not the owner of the design rested on the defendant who had failed to discharge the onus.

2. That the design by virtue of s. 7(3) of the Act was presumed to be validly registered and the evidence adduced confirmed that it had sufficient subject matter for the purpose.

3. That "publication" in s. 14(1) of the Act means the date when the article in question was first offered or made available to the public and the evidence showed that registration had been effected within one year from that date.

4. That the articles had been properly marked as required by s. 14(1) of the Act.

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ACTION for infringement of an industrial design.

The action was tried before the Honourable Mr. Justice Kearney at Montreal.

Cuthbert Scott, Q.C., for plaintiff.

H. Gerin-Lajoie, Q.C. and *Pierre Bourque* for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

KEARNEY J. now (May 27, 1961) delivered the following judgment:

This is an infringement action instituted by the plaintiff pursuant to the provisions of the *Industrial Design and Union Label Act*, R.S.C., 1952, c. 150, s. 15, which reads as follows:

> 15. If any person applies or imitates any design for the purpose of sale, being aware that the proprietor of such design has not given his consent to such application or imitation, an action may be maintained by the proprietor of such design against such person for the damages such proprietor has sustained by reason of such application or imitation. R.S., c. 201, s. 38.

It is admitted that the plaintiff and the defendant had each a place of business in the City of Montreal, were engaged in the sale and distribution of ribbons and bows of ribbon used for tying and decorating wrapped parcels or packages, and were servicing the same retail outlets. The plaintiff is a jobber who buys and sells ribbons and bows but does not manufacture them; the defendant, while manufacturing these articles, buys and sells some which are not of its own manufacture. As appears by certificate No. 163/22797, dated October 19, 1959, the plaintiff, pursuant to the Act, has caused to be registered a certain industrial design known as a transparent acetate blister, and exemplified by exhibits P-2, P-13, P-17, which is used for the ornamental display of its contents consisting of what is called in the instant case a "Beauti-Bow and Tye Ribbon."

This "Beauti-Bow" consists of ribbon arranged in what appears to be a cluster of bows placed in a semi-spherical shape, used to decorate the top of wrapped gift packages.

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The Tye Ribbon, or hank as it is sometimes called, is made of matching ribbon used to tie the package and to maintain the decorative bow in place. Another feature of this design is the protection it affords bows on packages in transit.

The plaintiff alleged that the design was developed on its behalf by an officer and/or servant in its employ in the normal course of duty; that it thus became the first and true designer of the said transparent display blister; and that the defendant has and continues to apply the said design or fraudulent imitation thereof to its wares and has refused to discontinue such practice although requested by the plaintiff to do so. Two samples of the defendant's infringing design, entitled "Glamour Bow and Matching Ribbon," were filed as exhibits P-12 and P-15. For simplification I will refer to the design in issue as P-2 and the infringing design as P-12.

In addition to damages amounting to $10,000 the plaintiff seeks an injunction restraining the defendant from manufacturing, selling and distributing transparent display blisters of the type in issue, and an order requiring it to deliver up to the plaintiff all such infringing design in its possession or under its control.

The defendant's first two exhibits, A and B, were filed long before its third exhibit and, when the latter came to be filed, it was erroneously marked as exhibit A instead of C, and a like occurrence befell the defendant's subsequent exhibits. This oversight was discovered only after much of the evidence had been taken down in stenography. The designation in the official transcript of the defendant's third, fourth, fifth, sixth and seventh exhibits should therefore be changed to read C, D, E, F and G instead of A, B, C, D, E.

Unusual at it may appear, infringement is not in issue. Far from denying that it applied to its wares a duplication or imitation of the plaintiff's registered design, the defendant in its statement of defence and amended particulars of objection declared that the use by it of the said design had been carried out properly and legally. It alleged that the registration of the design in question is and always has been illegal, invalid, null and void for the following reasons: (1) the plaintiff is not the true owner

thereof; (2) the design lacks subject matter for registration under the Act; (3) it was registered too late; (4) following registration the plaintiff failed to have its name as proprietor and registration number appear on the article to which the said design applied as required by the Act. Accordingly the defendant concludes and asks that the said registration certificate No. 163/22797, dated October 19, 1959, be declared null and void and that it be set aside for all legal purposes.

In support of point (1) the defendant invoked two grounds: (*a*) the design in issue was originally developed by Vogue Plastics Limited of Montreal in February 1958, at the instance of J. H. Street & Co. Ltd., Toronto foil specialists, hereinafter designated J.H.S., under the following circumstances. Prior to February 1958, J.H.S., through its salesman, Mr. A. Feller, had been in touch with the plaintiff which desired to secure an improved package for the sale of bows and ribbons. At the request of J.H.S., Vogue Plastics Ltd. designed and manufactured specimens of "Blister Packs," also known as "Transparent Display Blisters," which were submitted by J.H.S. to the plaintiff, together with price quotations dated February 14 and 19, 1958. The plaintiff did not give effect to these quotations, but several months later took advantage of the knowledge thus acquired and unduly appropriated the said design for its own use.

(*b*) On or about March 25, 1959, Mr. Maurice C. Robinson, president of the plaintiff company, filed an application for registration in his own name of an industrial design for a transparent display blister, identical to the one previously submitted to the plaintiff by J.H.S. and designed by Vogue Plastics Ltd. in February 1958, and an industrial design registration was granted in Mr. Robinson's name on May 19, 1959, under No. 161/22501. Subsequently Mr. Robinson arranged with the plaintiff to have the said industrial design registered in the latter's name. Accordingly the plaintiff instituted an action against its president. On October 1, 1959, judgment was rendered ordering and adjudicating that registration No. 161/22501 be expunged from the Register of Industrial Designs. A

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new application was filed on behalf of the plaintiff on October 19, 1959, for registration in its name of an identical or similar industrial design under No. 163/22797.

Under 1(*a*) is to be found the most contentious and most important issue, namely, whether the plaintiff is the true proprietor of P-2. Its determination resolves itself into almost exclusively a question of fact which depends in a great measure on the credibility to be attached to the respective witnesses called by the parties. The plaintiff relies for proof of authorship mainly on the evidence of its president, Mr. Robinson, and its production manager and purchasing agent, Mr. Levy. The defendant, in respect to proof that the rightful owner of the design is J.H.S. is dependent in a large measure on the testimony of Andrew Feller.

In dealing with evidence I will refer to exhibits which have been produced and represent acetate blister designs which are not in issue, and I will refer to them principally to preserve a proper sequence of events, but I think it should be borne in mind that we are here concerned only with the design described in certificate No. 163/22797 and exemplified by P-2.

The following are some facts concerning which Messrs. Robinson and Levy on the one hand, and Mr. Feller on the other, are in agreement. J.H.S. specialized in making aluminum foil bendovers for hanks (Ex. P-5); and during the course of the year 1957 Mr. Feller called on Mr. Levy in an effort to procure an order for this article but at no time was he successful. On one such visit, late in December 1957 or early in January 1958, the question of an acetate blister to house a bow and hank first arose. Although Messrs. Robinson, Levy and Feller agree on when this question was first brought up, in many respects they are poles apart on what occurred on that occasion and subsequent thereto.

According to Mr. Robinson, in 1954 a "Beauti-Bow" and hank enclosed in a container, made partly of cardboard and partly of cellophane, was originated by him with the assistance of Mr. Levy and was marketed very successfully for several years. The container was not registrable as a design, but the name "Beauti-Bow" was

registered as a trade name early in 1954. The cellophane bag, as P-1 was called, while its production cost was low, had two serious drawbacks: it was fragile and had a tendency to dry and crack and take on a puckered appearance. Early in 1957, according to Messrs. Robinson and Levy, they had seen in trade magazines how businessmen, particularly in the hardware trade, were making use of acetate containers and they went to work on devising how they could convert the cellophane bag type into an acetate blister type container. They had drawn sketches of how this best could be attained, and they had gone to several manufacturers with a view to having their ideas put into practice. They could find manufacturers, but the main difficulty with the display blister type was its high cost of manufacture against the moderate cost of the cellophane bag type. They consulted some firms which used the latest method called the "vacuum forming process," and among them were Style Plastics, Monsanto Chemicals, Canadian Chemicals, G.M. Plastics, Quebec Plastics. One firm, namely, Neelack, which manufactured acetate blisters by the injection moulding method, informed them that even to make a small die for an acetate blister would cost over $20,000. By the end of 1957 they had reached the state of knowing what they wanted but they had not yet given instructions to anybody to make a model of their design. It was at this stage that Mr. Feller raised with Mr. Levy the subject of making an acetate blister, by informing him that the firm of J.H.S. had lately acquired vacuum processing machinery and was interested in making acetate blisters. Mr. Robinson was called in and both he and Mr. Levy led Mr. Feller into the showroom, showed him hand-drawn sketches of an acetate blister designed to house a bow and hank, gave him several samples of their cellophane package (P-1) and asked him to quote prices.

Under date of February 14 they received a quotation from J.H.S. per J. A. Ritchie for the manufacture in large quantities of the "Beauti-Bow" pack, consisting of an acetate circular blister which would house the "Beauti-Bow" alone, together with a quotation for printing a base card for each blister. Similarly under date of February 19

quotations were also received for a blister and base card which provided housing for both the bow and the hank, the whole as appears by exhibit A.

According to Messrs. Robinson and Levy, they informed Mr. Feller that the prices quoted were prohibitive and that they could not think of buying the design. Mr. Feller said he would give the information to his principals and about two or three weeks later Mr. Feller returned accompanied by Mr. Street and they interviewed Mr. Robinson and Mr. Levy, promising they would see what they could do with regard to the price; but they did not submit any further quotations and their dealings with Mr. Feller thereupon came to an end.

Not long after a Mr. Cameron of Canadian Decor Products Inc., Montreal, who while with the T. Eaton Co. had purchased for resale the plaintiff's "Beauti-Bows" in the cellophane bags (Ex. P-1), got in touch with the plaintiff and informed it that his company had vacuum processing machines and was anxious to see them in connection with converting the above exhibit into an acetate container. As a result, Canadian Decor Products Inc. made two hand-made samples of acetate blisters—one to house a "Beauti-Bow" and hank (P-8) and a smaller circular blister for a bow without the hank (Ex. P-9). As a result, the price being satisfactory, the plaintiff placed an order, subject to being okayed and checked, on May 5, 1958, with Canadian Decor Products Inc. for 10,000 large circular blisters without the hank and 10,000 smaller blisters of the same type. (See invoice, exhibit P-6).

According to Messrs. Robinson and Levy, the plaintiff company had some market for the sale of bows alone, and having a large stock of cellophane containers such as P-1, they decided to test the market with the circular blister for the bow alone because, if they placed the bow and hank model (Ex. P-8) immediately on the market, they thought they would be unable to dispose of their large stock of P-1 type of container. No further orders were given to Canadian Decor Products Inc. because it got into financial difficulty and soon after, in August 1958, went into liquidation. Just about this time, Charles Kirchoff of Vogue Plastics Ltd., who, according to Mr. Levy, saw

that the plaintiff was selling bows alone in plastic containers (Ex. P-7), got in touch with Mr. Robinson and Mr. Levy to solicit orders for acetate blisters of the type for the bow and hank similar to exhibit P-2. It turned out that it was he who had made samples of P-2 and P-7 for J.H.S. but had been unable to secure an order from them. As a result of Mr. Kirchoff's visit, the plaintiff gave, subject to checking and approval, an order for 9,000 acetate blisters, called the "Twin Pack Beauti-Bow," which provided housing for two bows and a double length hank. The first sample was unsatisfactory to the plaintiff but Mr. Kirchoff made a second sample which overcame the defects complained of, and the twin pack order was completed in November 1958, in time for the Christmas market. A sample of the twin pack was filed as exhibit P-4. In the meantime a model of P-2 was similarly submitted and, after some alterations were made at the instance of the plaintiff, an order for the finished article was given, and it went on the market in January 1959.

Mr. Feller's version of his relationship with Messrs. Robinson and Levy is substantially as follows:

Towards the end of December 1957 or early in January 1958, after several preceding visits with Mr. Levy, he found that he was unable to sell aluminum foil bendovers to the plaintiff. He showed Mr. Levy some display work, whereupon the latter took him to the plaintiff's showroom to have a look at the company's products and asked Mr. Feller, if he could come up with any idea that he felt would be of interest to him, he should contact him immediately. Mr. Feller stated that he hit upon the idea of placing the plaintiff's "Beauti-Bow" in an acetate container. He left Mr. Levy, went out to a drugstore on St. Catherine Street and purchased one of the plaintiff's cellophane bags (Ex. P-1). He then went to his own office and procured a sample used by Stetson's (Ex. F) to advertise their hats, which consists of a semi-spherical blister made of acetate. Mr. Feller claims that sometime in 1955 his company conceived this idea, did the actual printing of the card and contracted with a firm in Toronto or Brampton, Ontario, to make the blister package which is part of the display. He brought these articles to Mr. Levy and suggested that the bow in exhibit P-1 would be much better

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displayed if it were transferred to a blister such as exhibit F. He asked Mr. Levy if he could go ahead and make him an actual sample of the round blister because exhibit F was only a component part of another product. Mr. Levy replied that he would be interested. Mr. Feller contacted not J.H.S. but Vogue Plastics Ltd. and arranged with that firm to make another acetate blister sample to fit the contour of the bow contained in exhibit P-1. In January 1958 he showed Mr. Levy the new sample which was of a lot cleaner transparency than the Stetson sample. Mr. Levy was very enthused and thought the idea worth considering and asked Mr. Feller at the time if it would be possible to include a hank with the blister. Mr. Feller then obtained for Mr. Levy a striking scarlet sample of the company's "Beauti-Bow" and a hank to match, and he contacted Mr. Kirchoff, asked the latter whether he thought this idea could be carried out, who replied that he foresaw no great difficulties in implementing it. When he had received the sample blister, he enclosed the ribbon and hank in it and sent it to his firm in Toronto to complete by hand the art work consisting of the wording and colour scheme on the card which formed the bottom of the blister, and asked for quotations of the whole, which he received back in the middle of February (Ex. A). He took the sample and the quotations to Mr. Levy who was very enthused about it and Mr. Levy introduced Mr. Feller for the first time to Mr. Robinson. Both were favourably impressed, and Mr. Levy informed Mr. Feller that they were definitely interested in a package of this type and that he, Mr. Feller, should not contact any other manufacturer. I should here interpose that in cross-examination Mr. Feller admitted that he had led Messrs. Robinson and Levy to believe that J.H.S. would manufacture the sample in question.

Mr. Feller declared that both Mr. Levy and Mr. Robinson took exception to the price and that he suggested that the price might be brought down by substituting staples by a "flange" on the blisters; and, instead of printing it in two colours it could be printed in one; and finally, by reducing the cardboard's thickness from 15 point to 12. It all ended, said Mr. Feller, with Mr. Robinson going on a trip and asking to take with him two blisters: a semi-spherical blister

to house only the bow and another blister with provision to house a bow and hank, as he wanted to test the reaction of the various buyers to the acetate packs and he suggested that Mr. Feller contact him in a few weeks on his return. Mr. Feller contacted Mr. Robinson again on the latter's return, early in March 1958, who reported that there was an enthusiastic response from some while others were not so keen on the idea; and he asked Mr. Feller to return at the end of March or beginning of April; and, as Mr. Street happened to be in Montreal, both he and Mr. Feller called on Mr. Robinson and Mr. Levy and again discussed the idea of this blister pack. The result of the discussion, he said, was that Mr. Robinson thought it would be taking a gamble on completely changing to this package. He wanted to consider it further, and it would help if something on the price could be done. Mr. Feller stated he saw Mr. Robinson once more in the fall of 1958. Beyond saying that this was his last meeting with Mr. Robinson, Mr. Feller said nothing about what occurred on this occasion. Mr. Feller said he dropped in occasionally to see Mr. Levy and, though he was not sure, he thought he submitted quotations such as those in exhibit B, bearing the date of March 15, 1958, which are in his own handwriting and about half the amount of his original quotations. Mr. Robinson declared that he never previously saw exhibit B.

Mr. Levy who was heard in rebuttal stated that the discussions about the acetate blister with Mr. Feller began at the end of December 1957 and ended in early March 1958. He testified that at no time did Mr. Feller show him the Stetson blister (Ex. F) and the first time he saw it was in court. He also declared that J.H.S., in their quotations for "Beauti-Bow" blister packs (Ex. A), was asking four and a half to five times more per unit than Vogue Plastics Ltd. charged the plaintiff for making P-2, P-13 or P-17. When asked in cross-examination why he did not mention to Mr. Feller during their discussions in December 1957 that prior and subsequent thereto Mr. Robinson and himself were discussing with other manufacturers the production of acetate blisters, Mr. Levy replied that the plaintiff in the ordinary course of business, is often in touch with several manufacturers at the same time in order to get the lowest

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quotation on the article which they wish to produce and they never give one manufacturer information which they have received from another.

The sample blister packs which Mr. Feller had made by Vogue Plastics Ltd. were not produced at trial and were the subject matter of considerable evidence. Messrs. Robinson and Levy said that to the best of their memory they had been returned to Mr. Feller and that at no time had Mr. Feller or J.H.S. asked for their return. Mr. Feller was not sure what happened to them.

What conclusions are to be drawn from the evidence submitted on behalf of the plaintiff and the defendant, which in so many important respects is contradictory?

If the version of what occurred, as given by Messrs. Robinson and Levy on the one hand and Mr. Feller on the other, were considered separately, each might be regarded as not only possible but plausible. It is when contrasted that they become subject to suspicion. Thus one may query whether it was only coincidental that both the hand-made sample of the blister for a bow alone and the other for a bow and hank (Exs. P-8, P-9) were made by Canadian Decor Products Inc. not long after Mr. Feller's visits to the plaintiff's office during February 1958 and after he had placed in the hands of Messrs. Robinson and Levy similar samples which they thought J.H.S. had made but which they later learned were manufactured by Vogue Plastics Ltd. Nevertheless I consider that the actions of Messrs. Robinson and Levy were more consistent with their testimony of what occurred than were the actions of Mr. Feller with his testimony regarding the same visits, and that the weight of evidence favours the plaintiff.

A grave weakness in Mr. Feller's evidence which casts doubt on the veracity of the remainder of his testimony is the fact that, without offering any justification or excuse for so doing, he was driven to acknowledge that he had deceived the plaintiff into believing that J.H.S. would manufacture the acetate blisters mentioned in the quotations it sent to the plaintiff, as it had recently acquired the vacuum process machinery necessary for the purpose.

It was submitted on behalf of the defendant that there was evidence from which it could be inferred that the plaintiff never intended to place an order with J.H.S. which, while putting off giving a definite answer to Mr. Feller, was making use of his idea on the conversion of its cellophane bag into an acetate display blister; that, while taking advantage of the trustfulness of Mr. Feller, the plaintiff was negotiating with one company or more to put this idea into practice, thus appropriating to itself the resulting design which rightfully belonged to J.H.S. Even were there some evidence which would lend colour to this conclusion, it was negatived by the actions of Mr. Feller. It was proven that, in making enquiries regarding an acetate blister, the plaintiff had previously contacted concerns capable of manufacturing it and its witnesses testified that, had they known that J.H.S. did not manufacture acetate blisters and was only a middleman, they would never have dealt with this concern. By having recourse to a deliberate misrepresentation, Mr. Feller, I think, provided the plaintiff with a just and reasonable cause for breaking off negotiations, on the grounds of excessive price alone, more particularly as it was proven that Vogue Plastics Ltd. undertook to manufacture display blisters on speculation and had quoted J.H.S. a price nearly five times less than the latter had quoted to the plaintiff for the same work. Under the circumstances there is little justification to question the truth spoken by the witnesses called for the plaintiff when they stated excessive charge was their only cause for discontinuing relations with J.H.S.

Although it is claimed that J.H.S., and not the plaintiff, is the rightful owner of the design in issue, I do not think that the former acted in the manner expected from such an owner. No officer of the company came forward to testify that it claimed ownership of the design. Mr. Street who, it is proved, had gone to see the plaintiff's officers to discuss prices was not heard as a witness, possibly because at the time it occurred he did not know of the deception practised by Mr. Feller who was simply a salesman. In any event, if negotiations between the plaintiff and J.H.S. were, as it is claimed, unduly prolonged, one would have expected that an officer of the company would have

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brought them to an end and tried to interest one of the many other concerns which sells bows and ribbons in a design of which it claimed to be the rightful owner.

Mr. Feller also admitted that what he called his saleable idea consisted of placing a "Beauti-Bow" in a semi-spherical blister and that the idea of adding the hank came from Mr. Levy.

For the reasons stated earlier the plaintiff has discharged the burden of proving infringement, and for good measure I might add that Mr. Homer H. Bland, president of the defendant company, when examined on discovery, admitted that his company knew that the plaintiff's exhibit P-2 was on the market and that it knowingly sold P-12 which is practically a duplicate thereof. As a consequence, in my opinion the burden of proving that the plaintiff is not the proprietor of P-2 rests on the defendant by reason of ss. 7(3) and 25 of the Act, which read as follows:

> 7(3) The said certificate, in the absence of proof to the contrary, is sufficient evidence of the design, of the originality of the design, of the name of the proprietor, of the person named as proprietor being proprietor, of the commencement and term of registry, and of compliance with the provisions of this Act. R.S., c. 201, s. 30.

> 25. Every certificate under this Act that any industrial design has been duly registered in accordance with the provisions of this Act, which purports to be signed by the Minister or the Commissioner of Patents shall, without proof of the signature, be received in all courts in Canada as *prima facie* evidence of the facts therein alleged. R.S., c. 201, s. 48; 1932, c. 38, s. 61.

Looking at the evidence as a whole, I think that the testimony given by the plaintiff's witnesses is entitled to at least as much credence as that adduced by the defendant, and I consider that the defendant has failed to discharge the burden of proof which rests upon it.

I think the grounds invoked by the defendant under 1(*b*) lack merit. Mr. Robinson testified on discovery that the proceedings therein mentioned were taken on the advice of counsel, and s. 21 of the Act provides the only way to expunge a registration which should not have been made, which is by means of an action. The amended statement of claim filed in case No. 157454 of this court states that, although he originated it, he did so for good and valid consideration paid him by the plaintiff; he was a salaried

employee whose duties included the designing and styling of new articles and the ornamentation thereof for marketing by the plaintiff; and that he was acting within the scope of his employment, on the plaintiff's time, on the plaintiff's premises and with material supplied by the plaintiff. The record also shows that Mr. Robinson acknowledged the correctness of the allegations contained in the statement of claim and consented to judgment. Under the above circumstances I think that it was by error that the design was registered in Mr. Robinson's name in the first place, by reason of the provisions of s. 12(1) of the Act which states:

> 12(1) The author of any design shall be considered the proprietor thereof unless he has executed the design for another person for a good or valuable consideration, in which case such other person shall be considered the proprietor.

The defendant, if it were attempting to prove that Mr. Robinson is not the true owner of the registered design, might, I think, with justification invoke the above proceedings, but they cannot, in my view, be validly invoked against the plaintiff, since the purpose and effect of the above-mentioned action was to put the registration of the instant design in the name of the plaintiff where it rightfully belonged.

In respect of the question of invalidity due to lack of subject matter referred to under (2), counsel for the defendant did not raise this point in argument. This is quite understandable, I think, firstly since, in the absence of evidence to the contrary, the design is presumed, under s. 7(3), to possess the necessary qualities for valid registration and, secondly, because of the testimony given by the defendant's own witnesses, Messrs. Feller and Kirchoff. Mr. Feller, speaking of newness or novelty and originality, stated that he considered the idea he conceived of applying acetate design blisters to ribbon bows was something original and saleable. This evidence, in my opinion, far from rebutting the presumption in favour of sufficient subject matter, only serves to confirm it. In addition to the foregoing, the plaintiff in my opinion offered sufficient proof in respect of the adequacy of subject matter, but under the circumstances I think it unnecessary to refer to it.

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The third reason given by the defendant to prove the invalidity of the registration in issue is that the plaintiff registered the design on October 19, 1959, which was more than one year after its date of publication, thus contravening s. 14(1) which reads as follows:

> 14(1) In order that any design may be protected, it shall be registered within one year from the publication thereof in Canada, and, after registration, the name of the proprietor shall appear upon the article to which his design applies by being marked, if the manufacture is a woven fabric, on one end thereof, together with the letters *Rd.*, and, if the manufacture is of any other substance, with the letters *Rd.*, and the year of registration at the edge or upon any convenient part thereof.

"Publication" means the date on which the article in question was first offered or made available to the public and, since the evidence shows that this occurred in January 1959, it disposes of the above-mentioned objection.

In respect to lack of proper markings, which is the last reason advanced by the defendant for invalidity, this also falls under s. 14(1) (*supra*). All the exhibits exemplifying the plaintiff's registered design show that they were marked in accordance with the Act; and the defendant has failed to make proof of any instance in which the plaintiff offered such articles for sale, which did not bear the required inscriptions, and I do not think that anything more need be added under this heading.

For the foregoing reasons I consider the plaintiff's action should be maintained with costs and that it is entitled to an injunction and a surrender by the defendant of all infringing articles in the manner sought in the conclusions of its action. As to its claim for damages amounting to $10,000, this will be referred to the learned registrar of this court for assessment.

Judgment accordingly.

BETWEEN:

1960 Apr. 28 Aug. 16

EARL B. FINNING .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... } RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 67(1)(3) and 68(1)(a)(c)—Personal corporation—"Does not carry on an active financial, commercial or industrial business"—"Active" the converse of "passive"—Appeal dismissed.

Appellant and his two daughters were, during the taxation years under review, the sole shareholders of Finning Securities Limited. This corporation and one other corporation were set up for the sole purpose of negotiating with the banks all commercial paper, mainly customers' notes received by a mother firm known as Finning Tractor and Equipment Company Limited. These notes usually bore interest at 8½ per centum and were sold to Finning Securities Limited which in turn pledged them to the bank for loans at 6 per cent, profiting by the spread in interest rates. During the taxation years, 1954, 1955 and 1956 Finning Securities Limited handled for the account of Finning Tractor and Equipment Company Limited 863 contracts of this nature with a gross value of over $5,000,000, making a net profit of over $50,000 and only 4 contracts for outsiders for a profit of less than $6,000. Respondent taxed the shareholders of Finning Securities Limited on the basis of it being a personal corporation. Appellant appealed from that decision to this Court.

Held: That Finning Securities Limited was a personal corporation as defined by s. 68 of the *Income Tax Act*, R.S.C. 1952, c. 148.

2. That Finning Securities Limited "did not carry on an active financial, commercial or industrial business" as provided by s. 68(1) of the *Income Tax Act*; it did not advertise its business to the public, it had no telephone listing, it had no office or staff of its own, all its bookkeeping and other activities were carried on for it by Finning Tractor and Equipment Company Limited and by the staff of that company; it acquired only the trade and paper of that company which it discounted immediately at the banks pocketing the profits.

3. That the word "active" is the converse of "passive" which is defined as "suffering action from without . . . acted upon by external force, produced by external energy" and Finning Securities Limited was without any *active* financial, commercial or industrial business and was a personal corporation.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Vancouver.

William Murphy, Q.C. and *R. J. Harvey* for appellant.

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Miss Mary Southin and *T. E. Jackson* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

DUMOULIN J. now (August 16, 1961) delivered the following judgment:

This is an appeal from a decision of the Minister of National Revenue, rendered May 25, 1959, rejecting appellant's objection to his re-assessments for income tax in the 1954, 1955 and 1956 taxation years. The appellant, Earl B. Finning was not heard in evidence at trial but had testified on discovery.

In determining Mr. Finning's net taxable income for 1954, the Department of National Revenue added to his income a sum of $25,747.37 entailing an increase of $25,225.47 to the tax already owing. In 1955 and 1956 additions of $26,474.01 and $21,081.97, respectively, were made, with corresponding raises in the taxes payable of $30,090.10 and $26,467.15.

The reason invoked for such drastic revisions appears in para. 8 of the Reply to Notice of Appeal, where one reads that . . . "Respondent included in computing income the respective amounts of $25,747.37, $26,474.01 and $21,081.97 *upon the assumption these amounts were properly deemed as having been distributed to the appellant in those years by a personal corporation called Finning Securities Limited*". (Italics throughout these notes are mine).

The apellant, taking objection to this interpretation, counters that: . . . "in each of the taxation years of the said Finning Securities Ltd., in which income was deemed to be distributed by that Company to the Appellant, *the said Finning Securities Ltd. was not a personal corporation as it carried on in each of such years an active financial business*".

Before passing on to the pertinent law, some explanatory information might be of use.

To start with Finning Securities Limited, during those material years, had, according to my notes, only three shareholders, namely, Earl B. Finning himself and his two daughters, Mrs. Mary Margaret Young and Mrs. Joanne E. Parker.

Two other corporate organisations: Finning Tractor and Equipment Company Ltd., and Tractors Holdings Limited, were, the former, distributors of heavy equipment, earth moving machinery, tractors, etc., the latter, and Finning Securities Ltd., nothing more than financing companies,—or should I say agencies,—set up for the sole purpose of negotiating with the banks all commercial paper, mainly customers' notes, received by the mother firm, Finning Tractor and Equipment Company. Such notes, bearing interest, usually at 8½ per centum, were "sold" by Finning Tractor and Equipment to its handmaid dummy (as it will develop), which, pledging these collaterals with the bank, obtained financing loans at 6 per cent, thereby deriving neat profits through this spread of interest rates.

Exhibit "6", labelled "Details of all contracts Financed—1954 to 1956 Inc.", reveals that over the aforesaid period Finning Securities Limited did handle, but merely for the account of Finning Tractor and Equipment Company, 863 contracts for a global value of $5,740,219 at an over-all net profit, taxes deducted, of $53,777.71.

Apart from this imposing bulk of 863 transactions with the one firm, exhibit "7" lists so few as 4 contracts negotiated with "outsiders" during the same period, to a total of $20,908.92, practically of negligible proportion when compared to the preceding sum of $5,740,219.

Such is the outline of this case which squarely raises the issue of what, in the eyes of the law, constitutes a "personal corporation", and, accessorily, the rational meaning attaching to financial business "actively carried on".

As often occurs in statutory texts, the effect or consequence precedes the cause, a probable explanation why s. 67, governing the distribution of a personal corporation's income, comes before s. 68 defining personal corporations.

Section 67, s-ss. (1) and (3) decrees that:

67(1) The income of a personal corporation whether actually distributed or not shall be deemed to have been distributed to, and received by, the shareholders as a dividend on the last day of each taxation year of the corporation.

(3) The part of the income of a personal corporation that shall be deemed under this section, to have been distributed to and received by a shareholder of the corporation, shall be the proportion thereof that the value of all property transferred or loaned to the corporation by

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Dumoulin J.

the shareholder or any person by whom his share was previously owned is of the value of the property so acquired by the corporation from all its shareholders.

At the risk of being repetitious, I would next insert para. 10 of the Reply to Notice of Appeal, since it expounds the Respondent's basic argument.

10. Respondent says that by virtue of subsections (1) and (3) of section 67 of the Income Tax Act the Respondent deemed the amounts concerned to have been distributed by Finning Securities Limited because in the years concerned that company was a personal corporation as defined by section 68 of the said Act.

The afore-mentioned enactment points to the following traits as specifying, in law a "personal corporation":

68(1) In this Act, a "personal corporation" means a corporation that, during the whole of the taxation year in respect of which the expression is being applied,

(*a*) was controlled, whether through holding a majority of the shares of the corporation or in any other manner whatsoever, by an individual resident in Canada, *by such an individual and one or more members of his family who were resident in Canada or* by any other person on his or their behalf;

(*c*) did not carry on an *active financial, commercial or industrial business.*

This latter requirement, i.e., carrying on in a truly active manner the corporation's alleged line of business constituted the main if not the whole ground of discussion. In other words did those 863 customers' notes taken up, in the material three years, and negotiated by Finning Securities Limited for a single client, Finning Tractor and Equipment Company, qualify with the statutory norms of "active financial business?" The conditions inherent to Finning Securities' trading activities must necessarily shed some revealing light.

On this score, Mr. William Murphy, Q.C., appellant's counsel, contributed a guarded but very useful commentary that I quote as reported at pages 2 and 3 of the official transcript:

Page 2:

We admit, at once, my lord, that Finning Securities Limited met every qualification of a personal corporation set out in Section 68(1) with one single exception, and that is we say it did carry on an active financial business in the three years in question 1954, '55 and '56. The Crown says it did not. And that is the simple point at issue . . . .

Page 3:

The evidence we are going to admit is that during these three years Finning Securities Limited did no advertising. It did not have a telephone listing. It had no employee or office of its own. It had an arrangement with an associate company, Finning Tractor and Equipment Company Limited, whereby Finning Tractor and Equipment Company Limited did the necessary clerical help, the necessary managerial assistance, also the use of its offices and so on; and for those services Finning Securities Limited paid in the year 1954 the sum of $1,000, in 1955 the sum of $1,000 and in 1956 the sum of $2,000 . . . .

Could one wish for a better description of "inactivity"? Whenever a person, or a body politic as in this instance, retains the remunerated services of someone else to be totally relieved from its normal duties or functions, surely, then, the former party relinquishes its "activity" to the latter.

In a matter of simple common sense were a "man on the street" asked if he considered as active a firm that did not advertise, had no telephone listing, no employee nor any office of its own, but paid another company to conduct its customary tasks, I doubt greatly whether that man would require a dictionary's assistance to reply promptly in the negative. The most that can be said of the instant set of facts is that Finning Tractor and Equipment Company "actively carried on" the financial affairs of a mere "prête-nom", Finning Securities Limited.

Here again, the appellant's counsel, most fairly submitted the issue to the Court in these terms (vide page 15, transcript):

Page 15:

(Mr. Murphy, Q.C.) I do not, my lord, endeavour to suggest to you that these four contracts (referring to exhibit 7) in three years make any difference to whether this company was active or inactive. In other words, if this company, Finning Securities, is not an active financial business on the basis of the business it did with one company, Finning Tractor and Equipment Company Limited, I could not ask your lordship to hold that it was on the basis of these four outside contracts.

Adverting, now, to the only oral evidence heard in Court, that of Mr. Hugh Edwin Hender, internal auditor in the employ of Finning Tractor and Equipment, who also supervised entries and accounting for Finning Securities, it was not of such a nature as to modify the opinion I had otherwise formed of the problem.

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Dumoulin J.
—

A few excerpts from this witness' testimony, when cross-examined by one of the respondent's counsel, Miss Mary Southin, do not denote on the part of Finning Securities Ltd., commercial activity nor even a slight degree of corporative initiative and responsibility. I quote some revealing replies appearing on pages 20, 21 and 22 of the proceedings at trial:

Page 20 (Miss Southin)

Q. Now, who determines, and determined in the relevant years, which notes of Finning Tractor were sold to Finning Securities?

A. Well, it was not a question of saying this series of notes or; that series of notes will go either way. The notes were handled by the clerk on the note desk (e.g. an employee of Finning Tractor and Equipment Co.) who was instructed basically to divide them approximately evenly between the two companies (the second one being Tractor Holdings Company).

Q. And this clerk on the note desk was some employee of Finning Tractor and Equipment Limited?

A. Yes.

Q. To the best of your knowledge in these years did Finning Securities Limited ever reject any of the notes that were offered to it by Finning Tractor and Equipment Limited?

A. No, I would not know, but I would doubt it.
By the Court. Q. Were any arrangements or any talks, I should say, had, before Finning Equipment would accept a contract? Would any parley ensue with Finning Securities to see whether Finning Securities approved?

A. No, sir.

Page 21 (Miss Southin)

Q. Well, now, is it correct to say that in these years, Mr. Hender, Finning Securities Limited took no risk except the possible risk that Finning Tractor and Equipment would go broke?

A. I would agree with that.

Q. And is it true to say that on these contracts that Finning Securities gets from Finning Tractor and Equipment Limited the customer is never advised that his paper has been purchased by Finning Securities Limited?

A. I would not want to say that, yes or no to that.

Q. You don't know?

A. He might know, but I would say it was not his concern.

Q. Let me put it this way then: In these years were notices of assignments sent to customers as part of the regular business procedure of the Company, Finning Securities Limited?

A. I would think not.

Q. To whom does the customer pay the instalments? To Finning Securities or Finning Equipment?

A. To Finning Equipment rather than Finning Securities. Finning Equipment handle the notes and they are sold over to the other company (e.g. Finning Securities Ltd.).

Page 22 (top)

Q. In these years, Mr. Hender, is it true to say that all the decisions that were made as to the purchase of notes by Finning Securities Limited were made not by the shareholders of Finning Securities Limited, but by the employees of Finning Tractor and Equipment Limited in the Finning office?

A. I would say yes.

Q. Finning Securities Limited has no employees of its own?

A. None.

Q. And did not have in the years in question?

A. No.

Once more the same truism obtrudes itself upon one's mind. By what stretch of the imagination could a company without a staff, having no "place of business", whose so-called decisions are perforce the acts of others, be deemed, notwithstanding, to carry on "an active financial, commercial or industrial business?" To put this question is tantamount to answering it, and the situation herein outlined fits to a nicety the definition of the word "passive" in the Shorter Oxford Dictionary 3rd Ed. p. 1444, verbo: passive.

Passive: "*suffering action from without;* that is the object, as distinguished from the subject of action; *acted upon by external force, produced by external agency.*"

An apt summary of the facts admitted or duly proved was provided by Miss Southin, in these words: (Transcript, p. 37).

> This company (Finning Securities Limited) does nothing with its own mind at all. It is, if I may use the phrase, a puppet on the string of Finning Tractor and Equipment Limited and it does in its business what Finning Tractor and Equipment Limited chooses to have it do. Finning Tractor and Equipment Limited supplies it with its business.

In this analysis I thoroughly concur. Pursuant to exhibit "6", labelled: "Finning Securities Ltd., Details of Contracts Financed—1954 to 1956 Inc.", and to exhibit "7", "Details of other Contracts Financed, 1954-1956", I might add as a concluding note, that this company proved itself to be totally "passive" in 863 cases, and relatively "active" in four only. Assuredly, the situation just revealed is of the class which the legislator envisaged when he wrote into the law subsection (*c*) of section 68(1):

> (*c*) did not carry on an active financial, commercial or industrial business.

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Lastly, other factors mentioned at the beginning of these notes enhance my conviction that Finning Securities was nothing but a "personal corporation" as defined in s. 68 of the *Income Tax Act* (R.S.C. 1952, ch. 148) with all legal implications attaching to the appellant, Earl B. Finning.

Therefore, the Court doth decide and adjudge that Appellant's re-assessment for taxation years 1954, 1955 and 1956, in the sums stated at paragraphs 1, 3 and 5 of the Notice of Appeal, and for the motives set out in paragraphs 2, 4 and 6, are in conformity with the relevant law. The appeal is dismissed; and the Respondent entitled to recover all taxable costs.

Judgment accordingly.

1960
Oct. 17
July 24

BETWEEN:

ISAAC SHULMAN ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, s. 137(1)—Management company incorporated by solicitor—Management fees paid to the company not deductible—Income unduly or artificially reduced—Meaning of "unduly" and "artificially"—Appeal dismissed.

Appellant, a solicitor, incorporated a company to act as manager of his office. He agreed to pay it $1,000 per month for which it was to provide all the non-professional services attendant upon his practice. It was to employ all the secretarial and clerical staff, purchase all the equipment, stationery and library and generally manage the office. In fact appellant continued to pay the non-professional staff, and in 1957 he also devoted half his time to the reorganization of the office, maintaining that he was acting as agent of the company. In December of 1957 he paid to the company the sum of $9,500 as a management fee. The company then purchased a home from appellant's wife agreeing to pay $19,000 and assume a mortgage. She then assigned the amount receivable to the appellant who gave her his note for $19,000. The appellant then received from the company the sum of $9,000 by way of payment on this obligation which was returned by him to the law office treasury as working capital. In his income tax return for 1957 appellant deducted this $9,500 paid to the management company and was later re-assessed by respondent who added that amount to his taxable income for the year 1957. Appellant now appeals from that re-assessment.

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Held: That the management agreement with the corporation and the way the transactions were carried out unduly or artificially reduced the income of the appellant and the fee paid to the corporation was not deductible from income by virtue of s. 137(1) of the *Income Tax Act* R.S.C. 1952, c. 148.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Ritchie, Deputy Judge of the Court, at Vancouver.

M. M. McFarlane, Q.C. for appellant.

C. C. I. Merritt, Q.C. for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

RITCHIE D.J. now (July 24, 1961) delivered the following judgment:

The appellant, since 1949, a barrister and solicitor of the Supreme Court of British Columbia, has appealed from a re-assessment made under the *Income Tax Act,* R.S.C. 1952, chapter 148. The re-assessment added $9,500 to the taxable income shown on his 1957 income tax return.

During the taxation year above mentioned the appellant, under the firm name and style of Shulman, Tupper, Southin, Gray & Worrall, was carrying on the practice of law in Vancouver. The other four solicitors whose names were included in the firm name and style and one additional lawyer, whose name was not so included, were his salaried employees. An accountant, five stenographers, a switchboard operator and a law student comprised the non-professional office staff.

Prior to March 15, 1957 the appellant's practice had been conducted with little, if any, overall management or control. The office procedure was comparable to what it would have been had the six lawyers been sharing the office space with each carrying on his practice independently of the others. What supervision did exist was exercised by Mr. Shulman. He, of course, was entitled to disapprove and vary any action taken by any of his employees.

Each lawyer in the office was permitted to engage his own secretary and fix his own charges for professional services. As the work load was not distributed evenly, dissatisfaction and unrest had developed among the stenographic

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Ritchie, D.J.

staff. Confusion and uncertainty existed in respect of the responsibility for rendering bills and tracing disbursements. When making up accounts it, sometimes, was necessary to spend two or three hours going through files to ascertain the disbursements which should be included. Quite often it was found no account had been rendered because of a misunderstanding between two of the lawyers as to on whom the responsibility for so doing rested. There was no systemized vacation schedule. A lawyer and his secretary might be absent from the office on vacation at the same time and so render it difficult to answer enquiries respecting work he had in hand.

In 1955 the appellant had employed an accountant as an office manager at a salary of around $300 or $350 per month. No improvement in office routine resulted. The other lawyers resisted implementation of any recommendations advanced as to changes in office procedure. It was not long before the office manager was devoting his time exclusively to accounting duties and the office routine had resumed its haphazard course. In Mr. Shulman's opinion the explanation of the failure of this attempt to solve administration problems is that the office manager's lack of legal training permitted the lawyers, by the use of arguments he did not understand, to talk him out of every change he wished to make in the office system.

Early in 1957 the appellant decided office administration was important enough to warrant an expenditure of whatever portion of his time was required to organize it properly and that drastic and immediate action must be taken if the office was to operate efficiently. On March 15 Mr. Shulman caused Shultup Management & Investments Ltd. to be incorporated. For convenience, this company sometimes hereafter shall be referred to as "Shultup". The authorized capital is 10,000 shares of the par value of $1 each. The paid up capital is the nominal sum of $4 of which $2 was subscribed by the appellant and $2 by his wife. They are the directors and only shareholders of the company. Mr. Shulman is the president and, presumably, the chief executive officer.

Under date of March 15, 1957 the appellant, under his firm name of Shulman, Tupper, Southin, Gray & Worrall, entered into a management agreement with Shultup. As this appeal is of importance I will set out the agreement in full. It reads:

THIS AGREEMENT made in duplicate the 15th day of March, 1957:

BETWEEN:

SHULMAN, TUPPER, SOUTHIN, GRAY & WORRALL,

Barristers & Solicitors, Suite 404-510 West Hastings Street, Vancouver, British Columbia, (hereinafter referred to as "the Solicitor")

OF THE FIRST PART

AND:

SHULTUP MANAGEMENT & INVESTMENTS LTD.

a body corporate, incorporated under the laws of the Province of British Columbia and having its registered office at Suite 404-510 West Hastings Street, Vancouver, British Columbia,
(hereinafter referred to as "the Company")

OF THE SECOND PART

WHEREAS the Solicitor carries on business as Barristers and Solicitors at Suite 404-510 West Hastings Street, Vancouver, British Columbia;

AND WHEREAS the Company has agreed with the Solicitor to perform certain non-professional services as hereinafter set forth;

NOW THEREFORE IN CONSIDERATION of the premises and the terms and conditions hereinafter set forth, IT IS AGREED AS FOLLOWS:

1. The Company shall at such time and from time to time as shall be required or requested by the Solicitor to perform the following non-professional services (hereinafter referred to as the "non-professional services").
   (i) The employment of any and all secretarial and clerical staff.
   (ii) The employment of any and all maintenance staff.
   (iii) The purchasing or acquiring of any and all secretarial and clerical staff's equipment, furniture and fixtures.
   (iv) The purchasing or otherwise acquiring of all general office equipment, furniture and fixtures.
   (v) The purchase of all stationery and legal forms.
   (vi) The purchase of all periodic and professional literature.
   (vii) The purchase of any and all text books and reference materials.
   (viii) Purchasing or leasing of office and waiting room space.
   (ix) Management of all secretarial and clerical staff.
   (x) Management of maintenance staff.

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Ritchie, D.J.

(xi) Collection of all outstanding accounts, including the taking as agent for the Solicitor of any and all legal proceedings to secure payment of such accounts.

(xii) The appointment of any and all Auditing and Accounting staff.

(xiii) The purchasing or otherwise acquiring and maintenance of transportation facilities to be used by the Solicitor for business purposes.

(xiv) Payment of any and all insurance premiums necessary to maintain good and adequate insurance, including fire, theft, and private and professional liability insurance.

(xv) Preparation and filing of Income Tax Returns.

(xvi) Such other duties as may be agreed upon by the parties from time to time.

2. In consideration of the performance by the Company of the non-professional services agreed to be performed, the Solicitor agrees to pay to the Company a fee (hereinafter referred to as "the management fee") in the sum of One Thousand ($1,000.00) Dollars per month commencing the 15th day of March, 1957 until the end of the first fiscal period of the Company and thereafter a rate to be agreed upon by the parties hereto and in the event the parties shall fail to agree on such rate, the question of determination of the amount of the management fee shall be referred to the Company's Auditor, whose decision shall be binding upon both parties.

Each of the parties hereto agree to make, do and execute or cause to be made done or executed all such further and other acts, deeds, documents, conveyances and assurances as may be necessary or reasonably required to carry out the intent and meaning of this Agreement.

This Agreement shall enure to the benefit of and be binding upon the respective parties hereto, their heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF the parties hereto have caused these presents to be executed as of the day and year first above written.

THE COMMON SEAL of SHULTUP MANAGEMENT & INVESTMENTS LTD. was affixed hereto in the presence of:	(Sgd.) W. J. Worrall
(No signature)	(Sgd.) J. Graham
SIGNED, SEALED and DELIVERED by SHULMAN, TUPPER, SOUTHIN, GRAY & WORRALL, per: in the presence of: (Signature illegible)	(Sgd.) Harold W. Tupper

No evidence was lead as to the authority of Messrs. Worrall and Graham to execute the agreement on behalf of the company nor as to whether they were officers thereof. They were both employees of the appellant.

The management fee of $1,000 per month is an arbitrary figure set by the appellant. For the period from March 15 to December 31, 1957, pursuant to the terms of the agreement, Shultup was paid $9,500. The payment was made in a lump sum on December 27, 1957.

Immediately after its incorporation, Shultup, through the appellant as agent, took over the control and supervision of the law office administration. Mr. Shulman previously had devoted not more than one hour per day to administrative duties. In the ensuing nine and one-half months of 1957, he spent from one-third to one-half of his time reorganizing the office setup and endeavouring to evolve a more efficient administrative system. Any proposed change in procedure was, before being implemented, discussed with the other lawyers in the office. After discussions with Ediphone executives extending over some months there was installed in September 1957 a mechanical dictation system whereby each of the lawyers, by merely switching a button on his desk, could dictate direct to any one of the stenographers. The new system of dictation speeded up office production and improved secretarial morale. It became the rule rather than the exception for dictation to come back engrossed on the same day.

The dictation equipment cost slightly more than $7,000. While the purchase was negotiated by Shultup it was billed to the law office under an agreement covering payment by monthly instalments. In September 1958, when the interest rate on the deferred payments under the purchase agreement increased sharply, Shultup borrowed from a bank the amount required to pay the balance owing and paid out the Ediphone account. The law office then, over a period of time, reimbursed the company.

The use of printed forms, sold over the counters of stationery stores, was discontinued and, in lieu thereof, Shultup installed a set of office forms especially drafted to meet the type of transactions usually encountered in the office practice. Substantial savings were effected by purchasing an inferior quality paper for use in drafting documents and a superior quality paper for engrossing them in final form. A new car was acquired by the law office but the purchase

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was negotiated by the appellant as the agent of Shultup. Part time staff were employed to handle seasonal tasks, such as the preparation and filing of annual reports on behalf of corporate clients.

A more efficient accounting method was inaugurated to effect a better control of trust accounts and a time control system adopted to maintain a record of the time spent by each lawyer on the business of clients. Lists of accounts receivable and disbursements were prepared each month. Bills, for the most part, were rendered monthly, after first having been submitted to the appellant, as the agent of Shultup, for approval and a comparison of costs.

Additional office space was leased and a more satisfactory floor layout devised. Any changes necessary in the office staff, vacation periods, et cetera, were arranged by Mr. Shulman in his capacity as the agent of Shultup.

Prior to Shultup assuming administrative control, each of the lawyers had purchased law books for the office account as he saw fit. No record was kept of books loaned. The binding of law reports and periodicals was neglected. When Mr. Shulman checked the library he found no inventory existed and that text book duplications had resulted from the haphazard purchasing system. A library inventory was compiled and a system set up whereby a record was kept of all books loaned and the binding needs attended to monthly. New purchases for the library were made by the appellant as agent of Shultup but for the account of the law office.

The expense, if any, incurred by Shultup in respect of the law office management was negligible. It had no employees, no letter-heads, no stationery and no files. Any Shultup correspondence or memoranda were kept in the law office files. Staff salaries were paid and all disbursements made by the law office. Although the appellant spent from one-third to one-half of his time performing the duties which Shultup had contracted to perform, he received no remuneration from the company.

In effect the only service rendered by Shultup was making Mr. Shulman available to perform the management duties as its agent. The non-professional staff, apart from the accountant, would not notice any change in office management procedure.

The assets of Shultup include the house in which the appellant resides, an interest in "Cambridge Enterprises", an interest in "Burnham Enterprises" and shares in the capital stock of "Public companies". Cambridge Enterprises is the owner of shares in the capital stock of a company which deals in real estate and also conducts an insurance agency. Burnham Enterprises is an "Oil company".

The house was purchased from Mrs. Shulman on December 5, 1957 for the price of $33,500, apportioned $4,300 to land and $29,200 to the building. Adjustments of $31.60 for taxes and $54.40 for insurance brought the total cost to $33,586. The property was subject to a mortgage for $14,583.86 which Shultup assumed. The difference of $19,002.14 between the total cost and the amount of the mortgage was an account payable by the company to Mrs. Shulman. This indebtedness of the company was assigned by his wife to the appellant who then gave her his promissory note for $19,002.14 and set up a credit to himself of the same amount on the books of the company. The Crown concedes this was a perfectly proper transaction.

Mr. Shulman admits part of the revenue of the company, derived basically from the management fee, was paid to his wife on account of the purchase price of the house and that as a result he, as a shareholder of the company, acquired an indirect beneficial interest in the house.

As above mentioned, payment of the $9,500 management fee was made by the law office to Shultup on December 27, 1957. On the same day $9,000 of that payment was paid by the company to the appellant on account of its $19,002.14 indebtedness to him. Then, also on the same day, the appellant paid the $9,000 into the law office bank account for use as working capital, particularly in respect of financing disbursements. The $9,500 was received as income and disbursed as an operating expense. When the $9,000 came back into the law office account it was in the form of "a loan" for capital purposes. On the law office balance sheet there is an item "Loan Payable $9,000". How Mr. Shulman could loan $9,000 to himself was not explained. In the end result the payment of the $9,500 management fee reduced the cash resources of the law office by only $500.

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William Joseph Worrall, a barrister and solicitor of the Supreme Court of British Columbia who has been associated with Mr. Shulman since his admission to the Bar in 1956, corroborated the appellant's evidence regarding the inadequacy of the office administration, particularly in respect of the secretarial and accounting services. He testified that immediately after becoming associated with the Shulman office in 1956, he noticed the administrative procedure was far less efficient than in the office with which he had been articled as a student. To illustrate how haphazard the accounting methods were, Mr. Worrall said that for the same type of services his charges would vary in accordance with the views of the senior lawyer with whom he happened to be working. Based on personal observation, it was his opinion Mr. Shulman, in 1957, spent almost one-half of his time on duties pertaining to office administration. Mr. Worrall also said he knew of at least three mining companies who had contracted with "management companies" to supply management services on a fee plus cost basis and that in those instances the records were kept by the mining company staffs.

On his 1957 return the appellant showed the gross revenue from his law practice to be $96,888.07 and his net income therefrom to be $14,892.30. Operating expenses were shown as $81,995.77, including the management fee of $9,500; staff salaries were $48,782.72; travelling and auto expense totalled $1,302.16; and provision for depreciation was $3,713.40. The gross revenue figure of $96,888.07 covered a full fiscal period of twelve months while the management fee applied to a period of only nine and one-half months. Neither the total nor individual remuneration paid the other five lawyers is disclosed. Such remuneration was included in the staff salaries total of $48,782.72, more than 50% of the gross revenue.

According to the tax return figures, the appellant's practice netted him only 15.37% of the gross fees for professional services. Had the $9,500 management fee, 9.8% of the gross, not been deducted the net profit would have been 25.18%.

By the re-assessment, dated May 27, 1960, the Minister of National Revenue disallowed the deduction of the $9,500 management fee and added it back to income. The

tax on the so revised taxable income was computed to be $6,019.10. Had the management fee not been disallowed, the tax would have been $2,151.89. The difference is $3,867.21.

The first income tax return filed by Shultup was for its fiscal year ending March 15, 1958, a period of twelve months. Gross income was shown as $12,612.50 comprised of the $12,000 management fee (for twelve months) and $612.50 derived from property rentals. Operating expenses were shown as $2,948.01 computed as follows:

Accounting	$ 65.00
Insurance	13.57
Mortgage Interest	226.26
Property Taxes	81.68
Secretarial Services	250.00
Sundry	1.50
Depreciation—Buildings	2,310.00
	$2,948.01

There is no evidence as to who received the remuneration for the accounting and secretarial services nor as to the activities of the company in respect of which such services were rendered. Net income was shown to be $9,664.49 on which was paid an estimated tax of $1,932.90, computed at 20%, the rate on corporate taxable incomes not exceeding $25,000. Pending the disposition of this appeal, the Shultup assessment has been held in abeyance.

If the management fee is allowed as a deduction from his income, the personal tax of the appellant for 1957 will, as above mentioned, be $2,151.89. Computing the 20% corporate rate on the full $9,500 as income in the hands of Shultup, without any deduction for expenses and without regard to the rental income, would mean a tax of $1,900. On that basis the personal tax of $2,151.89 plus a corporate tax of $1,900 total $4,051.89, an amount $1,967.21 less than that of the revised assessment.

While insisting the management fee was not an expense incurred for the purpose of producing income and its deduction had artificially or unduly reduced the income of the appellant, Crown counsel concedes he was an honest witness and no question of a deceitful purpose is involved herein. Mr. Shulman's manner on the stand was frank.

His credibility was not attacked.

To support the re-assessment the Minister submits:

1. the payment of the $9,500.00 to Shultup is not an outlay or expense for the purpose of gaining or producing income from the business of the tax payer and its deduction from taxable income is, accordingly, precluded by section 12 (1) (*a*) of the Act;
2. the outlay of the $9,500.00 is not the expenditure of an amount that, in the circumstances, is reasonable as a management fee and so falls within the provisions of section 12 (2); and
3. the management agreement with Shultup is a transaction artificially reducing the income of the appellant and so the deduction of the $9,500.00 is forbidden by section 137(1).

The sections above mentioned read:

12 (1) In computing income, no deduction shall be made in respect of

(*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer.

12 (2) In computing income, no deduction shall be made in respect of an outlay or expense otherwise deductible except to the extent that the outlay or expense was reasonable in the circumstances.

137 (1) In computing income for the purposes of this Act, no deduction may be made in respect of a disbursement or expense made or incurred in respect of a transaction or operation that, if allowed, would unduly or artificially reduce the income.

The income of a tax payer for a taxation year is defined by section 3 of the Act to include "income for the year from all businesses". Section 4 states income from a business "is the profit therefrom". The word "business" is defined by section 139 (1) (*e*) to include a profession.

Two principles which have direct application to the determination of this appeal are that a corporation is an entity distinct from its shareholders and that a taxpayer is entitled to arrange his affairs, if he can do so within the law, so as to attract upon himself the least amount of tax. Those two principles must, however, be considered having regard to the fact that in enacting the Income Tax Act, Parliament undoubtedly intended to impose a tax on income.

Wherever the law draws a line, any action taken by a tax payer must be on one or the other side of it. If on the safe side, the action is not illegal. If on the wrong side,

it is illegal. If the management fee is not deductible it must be because of some provision or prohibition contained in the Act.

The rule of strict construction applies to the two sections of the Act upon which the Minister rests his revised assessment. The letter of the law and not its assumed or supposed spirit must govern. The intention of Parliament to impose a tax must be gathered solely from the words by which it had been expressed and from reading them in the sense they ordinarily are used. *Executors of David Fasken v. M.N.R.*[1]

Because the management fee was paid to a corporation of which the appellant and his wife are the only shareholders and, so far as the record discloses, the management agreement was negotiated between the appellant in his personal capacity and the appellant in his capacity as the agent of Shultup does not, *per se*, preclude the management fee from being a legitimate operating expense of the law practice. The personal and corporate entities are distinct. *Salomon v. Salomon*[2], *Pioneer Laundry & Dry Cleaners Limited v. M.N.R.*[3], *Duke of Westminster v. C.I.R.*[4]

In the absence of precise evidence as to how the terms of the management agreement were settled, I assume they were thought out by Mr. Shulman in his dual capacities. The signatures of the individuals who executed the agreement on behalf of the corporation suggest the possibility the appellant, speaking as the owner of the law practice, may have discussed the terms of the agreement with those individuals as representing Shultup. Discussions respecting the agreement with his employees as dummy representatives of the company, or with his wife, as a director of the company, would be a mere formality.

A solicitor is not precluded from entering into a contract with a corporation to perform the non-professional duties relating to the management of his law office which he, if so minded, could perform himself. Unless I find fraud or improper conduct, I cannot disregard the separate legal existence of Shultup and hold the fee payable under the

[1] [1948] Ex. C.R. 580, 589; [1948] C.T.C. 265.
[2] [1897] A.C. 22 (H.L.).
[3] [1940] A.C. 27 (P.C.).
[4] [1936] A.C. 1.

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management agreement is not a legitimate operating expense solely because the appellant and his wife are the only shareholders of Shultup and because the appellant, as a lawyer, negotiated with himself, as the president of the company. If the re-assessment is to stand, justification for deduction of the $9,500 fee being brought within either or both of the sections of the Act upon which the Minister relies must be found in the procedure by which the terms of the agreement were implemented and the results flowing therefrom.

Mr. Shulman admits that whatever he did as the agent of Shultup he could have done in his personal capacity as a lawyer. He also admits that had the management fee been paid to him personally as compensation for the time spent on administrative work it would have been income in his hands.

The explanation advanced for incorporating Shultup and entering into the management agreement is that had the appellant undertaken the management duties in his personal capacity the office records would have shown him as a very small contributor to the gross income earned by the law office. I do not understand that explanation. So far as the effect of the time devoted to administrative duties on his contribution to the professional income is concerned, the result would be the same whether that time was spent as the agent of Shultup or in his personal capacity.

When questioned as to whether his assuming the responsibility of management had resulted in loss of income for the law office, the appellant stated he was satisfied that if the time he consumed in management duties had been devoted to performing professional services, it would have produced fees grossing at least $2,000 per month; that, as a result of the administrative duties he performed as the agent of Shultup, his personal professional billings for 1957 decreased but the gross revenue of the law office and his own net professional income increased; and that had he not, as the agent of Shultup, devoted from one-third to one-half of his time to office administration, his own net income from the professional fees of the law office would have been less.

There is no evidence as to how many income producing hours the appellant applied to his law practice in 1957 and in the years prior thereto. Also lacking is evidence as to the

gross income of the office and the net professional income of Mr. Shulman in the years prior to 1957. His testimony, couched in general terms, as to the increase, because of his efforts as the agent of Shultup, in the gross revenue of the office and in his own professional income has not, however, been contradicted.

Payment of a management fee is not objectionable, *per se*. In the absence of special circumstances the payment of such a fee is an expenditure deductible in accordance with accepted business practice. The employment of an office manager, sometimes a chartered accountant, is not unusual in law offices having a volume of business necessitating a staff of employees and an accounting system requiring more supervision that any lawyer in the office can exercise without encroaching on time he should devote to revenue producing professional services. In some cases a managing partner supervises the office manager. In the case at bar the appellant chose to incorporate a company to assume the responsibility of the office management and then chose to perform the duties pertaining to such management himself, as the agent of the company.

I attach no importance to the fact the management agreement was a departure from the previous office management procedure of the appellant. The fact the $9,500 was not paid to Shultup until December 27, just before the taxation year end, has not in my view, any special significance. The 1957 profit of the law office would not be ascertained at that date. I do not regard the payment to Shultup as being a distribution of profits. Shultup had no right to participate in the profits earned by the law office.

In view of the uncontradicted evidence of Mr. Shulman, I am not prepared to find the provisions of section 12(1)(*a*) demand the dismissal of the appeal. According to Mr. Shulman's testimony the duties he performed as the agent of Shultup had a direct relation to increasing the income of the office and his own professional income. In such circumstances I am unable to find payment of the management fee, standing by itself, was not an outlay or expense that can be justified on the ground of having been made in accordance with the ordinary principles of commercial trading or

accepted business practice. Despite the nature of their relationship, the appellant and Shultup are separate legal entities.

It is obvious that when the management agreement was executed the appellant did not expect he, as the agent of Shultup, would spend all his working hours in attending to the requirements of office management. Had he had any such expectation, the monthly management fee would have been, at least, double and there would have been some provision for his personal remuneration. It may be a competent full time office manager could have been secured at a salary less than $2,000 per month and a part time manager for less than $1,000 per month. Mr. Shulman has sworn he would have welcomed the opportunity to obtain a competent manager capable of controlling his professional staff; that he would have had to pay to a competent manager of Shultup, other than himself, a salary approximating $1,000 per month; and that he had not been able to obtain such a manager. There is no evidence as to the scale of salaries competent office managers command in Vancouver. There is the testimony that results were nil from an office manager paid a salary of $350 per month. In the circumstances there is no foundation on which I can apply section 12 (2) and apportion the extent to which the management fee was reasonable in the circumstances. It must stand or fall in its entirety.

The disposition of the appeal, in my view, rests on section 137 (1). On behalf of the appellant it was urged the words "made or incurred in respect of a transaction or operation" in subsection (1) add nothing to its meaning and that the subsection should be read as though they were not included therein. Counsel for the appellant further submitted the word "that" in the phrase "that if allowed" should be construed not as relating to the immediately preceding words "transaction or operation" but as relating to the words "a disbursement or expense". The meanings to be ascribed to the words "unduly" and "artificially" also were the subject of argument.

While the language of section 137 (1) is not as clear and explicit as, on first examination, it appears to be, I do not regard any of it as surplus.

In my opinion the word "that" relates to "deduction". I interpret "unduly" as relating to quantum and meaning "excessively" or "unreasonably". In the context found here, "artifically" means "unnatural",—"opposed to natural" or "not in accordance with normality".

I construe subsection (1) as though it read:

> In computing income for the purpose of this Act no deduction that if allowed would unduly or artificially reduce the income may be made in respect of a disbursement or expense made or incurred in respect of a transaction or operation.

In considering the application of section 137 (1) to any deduction from income, however, regard must be had to the nature of the transaction in respect of which the deduction has been made. Any artificiality arising in the course of a transaction may taint an expenditure relating to it and preclude the expenditure from being deductible in computing taxable income.

In my opinion, the primary object of injecting Shultup into the management setup was to reduce the income tax payable by the appellant on his professional income. Had the main objective of the appellant not been so to order his affairs as to reduce tax, he would have drawn some salary as compensation for the time spent on management duties as the agent of Shultup. The intention of the appellant would appear to have been to forego any salary for the time spent on management duties and obtain remuneration for having performed such duties by way of any capital gain which might result from using the tax savings to build up the assets back of the issued shares in the capital stock of Shultup.

The non-payment of any direct remuneration to the appellant for the services performed as agent for Shultup is opposed to the usual and natural relationship existing between a company and an agent who devotes from one-third to one-half of his time to the business of the company. The dividing line between the appellant as the owner of the law practice and the appellant as the agent of Shultup was so thin as to be invisible to his own employees. By a simple exercise in mental acrobatics the appellant was able to move, at will and instantaneously, over, or through, that invisible line. The transition from one capacity to the other could be

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effected without anyone other than the appellant himself being aware it had occurred. As he put it, "From the point of view of the employees they were not aware of any change".

The manner in which the management agreement was implemented cannot be regarded as natural. Shultup was used as a two way conduit pipe through which to withdraw $9,500 from the operating revenue of the law office and then return $9,000 of that withdrawal to the law office treasury as a loan for use as urgently needed working capital. That is clearly an artificial transaction. Mr. Shulman cannot loan money to himself.

Notwithstanding the separate entities of the appellant and Shultup, the uncontradicted testimony of the appellant and the fact his credibility has not been attacked, I, after most careful consideration, have reached the conclusion that, having regard to the primary object of creating Shultup to assume the functions of office management being, in my view, to reduce tax, the manner in which the management agreement was implemented and the non-payment of any salary to Mr. Shulman for the management duties he performed, the procedural mechanics of

(*a*) the December 27, 1957 payment of the $9,500.00 fee;

(*b*) the application of $9,000.00 of such payment to reduction of the indebtedness of the company to the appellant; and immediately thereafter

(*c*) the return of $9,000.00 to the law office treasury by way of "a loan" from the appellant to himself

add up to an artificial reduction of the taxable income of the appellant by the sum of $9,500.

The appeal will be dismissed, with costs.

Judgment accordingly.

BETWEEN:

1960
Apr. 11, 12

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July 13

HARRY GRAVES CURLETT ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... } RESPONDENT.

Revenue—Income tax—Income Tax Act, S. of C. 1948, c. 52, ss. 3, 4 and 127(1)(e)—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, and 139(1)(e)—Capital gain or income—"Venture or concern in the nature of trade"—Pursuit of a scheme for profit making—Appeal dismissed.

Appellant held 98 per cent of a company engaged in the sale of investment contracts. He loaned his own personal money at 8 per cent interest and a further consideration of a 15 per cent discount, the loans being secured by mortgages which were assigned to the company at face value. The bonuses thus realized by him during the taxation years in question amounted to $390,000. He also realized a profit of $12,489 on the sale of land in a town which he had acquired when mayor. He contended that this land had been subdivided and sold as lots at the request of the ratepayers of the town to meet the requirements of the town for increased expansion.

The respondent re-assessed appellant for income tax purposes by adding to his income those amounts mentioned. An appeal to the Income Tax Appeal Board was dismissed and appellant appealed to this Court.

Held: That the difference between the amounts advanced by the appellant on the mortgages and other investments and the amounts which he received on their assignment to the company constitutes income from a business in virtue of sections 3 and 4 and paragraph (*e*) of subsection (1) of section 139 of the *Income Tax Act*, Statutes of Canada 1948, c. 52 and R.S.C. 1952, c. 148.

2. That the gains realized on the sale of the lots resulted from an "adventure or concern in the nature of trade" or in the pursuit of a scheme for profit making and are taxable as income.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Edmonton.

B. V. Massie, Q.C. and *A. F. Moir, Q.C.* for appellant.

H. L. Irving and *T. E. Jackson* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

DUMOULIN J. now (July 13, 1961) delivered the following judgment:

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Dumoulin J.

This is an appeal from a decision of the Income Tax Appeal Board, dated April 2, 1958, which affirmed a re-assessment, in respect of the appellant's income tax assessment for taxation years 1949 to 1954, inclusive.

Harry Graves Curlett, of Edmonton, Province of Alberta, is an aggressive and highly successful businessman, whose "principal occupation . . . during the period was General Manager (also President) of Associated Investors of Canada Ltd. (hereinafter referred to as the Company), a private Company of which the taxpayer was a director and the holder of 98 percent of the initially issued share capital of $100,000 subscribed by the taxpayer in cash". This absolute control and undisputed ownership of the enterprise are reflected in the possessive form "my company" constantly resorted to by the appellant in designating Associated Investors of Canada Ltd.

Section 3 of the Statement of Fact mentions 1948 as the year of incorporation under the Companies Act of Alberta, adding that this Company "since incorporation has been engaged in the sale of investment contracts by which the Company, in consideration of periodic payments by contract holders, agrees to pay the holders a stated sum in one or more periodic payments . . .".

Section 4 outlines in extenuating tones the crux of the matter. Though by no means concise, it may save time to cite it at length. I quote:

> 4. A considerable proportion of the investments of the Company consisted of mortgages of real property. From the commencement of its operations, the Company has been required by the Alberta Administrative Board to file monthly statements indicating the liability to contract holders and indicating the deposit with the Trustee of the required investments. To assist the Company in fulfilling these investment requirements and to avoid the delay in investment occasioned by loan negotiation and registration requirements, the taxpayer provided funds with which he acquired and held in his own name mortgages and other qualified investments, selling them to the Company when required by it from time to time.

Section 5 next tells us that the loans or mortgages aforesaid were subject to payment by the borrower of a bonus or discount to the lender, no other than the actual appellant.

It so happened that Mr. Curlett during the six material years, 1949 to 1954, out of his own personal funds, would advance to a client the amount agreed upon, at an 8% rate

of interest and, above all, in consideration of a 15% discount. In other words the debtor, on a $5,000 mortgage, received from Curlett no more than $4,250. Usually, these mortgages were passed on by the appellant to his Company at the end of each month and, of course, for their total face value of one hundred per cent, i.e., the full amount of the principal secured by the mortgage. Since Mr. Curlett undeniably possessed tremendous activity and a very keen sense of salesmanship, "these bonuses, reveals Section 6 of the Statement of Fact, account for approximately $390,000 of the subsequent re-assessment of $402,367.

A second ground of appeal, that might slip off undetected, so picayune does it seem in the wake of the impressive sum above, consists in a gain of $12,419 realized by Curlett on the resale of land acquired while he was Mayor of the Town of Westlock. We are told in s. 7 by the appellant himself, that "... at the request of the ratepayers of that Town, (he) had subdivided the land and sold it in lots to meet the requirements of the Town for increased expansion".

A few excerpts from the appellant's cross-examination paint a convincing summary of Curlett's dealings in the relevant connection.

Counsel for respondent, Mr. Howard L. Irving, puts the following questions:

Q. Mr. Curlett, you have told us that from time to time when the Company was incorporated and . . . started to invest in these mortgages, that you obtained 15 per cent of the amounts of the mortgages by actually making loans with your own money, and at a later time assigning the mortgage to the Company?

The witness replies:

A. That is correct.

Q. And with your own money you would loan out to the borrower at 85 per cent and the company would repay you 100 per cent?

A. That is correct. (cf. pages 34-35 of the transcript). Previously asked by his counsel, Mr. A. T. Moir, Q.C. (bottom lines on p. 19):

Q. And you treated that money as your own?

The answer was:

A. Yes Sir.

At the top of page 20:

Q. And did you report that in your Income Tax returns for the years in question?

A. No, I did not, Sir.

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The exculpating argument on which this taxpayer predicates his defense would indeed be unanswerable if only its legal persuasion were on a level with its imaginative originality. Sections 1 and 2 of the "Statutory Provisions upon which the Appellant relies", hereunder recited, may afford another instance of one jumping into the fountain to escape the rain. Now, Mr. Curlett did not report these $390,000 bonuses or discounts, because:

> 1. At the time the taxpayer assigned the discounted mortgages to the Company, he was a director and officer of the Company. The fiduciary relationship thus existing between the taxpayer and the Company prevents the taxpayer from making any profit under a contractual relationship between himself and the Company, and the taxpayer is bound to account to the Company for any profit made by him on the sale of the mortgages . . .
>
> 2. Thus, the proceeds of the mortgage discounts in the hands of the taxpayer do not possess the essential quality of income in his hands as his right to them was not absolute and he was under a duty to account for and to pay the same to the Company.

As a basic principle of company law the proposition above, especially in the wording of s. 1, remains unassailable. Unfortunately, the evidence adduced points to a glaring discrepancy between so orthodox a tenet of law and the recorded facts. I do not question but that the appellant might have had to perform the duty so clearly expounded in the lines preceding.

However, there lies quite a stretch between a duty and its accomplishment. In this line of thought the appellant so late as March 26, 1956, date of his re-assessment, had not evinced discernible signs of being prompted by any lurking urge to discharge such a belatedly invoked obligation to refund the Associated Investors of Canada Ltd. For all I know he still retains these accumulated profits or, at the very least has failed to account for them with the Company.

The allegation made in s. 8 of the Statement of Fact that, in 1958, pursuant to a report of the Saskatchewan Superintendent of Insurance, "the taxpayer caused a company of which he was the majority shareholder, to subscribe and pay for an additional $300,000 of the capital stock of the Company", is alien to the issue, unconnected with Curlett's transactions herein reviewed and, moreover, pleaded *ex post facto*.

The one and only possible conclusion flowing from appellant's acts, from his written and oral statements, is that during the material period, 1949 to 1954 inclusive, he considered this practice of discounting loans and mortgages in the light of a personal venture, completely separate from that pursued by Associated Investors of Canada Ltd.

Under such circumstances, I readily concur with the Respondent's interpretation, as formulated in paragraph 11 of his Reply to Notice of Appeal, that:

> . . . the difference between the amounts advanced by the Appellant on the mortgages and other investments and the amounts which he received on the assignment of the mortgages and other investments to Associated Investors of Canada Limited constitutes income from a business in virtue of sections 3 and 4 and paragraph (*e*) of subsection (1) of section 127 of *The Income Tax Act* and sections 3 and 4 and paragraph (*e*) of subsection (1) of section 139 of *The Income Tax Act*.

All of these sections are so familiar to the parties concerned that it would be purportless to reproduce them. Suffice it to say that, effectively, the profits herein discussed, totalling $390,000, were the direct returns from a business carried on by appellant and therefore taxable.

On a much smaller scale but in a similar trend of fact and law, an assessment of $12,419 pertaining to gains realized by the taxpayer on the sale of subdivided lots in Westlock, bears, *prima facie*, the characteristic traits of "an adventure or concern in the nature of trade" or the pursuit of a scheme for profit making, and retains them throughout the case, since no attempt was made at trial to refute the statutory presumption.

For the reasons given this Court doth adjudge and decide that the appellant, Harry Graves Curlett, was taxed in the total sum of $283,571.08 for taxation years 1949 to 1954 inclusive, conformably to the pertinent law. The appeal is therefore dismissed with taxable costs allowed to Respondent.

Judgment accordingly.

1960 Apr. 8
1961 June 19

BETWEEN:

GOLDEN ARROW SPRAYERS LIMITED .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Patent rights, sale of—Non-arm's length transaction—Capital cost allowance—Income Tax Act, S. of C. 1948, c. 52, ss. 127(1)(af), 127(5)(a)—Income Tax Act, R.S.C. 1952, c. 148, s. 20(4)(a)—Patent Act, R.S.C. 1952, c. 203, s. 49.

The appellant company was incorporated in 1952 to take over the assets and business of Golden Sprayers Ltd., a company which for a number of years had manufactured and sold farm chemical sprayers under patents owned by P, its president and controlling shareholder. After arrangements were made to obtain an underwriting of 250,000 shares of the new company at one dollar per share less 25 per cent commission, the subscribers to the Memorandum of Association chose P, P's son and three others, two of whom had been shareholders in the old company, as directors. The directors appointed P president and approved the allotment to him of 200,000 shares for the use of his patents, P taking no part in the voting. They also approved the purchase of the assets of the old company for 100,000 shares of the new company's stock. A return allotment filed with the Registrar of Companies showed the amount per share treated as paid up in cash for the shares allotted to P as $150,000. The appellant claimed a capital cost allowance for its 1953 taxation year of $8,816 in respect to the acquisition of the right to use the patents. The Minister disallowed the claim and re-assessed for an additional $3,921. The appellant's appeal to the Tax Appeal Board was allowed in part. On a further appeal to this Court

Held: That the right to the use of P's patents was "property" as defined by s. 127(1)(*af*) of the *Income Tax Act*, S. of C. 1948, c. 52, "a right of any kind whatsoever", and such a right, directly related to patents, is essentially depreciable property being coextensive to the 17 year duration of the patents themselves. (cf. *Patent Act*, R.S.C. 1952, c. 203, s. 49).

2. That under s. 127(5) of the *Income Tax Act*, 1948, P indisputably was "one of several persons by whom it (the appellant corporation) is directly or indirectly controlled" and therefore cannot be deemed to have dealt at arm's length with it in matters pertaining to this appeal. *Miron Freres Ltd. v. M.N.R.* [1955] Ex. C.R. 679; *M.N.R. v. Kirby Maurice Co. Ltd.* [1958] Ex. C.R. 77 at 84-5.

3. That under s. 20(4)(*a*) of the *Income Tax Act*, R.S.C. 1952, c. 148, the capital cost should be fixed at the cost to P the original owner, namely $700.

APPEAL from a decision of the Tax Appeal Board[1].

The appeal was heard before the Honourable Mr. Justice Dumoulin at Calgary.

W. Adamson for appellant.

C. E. Smith, Q.C. and *T. E. Jackson* for respondent.

DUMOULIN J. now (June 19, 1961) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated July 2, 1959[1], in respect of the income tax assessment for taxation year 1953, of Golden Arrow Sprayers Ltd., a company having its Head Office at Calgary, Province of Alberta. The appeal was allowed to the extent only of $1,000.

The material facts giving rise to this litigation offer no complexities.

Golden Arrow Sprayers Limited, incorporated in Alberta, on November 20, 1952 (cf. ex. "C"), replaced to all intents an older firm operating under the style of Golden Arrow Services Ltd., which, for many years, had manufactured farm-chemical sprayers according to patent rights, the property of one John E. Palmer, its President and Manager.

With a view to expanding their field of business, the directors of Golden Arrow Services Limited, decided that a proper method of raising additional capital would be the incorporation of another company, Golden Arrow Sprayers Limited, that would purchase and take over the entire assets of the former organization. Arrangements were at once concluded to "obtain an underwriting on 250,000 shares of the new Company at $1 per share, less 25 per cent. commission".

In furtherance of the afore-mentioned decision, original subscribers to the Memorandum of Association met on November 21, 1952, and chose as first directors, John E. Palmer, his son, Harry E. Palmer, Harold Milburn, Secretary of the out-going Golden Arrow Services Ltd., Harvey Brown and Karl F. Zeise, a foreman in the employ of the above company. Exhibit "2" relates the minutes of this initial meeting.

[1] (1959) 22 Tax A.B.C. 260; 13 D.T.C. 371.

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A further meeting of the newly elected Board of Golden Arrow Sprayers took place, the same day, at 3.00 p.m., designating John E. Palmer as President of the Company (ex. "3"). At 3.30 p.m., again on November 21, 1952, a third meeting of directors occurred approving ". . . the issue and allotment of 200,000 shares of the capital stock of the Company in consideration of the use of the Palmer Patents. Such shares to be issued and allotted when such Company received a certificate to commence business from the Registrar of Companies (cf. Statement of Facts, para. 4 and exhibit 5, s. 2)". These shares were to be placed in escrow with the Montreal Trust Company pending the issue of a certificate to commence business.

At this same meeting, the sale by Golden Arrow Services to Golden Arrow Sprayers of all its assets was approved as against an allotment by Purchaser to Vendor of 100,000 shares fully paid up and non-assessable of the Purchaser's capital stock (cf. exhibits "D", "4" and "A", the latter dated January 2, 1953).

A subsequent Return of Allotment filed with the Registrar of Companies showed ". . . the amount . . . treated as paid up in cash for the 200,000 shares was $0.75 per share, or $150,000". The incipient company, having obtained the requisite certificate, on or about February 26, 1953, the aforesaid 200,000 shares were then issued and allotted to J. E. Palmer.

For its 1953 taxation year the Appellant ". . . claimed a capital cost allowance in respect to the acquisition of the right to use the said patents in the sum of $8,816. This capital cost allowance was disallowed by the Minister and the Appellant reassessed for an additional sum of $3,921.43".

This much for the facts; now as to the conflict of law, thus occasioned, it is succinctly formulated by Appellant in the following lines, under the sub-title "Statement of Reasons for Objections", page 3.

The question now arises as to the amount at which the capital cost to the Company of the licence to use the Palmer Patents should be fixed.

This then raises the question of whether the Company and Palmer were on the 21st day of November, 1952, dealing at arm's length.

It seems hardly necessary to note that in the Appellant's opinion, J. E. Palmer, albeit President and Manager of the purchasing company, was, nevertheless, dealing at arm's length when he assigned the utilization of his three Patents to Golden Sprayers at a "price" of two hundred thousand shares. Exhibit "4", true to say, mentions that: "Mr. Palmer wished it to be pointed out to the meeting that he did not vote in respect to the said motion", which ratified the transaction in exhibit "5", the agreement between John E. Palmer, Patentee, and Golden Arrow Sprayers Ltd., Licensee allotting shares for the right to use the Patents.

The respondent's basic argument appears in subsections (*a*) (*b*) (*c*) and (*d*) of paragraph 9 of its "Reply to Notice of Appeal", it reads:

> 9. (*a*) . . . the Appellant in calculating this income claimed as a deduction for capital cost allowance the sum of $8,816 in respect of the licence which it had obtained by an agreement dated the 21st day of November, A.D. 1952 with John E. Palmer to use certain patents,
>
> (*b*) . . . the Appellant at the time it acquired the licence from John E. Palmer was not dealing at arms length with John E. Palmer, and,
>
> (*c*) that John E. Palmer was the original owner of the patents,
>
> (*d*) that the capital cost of the patents to John E. Palmer was nothing, . . .

A brief oral evidence was adduced on Appellant's behalf, consisting of Messrs. John E. Palmer's and Harold Milburn's testimonies.

Palmer substantiated the averments of the Statement of Facts, and declared that he "had not given nor promised to give any of his shares to the other directors of Golden Arrow Sprayers Ltd." He also agreed holding presently in his own right 253,000 shares of this latter company, thereby becoming its controlling shareholder.

Mr. Harold Milburn, it will be remembered, was the Secretary of the older organization before assuming a directorship in the younger one.

On November 21, 1952, he attended the 3:30 p.m. meeting "when 200,000 shares of the new concern were granted to J. E. Palmer, an allotment that encountered no difficulty whatever". According to this witness "the life of Golden Arrow Sprayers Ltd., was dependent upon the use of Palmer's patents, and therefore, it seemed reasonable to extend adequate pecuniary appreciation to the patentee".

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Thus summarized, the case raises, in my mind, a threefold question:

1. Was the right to use Palmer's patents, acquired by the Appellant on November 21, 1952, a "depreciable property", as foreseen in s. 20(2) of the 1948 *The Income Tax Act* (S. of C. 1948, c. 52)?
2. Was John E. Palmer dealing at arm's length with Appellant company when he concluded the deals aforecited?
3. Should the first query receive an affirmative answer, and the second, a negative one, in that event, what would be the capital cost to the taxpayer, i.e. Golden Sprayers, of the depreciable property thus obtained?

Section 127(1)(*af*) opposite the expression "property" sets forth that it "means property of any kind whatsoever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing includes a right of any kind whatsoever, a share or a chose in action".

It may be held beyond doubt that a title to the use of Mr. Palmer's patents assuredly fits into the unrestricted category of "a right of any kind whatsoever". Moreover, such right, directly related to patents, is essentially depreciable property, being coexistensive to the 17 year duration of the patents themselves (cf. *Patent Act,* R.S.C. 1952, c. 203, s. 49).

The second point unquestionably is the pivotal one. Section 127, s-s. (5)(*a*), text of 1948, though not purporting to define restrictively "arm's length" enacts that:

127(5) For the purpose of this Act,

(*a*) a corporation and a person or one of several persons by whom it is directly or indirectly controlled,

* * *

shall without extending the meaning of the expression "to deal with each other at arm's length", be deemed not to deal with each other at arm's length.

Reverting to the admitted facts we see that Appellant's executive body had J. E. Palmer for chairman of the Board and Manager, his son, Harry, and two of the old company's employees, Harold Milburn and Karl Zeise, as co-directors, one being the secretary, the other a foreman

of Golden Arrow Services. Palmer, senior, to all material intents, owned the merging company and could dictate to the nascent one any terms or conditions he wished to impose both as patentee and through his ascendency over his son and associates or, should I say, his employees. Out of five directors, this man could control four, himself included. At all events, J. E. Palmer undisputably was "one of several persons by whom it (the appellant corporation) is directly or indirectly controlled", and therefore cannot be deemed to have dealt at arm's length with Golden Arrow Sprayers Ltd., in matters pertaining this appeal.

Two precedents, among many, bear out this interpretation. In Re: *Miron & Frères Limited and the Minister of National Revenue*[1] the factual incidents were substantially these:

The appellant (in 1948) acquired a farm from one of its shareholders at a price far exceeding the original cost to the vendor. The appellant claimed a capital cost allowance based on the price paid. All the issued shares of the appellant, minus three, were owned by the vendor and his five brothers, with more than one half of the shares being owned by the vendor and any three of his brothers . . .

HELD: The appeal should be dismissed. Under s-s. (5) of s. 127 of the *Income Tax Act, 1948,* c. 52, the appellant and the vendor were deemed not to have dealt with each other at arm's length.

Per Kerwin C.J. and Fauteux J.: *Since the appellant was controlled by the vendor and three of his brothers, the vendor was one of several persons by whom the appellant was directly or indirectly controlled* (italics are mine).

Per Taschereau, Kellock and Abbott JJ.: The appellant failed to show error in respect of the Minister's conclusion that the transaction was not one between persons dealing at arm's length.

Mr. Justice Cameron, in *Minister of National Revenue v. Kirby Maurice Co. Ltd.*[2], wrote:

That s-s. (5) of s. 139 does not purport to define all transactions which are not at arm's length is made clear in the case of *M.N.R. v. Sheldon's Engineering Ltd.* (1955 S.C.R. 637) where Locke J., in delivering the judgment for the Court, said at p. 643: "The words (i.e., to deal with each other at arm's length) do not appear in the *Income War Tax Act,* though the same subject-matter is dealt with in s. 6(1)(*n*) of that Act. In addition to appearing in ss. 20 and 127, the term is employed in ss. 12(3), 17(1), (2) and (3), 36(4) and 125(3) of the *Income Tax Act*. Section 127(5) does not purport to define the meaning of the expression generally; it merely states certain circumstances in which persons are deemed not to deal with each other at arm's length. I think the language of s. 127(5), though in some

[1] [1955] S.C.R. 679.

[2] [1958] Ex. C.R. 77 at 84, 85.

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respects obscure, is intended to indicate that, in dealings between corporations, the meaning to be assigned to the expression, elsewhere in the statute is not confined to that expressed in that section."

On the merits of the case Cameron J. continues thus:

> The evidence of Maurice satisfies me completely that the transaction by which the franchise came into the hands of the respondent was not one at arm's length. The Act does not define the expression, and it would perhaps be unwise for me to attempt to do so. It is sufficient to state that in my opinion, in a vendor and purchaser matter, an arm's length transaction does not take place when the purchaser is merely carrying out the orders of the vendor, and exercising no independent judgment as to the fairness of the terms of the contract, or seeking to get the best possible terms for himself . . . In effect, Maurice was both vendor and purchaser, and while he was not actually a shareholder at the time the agreement of October 1, 1952 was signed he had in fact full control of the entire operation.

A comparable situation exists here: the all-important patent rights owned by Palmer, the impressive bulk of his stock-holdings, plus his parental connection with one and business ties with two other directors, his presidency of the appellant company, were of such a nature that "he had in fact full control of the entire operation" now under review, and, I repeat, was therefore, not dealing at arm's length, with the appellant.

There now remains for determination the assessment of a capital cost to Golden Sprayers Ltd., of the "depreciable property" acquired, in other words the "right to use", these oft-mentioned patents.

Section 20(4) and (*a*) of this subsection provide the relevant rule:

> 20(4) Where a depreciable property did, at any time after the commencement of 1949, belong to a person (hereinafter referred to as the original owner) and has, by one or more transactions between persons not dealing at arm's length, become vested in a taxpayer, the following rules are, notwithstanding section 17, applicable for the purposes of this section and regulations made under paragraph (*a*) of subsection (1) of section 11:
>
> (*a*) the capital cost of the property to the taxpayer (i.e. Golden Arrow Sprayers Ltd.) shall be deemed to be the amount that was the capital cost of the property to the original owner (i.e. John E. Palmer).

John E. Palmer asserted having spent "about $700 to secure his patents for 'Spraying Nozzle, Field Marker' and an application for a third patent now abandoned". This expense, I believe, represents the capital cost of the property to its original owner and should be allowed to the appellant.

For the reasons above, the appeal is dismissed, save that appellant will be granted a capital cost allowance of $700 in respect of its income tax return for taxation year 1953. The Minister of National Revenue is entitled to the costs of this appeal after taxation.

Judgment accordingly.

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injury to his property resulting from the construction of a canal and locks on an adjoining property by the St. Lawrence Seaway Authority, an agent of the Crown in the right of Canada. He alleged that such construction resulted in the obstruction of the highway on which his land abutted and necessitated a relocation whereby he was deprived of access to the highway and his property left in a cul de sac. No land of the suppliant was expropriated for the purpose of the seaway. *Held:* That the evidence established that the construction of the works of the Authority, an agent of the Crown, rendered inevitable the consequences of which the suppliant complained. 2. That the *St. Lawrence Seaway Authority Act,* R.S.C. 1952, c. 242, created the St. Lawrence Seaway Authority and authorized it in the exercise of its powers to acquire lands by expropriation and to pay compensation for lands injuriously affected by the construction of works erected by it. 3. That in a case of injurious affection a claim for loss of business profits cannot be maintained. The damage or loss must be to the property itself and not in respect of any particular use to which it may from time to time be put. *Beckett & Midland Ry. Co.* L.R. 3 C.P. 82. 4. That the lands of the suppliant were injuriously affected by the works erected by an agent of the Crown (the Authority) and for such injuries the suppliant was entitled to be paid compensation as provided by s. 18(3) of the *St. Lawrence Seaway Authority Act. Autographic Register Systems v. C.N.R.* [1933] Ex. C.R. 152; *Renaud et al v. C.N.R.* [1933] Ex. C.R. 230 at 234; *Beckett v. Midland Ry. Co.* 3 L.R.C.P. 82; *Metropolitan Board of Works v. McCarthy* L.R. 7 H.L. 243, referred to. EDGAR LOISELLE v HER MAJESTY THE QUEEN......... 31

2.—*Action to recover cost of snow removal from street bordering Crown property—Municipal by-law obligating property owners to pay cost ultra vires as against the Crown in the right of Canada—Cross-demand to recover payments made through error of law—Laws of prescription not applicable to proceedings brought by the Crown against the subject—The British North America Act, 1867, s. 125—An Act to amend the Charter of the City of Quebec, S.Q. 1945, c. 71, s. 20; S.Q. 1952, c. 63, s. 8(154); Civil Code arts. 1047, 2260.* The City of Quebec by Petition of Right sought to recover payment of $259.25 for removal of snow and ice in the winter of 1951-52 from that part of Grand Champlain Street bordering property of the Crown in the right of Canada and administered by the National Harbour Board. The respondent pleaded that the claim constituted a municipal tax and since the property in question was Crown property it was exempt from municipal or provincial taxation by virtue of s. 125 of the *British North America Act, 1867.* The City submitted that under the laws of the Province of Quebec and in particular *An Act to Amend the Charter of the City of Quebec,* S.Q. 1945, c. 71,s.20(154) and under the city by-laws and in particular City By-Law 823, the amount claimed was not a municipal tax. As a further subsidiary defence the Crown submitted that by an Order in Council dated April 28, 1952, the Federal Cabinet authorized payment to the City of an annual grant of $42,000 for the five year period 1950-1954 inclusive in payment of all municipal services other than water. The City contended that the grant did not include snow removal and that its claim, whether a tax or not, was for a service from which the defendant had benefited and for which it should pay a just and reasonable amount. The Crown by cross-demand claimed re-imbursement of $4,671.10 which it alleged its agent, the National Harbour Board, had through error in law paid the City for the period 1942-1954 for snow removal from in front of the property in question. The City admitted that for all intents and purposes the amount claimed had been paid, but for the reasons set out in its Petition, alleged payment had been made knowingly and willingly by the Crown and its agent the National Harbour Board and that in any event the greater part of the claim was prescribed. *Held:* That having regard to the provisions of ss. 10 and 11 of City By-Law No. 823, that the cost of snow removal shall be collected as "an assessment tax on the said immoveables", and in view of the provision of s. 8(154) of *An Act to Amend the Charter of the City of Quebec,* S.Q. 1952, c. 63 that "the city's claims shall be privileged, ranking with municipal assessments or taxes" — the charge in question had all the essential characteristics of a tax imposed on the property of the defendant. 2. That the provisions of s. 20 of *An Act to Amend the Charter of the City of Quebec,* S.Q. 1945, c. 71, that "the owners of non-taxable immoveables shall be obliged to pay for snow removal like the other taxpayers" was, in view of s. 125 of the *British North America Act, 1867,* clearly *ultra vires* insofar as the Crown in the right of Canada was concerned. 3. That on the evidence the error in law had been proven. 4. That the law of prescription does not apply to proceedings of the Crown against the subject. *The Queen* v. *Montreal Transportation Commission* [1955] Ex. C.R. 83 at 91. 5. That the petition should be dismissed and the cross-demand allowed. In view of the finding on the main issue the Court did not deal with the subsidiary defence. THE CITY OF QUEBEC v. HER MAJESTY THE QUEEN.......................... 55

3.—*Practice—Property re-sold under Veterans' Land Act—Surplus proceeds paid into Court—Rights of creditors and veteran—The Veterans' Land Act, R.S.C. 1952, c. 280, ss. 2(1), 3(1)(2), 5(1)(2)(4), 10(4) and 21(1)—The Exchequer Court Act,*

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R.S.C. 1952, c. 98, s. 24(2)(3)(4)(5)—The Execution Act, R.S.O. 1952, c. 120, ss. 20(2), 24(2)(3)(4) and (5). By s. 21(1)of the *Veterans' Land Act*, R.S.C. 1952, c. 280, it is provided that "Where a contract made by the Director with a veteran is rescinded or otherwise terminated and any property that was sold by the contract is re-sold by the Director for more than the amount owing under the contract, the surplus shall be paid by the Director to the veteran." In January, 1957, the Director, the *Veterans' Land Act*, re-sold a property which had been the subject matter of an agreement made pursuant to the statute between the Director and one H, a veteran, and on such re-sale realized a surplus of $3,247.17. While this surplus was still in the Director's hands, notices purporting to seize H's right to this fund under a number of executions against him, including one issued by the Supreme Court of Ontario and held by the Sheriff of Carleton County in the Province of Ontario were received. By s. 20(2) of the *Execution Act*, R.S.O. 1950, c. 120, a sheriff holding a *fieri facias* is authorized to seize any book debts and choses in action of the execution debtor and to sue in his own name for the recovery of the monies payable in respect thereto. Thereafter, the Attorney-General of Canada, being in doubt as to the proper party to whom the money should be paid, applied for and obtained an order pursuant to s. 24(2) of the *Exchequer Court Act*, permitting the payment of such sum into the Exchequer Court. In this order, it was expressly provided that the payment into Court should be without prejudice to the rights, if any, of H or of any party who had laid claim to the money. In proceedings taken by a judgment creditor of H, asking for payment out of Court to her of the money or for determination of the party entitled thereto, claims were filed by H and by the Sheriff of Carleton County, as well as by several execution creditors, and on the trial it was contended on behalf of H that, since the Director is an agent of the Crown money in his hands is not subject to seizure under execution and that, accordingly, H was entitled to have the money paid out to him. By s. 5 of the *Veterans' Land Act*, it is provided that "Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the Director on behalf of Her Majesty, whether in his name or in the name of Her Majesty, may be brought or taken by or against the Director in the name of the Director in any Court that would have jurisdiction if the Director were not an agent of Her Majesty." *Held:* That the right of a veteran under s. 21(1) of the *Veterans' Land Act* to the surplus proceeds arising on a re-sale is a personal right and there is neither any statutory provision nor any valid objection on grounds of public policy rendering such surplus proceeds unassignable by the veteran or unavailable to satisfy the claims of his creditors. 2. That the Sheriff of Carleton County, by giving to the Director at Ottawa notice of seizure under the execution held by him, had effected a valid seizure of H's right entitling him to sue for and recover money. 3. That the effect of s. 5(2) of the *Veterans' Land Act* is to remove the impediment which normally prevents the attachment of public moneys owing to a judgment debtor and that no valid objection of that kind could be raised by either the Director or the veteran to a suit or proceeding by the sheriff to recover in his own name under s. 20(2) of the *Execution Act*, money payable pursuant to the provisions of the *Veterans' Land Act* by the Director to the veteran, where the veteran's right to such money had been seized by the sheriff under an execution. *C.N.R.* v. *Croteau*, [1925] S.C.R. 384 at 388, referred to and followed. 4. That although no action or suit had in fact been brought while the money remained in the hands of the Director, what the sheriff had done was sufficient to give him an enforceable right to payment of it and that, accordingly, the money in Court should be paid out to him to be dealt with by him as money of H levied under execution against his property. *In Re* HELEN SHAUL 101

4.—*Expropriation—Basis of valuation fair market value based on most advantageous use of property at time of taking—Compensation may include depreciation in value of unexpropriated lands to extent depreciation result of actual or anticipated use of lands taken—The Expropriation Act, R.S.C. 1952, c. 106—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 46.* On January 7, 1954 the Crown in right of Canada expropriated for the purpose of a public work some 45 acres and the buildings thereon of the suppliants' 152 acre farm adjoining the Dorval Airport on the outskirts of the City of Montreal. The suppliants seek by Petition of Right to recover damages in the sum of $217,855, including compensation for the land and buildings taken, damage to the remaining property by severance of the expropriated part, and an allowance for compulsory taking. *Held;* that s. 46 of the *Exchequer Court Act* provides that the Court in determining the amount to be paid any claimant for any property taken for the purpose of a public work shall estimate the value thereof at the time when the property was taken. 2. That such value is the property's fair market value at the date of taking estimated on its most advantageous use. *Cedar Rapids Manufacturing & Power Co.* v. *Lacoste* [1914] A.C. 569 at 576 referred to. 3. That the most advantageous use to which the expropriated property is adapted is industrial or residential development. 4. That since the existing buildings in no way enhance the value of

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the land for industrial or residential development nothing can be allowed for them in a valuation based on such use. *The King* v. *Edwards* [1946] Ex. C.R. 311 at 333, followed. 5. That the suppliants are entitled to compensation not only for the value of the expropriated land but also for the depreciation in value of the unexpropriated lands to the extent that such depreciation is the result of the actual or anticipated use of the expropriated land. *The King* v. *Acadia Sugar Refining Co.* [1947] Ex. C.R. 547 at 566. 6. That an allowance of ten per cent for compulsory taking is not a matter of right, and in the circumstances of this case, should not be allowed. *Diggon-Hibbon Ltd.* v. *The King* [1949] S.C.R. 712 at 713. LEO CARDINAL *et al* v. HER MAJESTY THE QUEEN 160

5.—*Action to recover damages for loss of fish caused by spraying operations to kill bud worms—Negligence of defendant's employees in carrying on spraying operations—Volenti non fit injuria—Crown not bound by estoppel—Consent of Minister lacking—No evidence to warrant application of doctrine of estoppel in equity—Damages—No direct damage to plaintiff though inconvenience to public—Agreement between Province and Dominion—The Fisheries Act, R.S.C. 1952, c. 119, s. 33(2).* The action is brought by the Crown to recover from the defendant damages in the sum of $5,674.01 alleged to have been caused by the negligence of employees or servants of the defendant in spraying from an aircraft the Miramichi hatchery located on property of the plaintiff, and the headwaters of a brook which runs through the owner's property, with a substance poisonous to fish, resulting in the poisoning and death of a number of small trout and salmon. Plaintiff also pleads contravention of the *Fisheries Act*, R.S.C. 1952, c. 119, s. 33(2) prohibiting the pollution of waters containing fish, or the escape of a dangerous thing. The spraying was carried out in an endeavour to extinguish bud worms which were causing heavy damage to the timberlands of New Brunswick. The Government of New Brunswick and the Government of Canada entered into an agreement which provided for the allocation of certain expenditures for carrying out the spraying operations which were carried out by the defendant company, incorporated by the Province of New Brunswick, under the direction of its manager. The agreement also provided that the Province would indemnify and keep harmless the Dominion from all claims of whatsoever nature arising from and out of anything done under the agreement. It also provided that if any question arose as to whether the Province is entitled to payment of the whole or any part of an amount claimed by it under the agreement the Minister of Resources and Development of Canada shall determine the question. The Court found that the fish

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had died as a result of eating food thrown in the pools which had become saturated with the insecticide used in the spraying operations. *Held:* That there was no evidence to indicate that the spraying of the area, including the hatchery and plaintiff's property had taken place with the knowledge and consent and the collaboration and support of the Dominion Minister, and in the absence of such consent given by the Dominion Minister with the full knowledge of the risk involved and the area to be sprayed the plaintiff cannot be bound. 2. That the Crown is not estopped from taking the action as asserted by defendant because it had paid the Province its share of the cost of the spraying operations as there is no evidence that payment had been made and on the facts disclosed there is no foundation for the application of the doctrine of estoppel in equity. 3. That since the fish lost had no commercial value and no loss of profit was involved, the destruction of the fish being a source of inconvenience to the public only and not to the plaintiff, the damages would consist only of the cost of the wasted food of the destroyed fish and a certain amount for the disturbance and inconvenience suffered by the plaintiff's employees resulting from the strong and disagreeable odor of the insecticide and the removal of the dead fish. HER MAJESTY THE QUEEN v. FOREST PROTECTION LTD. 263

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CUSTOMS ACT, R.S.C. 1952, c. 58 AS AMENDED BY S. OF C. 1958, c. 26, s. 2.
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CUSTOMS DUTY.
See REVENUE, No. 16.

CUSTOMS TARIFF, R.S.C. 1952, c. 60, SCHEDULE A, TARIFF ITEM 443 AS AMENDED BY S. OF C. 1956, c. 36, s. 1.
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EXCHEQUER COURT ACT, R.S.C. 1952, c. 98, s. 24(2)(3)(4)(5).
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FAILURE OF BOTH SHIPS TO COMPLY WITH REGULATIONS FOR PREVENTING COLLISIONS AT SEA.
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FARMING SUCCESSFULLY CARRIED ON FOR FIVE YEARS.
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INCOME TAX ACT.
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INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 2(2), 31(1), 106(1)(d), 109(9), 109(1), 123(8)(10), 139(7), INCOME TAX REGULATION 805(1).
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INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 2(3), 3, 4, 5, 6, 11(6)(9)(11) AND 24.
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INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 3, 4, 6(1)(j) AND 139(1)(e).
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INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 3, 4, 12(1)(e), 14(1), 85B(1) AND 139(1)(a).
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INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 3, 4, 24(1) AND 129(1)(e).
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INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 3, 4, 46, 58(3), 59(1), 61, 92(1) AND 139(1)(e).
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INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 3, 4 AND 46(5).
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INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 17(2) AND 139(5).
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INCOME TAX ACT, R.S.C. 1952, c. 148, s. 20(4)(a).
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INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 67(1)(3) AND 68(1)(a)(c).
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INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 71(1) AND (2)(c)(i)(ii)(iii).
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INCOME TAX ACT, R.S.C. 1952, c. 148, s. 119(1)(2).
See REVENUE, No. 8.

INCOME TAX ACT, R.S.C. 1952, c. 148, s. 137(1).
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INCOME TAX REGULATIONS, s. 1102 (1) (c).
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INCOME TAX ACT, S. OF C. 1948, c. 52, ss. 3, 4, 20(1)(d), 40(1)(a) AND 42 (4A) AS ENACTED BY S. OF C. 1951, c. 51, s. 14.
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INCOME TAX ACT, S. OF C. 1948, c. 52, ss. 3, 4 AND 127(1)(e).
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INCOME TAX ACT, S. OF C. 1952, c. 148, ss. 46(2)(4) AND 57(1).
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INCOME TAX ACT, S. OF C. 1948, c. 52, ss. 127(1)(af), 127(5)(a).
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INCOME WAR TAX ACT, s. 55 AS ENACTED BY S. OF C. 1944-45, c. 43, s. 15 AND INCOME TAX ACT 1948, S. OF C. 1948, c. 52, s. 42(4).
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2. Contested inscription on confession of judgment. No. 1.

PRACTICE—*Contested inscription on confession of judgment—Exchequer Court General Rules and Orders, rule* 104. *Held:* That judgment may be entered according to a confession of judgment filed under rule 104 of the General Rules and Orders of this Court only if such confession has been accepted by the plaintiff. The so-called confession is nothing more than an offer to confess judgment, which upon the plaintiff's refusal becomes of no avail and works no change in the ordinary mode of procedure. WORLD WIDE AIRWAYS INC. v. HER MAJESTY THE QUEEN.......... 261

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REVENUE—*Income tax—Capital or income—Apartment houses built as investment—Sale forced by financial difficulties—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 24(1) and 129(1)(e).* A building contractor in 1952 exchanged an apartment house which he had built for his own account for a parcel of land on which he proposed building two apartment houses as an investment but on which to make full use of the land he subsequently built seven. As a result of the more ambitious scheme he became involved in financial difficulties. The buildings were completed in October 1953 and were operated on a rental basis to August 1955 during which time several offers to purchase were refused. Then the appellant to meet his liabilities and to secure capital to engage in the building for resale business sold six of the apartment houses at a profit of some $26,000. As part of the purchase price he agreed to accept $35,000 of the preference shares of the purchasing corporation. The purchaser subsequently became bankrupt and the shares became worthless. The Minister added the profit realized on the sale of the apartment houses to the appellant's 1955 income. On an appeal to this Court from a decision of the Income Tax Appeal Board affirming the assessment, the appellant submitted that if any profit had been made from the sale of the apartment houses,

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which he denied, it was a capital gain, and in the alternative that if a profit was realized the selling price should be reduced by $35,000 which represented not cash but worthless securities. *Held:* That the profit was not due to any increase in the value of an investment but to an adventure or concern in the nature of trade within the meaning of s. 139(1)(*e*) of the *Income Tax Act* R.S.C. 1952, c. 148, which bore all the marks of characteristics of a business venture or of a project which had been undertaken with the intention of making a profit. The appellant's course of conduct was similar to that of other contractors engaged in the building and selling business. 2. That the fact that the appellant agreed to take preference shares as part of the same price could not, in view of the provisions of s. 24(1) of the *Income Tax Act*, in any way affect the determination of the appellant's income nor the amount of the transaction. J. A. VERRET v. MINISTER OF NATIONAL REVENUE 1

2.—*Income tax—Business losses—Right to deduct losses from profits—The Income Tax Act, R.S.C. 1952, c. 148, s. 27(1)(e)(iii)(A).* A company incorporated under the *Quebec Companies Act* to carry on an automobile and garage business operated at a profit from 1951 to 1953 and at a loss in 1954 and 1955. It ceased operations in 1954 and in 1955 liquidated all its assets. In 1956 its letters patent which were still in force were acquired by B by a purchase of all the issued shares. B then obtained supplementary letters patent whereby the name of the company was changed and its head office re-located in a town in which B carried on garage and automobile dealer business and which business he then sold to the company for among other consideration, the balance of its unissued and unsubscribed shares, and became the only shareholder and sole owner of the company as well as its president and manager. In its 1956 income tax return the company declared a profit from which it deducted the losses it had suffered in 1954 and 1955. The Minister disallowed the deductions and an appeal from his ruling was dismissed by the Income Tax Appeal Board. On an appeal by the company to the Court. *Held:* That under the provisions of s. 27 (1) (*e*) (iii) (A) of the *Income Tax Act*, R.S.C. 1952, c. 148, the right to deduct losses does not extend to a profit from a business other than the business in which the loss was sustained. 2. That the appellant company had ceased its business operations before the end of 1955 and disposed of all its assets and when the new shareholders obtained control in 1956 it acquired and began to operate a new business and no longer had the right to deduct from its 1956 profits the losses sustained in 1954 and 1955, because these profits did not arise from the business in the course of

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which the losses had been sustained. GARAGE HENRI BRASSARD LTEE. v. MINISTER OF NATIONAL REVENUE 12

3.—*Income—Income tax—Bonus paid by real estate dealer to obtain mortgage loans—Whether capital outlay or deductible expense—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 11(1)(cb), 12(1)(a) and (b).* Appellant was a member of a partnership which carried on the business of buying and selling real estate. In December 1954, a property was purchased for $9,000 and sold the following February for $12,500. Prior to the sale the partners mortgaged the property to secure repayment in five years of $4,200, and it was a term of the agreement of sale that the purchaser, in payment of $4,200 of the selling price, should assume the mortgage. Of the $4,200 the partners received $4,000, a $200 bonus being exacted by the mortgagee. The evidence did not disclose what the money was used for or why it was borrowed. A second property was purchased in November 1954 for $12,200 and sold in February 1955 for $15,000. It too was mortgaged prior to sale to secure repayment in five years of $6,500, and the assumption of the mortgage by the purchaser represented $6,500 of the selling price. The proceeds of the loan were $6,000 after deduction by the mortgagee of a $500 bonus. The evidence was that the moneys received were applied in part payment of the balance of the purchase price by the partnership. In calculating its trading profit for 1955 the partnership deducted from its gross profit the bonuses of $700 as expenses incurred in arranging first mortgages. In making the assessment the Minister added back this amount on the ground that the bonuses were outlays made to secure working capital the deduction of which is prohibited by s. 12(1)(*b*) of the *Income Tax Act*. The appellant appealed to this Court from a decision of the Income Tax Appeal Board dismissing his appeal from the assessment. *Held:* That the loan secured by the property in respect of which a $500 bonus was paid while on its face not of a temporary nature could be so regarded since the partners did not expect to have the property for long and the assumption and retirement of the loan were in fact provided for in the transaction in which the property was sold. Further the borrowed money was directly used to pay part of the purchase price of a property acquired as a revenue asset and it did not add anything of a permanent nature to the assets employed as either fixed or circulating capital in the business. 2. That in the circumstances the money so borrowed was not used as capital in the business in the sense in which the word "capital" is used in s. 12(1)(*b*) of the *Income Tax Act*. 3. That the $500 bonus was not a payment or outlay on account of capital within the meaning of s. 12 (1)(*b*)

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and its deduction should be allowed. 4. That with respect to the mortgage on which a $200 bonus was paid the evidence did not show why the money was borrowed or what it was used for and the taxpayer not having met the onus placed upon him to satisfy the Court that the bonus was not incurred on account of capital failed to establish any right to its deduction. HARRY SILVERMAN v. MINISTER OF NATIONAL REVENUE 19

4.—*Income—Income tax—Credit balance not a "payment" or "receipt" subject to tax—The Income Tax Act, R.S.C. 1952, c. 148, ss. 2(3), 3, 4, 5, 6, 11(6)(9)(11) and 24.* By resolution of a company of which he was a shareholder, president and managing director, a taxpayer was authorized to be paid an annual salary of $10,000, and as owner of a building leased to the company, an annual rental of $12,000. In his income tax return for 1954 the taxpayer declared his annual income to be $22,000. The Minister added to the declared income, capital allowance on the taxpayer's car and certain travelling expenses paid by the company. By notice of objection the taxpayer alleged that the additions were not justified because although he had declared an income of $22,000 and paid income tax thereon he had received but $15,265.86 in cash and the balance constituted a credit on the company's books. The taxpayer's appeal to the Income Tax Appeal Board was allowed in part. The Minister appealed from the decision and the taxpayer cross-appealed. *Held:* That the general rule under the *Income Tax Act* is that in the absence of express provision to the contrary only income paid or received is taxable. The fact that a taxpayer is credited with a balance owing him on a company's books does not constitute a payment nor a receipt within the meaning of the Act. *Capital Trust Corporation Ltd.* v. *Minister of National Revenue* [1936] Ex. C.R. 163, affirmed by [1937] S.C.R. 192; *Gresham Life Assurance Society, Ltd.* v. *Bishop* [1902] A.C. 287 at 296. 2. That as to the exceptions to the rule, s. 6 refers to interest and income from partnerships or syndicates, and s. 24 to securities in satisfaction of income debts, and neither provision applies to the facts in the instant case. Other than these exceptions a tax cannot be levied on debts so long as they remain unpaid. 3. That under s. 5(*b*)(*v*) the taxpayer was not entitled to deduct the disputed travelling expenses as they were personal disbursements. 4. That the taxpayer having failed to prove he met the requirements of subsections (6) or (9) of s. 11 was not entitled to capital car allowance under s. 11(11) of the Act. MINISTER OF NATIONAL REVENUE v. CLAUDE ROUSSEAU 45

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5.—*Income—Income tax—Payment by company to permit group of shareholders acquiring control not an expense incurred to earn income—Accounting—Whether payments recorded in company's books as owing for sales tax a contingent liability—Income Tax Act, R.S.C. 1952, s. 12(1)(a) and (b).* The appellant company was incorporated in January 1954 to acquire lands and build houses thereon for sale at a profit. This was pursuant to an agreement entered into between two groups, A and B, whereby each was to acquire a 50% interest and to have equal representation on the Board of Directors. The duration of the agreement was to be for at least five years unless a majority of the Board deemed an earlier dissolution advisable. Each of the parties before selling to a non-shareholder was required to offer his shares to existing shareholders at their book value. Shortly thereafter the two groups entered into a second agreement under which another company was incorporated with the same objects and under similar terms. By a third agreement the annual salaries to be paid by the appellant were fixed at $21,000 of which $14,000 was to be paid to Group A's representatives and $7,000 to Group B's. In July following dissension between the parties a final agreement was entered into whereby Group A agreed to sell to Group B its shares in both companies for the amount of its investment in them and Group B, in consideration of the cancellation of the partnership agreements, undertook to pay $32,500 to Group A. The appellant company was not a party to the agreement but it paid the $32,500 and in computing its income for 1954 claimed the sum as a deduction for salary payments and/or operating expenses. It also claimed a deduction of $3,978 for legal fees paid in connection with the termination of the partnership agreements. The Minister disallowed both claims as not being outlays incurred by the company taxpayer for the purpose of earning income within the meaning of s. 12(1)(a) of the *Income Tax Act*. The appellant also sought to deduct for the years 1955, 1956 and 1957, amounts recorded in its books as owing under the *Retail Sales Act*, S.Q. 1940, c. 14, but not paid pending determination of the constitutionality of the Act. The Minister ruled the amounts constituted contingent liabilities within the meaning of s. 12(1)(e) and were not deductible. On an appeal to this Court. *Held:* That there was no evidence to establish that the appellant company was bound to fulfill Group B's obligation to Group A, or that the stipulations contained in the final agreement constituted any benefit to the appellant. In any event the $32,500 payment was not an expense made or incurred by the taxpayer for the purpose of producing income from the business of the taxpayer within the meaning of s. 12(1)(a) of the *Income Tax Act*. 2. That for the same reasons the claim for legal fees was not deductible. 3. That

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the validity of a statutory law must be presumed until the contrary is proved and until then any monetary obligation which it imposes should be treated as an outstanding liability. At the date of the trial the contingency of the Quebec *Retail Sales Act* being declared unconstitutional was too remote to bring it within the purview of s. 12(1)(e) of the *Income Tax Act*. The deductions claimed for sales tax should therefore be allowed. METEOR HOMES LTD. v. MINISTER OF NATIONAL REVENUE.. 68

6.—*Income—Income tax—Profit from sale of timber cutting rights—Capital gain or income—Meaning of "with all due despatch"—Effect of lack of notification within 180 days after service of Notice of Objection—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 46, 58(3), 59(1), 61, 92(1), 105(2) and 139(1)(e).* The appellant carried on general insurance business and that of a lumber merchant. In the latter business in addition to buying logs, sawing them into lumber and selling the lumber wholesale, he also bought timber lots which he re-sold after reserving the cutting rights thereon. In the years 1950, 1951, 1952 and 1953 he sold five of his cutting rights at a profit. On August 14, 1956 the Minister re-assessed for the taxation years 1950 to 1954 inclusive and added to the appellant's declared income the profits made on the sale of the five cutting rights. The taxpayer's appeal from the assessment to the Income Tax Appeal Board was allowed in part but the Board affirmed the addition of the profits made on the sale of the cutting rights. On an appeal from the decision to this Court the taxpayer contended that the profit made on the sales in question represented the liquidation of capital assets held for investment and for the support of his children. Two questions of law were also submitted to the Court: 1. Whether the Minister had acted with "all due despatch" in notifying the taxpayer of his reconsideration of the assessment for the taxation years in question. 2. Whether lack of such notification within a delay of 180 days pursuant to s. 59(1) carries with it the nullity of the assessments. *Held:* That after the time the appellant submitted he had decided to discontinue his business and liquidate his assets, he continued his lumber business and sold the five cutting rights in question from which it was to be concluded that the profits arising from their sale resulted from commercial transactions within the meaning of sections 4, 5 and 139(1)(*e*) of the *Income Tax Act* and were properly added to the appellant's declared income. 2. That the re-assessments of the appellant's income were all made within the period of time during which the Minister was lawfully allowed to do so and the appellant received due notice of the re-assessments. 3. That the meaning to be assigned to the words "with all due despatch" in s. 46 of the Act is that the Minister may exercise his power of assessment during a specified period, formerly six, now four years from the date of the original assessment. 4. That the fact that the Minister did not serve on the taxpayer within the time limit of 180 days after receipt of the Notice of Objection, notice that the assessments had been reconsidered, has no effect on the validity or non-validity of the assessments. 5. That the words "with all due despatch" in ss. 46(1), 58(3) and 105(2) of the Act have the same meaning as "with all due diligence" or "within a reasonable time" and are to be interpreted as giving a discretion, justified by circumstances and reasons, to the person whose duty it is to act. They are not to be interpreted as meaning a fixed period of time but purport a discretion of the Minister to be exercised for the good administration of the Act, with reason, justice and legal principles. JOSEPH BAPTISTE WILFRID JOLICOEUR v. MINISTER OF NATIONAL REVENUE.... 85

7.—*Income tax—Lumber company purchased to serve as subsidiary sold at a profit—Whether profit on sale income or capital gain—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, and 139(1)(e).* The appellant company, a general contractor and trader in building supplies and lumber, had for some years purchased a large portion of its lumber from P. Co. In June, 1952, P. Co. was in financial difficulties and the appellant, with the intention of making P. Co. a subsidiary and thus assuring the continuance of that source of supply, obtained for $100 an option, exercisable up to November 30, 1952, to purchase the latter's outstanding shares for $50,000. In September the appellant, having received from S, a lumber dealer, an offer of $160,000 for the shares, completed the purchase and a few days later sold them to S. In order to ensure that the opportunity to make this sale should not be lost, the appellant had arranged for the modification of the terms of a cutting lease held by P. Co., which S considered too onerous, and had relinquished to P. Co. its right under contract to the bulk of P. Co.'s season's cut of lumber and accepted repayment of $272,000, which had been advanced on the purchase price thereof. The Minister having treated the profit made on the sale of the shares as income, the appellant appealed from the assessment on the grounds that the option to purchase the shares was a capital asset, that what had occurred was in substance the realization of that capital asset, and that the profit realized from the transaction was capital and not income within the meaning of the *Income Tax Act*. *Held:* That what in fact was sold was not the option but the shares, and these were sold after the appellant had acquired them not to keep as capital assets, a purpose which had already been abandoned, but for the purpose of selling them for a profit. 2. That the profit so realized was profit from a

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business within the meaning of that term in s. 3(*a*) of the *Income Tax Act*, as defined by s. 139(1)(*e*), and was properly treated as income. HILL-CLARK-FRANCIS LTD. v. MINISTER OF NATIONAL REVENUE.... 110

8.—*Practice—Income Tax Act—Certificate registered under s. 119(2) not a judgment by default—Opposition to judgment filed under Code of Civil Procedure not applicable—Nature of certificate—Jurisdiction of Exchequer Court—The Income Tax Act, R.S.C. 1952, c. 148, s. 119(1)(2)—Code of Civil Procedure, arts. 1163, 1168, 1172 and 1175—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 29, General Rules and Orders, r. 6(2).* By s. 119(1) of the *Income Tax Act*, R.S.C. 1952, c. 148, an amount payable under the Act that has not been paid may, subject to the terms of the subsection, be certified by the Minister. By s. 119(2): "On production to the Exchequer Court of Canada, a certificate made under this section shall be registered in the Court and when registered has the same force and effect, and all proceedings may be taken thereon, as if the certificate were a judgment obtained in the said Court for a debt of the amount specified in the certificate plus interest to the day of payment as provided for in this Act." A certificate purporting to be made in respect of an amount payable by one B of Rouyn in the Province of Quebec having been registered pursuant to s. 119(2), B filed in the Court an opposition to judgment, alleging various objections to the certificate and its registration and ending with a claim that «le jugement obtenu contre lui par défaut comme susdit» be annulled and other declaratory relief. To the opposition so filed the Attorney General of Canada subsequently filed a contestation denying all save one of the paragraphs contained in the opposition and objecting that the facts therein contained were illegally and irregularly pleaded and offered no right to the relief claimed. On a motion by the Attorney-General of Canada to have the points of law raised on the contestation determined and to dismiss the opposition. *Held:* That the certificate was not a judgment and, in any case, was not a judgment by deault and that it was accordingly not open to attack under the rules contained in the *Code of Civil Procedure* of the Province of Quebec providing for oppositions to judgments by default and that the opposition should be quashed. 2. Observations on the nature of the certificate and the jurisdiction of the Court pertaining thereto. MINISTER OF NATIONAL REVENUE v. BERTRAND BOLDUC...... 115

9.—*Income—Income or capital—Income Tax Act, R.S.C. 1952, c. 148, ss. 46(1)(2)(3)(4)(6)(7), 51(1), 52(1), 56, 57(1), 58(1) and 61—Sale of inventory on cessation of business for lump sum—Lump sum is income subject to tax—"Day of assessment"—Proper notice of mailing of a notice of assessment to a taxpayer—Duty to send "a notice of assessment to the person by whom the return was filed"—Appeal allowed.* Appellant between 1945 and 1952 carried on business as a registered broker-dealer under the *Securities Act of Ontario*. In association with others he caused the incorporation of a company for the purpose of exploring and exploiting certain gas and petroleum rights. Through underwriting agreements appellant became the owner of shares of the capital stock of three companies. In 1952 appellant's registration as a broker-dealer was cancelled by the Ontario Securities Commission. He thereupon sold all his stock holdings in bulk and received for them the sum of $100,000. This he did not report in his income tax return for 1952 and the Minister in making a re-assessment for that year added that sum to his taxable income. Appellant contends that the amount received was capital and not income. Appellant filed his income tax return for 1952 in April 1953 giving his correct residence and business address. Appellant also contends that the re-assessment was not made within the four years limited by the Act. The original notice of assessment was mailed to appellant on May 28, 1953. After 1953 appellant terminated his business and moved his residence to a place unknown to the department. On May 16, 1957 an assessor in the department made a recalculation of appellant's tax for 1952 and on May 28, 1957 a notice of re-assessment was mailed to appellant in care of a solicitor who had represented him on an earlier tax problem. The solicitor photostated the contents of the letter and returned envelope and contents to the District Taxation Officer the next day stating he did not represent the appellant. The photostats were sent by the solicitor to an accountant who had acted for appellant earlier. The department on June 7, 1957 again mailed the notice of re-assessment to appellant's actual residence. There was no allegation of fraud or misrepresentation by the appellant. *Held:* That the sale of appellant's stock was the final act in a joint profit-making scheme between appellant and his associate and the sale having occurred in the course of carrying on business the profit therefrom was income and subject to tax, and the fact that it was a bulk sale did not alter its character as income. 2. That the mailing of the notice of re-assessment on May 28, 1957 to the solicitor who had no authority to receive it nor to act for the appellant was not a valid discharge of the Minister's duties under s. 46(2) of the Act which requires him to send "a notice of assessment to the person by whom the return was filed". 3. That the re-assessment was invalid not having been made within the four year period prescribed by the Act. LAWRENCE B. SCOTT v. MINISTER OF NATIONAL REVENUE........................ 120

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10.—*Income tax—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—Capital or income—Sale of farm in bloc at substantial profit—Sale by farmer with prior dealings in real estate—Farming successfully carried on for five years—Profits held to be income—Appeal dismissed.* Appellant from 1943 to 1955 had been engaged in farming, first as a salaried employee and from 1949 onward on his own account. During the years from 1943 to 1949 this farming operation included the raising of beef and dairy cattle and hogs. His father was the owner of two tracts of land, one a 55-acre lot bought in 1941 and the other a 100-acre lot bought in 1943. Between 1946 and 1949 two portions of the latter lot were subdivided into a total of 75 lots and sold. The appellant assisted his father in making these sales. In 1949 the remaining portion of the 100-acre lot was transferred to appellant who subdivided it into 63 lots, of which 33 were sold by him in the same year. In 1951 the 55-acre parcel was transferred to appellant in trust for his father. It was subdivided into lots of which a number were sold between 1951 and 1955. Appellant contributed one third of the expenses of this subdivision and received one-third of the profits for looking after it and for the sales of the lots. In 1950 appellant and his father, who was a printer and not a farmer, jointly purchased a 125-acre farm about one mile away from this original farm, fronting on a major highway and near the City of Toronto, for which they paid $45,000. During the years 1951 to 1955 this property was farmed by appellant with farm help, about 100 acres being used to grow grain and hay. Livestock for personal use was kept and portions of farm buildings not needed by appellant were rented as stables for race horses. The appellant contributed $7,000 to the purchase of this farm and in 1952 the house on it together with one acre of land was sold for $12,000 and provided a further sum of $6,000 towards appellant's share of the purchase price, and the remaining $9,500 was paid by him to his mother after his father's death, his mother having become entitled to the father's property. The remainder of this farm was sold in one single transaction for $260,000 in 1955. Shortly after the sale of the farm appellant sold his farm machinery and has not since been engaged in farming. The Minister assessed appellant for the profits from this sale for the years 1955, 1956 and 1957. From this assessment appellant now appeals to this Court. He contends that the farm was purchased in 1950 for farming and that it was used for that purpose until sold in 1955, no efforts having been made to sell it, the sale resulting from an absolutely unsolicited offer to purchase, and that he had realised an investment and was not engaged in the real estate business. *Held:* That the appeal must be dismissed. 2. That the purchase of the property by appellant and his father was not an investment looking primarily to the maintenance of an annual return but was really a venture of capital in acquiring a property with a view to realising the profit that could be made from seizing upon a favorable opportunity that could be expected to come from selling it either in lots or as a whole. 3. That the profit from the sale of the farm is income from a business as defined in the Act and taxable. HARVEY CLARKE SMITH v. MINISTER OF NATIONAL REVENUE.........136

11.—*Income—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 12(1)(e), 14(1), 85B(1) and 139(1)(a)—Contingency reserves—Concurrence of Minister necessary to change in accounting methods—Time of recognition.* Appellant, incorporated in and carrying on business in Canada, allowed a discount to certain classes of customers for prompt payment on the invoice price of sales to them if payment were made before the 15th day of the month following the date of sale. It is the practice of appellant to make monthly payments on account of income tax for the current year as soon as the amount of discounts taken by its customers on the sales of the previous month can be ascertained, calculating the amount of this income tax instalment accordingly. Appellant's fiscal year corresponded with the calendar year and prior to 1954 it entered as taxable income unpaid December sales at their invoice price, paid its tax instalment and closed its books as of December 31, and sometime after the 15th of the following January when it ascertained the exact amount of discount taken on December sales, it claimed and was allowed to deduct such amount from the current years accounts receivable. In 1954 appellant changed its method of treating discounts by making a 1954 adjustment entry reducing its accounts receivable by the amount of the estimate the discount would be in respect of December billing and would be given at January, 1955, and closed its books without waiting until the exact amount of discount could be ascertained. The Minister of National Revenue reassessed the appellant on its 1954 income by adding thereto, *inter alia,* the amount of estimated discounts for 1954. An appeal to the Income Tax Appeal Board was dismissed and appellant appealed to this Court. *Held:* That the appeal must be dismissed since the change in accounting methods was made by the appellant without receiving the concurrence of the Minister in accordance with s. 14(1) of the *Income Tax Act* R.S.C. 1952, c. 148. CRANE LTD. v. MINISTER OF NATIONAL REVENUE 147

12.—*Income—Income tax—Railroad subsidized by grant of Crown lands—Lands pledged to secure bonds—Whether revenue obtained from sale of mining, prospecting*

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and timber rights, capital or income—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6(1)(j) and 139(1)(e) The appellant company was incorporated by Act of Parliament in 1899 for the purpose of constructing a railroad through the District of Algoma. To assist in financing the project cash subsidies were paid the company by both the Federal and Ontario governments and the latter body also granted it large tracts of land along the proposed right of way. The appellant subsequently sold bonds to the public and pledged the lands as security. Thereafter the proceeds of any sale of these lands or of the timber or mineral rights thereon had to be accounted for to the trustee for the bondholders. From time to time the appellant disposed of the mineral, surface and timber cutting rights in the lands it had been granted. In assessing the appellant for the years 1953 to 1956 inclusive the Minister added the sum received for such rights to the appellant's declared income. In an appeal from the assessment it was contended for the appellant that the amounts in question were not income but receipts of a capital nature and formed part of the subsidy lands granted and received as capital assets along with the cash subsidies. The Minister submitted that dealing with the granted lands formed part of the appellant's business and the receipts part of its income and, that in any event, they constituted receipts which were dependent upon use of production from property. *Held:* That even if the lands when received were of a capital nature, their character was changed by the manner in which they were dealt with by the appellant. To deal with the mining and timber-cutting rights it set up an organization which carried on its activities as a business operation in the same manner as an ordinary trader in such items. The profit was obtained by transactions having the characteristics of a trade, business or of an adventure in the nature of trade, and the profits were properly assessed as taxable income. *The Commissioners of Inland Revenue v. Livingston* 11 T.C. 538 at 542 and *Western Leaseholds Ltd. v. Minister of National Revenue* [1960] S.C.R. 10 at 23, referred to and followed. *Hudson's Bay Co. v. Stevens* 5 T.C. 424, distinguished. ALGOMA CENTRAL AND HUDSON BAY RAILWAY CO. v. MINISTER OF NATIONAL REVENUE...175

13.—*Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 16 and 23—Assignment of right to receive income—Retroactive effect of fiscal legislation—Appeal dismissed.* Appellant corporation in 1871 leased all of its railway property for a term of 999 years, the lessee agreeing to make annual payments to both the bondholders and shareholders of appellant. Appellant was assessed for tax on the amounts paid to the bondholders and shareholders in 1951. An appeal to the Tax Appeal Board was allowed and from that decision the Minister of National Revenue appealed to the Exchequer Court. *Held:* That the appeal must be dismissed. 2. That both parties having agreed that the transaction at issue should be envisaged in the light of the Quebec Civil Law, Art. 1029, C.C. regarding "stipulation for third person" should apply, according to which a valid stipulation in favour of a third person creates a contract between the third person and the person who has agreed to be bound by the contract; it establishes a *vinculum juris* between the latter and the third person. 3. That there was no transfer or assignment of any income within the meaning of ss. 16 and 23 of the *Income Tax Act* since the appellant never had the right to the income as the original lease provided that the consideration for it went directly to the bondholders and shareholders. 4. That the appellant could not be held liable for income tax because the contractual obligations under the leasing had been entered into prior to the effective date of the first income taxation statute in 1917. MINISTER OF NATIONAL REVENUE v. MASSAWIPPI VALLEY RAILWAY CO.....191

14.—*Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 17(2), 139(5)—Transactions between persons not dealing at arm's length—Transaction between a corporation and a director—Fair market value—Appeal allowed in part.* Appellant company was incorporated in 1952 for the purpose, *inter alia*, of purchasing and selling real estate. Its issued capital stock consisted of 1,000 shares of which Y (the President) and R (Secretary-Treasurer) each held 450 shares and A (Vice-President) 100 shares. In April, 1952, Y sold 88 lots to the appellant company and at the same Directors' Meeting it was agreed to sell 26 of the lots to R at cost. At a Directors' Meeting on September 25, 1952, R abandoned his right to purchase the lots and Y agreed to purchase them at cost fixed at $500 each. In 1953, the appellant conveyed 16 lots to Y, the latter at once sold them to Nelmar Realty at $1,200 each, and that company then sold them at $1,500 each to Rolmac Construction Company, which company was solely owned by R. There was evidence that Y had made substantial gifts in money or bonds to R. The Minister of National Revenue re-assessed appellant by adding to its declared income for 1953 the difference between what he considered a fair market value of the lots ($1,500 each) and the price paid for them by Y ($500 each). An appeal to the Tax Appeal Board was dismissed and from that dismissal a further appeal was taken to the Exchequer Court. The Income Tax Act, s. 139(5) provides that a corporation and a person or one of several persons by whom it is directly or indirectly controlled shall . . . be deemed not to deal with each other at arm's length. *Held:* That Y and R, holding sufficient shares in the appellant company to control it, were acting in concert in the transactions

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outlined; that they were not dealing with the appellant at arm's length; and that as the fair market value of the lots sold at wholesale in 1953 was $875 each, the appeal should be allowed in part by reducing from $16,000 to $6,000 the amount added in the re-assessment. 2. That the appeal from re-assessment for the taxation year 1954 should be dismissed, there being no "loss" in 1953 to carry forward to 1954. ANCASTER DEVELOPMENT CO. LTD. v. MINISTER OF NATIONAL REVENUE.................201

15.—*Income—Income tax—Whether expense in respect of aircraft used to transport executive incurred for purpose of earning income—Income Tax Act, R.S.C. 1952, ss. 11(1)(a), 12(1)(a), 20(5)(a), 20(6)(e)—Income Tax Regulations, s. 1102(1)(c).* The appellant, a British Columbia corporation, operates saw mills in the vicinity of 100 Mile House and maintains a sales office in Vancouver. Its president, who is also its sales manager, resides in that city and to permit his making weekly trips between the sales office and the mills with the greatest despatch the appellant in 1955 purchased a single-engined aircraft. Piloted by the president it was used as his means of transportation in 1955 and 1956. In 1957 with the object of increasing the safety factor, reducing the flying time, and to permit of more flights in marginal weather, this aircraft was traded in for a twin-engined model. In filing its income tax returns for the years 1955 and 1956 the appellant had claimed and was allowed a deduction of 85% of the expense of operating the single-engined aircraft and as capital cost allowance 85% of the purchase price. A claim to similar deductions with respect to the twin-engined aircraft made in the 1957 income tax return was disallowed. The Minister ruled that the expenditure had not been incurred for the purpose of gaining or producing income from the business. In an appeal from the re-assessment to this Court. *Held:* That the appeal must be allowed as the evidence adduced established that the twin-engined aircraft had been used by the appellant company for the purpose of gaining or producing income from its business. 2. That since the appellant admitted a 15% personal use of the aircraft the deduction to be allowed should be 85% of the operating expenses and a proportionate deduction of the capital cost computed on the 40% annual exemption foreseen in Schedule B, Class 16 of the *Income Tax Regulations.* CANIM LAKE SAWMILLS LTD. v. MINISTER OF NATIONAL REVENUE............. 214

16.—*Customs Duty—Appeal on question of law from Tariff Board's decision—Meaning of "apparatus for cooking" when applied to certain food processing equipment—Customs Act, R.S.C. 1952, c. 58 as amended by S. of C. 1958, c. 26, s. 2—Customs Tariff, R.S.C. 1952, c. 60, Schedule A, Tariff*

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Item 443 as amended by S. of C. 1956, c. 36, s. 1—Tariff Board Act, R.S.C. 1952, c. 261, s. 5(9). The appellants appeal from a declaration of the Tariff Board affirming the Deputy Minister's classification for customs purposes of certain imported food processing equipment as "apparatus for cooking" within the meaning of Item 443 of the *Customs Tariff,* R.S.C. 1952, c. 60 as amended. The importations in question involve two kinds of units described respectively as a pre-heater and a pressure cooker. Each consists of a chamber or tank equipped with mechanism by which sealed cans may be moved through the tank, and while being so moved, heated by hot water or steam or cooled by water or some other medium, the whole at controlled speeds, temperatures and pressures. The appellant contended that the Board in defining "cooking" as "preparing food for consumption by subjecting it to the application of heat" expanded the dictionary meaning and misdirected itself as to the meaning of "cooking" in Item 443. *Held:* That the Tariff Board had correctly concluded that the word "cooking" is not used in Tariff Item 443 in any technical sense and that it should be given its ordinary meaning. 2. That no valid objection could be taken to the Board's definition and such definition did not expand the dictionary meaning of the word "cooking". 3. That the definition set out in the Board's declaration indicates that the Board "was properly instructed in law as to the construction of the statutory item". 4. That there was evidence upon which the Board properly instructed as to the law and acting judicially could reach the conclusion that the equipment in question was in fact apparatus for cooking within the meaning of that expression in Item 443. *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue* [1956] 1 D.L.R. (2d) 497 referred to and applied. CAMPBELL SOUP CO. LTD. *et al* v. DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS & EXCISE................ 224

17.—*Income—Income tax—Income Tax Act 1948, s. 37 enacted by Statutes of Canada 1952, c. 29, s. 13—The Income Tax Act, R.S.C. 1952, c. 148, s. 40—Income Tax Regulations 400, 401, 402, 411(1)(a)(b), (2)—Provincial tax credit—"Permanent establishment"—Requirements to constitute a permanent establishment—"Warehouse"—"Use of substantial machinery or equipment"—Appeals allowed.* In its income tax returns for the years 1952, 1953 and 1954 respondent deducted from the tax otherwise payable by it, an amount in respect of the taxable income earned by it in those years in the Province of Quebec. It claimed that it was entitled to do so for 1952 by virtue of s. 37 of the 1948 *Income Tax Act* and for 1953 and 1954 under the provisions of s. 40 of the *Income Tax Act* R.S.C. 1952, c. 148. Sections 400, 401 and 402 of the

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Income Tax Regulations are applicable to the 1952 and subsequent taxation years and provide *inter alia* that the Province of Quebec is the province prescribed for the purpose of s. 40 of the Act and that "where, in a taxation year, a corporation had no permanent establishment outside the province, the whole of its taxable income for the year shall be deemed to have been earned in the province" and "where, in a taxation year, a corporation had no permanent establishment in the province no part of its taxable income for the year shall be deemed to have been earned in the province". Section 411(*a*) of the Regulations defines "permanent establishment" and section 411(*b*) provides "where a corporation carries on business through an employee or agent who has general authority to contract for his employer or principal or has a stock of merchandise from which he regularly fills orders which he receives, the said agent or employee shall be deemed to operate a permanent establishment of the corporation". The Minister re-assessed respondent for its income tax for the taxation years in question by adding the amount which it had deducted. Respondent is a company incorporated under the laws of Canada with its head office in Toronto, Ontario, where it manufactures a number of electrical appliances which are sold throughout Canada, including the Province of Quebec. In each of the taxation years in question it was within the prescribed class of corporation referred to in the Regulations and in each year paid taxes to the Province of Quebec. Its sales are made exclusively to wholesale distributors throughout Canada and during the years in question employed four full-time sales representatives at Vancouver, Winnipeg, Toronto and Montreal. It had goods stored in a public warehouse in Quebec and also hired an agent there who established an office of his own in his residence in a residential section of the city, received a stock of displays and mechanical advertising devices, and stored them in the part of his home set aside for office use. He was paid a commission on net shipments made into Quebec with a guaranteed minimum annual amount. He was under no contractual obligation to establish such an office, the telephone directory did not list the employee's own residential telephone under the name of the corporation and there was no business sign on any part of the premises, nor did the agent pay business tax. He had no general authority to contract for his employer or to accept purchase orders. *Held:* That the appeal must be allowed. 2. That the office established by the employee or agent was merely the office of the employee or agent and not that of the taxpayer respondent. 3. That for a warehouse to constitute a permanent establishment as per the Regulations it is necessary that the warehouse be in some manner under the control of the taxpayer and respondent had no control over the placement of its goods in the warehouse nor any control over the warehouse itself other than delivering goods to it and ordering goods shipped from it; therefore respondent did not have a "warehouse" within the province as provided in Regulation 411(1)(*a*) and therefore had no "permanent establishment". 4. That the provision in Regulation 411(2) that "the use of substantial machinery or equipment in a particular place at any time in the taxation year shall constitute a permanent establishment in that place for the year" refers to the "use" of heavy or large machinery or equipment by such persons as contractors or builders and placing samples of a total value from $4,000 to $11,000 with the sales representative who used them in live demonstrations to wholesalers and in retail stores and in training demonstrators did not constitute a use of substantial machinery or equipment by respondent. MINISTER OF NATIONAL REVENUE v. SUNBEAM CORPORATION (CANADA) LTD. 234

18.—*Income or capital profits—Income Tax Act, R.S.C. 1952, c. 148, s. 139(1)(e)—"Business"—Taxability of profits made on disposal of land acquired in exchange for a capital asset instead of cash—Appeal dismissed.* Appellant, a lumberman, in 1954 traded a tractor used by him in his lumbering operations for a tract of land situated in a newly opened district on the outskirts of a town, which was held until it increased in value four-fold. In 1956 he subdivided the land and sold one lot, the proceeds of which sale were added to his taxable income for the year 1956 by a reassessment made by the Minister. An appeal to the Tax Appeal Board from such reassessment was dismissed from which decision appellant now appeals to this Court. *Held:* That the appellant had the realisation of profits in mind when he acquired the property and at the time of acquisition he had the intention of subdividing it and selling the lots. 2. That the appellant exchanged a piece of machinery forming part of his working capital for land which had no relation to his regular business and could not be used for the purpose of producing income by any other means than sale, and the transaction, while outside the scope of appellant's regular business, nevertheless constituted an adventure in the nature of trade. 3. That the fact that appellant instead of paying cash for the land gave a tractor in exchange for it does not constitute the resultant profit a capital gain not subject to taxation. 4. That the appeal must be dismissed. IRA D. ARCHIBALD v. MINISTER OF NATIONAL REVENUE......................... 275

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19.—*Income tax—Non-resident company—Subsidiary rented equipment in United States from parent company for use in Canada—Whether parent company carrying on business in Canada—Whether subsidiary its agent—Whether equipment payments "rent for use in Canada of property"—The Income Tax Act, R.S.C. 1952, c. 148, ss. 2(2), 31(1), 106(1)(d), 108(9), 109(1), 123(8)(10), 139(7), Income Tax Regulation 805(1).* The appellant company was incorporated in California in 1955 as a wholly-owned subsidiary of the United Geophysical Corporation, another California corporation which supplies geophysical services to oil companies. In May 1955 the appellant assumed the Canadian portion of the Corporation's assets in Canada and assuming its liabilities there. Equipment items of United States origin were not sold but by the terms of a written agreement the Corporation agreed to "rent" to the appellant necessary equipment for use in its Canadian operations. The rental was to be determined in California and to start on equipment leaving any place in the United States. Pursuant to the agreement the appellant in 1955 and 1956 paid the Corporation the sums agreed on as rental for the equipment supplied it by the Corporation. The Minister pursuant to s. 123(10) of the *Income Tax Act* assessed the appellant for the amount of tax he contended it should have under s. 123(8) withheld and paid to the Crown out of the sums it paid its parent company, a non-resident corporation. In an appeal from the assessment the appellant contended that the Corporation carried on business in Canada in 1955 and 1956 and was therefore subject to tax under Part I rather than Part III of the *Income Tax Act.* It submitted that the business carried on in Canada was the Corporation's business and that the appellant acted only as its agent, or in the alternative, that the Corporation itself carried on business in Canada by putting its equipment to use there and deriving income therefrom. *Held:* That during the material period the business carried on by the appellant was its own and not that of the Corporation. 2. That the "rental" for the equipment was income from that part of the Corporation's business carried on in the United States and could not be reasonably attributed to any part of the business which may have been carried on in Canada and therefore was not taxable under Part I but under Part III of the *Income Tax Act.* 3. That s. 106(1)(*d*) of the *Income Tax Act* refers to and includes a fixed amount paid as rental for the use of personal property for a certain time and the sums in question were amounts of the kind referred to in the section. UNITED GEOPHYSICAL CO. OF CANADA v. MINISTER OF NATIONAL REVENUE.... 283

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20.—*Income—Income tax—Foreign business corporation—Royalties received from licenses of European patents—No active business effort by licensor—Whether "business operations" carried on—The Income Tax Act, R.S.C. 1952, c. 148, ss. 71(1) and (2)(c)(i)(ii)(iii).* The appellant is the wholly-owned subsidiary of an Ohio corporation. Prior to 1957 it carried on business in Canada as a manufacturer of engine bearings and had acquired from its parent corporation a number of British and European patents pertaining to engine bearings. The British patent was subject to a licensing agreement made by the parent the benefit of which was transferred to the appellant. Under it royalties were payable by the licensee and the parent agreed to supply technical and other assistance to the licensee. The appellant licensed a German company to manufacture and sell products under the German patents and undertook to furnish the latter with technical information and other aid and to allow the licensee's technicians to visit the plant of the appellant in Canada and those of its parent in the United States to study methods and techniques. In 1956 the appellant ceased manufacturing and sold its plant and Canadian patents to an affiliated corporation but retained its British and European patents. Under the British patent licensing agreement the appellant was under an obligation to its parent to supply the services required by the licensor although in practice they had been rendered by the parent. There was no clear evidence that anything was required or done in 1957 by either corporation. As to the German licensing agreement, in 1957, if not in most other years as well, nothing was done by the appellant and, so far as anything was required, the obligations were carried out by the parent corporation. The appellant claimed exemption for the year 1957 under s. 71 of the *Income Tax Act* as a foreign corporation. The Minister ruled that it did not so qualify. On an appeal from the assessment. *Held:* That s. 71 of the *Income Tax Act* is an exempting provision and must be strictly construed. To qualify under clause (*c*)(i) of s-s. 2 thereof a corporation's business operations must be of an industrial, mining, commercial, public utility or public service nature and its operations must have been carried on entirely outside of Canada. 2. That prior to the sale of its plant the appellant's business included the development and manufacturing of bearings and the licensing of patents and servicing of the agreements was part thereof and the income received therefrom part of the income of the business which might have been carried on in Canada and elsewhere. 3. That after the sale the holding of the patents and licensing agreements and doing what was necessary to perform them continued to be a business of a commercial nature within the meaning of s. 71(2)(*c*)(i) of the Act and the royalties

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received by the appellant in 1957 should be regarded as income from its business rather than income from property. 4. That in using the expression "business operations" however the statute contemplates more than a situation in which nothing of an active nature is done in the material period by the party by whom the business is carried on. 5. That here after the sale of its manufacturing plant the role of the appellant was essentially passive. No "business operations" were carried on by it anywhere and accordingly it was not entitled to exemption as a foreign business corporation. *Inland Revenue Commissioners v. Desoutter Brothers Ltd.* [1946] 1 All E.R. 58; *Tootal Co. Ltd. v. Inland Revenue Commissioners* [1949] 1 All E.R. 261, referred to. CLEVITE DEVELOPMENT LTD. v. MINISTER OF NATIONAL REVENUE. 296

21.—*Income—Income tax—Sale of mineral rights by oil drilling company—Whether proceeds income or capital—Charter powers—Amended tax return not filed within statutory delay—Discretionary power of Minister—The Income Tax Act, S. of C. 1948, c. 52, ss. 3, 4, 20(1)(d), 40(1)(a) and 42(4A) as enacted by S. of C. 1951, c. 51, s. 14—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 46(5).* The Lodestar Drilling Co. which carried on the business of drilling by contract, was empowered by its charter to acquire and sell mineral rights. In 1952 it sold a one-half interest in an oil lease for $27,500 and treated the sum received as a capital receipt In filing its income tax return for its taxation year ending March 31, 1952 the company declared a profit of some $114,900 and for 1953 a loss of some $3,500. On September 30, 1953, it filed an amended tax return and claimed as a deduction from its income for 1952 the loss suffered in 1953. By notice of re-assessment dated April 28, 1955 the Minister added the $27,500 to the declared income for 1952 and allowed less than one-third of the loss claimed. In October 1953 the company made an assignment in bankruptcy and the Trustee after revising the company's accounts to provide for additional capital cost allowance not previsouly claimed, on June 2, 1955 filed amended tax returns for 1952 and 1953 in which a loss of some $53,000 alleged to have been incurred in 1953 was claimed as a deduction from the 1952 income. Subsequently the Trustee filed a notice of objection to the assessment in respect of 1952 and the Minister by notice dated August 28, 1956 confirmed the assessments. In an appeal from a decision of the Income Tax Appeal Board upholding the assessment, the appellant contended that the $27,500 payment constituted a capital receipt which should not have been included in its income, and that by reason of the increased capital cost allowance now reflected in its books, the deduction in respect of loss incurred

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in 1953 should be increased accordingly. *Held:* That the $27,500 payment was properly assessed as income since it was a gain made in the operation of a business in carrying out a scheme for profit-making which the company by its charter had power to undertake. 2. That since the amended tax return filed by the Trustee was not, as required by s. 42(4A) of the *Income Tax Act, 1948,* filed within one year from the day on or before which the taxpayer was required by s. 40(1) of the Act to file the original return, it was within the discretionary powers of the Minister to refuse to re-assess beyond the allotted delay. MONTREAL TRUST CO. (Trustee of Lodestar Drilling Co, a bankrupt) v. MINISTER OF NATIONAL REVENUE 309

22.—*Income War Tax Act, s. 55 as enacted by S. of C. 1944-45 c. 43, s. 15 and Income Tax Act 1948, S. of C. 1948, c. 52, s. 42(4)—Limitation period for re-assessment of taxes—Burden of proof on Minister to prove misrepresentation or fraud—"Any misrepresentation" in Act includes both innocent and fraudulent misrepresentation—Appeal allowed.* Respondent taxpayer in filing his income tax returns for the taxation years 1948 and 1949 failed to report debenture interest received by him, gifts made to his wife, and in filing his return submitted a balance sheet which in effect was a net worth statement and in which he failed to include certain debentures which were held by him as part of his personal assets, not connected with his business. In July, 1956, the appellant re-assessed the respondent for these two years from which re-assessment the respondent appealed to the Tax Appeal Board which allowed the appeals. The Minister now appeals from the decision of the Tax Appeal Board to this Court. Respondent contends that the right of the Minister to re-assess after the lapse of the statutory period of limitation should be confined to cases in which the taxpayer has made a fraudulent misrepresentation or has committed a fraud. *Held:* That in every appeal under the Act regarding a re-assessment made after the statutory period of limitation has expired and which is based on fraud or misrepresentation the burden of proof lies on the Minister to first establish to the satisfaction of the Court that the taxpayer has "made any misrepresentation or committed any fraud in filing the returns or in supplying any information under this Act", unless such is admitted by the taxpayer. 2. That the words *any misrepresentation* used in the section of the Act mean any representation that was false in substance and in fact at the material dates and includes both innocent and fraudulent misrepresentations. 3. That in each of the three matters mentioned the respondent made misrepresentations with respect to matters

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which were material at the times they were made and as the appellant has established that misrepresentations were made in the original returns for both 1948 and 1949 the re-assessments made by him and now under appeal could be made at any time. MINISTER OF NATIONAL REVENUE v. MAURICE TAYLOR.................. 318

23.—*Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, and 139(1)(e)—Capital profits or income—Profits obtained from trading in syndicate interests and vendor stock constitute income—Appeal dismissed.* Appellant from 1946 to 1949 was a shareholder and employee of a brokerage company which underwrote and marketed shares of oil producing companies. In 1949 he disposed of his holdings in the brokerage company and joined with two others in a partnership or syndicate operating in the natural gas and oil field, and acquired a working interest in an oil property that came into production. In 1950 and 1952 he sold parts of his working interest and the profits resulting therefrom were assessed as income. In 1950 he and another member of the syndicate transferred to a company which he organized certain oil properties for one million shares of stock which were disposed of at a profit in 1952. The profit on the sale of these shares was also assessed as income. An appeal from such assessment to the Tax Appeal Board was dismissed and appellant now appeals to this Court. *Held:* That the appellant was engaged in the business of dealing in oil interests and oil leases in any way through which a profit might be obtained and in promoting companies having the same objectives, and the syndicate of which he was a member entered into agreements with lease owning and drilling companies in the hope of obtaining profit from the percentages of revenue production to which they were entitled under the terms of such agreements. 2. That in the course of his activities as a promoter the appellant had organized the company of which he became managing director at no salary to which certain leases were transferred for a return of shares which were placed in escrow from the sale of which he hoped to realise a profit when the escrow terminated, and such escrow shares were part of his stock in trade and not an investment. 3. That the appellant was rightly assessed for income tax on the profits resulting to him from all these transactions and the appeal is dismissed. HERBERT WILLIAM PURCELL v. MINISTER OF NATIONAL REVENUE............. 334

24.—*Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(e)(i), 12(1)(e) and S. of C. 1952-53, c. 40, s. 28 enacting s. 75 B(1)(d)—Deductibility of doubtfull debt reserves—No deduction allowed where no account owing to taxpayer—Absolute assignment by taxpayer—Appeal dismissed.* Appellant assigned all of its accounts receivable to a finance company allegedly as security for a loan. The appellant then set up an account as a reserve for doubtful debts and deducted that amount from its income for the years 1952 and 1953. These deductions were disallowed by the Minister and an appeal from his re-assessment to the Tax Appeal Board was dismissed. Appellant now appeals from that decision to this Court. The Court found that the assignments to the finance company were absolute even though the payments by the customers to the finance company were guaranteed by the appellant and that there was no account receivable by the taxpayer. The taxpayer contends that the amounts set up as a reserve against doubtful debts were deductible from income by virtue of s. 11(1)(*e*)(*i*) of the *Income Tax Act* R.S.C. 1952, c. 148, or that it was entitled to a deferred revenue reserve under s. 75B(1)(*d*), S. of C. 1952-53, c. 40, s. 28. *Held:* That as the accounts were not assigned to the finance company as security for a loan but were absolute and hence no account was receivable by appellant, no reserve against doubtful debts could be taken. 2. That no deferred revenue reserve could be set up with respect to accounts that were paid in full, and since the finance company had paid the appellant in full s. 75B(1)(*d*) was not applicable. 3. That since s. 12(1)(*e*) of the Act limits the deduction of a contingency reserve appellant could not deduct any amount which would represent its contingent liability to the finance company with respect to bad debts accruing from the receivable accounts assigned to it. UNITED TRAILER CO. LTD. v. MINISTER OF NATIONAL REVENUE................ 345

25.—*Income tax—Income or capital gain—Valuation of securities received in satisfaction of a debt—No evidence that valuation of Minister wrong—Appeal dismissed.* Appellant was a member of a syndicate formed to develop an oil property. The syndicate sold its working interest in the property to a corporation, receiving escrow stock of the corporation in satisfaction of its liability for the purchase price, the payment being made after the flotation of the company as a public company. The shares received by the appellant for his interest in the syndicate were valued by the respondent at twenty cents per share and their value was added to appellants' income for the taxation year 1951, as being a receipt of an income nature. An appeal from the assessment so made was dismissed by the Income Tax Appeal Board and a further appeal to this Court was taken. *Held:* That the appeal must be dismissed. 2. That on the evidence the value of the shares fixed by the respondent at about one-half the price at which shares not subject to escrow were

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sold to the public had not been shown to be excessive. WILBERT L. FALCONER v. MINISTER OF NATIONAL REVENUE.... 353

26.—*Income tax—Penalties—Wilful evasion of tax—Preponderance of evidence sufficient to disprove intention to evade—Evidence of ignorance of taxpayer—No intent to wilfully evade tax—Appeal allowed.* The appellant, a farmer with little knowledge of accounting, made incorrect income tax returns for several taxation years, and the Minister, following an investigation, added to what the appellant had declared in his returns certain unreported income from the operation by the appellant of a farm in partnership with his father and disallowed certain expenses which the appellant claimed as deductions and thereupon assessed tax and penalties under s. 51(1) of the 1948 *Income Tax Act* for late filing of returns, and under s. 51A of the same Act for wilfully evading or attempting to evade payment of tax. On appeal from the judgment of the Tax Appeal Board, which allowed the appellant's appeal in part. *Held:* That on an appeal to this Court from an assessment of penalties made by the Minister in the exercise of the power to assess penalties conferred on him by s. 42 of the 1948 *Income Tax Act* (now s. 46) the onus is on the taxpayer to show that the assessment is wrong. 2. That on the evidence the appellant was entitled to deductions in respect of some of the disputed items and that the assessments of tax and penalties under s. 51(1) should be varied accordingly. 3. That save in respect of one item the appellant has satisfied the onus of showing that he did not wilfully attempt to evade payment of tax and that the assessments of penalties under s. 51A should be discharged except in respect of the item as to which the onus had not been satisfied. ALEX PASHOVITZ v. MINISTER OF NATIONAL REVENUE........................ 365

27.—*Income tax—Income Tax Act, S. of C. 1952, c. 148, ss. 46(2)(4) and 57(1)—Nil assessment—A notice of assessment must be treated as an assessment even though no tax levied—Appeal allowed.* Appellant on April 29, 1955, filed its income tax return for 1954. On June 7, 1955, the Minister forwarded to appellant a Notice of Assessment showing the tax levied for 1954 as "nil". On July 16, 1959, the Minister forwarded to appellant a Notice of Re-Assessment by which a tax and interest were levied. The appellant appealed to this Court. *Held:* That the "nil" assessment made in 1955 must be treated as an assessment made at that time and a re-assessment in July, 1959, is invalid as being out of time. *Vide* s. 46(4) of the *Income Tax Act* as it was in 1959. 2. That in construing s. 46(4) of the Act as it was in 1959, the word "assessment" therein includes an assessment of "nil" dollars

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and therefore the original assessment herein was that of June 7, 1955, and the assessment dated July 16, 1959, stated to be a "re-assessment" and being more than four years after the original assessment, was invalid and of no effect. ANJULIN FARMS LTD. v. MINISTER OF NATIONAL REVENUE........................ 381

28.—*Income tax—Income Tax Act, S of C. 1948, c. 52, ss. 3, 4 and 127(1)(e)—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, and 139(1)(e)—Capital gain or income—"Venture or concern in the nature of trade"—Pursuit of a scheme for profit making—Appeal dismissed.* Appellant held 98 per cent of a company engaged in the sale of investment contracts. He loaned his own personal money at 8 per cent interest and a further consideration of a 15 per cent discount, the loans being secured by mortgages which were assigned to the company at face value. The bonuses thus realized by him during the taxation years in question amounted to $390,000. He also realized a profit of $12,489 on the sale of land in a town which he had acquired when mayor. He contended that this land had been subdivided and sold as lots at the request of the ratepayers of the town to meet the requirements of the town for increased expansion. The respondent re-assessed appellant for income tax purposes by adding to his income those amounts mentioned. An appeal to the Income Tax Appeal Board was dismissed and appellant appealed to this Court. *Held;* That the difference between the amounts advanced by the appellant on the mortgages and other investments and the amounts which he received on their assignment to the company constitutes income from a business in virtue of sections 3 and 4 and paragraph (*e*) of subsection (1) of section 139 of the *Income Tax Act*, Statutes of Canada 1948, c. 52 and R.S.C. 1952, c. 148. 2. That the gains realized on the sale of the lots resulted from an "adventure or concern in the nature of trade" or in the pursuit of a scheme for profit making and are taxable as income. HARRY GRAVES CURLETT v. MINISTER OF NATIONAL REVENUE.... 427

29.—*Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 67(1)(3) and 68(1)(a)(c)—Personal corporation—"Does not carry on an active financial, commercial or industrial business". "Active" the converse of "passive"—Appeal dismissed.* Appellant and his two daughters were, during the taxation years under review, the sole shareholders of Finning Securities Limited. This corporation and one other corporation were set up for the sole purpose of negotiating with the banks all commercial paper, mainly customers' notes received by a mother firm known as Finning Tractor and Equipment Company Limited. These notes usually bore interest at 8½ per centum and were sold to Finning Securities Limited which

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in turn pledged them to the bank for loans at 6 per cent, profiting by the spread in interest rates. During the taxation years, 1954, 1955 and 1956 Finning Securities Limited handled for the account of Finning Tractor and Equipment Company Limited 863 contracts of this nature with a gross value of over $5,000,000, making a net profit of over $50,000 and only 4 contracts for outsiders for a profit of less than $6,000. Respondent taxed the shareholders of Finning Securities Limited on the basis of it being a personal corporation. Appellant appealed from that decision to this Court. *Held:* That Finning Securities Limited was a personal corporation as defined by s. 68 of the *Income Tax Act*, R.S.C. 1952, c. 148. 2. That Finning Securities Limited "did not carry on an active financial, commercial or industrial business" as provided by s. 68(1) of the *Income Tax Act;* it did not advertise its business to the public, it had no telephone listing, it had no office or staff of its own, all its bookkeeping and other activities were carried on for it by Finning Tractor and Equipment Company Limited and by the staff of that company; it acquired only the trade and paper of that company which it discounted immediately at the banks pocketing the profits. 3. That the word "active" is the converse of "passive" which is defined as "suffering action from without . . . acted upon by external force, produced by external energy" and Finning Securities Limited was without any *active* financial, commercial or industrial business and was a personal corporation. EARL B. FINNING v. MINISTER OF NATIONAL REVENUE.................. 403

30.—*Income tax—Patent rights, sale of—Non-arm's length transaction—Capital cost allowance—Income Tax Act, S. of C. 1948, c. 52, ss. 127(1)(af), 127(5)(a)—Income Tax Act, R.S.C. 1952, c. 148, s. 20(4)(a)—Patent Act, R.S.C. 1952, c. 203, s. 49.* The appellant company was incorporated in 1952 to take over the assets and business of Golden Sprayers Ltd., a company which for a number of years had manufactured and sold farm chemical sprayers under patents owned by P, its president and controlling shareholder. After arrangements were made to obtain an underwriting of 250,000 shares of the new company at one dollar per share less 25 per cent commission, the subscribers to the Memorandum of Association chose P, P's son and three others, two of whom had been shareholders in the old company, as directors. The directors appointed P president and approved the allotment to him of 200,000 shares for the use of his patents, P taking no part in the voting. They also approved the purchase of the assets of the old company for 100,000 shares of the new company's stock. A return allotment filed with the Registrar of Companies showed the amount per share treated as paid up in cash for the shares allotted to

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P as $150,000. The appellant claimed a capital cost allowance for its 1953 taxation year of $8,816 in respect to the acquisition of the right to use the patents. The Minister disallowed the claim and re-assessed for an additional $3,921. The appellant's appeal to the Tax Appeal Board was allowed in part. On a further appeal to this Court. *Held;* That the right to the use of P's patents was "property" as defined by s. 127(1)(*af*) of the *Income Tax Act*, S. of C. 1948, c. 52, "a right of any kind whatsoever", and such a right, directly related to patents, is essentially depreciable property being coextensive to the 17 year duration of the patents themselves. (cf. *Patent Act*, R.S.C. 1952, c. 203, s. 49). 2. That under s. 127(5) of the *Income Tax Act*, 1948, P indisputably was "one of several persons by whom it (the appellant corporation) is directly or indirectly controlled" and therefore cannot be deemed to have dealt at arm's length with it in matters pertaining to this appeal. *Miron Freres Ltd. v. M.N.R.* [1955] Ex. C.R. 679; *M.N.R. v. Kirby Maurice Co. Ltd.* [1958] Ex. C.R. 77 at 84-5. 3. That under s. 20(4)(*a*) of the *Income Tax Act*, R.S.C. 1952, c. 148, the capital cost should be fixed at the cost to P the original owner, namely $700. GOLDEN ARROW SPRAYERS LTD. v. MINISTER OF NATIONAL REVENUE................ 432

31.—*Income tax—Income Tax Act, R.S.C. 1952, c. 148, s. 137(1)—Management company incorporated by solicitor—Management fees paid to the company not deductible—Income unduly or artificially reduced—Meaning of "unduly" and artificially"—Appeal dismissed.* Appellant, a solicitor, incorporated a company to act as manager of his office. He agreed to pay it $1,000 per month for which it was to provide all the non-professional services attendant upon his practice. It was to employ all the secretarial and clerical staff, purchase all the equipment, stationery and library and generally manage the office. In fact appellant continued to pay the non-professional staff, and in 1957 he also devoted half his time to the reorganization of the office, maintaining that he was acting as agent of the company. In December of 1957 he paid to the company the sum of $9,500 as a management fee. The company then purchased a home from appellant's wife agreeing to pay $19,000 and assume a mortgage. She then assigned the amount receivable to the appellant who gave her his note for $19,000. The appellant then received from the company the sum of $9,000 by way of payment on this obligation which was returned by him to the law office treasury as working capital. In his income tax return for 1957 appellant deducted this $9,500 paid to the management company and was later re-assessed by respondent who added that amount to his taxable income for the year 1957. Appellant now appeals from that re-assessment.

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Held: That the management agreement with the corporation and the way the transactions were carried out unduly or artificially reduced the income of the appellant and the fee paid to the corporation was not deductible from income by virtue of s. 137(1) of the *Income Tax Act*, R.S.C. 1952, c. 148. ISAAC SHULMAN v. MINISTER OF NATIONAL REVENUE.............. 410

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SALE BY FARMER WITH PRIOR DEALINGS IN REAL ESTATE.
See REVENUE, No. 10.

SALE FORCED BY FINANCIAL DIFFICULTIES.
See REVENUE, No. 1.

SALE OF FARM IN BLOC AT SUBSTANTIAL PROFIT.
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SALE OF INVENTORY ON CESSATION OF BUSINESS FOR LUMP SUM.
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SALE OF MINERAL RIGHTS BY OIL DRILLING COMPANY.
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SHIPPING—

1. Appeal from judgment of District Judge in Admiralty. No. 1.
2. Apportionment of blame. No. 1.
3. Collision in Quebec Harbour. No. 1.
4. Failure of both ships to comply with Regulations for Preventing Collisions at Sea. No. 1.
5. Negligence of officers of both ships. No. 1.
6. Regulations for Preventing Collisions at Sea, rules 25(*a*), 28 and 29. No. 1.

SHIPPING—*Appeal from judgment of District Judge in Admiralty—Collision in Quebec Harbour—Negligence of officers of both ships—Failure of both ships to comply with Regulations for Preventing Collisions at Sea—Apportionment of blame—Regulations for Preventing Collisions at Sea, rules 25(a), 28 and 29.* In an action and counterclaim for damages resulting from a collision in the Harbour of Quebec between the M.V. *Montrose* downward bound and the M.V. *Donnacona II* upward bound, the

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District Judge in Admiralty found that the *Donnacona II* was solely responsible for the collision. On an appeal from the judgment. *Held:* That those in charge of the *Donnacona II* were blameworthy for the reasons given by the trial judge, that the collision would not have happened had not *Donnacona II* failed to keep to starboard as required by Regulation 8 of the *St. Lawrence River Regulations*. 2. That one factor that brought this about was the failure of *Donnacona II* to keep a proper look-out as required by rule 29 of the *Regulations for Preventing Collisions at Sea*. 3. That another fault was her failure immediately before the collision to slacken speed in the face of obvious danger instead of proceeding at full speed ahead. 4. That the admissions of those in charge of the *Montrose* showed that contrary to the *Regulations for Preventing Collisions at Sea*, rule 28(a), the *Montrose* two minutes before the collision altered course without signaling on her siren, and that she was not as required by Rule 29 of the Regulations, maintaining a proper look-out. 5. That the violation of rules 28 and 29 by the *Montrose* constituted negligence which contributed to the collision. 6. That there was common fault of which 75% was attributable to the appellants and 25% to the respondents. THE MOTOR VESSEL *Donnacona II* AND HER OWNERS v. MONTSHIP LINES LTD., OWNERS OF THE MOTOR VESSEL *Montrose*............ 249

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SUFFICIENCY OF SUBJECT-MATTER.
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TARIFF BOARD ACT, R.S.C. 1952, c. 261, s. 5(9).
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1. Appeal dismissed. No. 1.
2. Confusing. No. 1.
3. Date of first publication. No. 2.
4. Failure to discharge onus. No. 2.
5. Industrial design. No. 2.
6. Industrial Design and Union Label Act, R.S.C. 1952, c. 150, ss. 7, 12(1), 14, 21, 25. No. 2.
7. Marking of articles. No. 2.
8. Onus of proving invalidity. No. 2.
9. Opposition. No. 1.
10. Presumption of validity of registration. No. 2.
11. Proof of ownership. No. 2.
12. Publication. No. 2.
13. Sufficiency of subject-matter. No. 2.
14. Trade Marks Act, S. of C. 1952-53, c. 49, ss. 12(1)(b) and (c), 37(2)(b) and (c). No. 1.

TRADE MARKS — *Confusing — Opposition—Appeal dismissed—Trade Marks Act, S. of C. 1952-53, c. 49, ss. 12(1)(b) and (c), 37(2)(b) and (c). Held:* That the word "MIKEDIMIDE" when sounded in English is deceptively misdescriptive of the character of wares in association with which it is used and is therefore within the class of marks excluded from registration by s. 12(1)(*b*) of the *Trade Marks Act.* PARLAM CORPORATION v. CIBA CO. LTD. 245

2.—*Industrial design—Industrial Design and Union Label Act, R.S.C. 1952, c. 150, ss. 7, 12(1), 14, 21, 25—Presumption of validity of registration—Onus of proving invalidity—Failure to discharge onus—Proof of ownership—Sufficiency of subject-matter—Publication—Date of first publication—Marking of articles.* Plaintiff, the registered owner of an industrial design known as a transparent acetate blister used for the ornamental display of its contents consisting in the instant case of bows and ribbons for tying and decorating wrapped articles, brings this action against defendant for the alleged infringement of such design. Defendant admits the infringement and pleads that the plaintiff's registration is invalid. The Court found for the plaintiff. *Held:* That in virtue of ss. 7(3) and 25 of the *Industrial Design and Union Label Act,* R.S.C. 1952, c. 150 the onus of proving that the plaintiff was not the owner of the design rested on the defendant who had failed to discharge the onus. 2. That the design by virtue of s. 7(3) of the Act was presumed to be validly registered and the evidence adduced confirmed that it had sufficient subject matter for the purpose. 3. That "publication" in s. 14(1) of the Act means the date when the article in question was first offered or made available to the public and the evidence showed that registration had been effected within one year from that date. 4. That the articles had been properly marked as required by s. 14(1) of the Act. RIBBONS (MONTREAL) LTD. v. BELDING CORTICELLI LTD. 388

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"VENTURE OR CONCERN IN THE NATURE OF TRADE".
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WHETHER EQUIPMENT PAYMENTS "RENT FOR USE IN CANADA OF PROPERTY".
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WHETHER PARENT COMPANY CARRYING ON BUSINESS IN CANADA.
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