1964

Sept. 14, 15, 16

Oct. 23

BETWEEN:

NORMAN R. WHITTALL .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Revenue—Income—Income tax—Acquisition and sale of shares—Ordinary investment—Adventure or concern in the nature of trade—Fiduciary duty of director or officer of company—Conflict of interest of taxpayer as company director and officer—Taxpayer's access to information obtained through fiduciary position of company director and officer—

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Profits from a business—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e).

This is an appeal from the re-assessment of the appellant by the respondent for income tax in respect of the taxation years 1952, 1953 and 1954, resulting from the acquisition and disposal by the appellant of shares in three companies and one syndicate, viz. Inland Natural Gas Co. Ltd., Yankee Princess Oils Ltd., Canadian Collieries (Dunsmuir) Ltd. and St. John's Trust Syndicate.

The appellant was at all material times President and a director of Norman R. Whittall Ltd., an investment dealer and stockbroker carrying on business in Vancouver, B C. This Company was wound up in 1954 and a successor company was incorporated known as Norman Whittall Ltd., in which the appellant is and was a shareholder, director and officer.

Held: That on the facts of this case the appellant in respect of the acquisition of all the securities in question was endeavouring to make a profit by a trade or business, and was actually engaged in this business at all material times and the profitable sales and exchanges of securities were not in law a substitution of one form of investment for another.

2. That the appellant assisted materially in the marketing of the securities in question, which brought substantial gain to himself and the turning of these investments into profit was not merely incidental to but instead was the essential feature of his personal trading operation or business speculations.

3. That the investments under review, the realization of which produced the profit, were not ordinary investments within the meaning of the *Irrigation Industries Ltd. v. Minister of National Revenue* and the *Californian Copper Syndicate v. Harris* cases.

4. That the appellant was in a fiduciary relationship as a director, and in some cases also as an officer, of the various companies concerned and because of this relationship he was in a position to and did avail himself of the opportunity to make the trading profits in question.

5. That a director of two companies which deal with each other owes a fiduciary duty to each of them and to their respective shareholders that he will not exercise his powers as director in such a way as to benefit himself at the expense of the remaining shareholders, that he will not deal on behalf of the company with himself when there is a personal conflicting interest and he may only take up shares in a company of which he is a director on the same terms as the general public.

6. That because of the various fiduciary relationships in which the appellant was at the material times and the conflicts of interest which resulted, none of the investments of the appellant under review were ordinary investments within the meaning of the *Irrigation Industries Ltd. v. Minister of National Revenue* case.

7. That the conclusion is irresistable that the financial success of the transactions in question, in a most substantial way, was attributable to the fact that the appellant was able to use and act on information obtained through his fiduciary relationships and as a consequence the appellant in respect of these transactions was a trader in securities and not an investor.

8. That the appeal is dismissed.

APPEAL under the *Income Tax Act.*

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The appeal was heard before the Honourable Mr. Justice Gibson at Victoria.

D. McK. Brown, Q.C. and *R. A. C. McColl* for appellant.

H. J. Grey and *F. D. Jones* for respondent.

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

GIBSON J. now (October 23, 1964) delivered the following judgment:

This is an appeal from the re-assessment by the Minister of National Revenue for income tax made against the appellant in respect to the taxation years 1952, 1953 and 1954, wherein respectively, by reason thereof, he was assessed tax in the sums of $219,562.01, $74,223.38 and $151,527.64.

In this appeal at the outset, it should be noted that there are the circumstances surrounding the acquisition and disposal of shares in three companies and one syndicate in the years 1952, 1953 and 1954 which have to be considered, namely:

(1) St. John's Trust Syndicate,

(2) Inland Natural Gas Co. Ltd,

(3) Yankee Princess Oils, Ltd., and

(4) Canadian Collieries (Dunsmuir) Ltd. (changed in name in 1958 to Canadian Collieries Resources Ltd.)

It should also be noted that some of these three companies either had their origin in other companies, or purchased shares or assets of other companies or of so-called syndicates. For this reason reference will be made in these reasons to the Wilson Syndicate, Peace River Natural Gas Co. Ltd., St. John's Trust Agreement, St. John Gas and Oil Ltd., Canadian Northern Oil and Gas Co. Ltd., West Coast Transmission Co. Ltd., Northwest Syndicate, Inland Natural Gas Co. Ltd., Pacific Petroleums Ltd., Yankee Princess Oils Ltd., Canadian Atlantic Oil Co. Ltd., Canadian Oil and Gas Ltd., Canadian Collieries (Dunsmuir) Ltd. (later changed the name to Canadian Collieries Resources Ltd. in the year 1958), Canadian Weldwood Ltd., and other companies.

The adjustments for taxable income, which are the subjects of this appeal, made by the Minister on the re-assessment notices for the years 1952, 1953 and 1954 read as follows:

For the year 1952:		
Taxable Income previously assessed		$ 81,923.43
Add:		
Share of proceeds re sale of St. John's Trust Syndicate units $116,500.00		
Less:		
Cost of interest in 4 Wilson Syndicate units	7,500 00	109,000 00
Profit on sale of shares of Yankee Princess Oils Ltd. acquired during promotion and reorganization of Yankee Princess Oils Ltd.—		
Sales January 29, 1952 to April 21, 1952, per schedules filed— 105,250 shares $110,157.34		
Less: Purchase of January 31, 1952 shown as sale in error—500 shares	383 06	
	$109,774.28	
Sale of March 5, 1952—not included in schedule filed—2,000 shares	2,135 00	
	$111,909.28	
Deduct: Cost of shares sold:		
92,800 shares $6,750.00		
13,950 " @ 7½¢ 1,046.25	7,796.25	104,113.03
Adjusted Taxable Income now assessed		$295,036.46
For the year 1953:		
Taxable Income previously Assessed		$ 50,928.96
Add:		
Proceeds of sale of shares of Inland Natural Gas Co. Ltd., which were received from St. John's Trust Syndicate in 1952 .....$ 77,285 05		
Less: Cost of same @ $1.00 per share	37,500 00	39,785.05
Proceeds of sale of shares of Canadian Collieries (Dunsmuir) Ltd. purchased from Sunray Oils through participation in purchases by Ross Whittall Ltd.:		
14,650 shares .....$ 93,203.75		
Less: Cost @ $3.50 per share	51,275 00	41,928.75
Adjusted Taxable Income Assessed		$132,642.76

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For the year 1954:			
Taxable Income previously assessed			$ 92,645.31
Add: Proceeds from sale of shares of Inland Natural Gas Co. Ltd. which were—			
(1) Received from St. Johns Trust Syndicate in 1952 and			
(2) acquired by exchange as a result of the purchase of Canadian Northern Oil & Gas Co. Ltd. shares which were underwritten by Ross Whittall Ltd. .....$	55,721 50		
Less: Cost at $1.00 per share	21,000.00		34,721.50
Proceeds of sale of shares of Canadian Collieries (Dunsmuir) Ltd., which were acquired through participation with Ross Whittall Ltd. in purchase from Sunray Oils 10,350 shares .....$	89,446.88		
Less: Cost price at $3.50 per share ..	36,225.00		53,221.88
Proceeds from sale of Canadian Collieries (Dunsmuir) Ltd. shares acquired as a result of an option from Can. Collieries (Dunsmuir) Ltd. to purchase shares in that company—which option was acquired at a time when Ross Whittall Ltd. underwrote an issue of that company's shares—			
14,650 shares .....$	132,200 16		
Cost at $4 00 per share	58,600.00		73,600.16
Adjusted Taxable Income assessed ..			$254,188.85

The appellant at all material times was President and a Director of Norman R. Whittall Ltd., a company incorporated under the laws of British Columbia and carrying on business as investment dealers and stockbrokers, with place of business at 424 Burrard St., in the City of Vancouver, B.C.

Ross Whittall Ltd. was wound up in the year 1954 and a successor company was incorporated known as Norman R. Whittall Ltd.

In this company the appellant and his son H. Richard Whittall (who was also an appellant in another case) are and were shareholders, directors and officers at all material times.

It was the submission of the appellant in this appeal that shareholdings at all material times were "ordinary

investments" within the meaning of the jurisprudence concerning the same and that any profit which he made on the realization of any of these shares was capital and not income within the meaning of the *Income Tax Act*. On the contrary, the respondent, the Minister of National Revenue, submitted on this appeal that the transactions entered into by the appellant whereby the shares in these companies were obtained and realized upon were entered into as a scheme for profit making and with the intention of making a profit and the profit gained or received and derived by the appellant in these transactions was a profit or gain received or derived from a trade or business of the appellant and was income within the meaning of sections 3 and 4, and section 139(1)(e) of the *Income Tax Act*.

The appellant, the only witness, gave oral evidence and in addition there were entered as exhibits a large number of documents and memoranda.

According to the evidence, in the year 1952, the appellant Norman R. Whittall owned 67½% of the proprietary interest in the brokerage firm of Ross Whittall Ltd., which carried on a brokerage business on a commission basis and at times took part in underwriting security issues, and which was a member of the Vancouver Stock Exchange, a member of the Dealers and Brokers Association of Canada and various other investment and brokerage organizations. It dealt with clients in British Columbia and elsewhere.

The evidence dealt with the history of the acquisition and disposal of shares in the various companies and syndicates at various times and the transactions were not dealt with in evidence year by year to tie in by time sequence with the assessment notices.

The evidence adduced in support of the submission of the appellant that the profit realized on the sale of St. John's Trust Syndicate units and of Inland Natural Gas Co. Ltd. shares was not income was quite detailed and fairly complex.

RE: ST. JOHN'S TRUST SYNDICATE UNITS AND INLAND NATURAL GAS CO. LTD.

In February, 1952, the appellant acquired through Frank McMahon and George McMahon of Calgary, Alberta, one and one-half units (out of four units which the latter had available) in what was called the Wilson Syndicate, and Frank and George McMahon kept two of these units

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themselves. One-quarter of one of these units was acquired by the son of the appellant, H. Richard Whittall, and the other one-quarter of one unit was acquired by William K. McGee, an associate of the appellant in Ross Whittall Ltd.

There were forty units in total in the Wilson Syndicate.

The Wilson Syndicate owned a 10% "carried interest" in Permit No. 22 which was a right granted by the Province of British Columbia to prospect for and develop petroleum and natural gas on about one hundred thousand acres in the northern part of British Columbia known as the Fort St. John area which is near Dawson Creek.

This 10% "carried interest" was acquired from one Innes who was an applicant to the British Columbia Government for Permit No. 22, and who withdrew his application in favor of another applicant, namely, Peace River Natural Gas Co. Ltd., which was issued Permit No. 22 and for withdrawing Innes received a 10% "carried interest" in Permit No. 22.

Peace River Natural Gas Co. Ltd. at that time was a wholly owned subsidiary of Pacific Petroleums Ltd. Pacific Petroleums Ltd. was a company formed by the merger of several companies in 1936 and 1937, and prominent in the management and ownership of it were the said Frank McMahon and George McMahon of Calgary, Alberta.

In 1952 the appellant was a director of both Pacific Petroleums Ltd. and Peace River Natural Gas Co. Ltd.

A "carried interest" obviated the legal requirement of its owner to put up any money for drilling or other exploration expenses. Only if a property (in respect of which there was a carried interest) proved itself were these costs recoverable out of the revenues derived from the well or wells on such property, which costs would be deducted on a pro rata basis from the revenues accruing to all interests including the "carried interest", before distribution of any net proceeds of such revenue to the various owners of interests.

At that time, according to the evidence, neither West Coast Transmission Co. Ltd., Peace River Natural Gas Co. Ltd., or Pacific Petroleums Ltd. had any interest in this 10% "carried interest".

Pacific Petroleums Ltd., however, had the largest single interest in the other 90% of Permit No. 22 and also an interest in what was known as Permit No. 30.

The other owners in 1952 of the 90% interest in Permit No. 22, besides Pacific Petroleums Ltd., were Hudson's Bay Gas Co. Ltd., Union Oil of California, Peace River Oil Co. of Tulsa, Oklahoma, and certain other large oil companies.

In Permit No. 30, Ross Whittall Ltd. had a 6% interest and also a 20% interest in part of it. There were a number of other persons who owned interests in it, including the McMahon brothers.

The evidence disclosed that Pacific Petroleums Ltd. at this time had drilled on property included in Permit No. 22, and had discovered oil but it was not of great commercial quality or value. (The appellant called this well at this time a "teaser"—a term employed in the security market.)

The next thing that took place, at the suggestion of the McMahon brothers of Calgary, Alberta, was the pooling of certain interests in Permits No. 22 and 30, so that there would be a larger geographical spread thereby increasing the likelihood of getting gas and oil for these owners of interests and also thereby spreading the drilling costs among more persons.

This pooling arrangement as implemented, constituted what was known as the St. John's Trust Agreement, which was filed as Exhibit A-1.

By this contract, the McMahon brothers' two units in the Wilson Syndicate, the one and one-half units owned by the appellant in the Wilson Syndicate, the two one-quarter interests owned by H. Richard Whittall and William K. McGee, and the interests of Ross Whittall Ltd. in Permit No. 22 and in Permit No. 30 were placed in the St. John's Trust Agreement.

The St. John's Trust Agreement in total consisted of the following: one and one-half shares of the appellant in the Wilson Syndicate, two shares in it of the McMahon brothers, and two one-quarter shares in it of H. Richard Whittall and William H. McGee. In addition Ross Whittall Ltd. had an interest in the nearby but not contiguous Permit No. 30. Ross Whittall Ltd.'s interest had originally consisted of a 4½% interest in a block carved out of Permit

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No. 22 which had been consolidated with a block formed out of Permit No. 30 in which Ross Whittall Ltd. had a 6% interest. Ross Whittall Ltd. also had a 20% interest in the remainder of Permit No. 30. Ross Whittall Ltd. had sold to the McMahon brothers (represented in the St. John's Trust Agreement, Exhibit A-1, by the Eastern Trust Company and John McMahon) for the sum of $13,000, a 51% share in its interests above described, subject to a "carried interest" reserved by Ross Whittall Ltd., to the extent of 25%. The McMahon brothers assigned this 51% and Ross Whittall Ltd. assigned its remaining 49% to the St. John's Trust Agreement.

In this connection it should be noted that the only thing left out of the St. John's Trust Agreement was a 25% "carried interest" which remained with Ross Whittall Ltd.

In summary, therefore, the St. John's Trust Agreement had three interests in it, namely, firstly the "participating" interest to the extent of 4½% which obligated the owners of it to pay their proportionate share of drilling expenses, etc., namely, 4½%; secondly, the "carried interest" of 1% in Permit No. 22 and the 20% interest in 190,000 acres in Permit No. 30 and thirdly, the 6% "participating interest" in Permit No. 30 which was concerned with 10,000 acres.

In total there were 164½ units in the St. John's Trust Agreement and the owners of the unit certificates were as set out on page 6, paragraph 6, of that agreement, Exhibit A-1, *viz.*:

The Eastern Trust Company	46
John McMahon	39½
E. W. Mason (i.e, Norman Whittall, the appellant)	27
Ross Whittall Ltd.	43
H. Richard Whittall	4½
William K. McGee	4½
Total	164½

The 27 units in that agreement owned by the appellant were in the name of his confidential secretary, E. W. Mason, who was trustee for him.

These 27 units in the St. John's Trust Agreement were subsequently, on October 15, 1962, sold to St. John Gas and Oil Ltd. and in the result 710,000 shares in Inland Natural Gas Co. Ltd. were obtained by the appellant for them.

It is in respect to this transaction that the appellant was assessed for the year 1952.

The respondent alleges that the value of the Inland Natural Gas Co. Ltd. shares the appellant received from the sale of his interest in the St. John's Trust Agreement was $116,500 and that the difference between that sum and the cost to the appellant of his original units in the Wilson Syndicate, *viz.*, $7,500 which was $109,000, was taxable income.

The appellant at this time was a director in both St. John Gas and Oil Ltd. and Inland Natural Gas Co. Ltd.

The evidence showed that at the time the Wilson Syndicate was originally formed, no drilling had taken place, but that after that time in April, 1952, there was drilled one well which was known as Fort St. John No. 7 and in May, 1952, there was drilled another well called Fort St. John No. 9.

In respect to the costs of these drillings, which costs were respectively approximately $128,000 and $195,000 it appears that the participating members of the St. John's Trust Agreement received notice of the proposal to incur the same and did in fact put up their proportionate share of the drilling costs.

The appellant said that the decision as to these drillings was made by the Pacific Petroleum Co. Ltd., Union Oil of California, Sunray Oil of Tulsa, Oklahoma, and the other oil companies who owned interests in Permit No. 22, and not by him.

The actual costs of the drilling that the St. John's Trust Agreement people had to put up amounted to approximately $15,000 and the appellant said that he put up his proportionate share, namely, the proportionate cost as 27 units bears to 164½ units of 4½% of the cost.

It turned out that Fort St. John Wells Nos. 7 and 9 were large gas wells and as a result Permits Nos. 22 and 30 became valuable and many oil companies became interested in further drilling.

The appellant said that as a director of some of these companies, such as Pacific Petroleums Ltd., Westcoast Transmission Co. Ltd. and the Peace River Natural Gas Co. Ltd., that he might have known of the plans for drilling on the property in Permit No. 20.

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As a result of the success of these gas wells Nos. 7 and 9 at Fort St. John, Westcoast Transmission Co. Ltd., in order to market the gas, wished to build a pipe line from Fort St. John to the British Columbia-State of Washington border in order to sell the gas in the United States market. The British Columbia market could not take enough gas to pay for the pipe line which it was estimated would cost over $20,000,000, so a market had to be found also in the United States.

The evidence was that the Canadian Federal Board of Transport Commissioners would give no permission to export gas out of Canada until the British Columbia market was fully serviced.

It was at this stage that Westcoast Transmission Co. Ltd. arranged to get B.C. Electric Co. Ltd. and Inland Natural Gas Co. Ltd. as substantial purchasers of gas before the necessary permits could be obtained from the Canadian and United States authorities.

The appellant was a Director of Westcoast Transmission Co. Ltd., at this time, when he was asked by the Directors of Westcoast Transmission Co. Ltd. to form Inland Natural Gas Co. Ltd for it. This he did.

In addition, Inland Natural Gas Co. Ltd. subsequently went about acquiring property so that it would not be dependent on Westcoast Transmission Co. Ltd. entirely for gas and as a result Inland Natural Gas Co. Ltd. formed a wholly owned subsidiary which became known as Fort St. John Oil and Gas Co. Ltd. This company was formed for the purpose, therefore, of holding the gas rights and interests in lands for Inland Natural Gas Co. Ltd.

The next thing that happened was the making of an offer to the Fort St. John Trust Agreement people, above referred to, by Fort St. John Oil and Gas Co. Ltd. to purchase their interests in the permits above referred to. As stated above, the offer was for $710,000 for the 164½ units in it, and it was conditional upon the owners of those units buying 710,000 shares of Inland Natural Gas Co. Ltd. at a $1 per share, which they all did.

This agreement was dated October 15, 1952, and was filed as Exhibit A-4 in this appeal.

In due course, the appellant received his proportionate share of the 710,000 shares in Inland Natural Gas Co. Ltd., namely, 116,500 shares.

As mentioned above, it is in respect of these 116,500 shares at $1 per share that the appellant was assessed for the year 1952.

The respondent says that this was the equivalent of a receipt of cash of $116,500.

At this same time, another agreement was entered into. (This was the letter agreement dated October 14, 1952, and is Exhibit A-5, filed in this appeal.) It shows how the shares in Inland Natural Gas Co. Ltd. were acquired in these transactions.

When these agreements were implemented, the St. John's Trust Agreement people were relieved of their obligations to put up certain development monies, which is referred to in clause 4 of the agreement, Exhibit A-4, dated October 14, 1952.

At this stage, therefore, and as a result of these transactions, the appellant owned 15½% of the Inland Natural Gas Co. Ltd.

Thereafter, more wells, other than Fort St. John Nos. 7 and 9, were drilled and became valuable so that in the year 1953 the appellant alleges he found it desirable to sell certain shares he had acquired in the above manner, in the Inland Natural Gas Co. Ltd., and it is in respect to certain of the profits on sales of such shares that the appellant for the taxation year 1953 was assessed $77,285.05 less the cost of same at a $1 per share of $37,500 for a net taxable item of income of $39,785.05. (See adjustments for taxable income on the re-assessment notice for 1953, above recorded.)

In other words this assessment for the taxation year 1953 concerns the sale by the appellant of certain of the shares of Inland Natural Gas Co. Ltd. which he had acquired pursuant to the letter agreement dated October 14, 1952, Exhibit A-5, through the agreement, Exhibit A-4.

In this connection, there was filed a record of all the purchases and sales, made by the appellant, of Inland Natural Gas Co. Ltd. and of the shares of the other companies which are the subject of this appeal. This document is Exhibit A-6 and was prepared by the auditors of the appellant, namely, Peat, Marwick & Mitchell. On pages 7,

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8 and 9 of it, the dealings in the shares of Inland Natural Gas Co. Ltd. by the appellant are recorded.

The appellant submitted that at the material time when he liquidated certain of these Inland Natural Gas Co. Ltd. shares it was a prudent liquidation in view of the difficulties that were then being encountered by Westcoast Transmission Co. Ltd. (of which the appellant was a director) in obtaining export permits from both the Canadian Board of Transport and the United States Power Commission. At the same time, the appellant stated that Inland Natural Gas Co. Ltd., because it had not received these permits, had not obtained any firm franchises from any of the municipalities in the inland of British Columbia which it hoped to obtain in order to be the supplier of gas through Westcoast Transmission Co. Ltd.

On August 11, 1953, the appellant had exchanged 36,000 shares of Canadian Northern Oil and Gas Ltd., which he had purchased for 50¢ on a two-share for one-share basis for Inland Natural Gas Co. Ltd. shares. At that time the appellant was a director of both Canadian Northern Oil and Gas Ltd. and Inland Natural Gas Co. Ltd.

In the year 1954 the appellant made a further liquidation of certain shares in Inland Natural Gas Co. Ltd. and in respect of this the appellant was assessed by the respondent a net of $34,721.50. (See adjustment for taxable income on the re-assessment notice for 1954, above recorded.) Again, the appellant said in evidence that he sold because of the difficulty that Westcoast Transmission Co. Ltd. was having in obtaining permits so as to be in a position to deliver to Inland Natural Gas Co. Ltd. and as a result the appellant thought that the stock was overpriced in the market at the time.

The appellant said that at the material time he was active in the negotiations of Westcoast Transmission Co. Ltd., being a director of it, and that this information concerning the difficulties of Westcoast Transmission Co. Ltd. with the U. S. Federal Power Commission and the authorities of the Canadian Department of Transport came to him in that capacity.

The next transaction in shares in respect to which the appellant was assessed concerned shares in Yankee Princess Oils, Ltd.

RE: YANKEE PRINCESS OILS, LTD.

For the year 1952, the appellant, in respect to transactions concerning shares in Yankee Princess Oils, Ltd., was declared to have income in the sum of $104,111.03.

The acquisition of shares in this company by the appellant commenced with the interest the appellant had in C. P. R. Permit No. 257 which Yankee Princess Oils, Ltd. obtained.

This permit covered acreage in the Province of Alberta and the interest in this permit in 1944 was owned by one D. C. MacDonald, who was at that time in arrears of rent for it to the Government of Alberta. At that time Neil McQueen of Calgary, Alberta, the appellant says, asked him if he was interested in acquiring part of it and the appellant, along with one Ross of the firm of Ross Whittall Ltd., on August 31, 1944, along with others, acquired the interest of D. C. MacDonald in this permit.

The interest of D. C. MacDonald in C.P.R. Permit No. 257 as purchased was divided into shares which were distributed as follows:

(1) 37½% to Neil McQueen,
(2) 37½% to the appellant, Norman Whittall,
(3) 12½% to Mr. Ross, and
(4) 12½% to Ross Whittall Co. Ltd.

The purchase price for this interest in C.P.R. Permit No. 257 at that time was the payment of two or three years of rent in arrears.

This permit gave the owners of it the right to explore, prospect and develop almost 10,000 acres of land in Alberta.

From 1944 to 1948, when the rights to 4,162 acres of this permit were sold to Yankee Princess Oils, Ltd., this group paid the annual rentals which amounted to about 10¢ per acre, or, in other words, about $416.20 per year.

On September 24, 1948, Yankee Princess Oils, Ltd. was incorporated. The applicants for the charter of that company were Henry Tudor and his wife, from Boston, Massachusetts. Henry Tudor acted for Yankee Princess Oils, Ltd. and as its first purchase it acquired this interest in part of C.P.R. Permit No. 257 consisting of 4,162 acres above mentioned. The contract of sale was made through Neil McQueen and Yankee Princess Oils, Ltd. paid for this interest $20,000 in cash, $18,000 in promissory notes and it also gave 54,000 treasury shares at 5¢ per share.

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The appellant for his interest in this sale received $7,762.50 cash, $6,650 in promissory notes and 20,250 shares in Yankee Princess Oils, Ltd.

In March, 1951, the capitalization of Yankee Princess Oils, Ltd. was increased to 3,000,000 shares. The company had been dormant up to that time and was not listed on any stock exchange; but nine months later the company was changed to a public company and the capital stock was changed from no par value to par value shares.. The only shareholders at that time were Henry Tudor and his group and the group to which the appellant belonged. As a result, 630,000 shares were issued and the promissory note holders were given an opportunity to convert their notes into shares at the price of 7½¢ per share.

The evidence also was that in August, 1950, the appellant and Ross had sold to Ross Whittall Ltd. their notes received from Yankee Princess Oils, Ltd. for 80% of their par value; and Ross Whittall Ltd. at this juncture exchanged these notes for shares in the Yankee Princess Oils, Ltd. at the rate of 7½¢ per share.

In accordance with this arrangement, the appellant exchanged his former shares for the new par value shares in Yankee Princess Oils, Ltd.

In addition, in March, 1951, for $800 the appellant had bought a 40% interest in a spread of 25 quarter sections under lease for $1 per acre from the Alberta government. In other words, he received a 10% interest in this spread of acreage. This acreage was located in an area where oil was indicated.

On December 21, 1951, Yankee Princess Oils, Ltd. purchased this 40% interest of 25% interest for $38,000 and paid for it as follows, namely, by the payment of $8,000 cash and the balance by issuance of its treasury shares at 7½¢ per share.

It was a condition of this arrangement that all owners of the interest in this spread of acres agree to sell and for this purpose the lawyers representing Yankee Princess Oils, Ltd. prepared a contract constituting a syndicate called the North West Syndicate, a copy of which contract was filed as Exhibit A-10, and it was this vehicle, so to speak, through which the transaction was completed with Yankee Princess Oils, Ltd. pursuant to the contract, Exhibit A-9, dated December 11, 1951.

North West Syndicate, according to the evidence, only lasted long enough to complete this transaction, which took about one day.

The appellant stated that his reasons for selling his interests in this spread of acres to Yankee Princess Oils, Ltd. was to get rid of his obligations to drill, which obligations were being taken over by a company which could carry out the drilling obligations, and at the same time he could retain his investment.

Out of this transaction, the appellant obtained 40,000 shares in Yankee Princess Oils, Ltd. and all other members of the North West Syndicate took shares in Yankee Princess Oils, Ltd.

Around this time also the appellant purchased another 65,000 shares in Yankee Princess Oils, Ltd. and this came about because Henry Tudor offered Ross Whittall Ltd. 100,000 shares at $7\frac{1}{2}¢$ and the appellant purchased 65,000 of these shares from Ross Whittall Ltd. at $8¢$, the differential being made up in the commission paid to that firm.

The appellant also said, speaking generally, that in the case of practically 90% of all syndicates or groups which were successful, their interests were taken over by purchase by larger oil or gas companies. In this connection, he noted that subsequently (i.e., between 1954 and 1964), Yankee Princess Oils, Ltd., was taken over by Medallion Petroleums Ltd. at about $85¢$ per share and that now Medallion Petroleums Ltd. has been taken over by Canadian Industrial Gas Ltd., which was a $20,000,000 corporation and which in turn is controlled by Power Corporation Ltd.

The appellant said that any investment in interests in oil or gas lands which was successful had its origin similar to the subject investment, and that there were always various exchanges and stages of holdings before it emerged in its final form.

In this regard, it should be noted that the start of all of this, in so far as the appellant was concerned, was his interest in C. P. R. Permit No. 257.

When all this was accomplished, by December, 1951, the appellant owned 10% of Yankee Princess Oils, Ltd. shares of which there were outstanding a total of 1,250,000 shares.

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The appellant had become a director of Yankee Princess Oils, Ltd. when it became a public company. Prior to becoming a public company, it had obtained another oil lease, namely, on January 2, 1951, being a farm-out from Atlantic Oil Company Ltd. This farm-out obligated Yankee Princess Oils, Ltd. to pay all costs of drilling and after subtracting these costs it was to retain 50% of the net profit from any revenue obtained from production.

In order to raise funds to develop these interests in lands, the evidence was that it was necessary for Yankee Princess Oils, Ltd. to become a public company and at the end of January, 1952, a notice was sent out calling for an extraordinary general meeting for such purpose and because of what subsequently transpired it became a public company.

Yankee Princess Oils, Ltd. then entered into an underwriting agreement with Ross Whittall Ltd. and sold to it a million shares. These shares were released to the public market early in February, 1952.

Prior to this and after February, 1952, as appears from Exhibit A-6, the appellant had sold 40,000 shares in Yankee Princess Oils, Ltd. at 85¢.

At that time, as stated, he was a director of Yankee Princess Oils, Ltd. and a 10% shareholder and a director of Ross Whittall Ltd. who were underwriting and selling to the public 1,000,000 shares in Yankee Princess Oils, Ltd.

The price of the stock went up after its initial issue to the public but finally settled down to around 85¢ per share which was the price these shares were sold to Medallion Petroleum Ltd.

On February 7, 1952, a telegram was received by Ross Whittall Ltd. that a well of Yankee Princess Oils, Ltd. was successful. This was filed as Exhibit A-12.

In this underwriting, Ross Whittall Ltd. made a commitment to underwrite 350,000 shares of Yankee Princess Oils, Ltd. shares at 48¢ net to the treasury, retailing to the public at 60¢ and also took an option for 650,000 shares and the commitment was fulfilled and the option exercised immediately and the stock was all sold.

The underwriting agreement with Ross Whittall Ltd. dated January 31, 1952, was filed as Exhibit A-13 in this appeal.

On February 5, 1952, as stated, and on April 21, the appellant sold substantial shares in Yankee Princess Oils, Ltd. in the market.

The appellant stated that in his opinion the shares were worth 85¢ at the time and were so sold with the idea that when the boom was over he could buy them back. He stated that it was his policy to earmark part of his fortune in oil and had the philosophy that some oil wells bring back "your bait" only but others produced substantial returns, depending on the size of the well.

Again, in 1953, the appellant sold further shares in Yankee Princess Oils, Ltd. but the Department did not make any assessment in respect to the net profit made in the realization of these shares.

The next transaction in shares for which the appellant was assessed was in respect to shares in Canadian Collieries (Dunsmuir) Ltd. for the taxation years 1953-1954.

RE: CANADIAN COLLIERIES (DUNSMUIR) LTD.
(NAME CHANGED IN 1958 TO CANADIAN COLLIERIES RESOURCES LTD.)

The appellant for the taxation year 1953 was re-assessed by the Minister increasing his taxable income (by reason of certain sales of shares in Canadian Collieries (Dunsmuir) Ltd.) in the net sum of $41,928.75, and for the taxation year 1954, in the net sum of $53,221.88.

In this matter, the evidence was that Sunray Oils Ltd. became the owner of a block of shares in Canadian Collieries (Dunsmuir) Ltd. in the summer of 1952.

Sunray Oils Ltd. was a United States corporation, and at that time it had a large number of oil interests in Alberta, and it had acquired 243,000 shares of Canadian Collieries (Dunsmuir) Ltd.

The appellant was president and a director of Canadian Collieries (Dunsmuir) Ltd. when these material purchases and sales of shares (hereinafter referred to) were made by him, and he had been since 1945.

In November, 1953, the appellant was offered through a Mr. Wright, the President of Sunray Oils, Ltd., a block of 100,000 shares of Canadian Collieries (Dunsmuir) Ltd. (out of the said 243,000 shares it held) at a price of $3.50 per share. This was about the market value of the shares at that time on the Vancouver Stock Exchange.

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The appellant approached Frank McMahon and George McMahon to see if they were interested in taking some of these shares and in the result they agreed to take and did buy 50,000 of these shares.

The appellant bought 25,000 of these shares and his son H. Richard Whittall bought 2,500 and W. H. McGee bought 2,500, and the balance of 20,000 of these shares was bought by Ross Whittall Ltd.

This purchase took place about the end of November, 1953.

The appellant said that, in his view, there was no change in the prospects in the mines and minerals holdings of Canadian Collieries (Dunsmuir) Ltd. in Alberta at that time, which holdings were in the Pembina area. The wells in the Pembina area at that time, the appellant said, had to be pumped to get oil.

The appellant said that he was interested in seeing that these 100,000 shares of Canadian Collieries (Dunsmuir) Ltd. were in "safe hands", as he put it, and that this was one of the motives impelling him to make this arrangement regarding the acquisition of this block of 100,000 shares.

The appellant said that he did not buy the shares through Ross Whittall Ltd. (as was alleged in the wording of the re-assessment notice). Instead, the balance of 20,000 shares to make up what was left out of the 100,000-share lot was taken by Ross Whittall Ltd. No brokerage was paid in respect of the other acquisitions because no purchase and sale of them was made through Ross Whittall Ltd.

The appellant, as appears from page 2 of Exhibit A-6, commenced almost immediately to sell some of these shares after he acquired them. He sold 5,000 shares on December 1, 1953, and about 15,000 shares during the last fifteen days of December, 1952, through Ross Whittall Ltd.; and by the end of January, 1954, he had in effect disposed of 25,000 shares of Canadian Collieries (Dunsmuir) Ltd. which is equivalent to the number of shares he had obtained out of this block from Sunray Oils Ltd.

The appellant said that from 1945 he was a shareholder to the extent of 20,000 shares in Canadian Collieries

(Dunsmuir) Ltd. and from 1954 to 1964 his share interest was maintained and in 1946 when the Canadian Weldwood Ltd. bought out the shares in Canadian Collieries Resources Ltd. (until 1958 Canadian Collieries (Dunsmuir) Ltd.) he was the holder of 100,000 shares in this latter company.

The appellant said that from 1948 to 1952 the stock had been priced on the stock exchange from $1.98 to $4 per share and then in 1953 the stock did go as high as $9 per share. The appellant said that during the period 1953-1954 his holdings did not fall below 25,000 shares.

Speaking generally, in respect to all the shares in these companies, which were mentioned in evidence, the appellant stated that the Inland Natural Gas Co. Ltd. is currently paying a dividend; Canadian Collieries Resources Ltd. would have started paying dividends this year if it had not been taken over by Canadian Weldwood Ltd.; and that when Medallion Oil Co. Ltd. took over Yankee Princess Oils, Ltd., he had 20,000 shares in the latter company; that in any of these purchases of shares he did not borrow funds but instead the purchases were made out of surplus funds of his own; that Ross Whittall Ltd. itself had an investment account and that its policy in respect to investments in this account was that none of them would be sold for at least eighteen months after purchase.

In addition the appellant filed his income tax returns for the years 1952 to 1955, which are Exhibit A-14, which set out the substantial income he received from his employment in the business of Ross Whittall Ltd., which he alleged was his main occupation, and at which he spent his time.

In respect to all these transactions, as mentiond above, the appellant was a shareholder, director and/or officer of the following companies at the material times, namely, Pacific Petroleums Ltd., Peace River Natural Gas Co. Ltd., Westcoast Transmission Co. Ltd., Yankee Princess Oils, Ltd., Inland Natural Gas Co. Ltd., St. John Oil and Gas Co. Ltd., Canadian Northern Oil and Gas Ltd., Canadian Collieries (Dunsmuir) Ltd., Ross Whittall Ltd. and Norman R. Whittall Ltd.

In argument counsel for the appellant submitted that the appellant was in law an investor in his personal capacity and was not engaged in the business of trading in securities

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by reason of his employment in Ross Whittall Ltd. (*Sherer v. Zacks*[1] and *Davidson v. Minister of National Revenue*[2]); that the activities of the company Ross Whittall Ltd. were separate and apart from the personal investment activities of the appellant *Solomon v. Solomon*[3]; that all the appellant's trading activities were transferred and done in Ross Whittall Ltd. and were within the exclusion in the statutory definition of "business" contained in section 139(1)(*e*) of the *Income Tax Act,* namely, as defined by the words there employed, that is, "but does not include an office or employment" that the securities, the profit on the realization of which, the respondent taxed were an ordinary investment within the meaning of the cases *Californian Copper Syndicate v. Harris*[4] and *Irrigation Industries Ltd. v. Minister of National Revenue*[5], and so not taxable as income; that an ordinary investment within the jurisprudence was not an absolute or fixed standard but a variable one depending on who was the investor and what his position was and his statutory limitations, if any (as, e.g., an executor of a will); that although Ross Whittall Ltd. had done certain of the underwriting for the public issue of shares in Canadian Collieries (Dunsmuir) Ltd., Canadian Northern Oil and Gas Co. Ltd., Inland Natural Gas Co. Ltd., and Yankee Princess Oils, Ltd., there was no legal proposition that an investor should be taxed on an investment made during the period when the underwriting limited company of which such an investor was a member, was doing an underwriting of that particular investment; that the frequency of sales of investments is not a criterion, *Commercial Investment Co-op, v. Minister of National Revenue*[6]; and that special skill such as that of the appellant in financial matters is of minor importance in deciding the issue herein. *Edwards v. Bairstow*[7].

Counsel for the respondent submitted that the sole issue is whether the amount re-assessed by the Minister is properly income; which must be determined according to the facts of this case: Thorson P. in *Minister of National Revenue v. Spencer*[8]; and that the issue to be decided in this case is quite different from that which was decided in *Irrigation Industries Ltd. v. Minister of National Revenue*

[1] [1952] O.W.N. 341; [1952] 4 D.L.R. 504.
[2] [1964] Ex. C.R. 48. [3] [1897] A.C. 22 at 51. [4] (1904) 5 T.C. 159
[5] [1962] S.C.R. 346. [6] (1963) 32 Tax A.B.C. 1. [7] [1956] A.C. 14 at 37.
[8] [1961] C.T.C. 109 at 113.

(*supra*) and that certain surrounding and general circumstances were relevant in this case, viz.:

(1) that the appellant was an associate of the McMahon brothers of Calgary, Alberta, who were substantial traders in oil and gas securities;

(2) that the appellant at all material times was a shareholder, director and/or officer of Peace River Natural Gas Co. Ltd., Pacific Petroleums Ltd., Inland Natural Gas Co., Ltd., Yankee Princess Oils, Ltd., St. John Oil and Gas Co. Ltd., Canadian Collieries (Dunsmuir) Ltd., and Ross Whittall Ltd.;

(3) that he was a member of the stockbroker firm Ross Whittall Ltd. who underwrote issues of certain of these companies for treasury shares which were sold to the public and

(4) that the appellant participated personally in the formation of certain of these oil and gas companies from which he obtained shares, the profit on the realization of some of which such shares forms substantially the basis of the re-assessments herein.

Referring to certain particular share holdings, counsel for the respondent submitted

(1) that the acquisition of the two units in the Wilson Syndicate was at that stage a speculative venture which should be categorized properly as an adventure or concern in the nature of trade;

(2) that the pooling of all interests in the Wilson Syndicate with the interests of Ross Whittall Ltd. to spread the risk and increase the opportunity to find oil, resulting in the formation of the St. John's Trust Agreement and the sale of its interests for $710,000 in shares in Inland Natural Gas Co. Ltd. through two contracts, namely, with the latter company and with St. John Oil and Gas Co. Ltd., by which the appellant by October 17, 1952, received 116,500 shares of Inland Natural Gas Co. Ltd., was also an adventure or concern in the nature of trade;

(3) that alternatively after October 17, 1952, the trading of substantially all the said 116,500 shares was an adventure or concern in the nature of trade and the profit on the sales was income;

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(4) that the acquisition of Yankee Princess Oils, Ltd. shares by the appellant starting with his interest in C.P.R. Permit No. 257, and carrying through to the varying circumstances under which he obtained further shares in that company was inconsistent with the legal concept of what was an ordinary investment; and

(5) that in view of the circumstances surrounding the manner, method and time of acquisition and disposal of the shares in Canadian Collieries (Dunsmuir) Ltd. by the appellant, and the offices he held, the conclusion was that his scheme was to make a profit on this block of shares and not to acquire or dispose of the same as an ordinary investment.

The issue to be decided on these facts is whether or not all or any of these securities (the profit on the realization of which was taxed by the Minister as income of the appellant in the relevant years) were ordinary investments within the meaning of the jurisprudence in respect to the same, or whether the transactions entered into by the appellant in the acquisition, exchanging and realization of them were entered into as a scheme for profit making so that the profit gained, received or derived therefrom by the appellant was profit gained, received or derived from a trade or business of the appellant constituting income within the meaning of sections 3, 4 and 139(1)(*e*) of the *Income Tax Act*.

The former President of this Court, Thorson P., in *Minister of National Revenue v. Taylor*[1] gave an exhaustive treatise on the meaning of "adventure or concern in the nature of trade" and he laid down certain tests (in determining whether or not a particular transaction did or did not constitute an adventure in the nature of trade), which are referred to in both the majority and the minority judgments in the Supreme Court of Canada in *Irrigation Industries Ltd. v. Minister of National Revenue* (*supra*), and affirmed that

> . . . it is not possible to determine the limits of the ambit of the term or lay down any single criterion for deciding whether a particular transaction was an adventure of trade for the answer in such cases must depend on the facts and surrounding circumstances of the case.

Martland, J. in the *Irrigation Industries Ltd.* case (*supra*), at page 349 stated that in that case:

> The issue in this appeal is as to whether an isolated purchase of shares from the treasury of a corporation and subsequent sale thereof at

[1] 56 D.T.C. 1125

a profit, not being a part of the business carried on by the purchaser of the shares, or in any way related to it, constitutes an adventure in the nature of trade so as to render such profit liable to income tax.

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The deciding of this issue, *Irrigation Industries Ltd.* case (*supra*) involved an adjudication as to circumstances in which enhanced values are taxable when the realization of securities is involved; and on the facts of that case it was held that the particular security was an "ordinary" investment of a capital nature, and not a security purchased and realized upon in the manner of trading which would be carried on ordinarily by those engaged in the business of trading in securities.

On the facts of this case, however, and irrespective of the fiduciary relationships to which I will refer, I am compelled to hold that this appellant in respect to the acquisition of all these securities was endeavouring to make a profit by a trade or business, and was actually engaged in this business at all material times and the profitable sales and exchanges of securities were not in law a substitution of one form of investment for another. During all the material times the appellant assisted materially in the marketing of these securities, which brought substantial gain to himself. The turning of these investments into profit was not merely incidental to but instead was the essential feature of his personal trading operations or business speculations.

These investments, the realization of which produced the profit, in my opinion, were not "ordinary" investments within the meaning of the *Irrigation Industries* case (*supra*) and the *Californian Copper Syndicate case* (*supra*).

In addition, I am also of opinion that one of the outstanding facts which distinguishes this case from all the cases cited in support of the appellant's submission is the fact that the appellant was in a fiduciary relationship as a director, and in some cases also as an officer, of various companies at the material times as, e.g., Pacific Petroleums Ltd., Atlantic Oil Co. Ltd., Peace River Natural Gas Co. Ltd., Westcoast Transmission Co. Ltd., St. John Oil & Gas Co. Ltd., Yankee Princess Oils, Ltd., Inland Natural Gas Co. Ltd., Canadian Northern Oil & Gas Co. Ltd., Canadian Collieries (Dunsmuir) Ltd., and Ross Whittall Ltd.; and because of this fiduciary relationship was in a position to and did avail himself of the opportunity to make these trading profits.

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It is basic equity law that directors are creatures of statute and occupy a position similar in varying respects to those of agents, trustees and managing partners, and their position is clearly of a fiduciary character. They are trustees of the powers which they possess as directors, as for example, the power of issuing and allotting shares. In accepting office as such, directors place themselves in a fiduciary position towards the company and its shareholders. And a director of two companies which deal with each other owes a fiduciary duty to each of them and to their respective shareholders. As directors they may not exercise their powers as directors in such a way as to benefit themselves at the expense of the remaining shareholders. They are precluded from dealing legally on behalf of the company with themselves when there is a personal conflicting interest. Directors may only take up shares in a company of which they are directors on the same terms as the general public.

These are only a few of the consequences in equity which flow from occupying the position of director of a company when various transactions are being completed; and they are all relevant in the various circumstances which obtained in the transactions under review in this appeal.

In this case, because of the various fiduciary relationships in which the appellant was at the material times, and the conflicts of interest which resulted, on this ground alone I am of opinion that none of these investments of the appellant (the acquisition and realization of which resulted in a profit) were "ordinary" investments within the meaning of the *Irrigation Industries* case (*supra*).

The fiduciary relationships at the material times of the appellant in relation to these various oil and gas companies and their shareholders, and in relation to Ross Whittall Ltd., the brokerage firm which did the underwriting of certain of the securities of these companies, changed the whole character of these investments from a tax point of view, *inter alia;* and the profit from the acquisition and realization of these investments, in my opinion fits squarely within the legal meaning in the *Income Tax Act* of profit from an adventure or concern in the nature of trade; or putting it another way, the conclusion is irresistible that the financial success of these transactions, in a most substantial way, was attributable to the fact that the appellant was able to use and act on information obained through these fiduciary

relationships and as a consequence the appellant in respect to these transactions was a trader in securities and not an investor.

In the result, therefore, the appeal in respect to each of the re-assessments is dismissed with costs.

Judgment accordingly.

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