1965

CANADA

LAW REPORTS

RAPPORTS JUDICIAIRES

DU CANADA

Exchequer Court of Canada

Cour de l'Échiquier du Canada

PAUL A. RAYMOND, C.R.

WILLIAM C. McBRIDE, B.A. Sc.

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OTTAWA, 1965

91539—A

JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports:

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(*Appointed May 4, 1964*)

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(*Appointed November 1, 1951*)

THE HONOURABLE JACQUES DUMOULIN
(*Appointed December 1, 1955*)

THE HONOURABLE ARTHUR LOUIS THURLOW
(*Appointed August 29, 1956*)

THE HONOURABLE CAMILIEN NOËL
(*Appointed March 12, 1962*)

THE HONOURABLE ANGUS ALEXANDER CATTANACH
(*Appointed March 27, 1962*)

THE HONOURABLE HUGH FRANCIS GIBSON
(*Appointed May 4, 1964*)

THE HONOURABLE ALLISON ARTHUR MARIOTTI WALSH
(*Appointed July 1, 1964*)

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

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

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

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

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The Honourable L. T. PENNELL

JUGES

DE LA

COUR DE L'ÉCHIQUIER DU CANADA

en fonction au cours de la période de publication de ces rapports:

PRÉSIDENT:

L'HONORABLE WILBUR ROY JACKETT

(*nommé le 4 mai 1964*)

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(*nommé le 1er novembre 1951*)

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(*nommé le 1er décembre 1955*)

L'HONORABLE ARTHUR LOUIS THURLOW

(*nommé le 29 août 1956*)

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(*nommé le 12 mars 1962*)

L'HONORABLE ANGUS ALEXANDER CATTANACH

(*nommé le 27 mars 1962*)

L'HONORABLE HUGH FRANCIS GIBSON

(*nommé le 4 mai 1964*)

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L'honorable L. T. PENNELL

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CORRIGENDA

At page 234 in line 6 of the headnote "c. 5" should read "c. 52" and "62(1)(5)" should read "62(1)(s)".

At page 413 in line 7 of the headnote "1139(2)(b)" should read "139(2)(b)".

At page 460 in line 4 of the 25th holding the word "textural" should read "textual".

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3. *Bickle, Helen Ryrie et al v. Minister of National Revenue* [1965] 1 Ex. C.R. 664. Appeal pending.
4. *Bonus Foods Ltd. v. Essex Packers Ltd.* [1965] 1 Ex. C.R. 735. Appeal pending.
5. *Buckerfield's Ltd. et al v. Minister of National Revenue* [1965] 1 Ex. C.R. 299. Appeal pending.
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10. *DeFrees, Barbara B. et al v. Dominion Auto Accessories Ltd.* [1964] Ex C.R. 331. Appeal dismissed.
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16. *Hargal Oils Ltd. v. Minister of National Revenue* [1964] Ex. C.R. 27; [1965] S.C.R. 291. Appeal dismissed.
17. *Harmony Investments Ltd. v. Minister of National Revenue* [1965] 1 Ex. C.R. 863. Appeal discontinued.
18. *Hoechst Pharmaceuticals of Canada Ltd. et al v. Gilbert & Co. et al* [1965] 1 Ex. C.R. 710. Appeal pending.

19. *Hoffman-La Roche Ltd. v. Bell-Craig Pharmaceuticals Division of L. D. Craig Ltd.* [1965] 1 Ex. C.R. 179. Application for leave to appeal dismissed.
20. *Hoffman-La Roche Ltd. v. Delmar Chemicals Ltd.* [1965] 1 Ex. C.R. 611. Appeal dismissed.
21. *Jamb Sets Ltd. v. William H. Carlton* [1964] Ex. C.R. 377. Appeal dismissed.
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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

CAUSES

ADJUGÉES PAR

LA COUR DE L'ÉCHIQUIER DU CANADA

EN SA JURIDICTION DE COUR DE PREMIÈRE INSTANCE

ET

EN SA JURIDICTION D'APPEL

91536—1

BETWEEN:

1960
June 6-9
1964
June 18

ELGIN HANDLES LIMITED ....APPLICANT;

AND

WELLAND VALE MANUFACTURING COMPANY LIMITED } RESPONDENT.

Trade Marks—Trade Marks Act, S. C 1952-53, c. 49, ss. 2(t), 29(h) and 56—Application to strike out entry in register—Functional use or characteristic—Whether consequence of functional process can be a trade mark.

This is an application made by way of originating notice of motion for an order that the entry in the register of the respondent's trade mark relating to fire hardened wooden tool handles be struck out on the grounds, *inter alia,* that the subject matter of the entry is not a trade mark within the statutory definition.

Held: That section 56 of the *Trade Marks Act* confers jurisdiction on the Court to make an order that an entry in the register be struck out on the ground that what is registered is not a trade mark.

2 That since the description of the "mark" included in the entry in the register describes the "mark" as consisting "of the accentuation in darker colouring of the grain of the wood of tool handles the surface of which has been fire hardened to accomplish such purpose", the "mark" is not the tool handle but the accentuation in darker colouring of the grain of the wood of the handle when such is accomplished by the process of fire hardening.

3 That a process that is believed by those in the trade to improve an article is just as functional for commercial purposes as one that creates improvements according to some absolute scientific test or standard

4 That the change in the appearance of the wood that is the ordinary consequence of fire hardening cannot be a trade mark, since the process of fire hardening is primarily designed to improve wooden handles as objects of commerce and has therefore a functional use or characteristic

ACTION to strike out a trade mark.

The action was heard by the Honourable Mr. Justice Cameron at Ottawa and retried by the Honourable the President.

W. L. Hayhurst for applicant.

Harold G. Fox, Q.C. and *D. F. Sim, Q.C.* for respondent.

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

JACKETT P. now (June 18, 1964) delivered the following judgment:

This is an application by way of originating notice of motion under section 56 of the *Trade Marks Act,* chapter 49

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of 1952-53, for an order that an entry in the register kept pursuant to section 26 of that Act be struck out.

The matter was argued before Cameron J. before his retirement. Thorson P. made an order, on February 13, 1964, for a new trial on the existing evidence and argument. I have retried the application on that evidence and argument pursuant to that order and I now deliver judgment accordingly.

Many questions were argued concerning the application of the *Trade Marks Act* to the facts of the matter but it is sufficient for the disposition thereof that I deal only with the question whether the subject matter of the entry in dispute is a "trade mark" within the statutory definition. I shall therefore refer only to so much of the statute and the facts as are necessary to deal with that question.

Before doing that, I should refer briefly to the Court's jurisdiction. Section 56 of the Act confers on the Court jurisdiction, *inter alia,* on an application such as this, to order that an entry in the register be struck out on the ground that the entry does not accurately express or define the existing rights of "the person appearing to be the registered owner of the mark". These words are not as apt as they might be to confer jurisdiction to order that an entry be struck out because what purports to be entered as a trade mark is not a trade mark. However, there can be no doubt that, if a person is registered as the owner of a trade mark when he does not own a trade mark, the entry clearly "does not accurately express or define" his "existing rights" and I am, therefore, of the view that section 56 confers jurisdiction to make the order sought on the ground that what is registered is not a trade mark. In any event, section 54 confers jurisdiction on the Court to entertain any proceeding for the enforcement of any remedy defined or conferred by the Act.

The statutory definition of "trade mark" is to be found in paragraph (*t*) of section 2 of the Act, which reads as follows:

> (*t*) "trade mark" means
>
> (i) a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others,

(ii) a certification mark,
(iii) a distinguishing guise, or
(iv) a proposed trade mark;

The entry in dispute is supported only under that part of sub-paragraph (i) that reads: "a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares . . . manufactured . . . by him from those manufactured . . . by others".

Subsection (3) of section 58 provides that the proceedings on an application such as this shall be heard and determined summarily on evidence adduced by affidavit unless the Court otherwise directs. In this case, there was no direction for evidence other than affidavit evidence.

The entries in dispute are in the register as registration No. 104,424 in the name of the respondent. The initial entry consists of a picture of a wooden handle (appropriate for a hand tool such as a hammer) in which the grain of the wood can be seen, together with a description that reads:

> Consists of the accentuation in darker colouring of the grain of the wood of tool handles the surface of which has been fire hardened to accomplish such purpose.

It should be noted that, while paragraph (*h*) of section 29 of the *Trade Marks Act* requires that the application be accompanied by a "drawing of the trade mark", according to the description, the "mark" is not the handle a picture of which appears on the register, but is the "accentuation" in darker colouring "of the grain of the wood" of the handles in respect of which it was registered and then only when such accentuation is accomplished by a process whereby the surface of the wood is "fire hardened".

The applicant contended that this was not an entry of a trade mark at all and in support of that contention made several submissions. While I propose to refer only to one of those submissions, I must not be taken to have rejected any of the other submissions in support of that contention, nor indeed must I be taken to have rejected any of the applicant's several other contentions.

The submission of the applicant with which I propose to deal, as I understand it, is that something in, or in connection with, wares that has utility, whether ornamental or functional, cannot be a trade mark. Counsel for the applicant developed a very cogent argument, based on English and Canadian authorities, for this submission. Counsel for

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the respondent developed an argument for a contrary view based on an analysis of some of the same authorities. I am relieved of the necessity of reaching a conclusion based on that argument, because, in the meantime, the general principle involved has been settled by the Supreme Court of Canada.

In *Parke, Davis & Co. Ltd. v. Empire Laboratories Limited*[1], the Supreme Court of Canada dismissed an appeal from a decision of my brother Noël[2]. This decision establishes that that which has "a functional use or characteristic" cannot be a trade mark.

If, therefore, the subject matter of the entry in dispute falls within the principle so established, I must order that the entry be struck from the register.

The description of the mark on the register, as noted above, reads as follows:

> Consists of the accentuation in darker colouring of the grain of the wood of tool handles the surface of which has been fire hardened to accomplish such purpose

In my view, this may be paraphrased accurately as follows:

> Darker colouring of the grain of the wood of tool handles accomplished by fire hardening

Fire hardening (also called flame finishing, flame treating or fire tempering), according to the evidence, may be carried out by first passing a smooth sanded wooden handle through a flame so that the surface becomes slightly charred, then buffing or polishing the handle, and then dipping the handle in clear lacquer. This has the effect, among other things, of accentuating the grain of the wood. This happens because the dense parts of the grain (summer growth) do not char as rapidly as the soft parts (spring growth).

Fire hardening of wood, according to the evidence, was commonly believed in the trade to have many advantages of a functional character. In addition to being attractive, it was believed to have the advantage of reducing the moisture in the wood and hardening and sealing the surface and thus increasing the moisture resistance of the wood and decreasing its tendency to warp. Fire hardened handles have been advertised by manufacturers, including the respondent, as having advantages over handles not so processed, e.g.: "longer lasting", "pleasant to use", "removes all surface moisture", "thorough seasoning", "Surface stress is

[1] [1964] S C R 351 [2] [1964] Ex C R 399

relieved", "pores of the hickory are sealed", "more resilient and shock resistant", "scorched colour has high sales appeal", and "less fatigue". In particular, it might be mentioned that, on page 45 of the December 28, 1957 issue of "Hardware and Metal", there appears an advertisement of the respondent for "True Temper Fire Hardened Handles" in which the following appears:

FIRE SEALS OUT MOISTURE . . .

True Temper's exclusive Fire Hardening process locks out moisture, the enemy of all wood . ends harmful weather action adds more working life to the handle

FIRE GIVES OUTSTANDING APPEARANCE

True Temper Fire Hardened Handles sell on eye appeal alone The rich warm appearance makes it easy for you to sell your customers on the service features

FIRE MAKES TOOLS EASIER TO USE

These handles are smooth and stay smooth Grain does not raise Your customers can feel the difference

While there may be a large element of "puffing" in many of these claims, and while the advantages may to some extent exist only in the minds of the people in the trade, I am of the view that a process that is believed by those in the trade to improve an article is just as functional for commercial purposes as one that creates improvements according to some absolute scientific test or standard. In any event, fire hardening, whatever else it does, actually hardens the surface of the wood to a substantial extent.

I have therefore come to the conclusion on the evidence that the fire hardening process is primarily designed to improve wooden handles as objects of commerce and has therefore a functional use or characteristic. It follows that the change in the appearance of the wood that is the ordinary consequence of fire hardening cannot be a trade mark. If, as has been established by *Parke, Davis & Co. Ltd. v. Empire Laboratories Limited, supra,* the thing registered cannot be a trade mark if it has a functional use or characteristic, it follows, in my view, that, where a change in appearance of the goods in relation to which the alleged trade mark is to be used is the normal result of a process that has a functional use or characteristic, such a change in appearance cannot be a trade mark.

The application for an order striking the trade mark from the register is granted with costs.

Judgment accordingly.

1964
June 11
June 18

BETWEEN:

DAVID WALFISH ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148—Income or capital gain—Purchase of second mortgages at a discount and held to maturity—Whether purchased in course of a business or as investment—Whether profit realized on maturity income from a business.

The appellant, a solicitor practising in Toronto, Ontario, was during the years 1957 to 1960 a silent partner in Power Investments and Mortgage Company, which carried on business as a mortgage broker next door to the appellant's law office in a building owned by the appellant. The appellant also had an interest in Gledhill Investment Company, a partnership of three limited companies, namely, Sandbill Investments Limited, all of the shares of which were owned by the appellant, Trebwall Investments Limited, all of the shares of which were owned by the appellant's brother-in-law, and Sepal Investments Limited, all of the shares of which were owned by the appellant's brother. During the years 1957 to 1960 inclusive the appellant purchased fifty-seven second mortgages at discounts as high as fifty per cent, all of which he held until maturity. The evidence disclosed that a substantial part of the appellant's income was derived from sources other than his law practice

The respondent assessed the gain made by the appellant on the second mortgages as income.

Held: That the second mortgages were purchased by the appellant as a means of income, in the course of a business, and were not purchased as investments.

2. That the appeal is dismissed.

APPEAL under the *Income Tax Act.*

The appeal was heard by the Honourable Mr. Justice Gibson at Toronto.

Wolfe D. Goodman for appellant.

D. J. Wright and *M. Barkin* for respondent.

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

GIBSON J. now (June 18, 1964) delivered the following judgment:

This is an appeal by the appellant from the income tax assessments made by the respondent, dated October 15, 1962 wherein taxes in the sums of $9,371.12, $1,765.25, $17,296.93 and $11,563.13 were levied in respect of the income of the appellant for the respective taxation years 1957, 1958, 1959 and 1960. The specific subject of the appeal is whether the gain made by the appellant on the realization of certain second mortgages purchased by him in the years 1957 to 1960 was a capital gain or income.

The appellant is a practising barrister and solicitor in the City of Toronto, was called to the Bar in 1940 and has practiced continuously in Toronto since 1945. The appellant conducts what is known as a general law practice and does real estate transactions, is engaged in negligence and domestic relations litigation, does certain collection work and carries on an estate practice, but at least 50 per cent of his time in practising law is devoted to real estate transactions for private clients.

The appellant also, besides practising law, is and was a partner in the business known as Power Investments and Mortgage Company which conducts its business next door to the office of the appellant, but in the same building, which building is owned by the appellant.

In this business, the appellant is a silent partner and the business is that of a mortgage broker and the appellant receives as his share of the profits a part of the finder's fees paid in connection with the placing of the mortgages by this company. The appellant also has an interest indirectly in a company known as Gledhill Investment Company which is a partnership consisting of three limited companies, namely, Sandbill Investments Limited, the beneficial ownership of all of which shares is in the appellant, Trebwall Investments Limited, the beneficial ownership of all of which shares is in the appellant's brother-in-law, one Lambert, and Sepal Investments Limited, the beneficial ownership of all of which shares is in Henry Walfish, a brother of the appellant.

There were fifty-seven individual second mortgage contracts which produced the gain, during the material times, which is the subject-matter of this appeal.

The appellant ceased to purchase second mortgages after the year 1961 and in that year purchased only one second mortgage.

The appellant gave evidence that he ceased to purchase second mortgages because he felt the real estate market in Toronto, Ontario, was not satisfactory for this purpose, because of the low down-payments purchasers were being

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permitted to make in buying homes, and the longer terms being granted by vendors for the payment of the purchase price of the properties.

After the appellant ceased to purchase second mortgages, he became engaged in the car financing business in which he continues up to the present time.

In respect to the second mortgage transactions, the appellant prior to 1953 put the payments made by the mortgagors into his regular law office accounts bank account, but after that time, he deposited the payments in a separate bank account of his own.

The payments on the second mortgages were made by the mortgagors through his law office and were handled by the clerical staff there.

All the second mortgages were held until maturity by the appellant.

The second mortgages in the main were purchased by the appellant from clients who had sold their houses and had taken back a second mortgage as part of the purchase price. These mortgages for the most part were acquired by the appellant within three to four weeks of the time they were drawn.

Exhibit A-1 in this appeal contains a list of these mortgages, and shows, among other things, the rate of interest and the bonuses or discounts earned.

These mortgages bear the same rate of interest as the first mortgages which were placed on the various premises which were also charged with these second mortgages at the time of the sales of the premises. These second mortgages were purchased by the appellant from various persons at varying amounts of discount from the face amounts of the mortgages, up to 50 per cent discount.

All these second mortgages were on older houses in the general area where the appellant had his office in Toronto, Ontario, and all of the mortgages were on residential houses which the appellant described as "working-men's houses".

From the income tax returns of the appellant, which are filed on this appeal, it is patent that a substantial part of the income of the appellant is derived from sources other than his law practice.

Exhibit R-16 is a statement prepared by the Department of National Revenue and among other things it indicates the gain obtained by the appellant, during the material times, in respect to the second mortgage purchases made by him. This statement indicates that in the year 1957 he realized a bonus or gain of $2,000 in respect of these transactions; in the year 1958 he realized a gain of $6,870; in the year 1959 he realized a gain of $11,333.42; and in the year 1960 he realized a gain of $6,575.

On the facts of this case, I am of the opinion that these second mortgages were purchased by the appellant in the course of a business and not as investments; that the fact that they were held to maturity and not substituted prior to maturity is irrelevant in the circumstances here; that the gain is not a realization of an investment; and that the intent was to earn income notwithstanding that the form of the transactions was such as to make the same appear to be in some degree analogous to the bond security discount cases.

I am further of the opinion that the bond security discount cases, in which a security underwriter doing business in this country in the usual financial markets, sells a bond at a discount, which discount a purchaser realizes as a gain if he holds such bond to maturity, is not relevant to the adjudication in this case of second mortgages as to whether the gain is capital or income.

The bond market in this country is governed by market conditions quite separate and distinct from those which obtain in the so-called second mortgage market.

The second mortgages purchased in this particular case, in my opinion, were purchased as a means of income for the appellant, in the course of a business, and were not purchased as investments within the meaning of the jurisprudence of our Courts establishing their status under the *Income Tax Act*.

The appeal is dismissed with costs.

Judgment accordingly.

1964
June 2
June 18

BETWEEN:

MARVIN E. GOLDBLATT ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income Tax—Income Tax Act, R.S C. 1952, c. 148, ss 16(1) and 23—Transfer of rights to income by taxpayer to company.

In 1959 the appellant made an arrangement between Luria Bros, Inc, a large U S scrap metal dealer, and International Iron & Metal Co, Limited, a company owned by the Goldblatt family and in which the appellant was a small shareholder, which resulted in substantially improved business operations for International Iron & Metal Co., Limited The arrangement also led to the payment by Luria Bros Inc of a finder's fee or middleman's commission to Cosmopolitan Import & Export Limited, a wholly owned subsidiary of Cosmopolitan Scrap Metal Brokers (Bahamas) Limited, the shares in the latter company being listed as owned by persons in the accounting firm of Peat, Marwick, Mitchell & Company. Cosmopolitan Import & Export Limited had been incorporated in 1946 but had remained inactive until 1958, shortly before payment of the said commissions to it commenced Cosmopolitan Scrap Metal Brokers (Bahamas) Limited had invested certain of its monies in oil paintings which were stored in the appellant's home Cosmopolitan Import & Export Limited had no regular employees, except the appellant, who, although employed full time as General Manager of International Iron & Metal Co, Limited, alleged that he did the work resulting in the payment of the commissions in his free or leisure time during which he was working for Cosmopolitan Import & Export Limited and not for himself. Cosmopolitan Import & Export Limited had no office of its own other than the address of the office of the lawyers of the appellant.

The appellant alleged that the part of the commissions received and kept by Cosmopolitan Import & Export Limited was income of that Company and not income of himself

Held· That Cosmopolitan Import & Export Limited was activated in 1958 for the express purpose of receiving the commissions from Luria Bros Inc and it was not actively engaged in a business, except incidentally, which had nothing to do with the earning of the commissions

2 That the commissions paid to Cosmopolitan Import & Export Limited were income in the hands of the appellant under either s 16(1) or s 23 of the *Income Tax Act*

3. That the appeal dismissed.

APPEAL under the *Income Tax Act*.

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

P. N. Thorsteinsson for appellant.

D. A. Keith, Q.C. and *F. J. Dubrule* for respondent.

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

GIBSON J. now (June 18, 1964) delivered the following judgment:

This is an appeal from assessments made by the respondent dated September 6, 1962 for the taxation years 1959, 1960 and 1961, wherein taxes in the sums of $32,280.03, $20,226.19 and $31,145.12 were levied in respect of the income of the appellant. The question involved in this appeal is whether the income assessed by the respondent is that of the appellant or whether, as is contended by the appellant, the income at the material times belonged to a company known as "Cosmopolitan Import & Export Limited".

Cosmopolitan Import & Export Limited was incorporated in 1946 but remained an inactive company until 1958. Beginning in September, 1959 certain commissions from a United States company, known as Luria Bros., Inc., were paid to it.

Commencing October 1, 1959, according to a copy of a Declaration of Partnership filed in evidence, there was a partnership formed consisting of Cosmopolitan Import & Export Limited and LaSalle Scrap Metal Brokers Limited.

All of the shares in the latter company were owned beneficially by one Mort Levy.

Exhibit A-8 is the Declaration of Partnership between LaSalle Scrap Metal Brokers Limited and Cosmopolitan Import & Export Limited. It bears the date September 30, 1959 and is signed by two of the solicitors in the law office whom the appellant employed as his regular solicitors at all material times. There is no date on the face of this Declaration.

Exhibit A-7 is a copy of a partnership agreement between the same two companies which is dated September 1, 1961.

As of September 30, 1959, LaSalle Scrap Metal Brokers Limited was not incorporated. The appellant gave in evidence that as of this date the partnership was between himself and Mort Levy.

Evidence was given that International Iron & Metal Co., Limited was a company owned by the Goldblatt family and it was a scrap metal dealer and broker and its head office

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was at Hamilton, Ontario; and that the appellant was a small shareholder in that company.

It was also given in evidence that the United States company known as Luria Bros., Inc. with head office at Cleveland, Ohio (which company the appellant described as the largest scrap metal dealer in America) began to sell directly to the steel mills of Hamilton, Ontario at lower prices than International Iron & Metal Co., Limited could sell to them. This resulted, apparently, in a substantial decrease in profits for the latter, and in some years losses during the material period which was, namely, 1959 to 1960.

In the year 1959, by reason of an arrangement that the appellant made with Luria Bros., Inc., that company began to buy from International Iron & Metal Co., Limited and not to deal directly with the Hamilton steel mills. The result was that International Iron & Metal Co., Limited according to the evidence given, commenced to earn profits, and during the period 1960 to 1963 these profits increased each year.

Because of what was done, Luria Bros., Inc. paid a finder's fee, or a middleman's commission, to Cosmopolitan Import & Export Limited. This commission was shared by the partnership Cosmopolitan Import & Export Limited and LaSalle Scrap Metal Brokers Limited, according to the evidence.

The relevant part of the commissions paid by Luria Bros., Inc. was shown on the tax return of Cosmopolitan Import & Export Limited, and it is the allegation of the appellant that the part of the commissions received and kept by Cosmopolitan Import & Export Limited was income of that company and not income of himself.

All of the shares in Cosmopolitan Import & Export Limited, the appellant admitted on cross-examination, were owned not by himself, as he said in chief, but instead were owned by a company known as Cosmopolitan Scrap Metal Brokers (Bahamas) Limited.

The shares of this latter company were listed as being owned by persons in the accounting firm of Peat, Marwick, Mitchell & Company.

In effect, therefore, it was admitted that Cosmopolitan Import & Export Limited at the material times was a wholly-owned subsidiary of the Nassau company.

The appellant also admitted on cross-examination that this Nassau company had invested certain of its monies in oil paintings which were stored in the appellant's house in Hamilton, Ontario.

The minute book of Cosmopolitan Import & Export Limited, commencing in 1958, does not disclose any reference to any transactions for the earning of commissions from Luria Bros., Inc., and the appellant on discovery, which was held just a short time before the trial, had stated that he did not know the purpose of activating this company; but, at trial, he stated that the sole purpose for doing so was for entering into the commission transactions with Luria Bros., Inc.

In the minute book of International Iron & Metal Co., Limited, which was the Goldblatt family company, there is a reference to a meeting on October 25, 1960, a copy of which minute is Exhibit A-5 in this trial, by which it was recorded that it was desirable to confirm the arrangement made in 1958 on behalf of International Iron & Metal Co., Limited with Luria Bros., Inc. concerning the payment or allocation of commissions.

At that time, namely, October 25, 1960, it should be noted, it was not possible to confirm an arrangement to pay any commissions to the partnership, Cosmopolitan Import & Export Limited and LaSalle Scrap Metal Brokers Limited, because at that time, according to the evidence, LaSalle Scrap Metal Brokers Limited was not incorporated.

The appellant stated that this minute was prepared at the suggestion of the auditors.

Cosmopolitan Import & Export Limited, during the material time, had no regular employees except, as alleged, the appellant. Part-time clerical assistance was obtained from the law office of the lawyers of the appellant and from the office of International Iron & Metal Co., Limited.

During the material time, also, it had no office of its own other than the address of the law office of the lawyers of the appellant.

The appellant was the general manager of the family company, International Iron & Metal Co., Limited, at all material times and worked full time for that company; he alleged, however, that in his free or leisure time he did the work which resulted in the commissions being received from Luria Bros., Inc., and that during these times he was not working for himself, but instead he was working for the company—Cosmopolitan Import & Export Limited.

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Gibson J.

The appellant says that Mort Levy, beneficial owner of all the shares of LaSalle Scrap Metal Brokers Limited, had only a small part in completing the arrangements with Luria Bros., Inc.

The appellant admits that his lawyers had advised him concerning this matter which, in their view, was the best way to handle the commissions received from Luria Bros., Inc. It was on their advice that Cosmopolitan Import & Export Limited was activated (the language used in evidence in describing what took place with this company in the year 1958) after it had remained inactive, or dormant, since its incorporation in 1946.

On September 27, 1961, the Department of National Revenue wrote to the appellant a letter, a copy of which is Exhibit R-2, and on October 10, 1961, the appellant replied to this letter and a copy of this reply is filed as Exhibit R-3.

The relevant extracts from this latter letter are as follows:

I have your letter of September 27th and acknowledge it.

* * *

As to paragraph 2 of your letter I did have a discussion with you in my own office and I understand that you subsequently discussed our conversation with Mr. Paikin who is himself no party to any arrangements and whose firm is acting as Solicitors only and providing office facilities for Cosmopolitan Scrap Metal Brokers Limited and LaSalle Scrap Metal Brokers Limited Of course Mr Paikin could only affirm the fact of your conversation with me. The facts are that Luria Bros. & Company Inc and International Iron & Metal Co Limited were enabled to enter into certain brokerage and commercial relationships which had not hitherto existed. These companies are very much in competition but do purchase and sell materials from and to each other mutually on certain transactions These arrangements were primarily referable to the activities of myself and Morton Levy and when the opportunity arose, as a result of these arrangements, Cosmopolitan Scrap Metal Brokers Limited and LaSalle Scrap Metal Brokers Limited were expressly formed to receive the commissions which, both parties agreed, were to be payable as we might designate. The Corporations were formed further to carry on allied trading and Cosmopolitan Scrap Metal Brokers Limited has engaged in other commercial activities.

I am the beneficial owner of all of the issued shares of Cosmopolitan Scrap Metal Brokers (Bahamas) Limited.

I trust this reply gives you all the information you require.

On these facts, I am of opinion that Cosmopolitan Import & Export Limited was "activated" for the express purpose of receiving the commissions from Luria Bros., Inc. and that, during the material times, it was not actively engaged in a business, except incidentally, which had nothing to do with

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the earning of the commissions, the subject matter of this appeal.

In my view, the case is indistinguishable from the principles enunciated in *Adams v. Minister of National Revenue*[1].

I am therefore of the opinion that the part of the commissions paid to Cosmopolitan Import & Export Limited, during the material times, by Luria Bros., Inc., was income in the hands of the appellant within the meaning of either section 16(1) or section 23 of the *Income Tax Act*.

I should also record that there was a conflict of evidence between what the appellant said in chief and what he said on cross-examination, and also in respect of certain questions he was asked on discovery and the answers given in response to the same questions at trial.

The appeal is dismissed with costs.

Judgment accordingly.

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BETWEEN:

DON FINANCE COMPANY, LIMITED ..APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income Tax—Income Tax Act, R S.C. 1952, c. 148, ss. 85E, 85F (4) and 139(1)(w)—Income or capital gain—Sale of chattel mortgages to another finance company—Inventory—Receivables—Right to receive a receivable not in itself a receivable.

The appellant had been carrying on the business of lending money on the security of chattel mortgages, when, in 1958, it sold all its chattel mortgages to Industrial Acceptance Corporation Ltd for the total amount owing thereon at the date of sale plus $8,000. The appellant then surrendered its small loan licence and took steps to surrender its charter but could not do so because it could not obtain an income tax clearance. The appellant later commenced business again for an entirely different purpose and with certain new shareholders and new financing.

The issue on appeal was whether the above mentioned sum of $8,000 was capital profit or income of the appellant

Held: That the sale of chattel mortgages was not made for any other purpose than to enable the appellant to go out of the finance business

[1] 60 D.T.C. 253.

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2. That s. 85F(4) of the *Income Tax Act* is not applicable to the transaction in question because part of what was sold by the appellant was the right to receive a receivable, and the right to receive a receivable is not in itself a receivable.
3. That notwithstanding the definition contained in s. 139(1)(*w*) of the *Income Tax Act* the chattel mortgages sold by the appellant were not, for the purpose of the *Income Tax Act*, inventory.
4. That section 85E of the *Income Tax Act* has no application to the facts of this case.
5. That the sum of $8,000 is capital profit and not income
6. That the appeal allowed

APPEAL under the *Income Tax Act*.

The appeal was heard by the Honourable Mr. Justice Gibson at Toronto.

R. M. Sedgewick, Q.C. for appellant.

G. W. Ainslie and *D. H. Aylen* for respondent.

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

GIBSON J. now (June 19, 1964) delivered the following judgment:

Don Finance Co. Ltd. was licensed under the *Small Loans Act,* R.S.C. 1952, c. 51, from 1956 to 1958 and carried on the business of loaning money on the security of chattel mortgages in the City of Toronto, Ontario.

The original investment in this company was $50,000 and, by August 23, 1958, which is the material date, the total amount of loans outstanding was only about $27,000.

On August 23, 1958, that company sold all its chattel mortgages to Industrial Acceptance Corporation, Ltd. for the total amount owing on the chattel mortgages as of that date, plus the sum of $8,000. Exhibit A-3 is a copy of a letter from Industrial Acceptance Corporation, Ltd. to Don Finance Co. Ltd., and constitutes the only contract document.

After that time, Don Finance Co. Ltd. surrendered its small loans license and took steps to surrender its charter by requesting its solicitors to do so, but did not succeed in this endeavour because it could not get an income tax clearance.

Subsequent to this time, and for an entirely different purpose, the company commenced business again after certain new shareholders had acquired an interest in the company and substantial new financing was introduced in the company.

For the purpose of this appeal, however, what transpired after the transaction in 1958 with Industrial Acceptance Corporation, Ltd. and after the small loans license had been surrendered and steps taken to surrender its charter is irrelevant.

Mr. Richard McDonald Parkinson, a chartered accountant with over 25 years' experience gave in evidence his accounting opinion that the outstanding loans of this company as of August 23, 1958, should not be categorized as inventory. He stated that the Company computed its income on a cash basis; that the sum of $27,339.65 as of August 23, 1958, represented the balance of all monies owing from debtors of Don Finance Co. Ltd.; that as of that date there was no chattel mortgages in default; and that the $8,000, over and above the balance owing by the debtors, paid by Industrial Acceptance Corporation Ltd., was credited directly to the surplus account of Don Finance Co. Ltd. and not to its profit and loss account. This was done, he said, because, in his opinion, the $8,000 was an unusual gain outside the ordinary course of business and if it had been credited to the profit and loss account, it would have given an untrue and inaccurate picture of the normal operating profit of this company.

Ted Davy, President of Don Finance Co. Ltd., said in evidence that it was intended as of August 23, 1958, that this Company would go out of business because of the competition of other companies in this field of business and also because this company had never really developed a substantial business.

I am of opinion that the sale made to Industrial Acceptance Corporation, Ltd. by Don Finance Co. Ltd., on August 23, 1958, was not made for any purpose other than to go out of the finance business.

I am also of opinion that s. 85 F (4) of the *Income Tax Act* is not applicable to the transaction which took place here because, in my opinion, and I so find, part of what was sold by the appellant was the "right" to receive a receivable, and the right to receive a receivable is not in itself a receivable.

I am also of opinion that these chattel mortgages are not, for the purpose of the *Income Tax Act,* "inventory", notwithstanding the definition contained in s. 139(1)(*w*) of this Act. In this respect, I must respectively disagree with

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Gibson J.

the learned opinions set out in *Kendon Finance Company Ltd. v. Minister of National Revenue*[1] and *Cosmopolitan v. Minister of National Revenue*[2]. I say this because if the broad interpretation urged as the meaning of inventory in this subsection is correct, then many of the other sections of the *Income Tax Act* and the Regulations under the Act are meaningless.

It is not necessary in this particular case to give a broad and all inclusive meaning to that definition of "inventory" and in refraining from doing so a common sense solution to this problem results.

I am further of opinion that in so restricting the definition of "inventory" a meaning is not being given to it so as to make it inconsistent with other sections of the Act which provide in themselves what is tantamount to a full code. To categorize these chattel mortgages as inventory in this case would have the effect of making it in conflict with other sections of the Act.

Section 85E of the *Income Tax Act*, it follows, has no application to the facts of this case.

I therefore find that the $8,000 differential paid by Industrial Acceptance Corporation, Ltd. to Don Finance Co. Ltd., over and above the sum owing by the debtors to Don Finance Co. Ltd., as of August 23, 1958, is capital profit and does not have to be included in computing the appellant's income for the 1958 taxation year.

The appeal therefore is allowed with costs.

Judgment accordingly.

1964

June 2-4

June 19

BETWEEN:

TED DAVY FINANCE CO. LIMITED ... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income Tax—Income Tax Act, R S.C. 1952, c. 148, ss. 85D, 85F (4) and 139(1)(w)—Income or capital gain—Realization sale—Sale of chattel mortgages and conditional sales contracts to another finance company—Inventory—Receivables—Whether sale of receivables or right to receivables.

[1] 33 Tax A B C 149 [2] 27 Tax A.B C. 373

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In 1958 the appellant, which had been carrying on the business of purchasing conditional sales contracts from motor vehicle and appliance dealers and of lending money to individuals on the security of chattel mortgages, sold the majority of its conditional sales contracts and chattel mortgages to Industrial Acceptance Corporation Ltd. under a contract by the terms of which the sale was with recourse to the appellant in case of default.

The evidence established that there was a *bona fide* intention on the part of the appellant to go out of the conditional sales and chattel mortgage business because of the conditions then obtaining which made it no longer a financially satisfactory business for the appellant. The issue on appeal was whether the net gain obtained by the appellant on the sale was capital profit or income.

Held: That the sale in question was a realization sale and not a sale in the ordinary course of the appellant's business.

2. That the net excess proceeds of the sale were capital receipts, it being a sale of a right to receivables and not a sale of receivables.

3. That s. 85F(4) of the *Income Tax Act* refers only to cash basis taxpayers and not accrual basis taxpayers and is accordingly inapplicable insofar as the conditional sales contracts are concerned.

4. That s. 85D of the *Income Tax Act* deals with the sales of receivables by accrual basis taxpayers.

5. That s. 85F(4) deals only with income receivables and not with receivables representing capital loans repayable.

6. That what was sold in this case was not inventory within the meaning of s. 139(1)(*w*) of the *Income Tax Act,* and the definition of inventory in that section should not be given the broadest meaning that could be attached to it but the whole Act should be looked at to give it a reasonable and practical meaning, especially when there are other sections of the Act which in themselves constitute a complete code and which override the definition contained in s. 139(1)(*w*) insofar as it is repugnant to them.

7. That the appeal allowed.

APPEAL under the *Income Tax Act.*

The appeal was heard by the Honourable Mr. Justice Gibson at Toronto.

R. M. Sedgewick, Q.C. for appellant.

G. W. Ainslie and *D. H. Aylen* for respondent.

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

GIBSON J. now (June 19, 1964) delivered the following judgment:

Ted Davy Finance Co. Ltd. was, at the material times, a corporation incorporated under the *Ontario Corporations Act* and carried on, in the city of Toronto, Ontario, in the years 1953 to 1958, the business of purchasing conditional sale contracts from the used car sales company known as

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Ted Davy Ltd., and from other motor vehicle and appliance dealers. It also loaned money to individuals on the security of chattel mortgages.

On August 23, 1958, it sold to Industrial Acceptance Corporation Ltd. the majority of its conditional sale contracts and chattel mortgages but retained apparently one mortgage loan and twelve conditional sale contracts because Industrial Acceptance Corporation Ltd. did not wish to purchase them.

It was a term of the contract with Industrial Acceptance Corporation Ltd. that these chattel mortgages and conditional sale contracts were sold with recourse in case of default to Ted Davy Finance Co. Ltd.

The chattel mortgages sold were accounted for in the accounts of Ted Davy Finance Co. Ltd. on what is known as a cash basis; the conditional sales contracts were accounted for on what is sometimes known as an accrual basis.

The only contract document evidencing this sale and purchase from Ted Davy Finance Co. Ltd. to Industrial Acceptance Corporation Ltd. is a letter dated August 23, 1958 from Industrial Acceptance Corporation Ltd. to Ted Davy Finance Co. Ltd., which was filed as Exhibit A-12 in this appeal.

Ted Davy Finance Co. Ltd. credited the net excess of monies received from Industrial Acceptance Corporation Ltd. over and above the sum equivalent to the amount owing by all the debtors of Ted Davy Finance Co. Ltd., as of August 23, 1958, to its surplus account and not to its profit and loss account on the basis that this was a transaction out of the ordinary course of business and should not be accounted for in the accounts of the Company in a method which would result in the financial statements not reflecting a true criterion of the earning capacity of the Company.

The appellant submits that this sum represented a gain at the time of the sale, subject to future adjustments by way of premiums from or rebates paid to Industrial Acceptance Corporation Ltd., pursuant to the letter contract dated August 23, 1958. All such adjustments, the appellant submits, should be made through its surplus account and should not be reflected in the profit and loss account of the company at the time.

The evidence dealt with the method employed by the Ted Davy Finance Co. Ltd. in accounting for its earnings on its chattel mortgages which was described as the "cash method"; and also on its conditional sale contracts which was described as the "average interest method". Exhibit 10 was filed which is a copy of an article from the Canadian Chartered Accountant of July, 1962, entitled "Accounting for Finance Charges by Sales Finance Companies", wherein, among other things, the author of the article describes these two methods, whose opinion was concurred in by the witness, Mr. Richard McDonald Parkinson, C.A.

After this sale to Industrial Acceptance Corporation Ltd., the Ted Davy Finance Co. Ltd. did enter into one chattel mortgage contract and certain other transactions in respect to land mortgages but none of these transactions, in my opinion, have any relevance to the issue to be decided here.

The sole issue to be decided is whether the net gain obtained by Ted Davy Finance Co. Ltd. by reason of this transaction made with Industrial Acceptance Corporation Ltd., pursuant to the contract dated August 23, 1958, is capital profit or income which should be included in computing the appellant's income for the taxation year 1958.

I am of opinion as was given in evidence, that there was a *bona fide* intention on the part of Ted Davy Finance Co. Ltd. to go out of the conditional sale and chattel mortgage business in 1958 because of the conditions then obtaining in this business which no longer made it a financially satisfactory business for the shareholders, of whom the principal one was Mr. Ted Davy. The reasons given by him for going out of this business were entirely credible, namely that competition of other companies who entered the Toronto market and discounted conditional sale contracts and chattel mortgages in financing the sale of cars without requiring that there be recourse to the dealer, and who financed a most substantial part of the total sale price of cars, not demanding that a substantial down payment on the purchase price of motor cars be made by purchasers of same, resulted in this finance company becoming increasingly a less attractive business financially.

I am of opinion, therefore, that this was intended to be and was in fact a realization sale by Ted Davy Finance Co. Ltd. and not a sale in the ordinary course of its business.

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The net excess proceeds as hereinafter mentioned, I find were capital receipts within the principles of *Frankel v. Minister of National Revenue*[1].

I am further of opinion that s. 85 F (4) is not applicable to the facts of this case so as to require the inclusion of the amount referred to at the end of this judgment in computing the appellant's income for the year 1958, for a number of reasons.

Firstly, in my opinion, this was a sale of a "right" to receivables and not a sale of receivables, and is therefore a capital receipt. The principle of law enunciated in *C.I.R. v. Paget*[2] per Lord Romer at p. 699, is in my opinion applicable.

Secondly, s. 85 F (4) refers only to "cash" basis taxpayers and not "accrual basis" taxpayers, and therefore, in so far as the conditional sales contracts are concerned which were sold, is inapplicable.

Thirdly, s. 85 D deals with the sale of receivables by "accrual basis" taxpayers.

Fourthly, s. 85 F (4), in my view, deals only with "income" receivables and not receivables representing "capital" loans repayable.

I am also of opinion that what was sold in this case was not "inventory" within the meaning of s. 139(1)(*w*) of the *Income Tax Act*.

That definition of inventory, in my view, should not be given the broadest meaning that could be attached to it, but instead the whole Act should be looked at to give it a reasonable and practical meaning, especially when, for example, there are other sections of the Act which in themselves constitute a complete code. These particular statutory provisions override this general provision or definition (s. 139(1)(*w*)) in so far as it is repugnant.

With respect, therefore, I do not agree with the decisions of *Kendon Finance Co. Ltd. v. Minister of National Revenue*[3] and *Cosmopolitan v. Minister of National Revenue*[4].

Some examples of such particular statutory provisions referred to above, are as follows. Depreciable assets fit the description of "inventory" in the Act, but cannot be such because if classified as inventory, then Regulation

[1] [1959] C.T.C. 244.
[2] (1937) 21 T.C. 677.
[3] 33 Tax A.B.C. 149.
[4] 27 Tax A.B.C. 373.

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1102(1)(*b*) precludes a capital cost allowance deduction; if receivables are "inventory" then a deduction for "bad" and "doubtful" accounts could be obtained by a valuation under s. 14(2) and ss. 11(1)(*e*) and 11(1)(*f*) would be unnecessary; and if receivables are "inventory" then on their sale s. 85 E sets out consequence of sale and both section 85 D and 85 F (4) of the Act are unnecessary.

In the result therefore the appeal is allowed with costs.

Because of the adjustments that have been made between the appellant and Industrial Acceptance Corporation Limited, by reason of the wording of the contract between them of August 23, 1958, I am of opinion that the net gain in 1958, which is capital profit, is $68,259 and the appellant does not have to include it in computing its income; but the appellant will not henceforth be able to set up any future reserves under the provisions of s. 12(1)(*e*) of the Act.

Judgment accordingly.

1962
Dec. 3-5
1964
June 19

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

PREMIUM IRON ORES LIMITED ....RESPONDENT.

Revenue—Income Tax—Income Tax Act, S. of C. 1948, c. 52, s. 12(1)(a)—Sales Agency—Sales commissions—Written contracts to be given their plain ordinary meaning—Whether money paid to third party under contract a current business expense or a capital outlay—Whether legal costs incurred in resisting claim of foreign Government to tax a deductible expense—Dispute as to taxability as opposed to quantum of tax claimed.

In 1943 the respondent entered into a contract with Steep Rock Iron Mines Limited, by the terms of which it became the exclusive sales agent to sell all the ore mined by Steep Rock, for which it was to receive a commission of two per cent of the value thereof. The agreement also provided for the respondent to purchase shares of Steep Rock and to lend it money under certain conditions In 1944 the respondent entered into an agreement with Transcontinental Resources Limited, in which reference was made to the 1943 agreement with Steep Rock, and by the terms of which Transcontinental agreed that upon the respondent purchasing a certain number of Steep Rock shares at a specified price, Transcontinental would buy a certain number of them from the respondent at a specified price. By the

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terms of this agreement the respondent agreed to pay Transcontinental a sum equal to twenty per cent of all monies paid to the respondent by Steep Rock during each year of the agency under the agency contract.

The appellant assessed the payments made by the respondent to Transcontinental under the second agreement, which amounted to twenty per cent of the commissions received by the respondent from Steep Rock, as income of the respondent, whereas the respondent alleged that the execution of the two contracts and the circumstances leading thereto established the relationship of partnership or joint venture between the respondent and Transcontinental, or that the monies received by the respondent from Steep Rock were impressed with a trust to the extent of twenty per cent thereof in favour of Transcontinental or, finally, that the payments to Transcontinental by the respondent were an outlay or expense made by it for the purpose of gaining or producing income from its business.

By way of cross-appeal the respondent claimed expenses incurred in successfully resisting payment of United States income and capital gains tax as an allowable deduction in computing its taxable income.

Held: That the two contracts under review must be given their plain, ordinary meaning and there is nothing in the language thereof from which a partnership relationship, a joint venture or a trust can be inferred.

2. That the purchase by the respondent of Steep Rock shares was an investment of capital and the money paid to Transcontinental by the respondent in consideration of Transcontinental buying some of these shares from the respondent was equally a capital outlay and cannot be regarded as a current expense of the respondent's business.

3. That legal costs incurred in disputing a claim for income tax are not an allowable deduction in computing business profits and this is so whether the dispute relates to the amount of the taxable profit or to the taxability of the profit at all, and whether the dispute arises out of a domestic or foreign tax imposition.

4. That the appeal is allowed and cross appeal dismissed.

APPEAL from the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Cattanach at Toronto.

S. J. M. Grange and *S. Silver* for appellant.

Charles Gavsie, Q.C., Guy Favreau, Q.C. and *D. O. Mungovan, Q.C.* for respondent.

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

CATTANACH J. now (June 19, 1964) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Tax Appeal Board[1] allowing appeals by the respondent from its income tax assessments for 1951

[1] (1959) 21 Tax A.B.C. 178.

and 1952 under the *Income Tax Act*, 1948 S. of C., c. 52 and a cross appeal by the respondent.

The appeal relates to an item of $46,532.16 in respect of 1951 and $45,192.03 in respect of 1952, being portions of commissions payable to the respondent for acting as a sales agent which portions the respondent had bound itself by contract with a third person to pay to that person.

The cross appeal relates to legal expenses incurred by the respondent in successfully resisting payment of United States income and capital gains tax.

The commissions that are the subject matter of the main appeal were payable to the respondent under an agreement made on January 15, 1943 between the respondent and Steep Rock Iron Mines Limited (hereinafter referred to as "Steep Rock"). By this agreement Steep Rock appointed the respondent "sole and exclusive sales agent" to sell all iron ores produced and mined from its lands and the respondent accepted the appointment and agreed that it would not act as sales agent for any other person engaged in the production and sale of iron ores. In addition to detailed provisions regulating the sales agency, including a provision for a commission of two percent of the value of all ores sold by the respondent and Steep Rock during the life of the agreement "for services rendered", the agreement contained a provision for the purchase, by the respondent from Steep Rock, of 1,437,500 shares of the capital stock of Steep Rock for the sum of $14,375, and for a loan by the respondent to Steep Rock not exceeding $1,000,000, if required by Steep Rock for certain purposes.

The other relevant agreement is an agreement between the respondent and Transcontinental Resources Limited (hereinafter referred to as "Transcontinental") made on December 29, 1944. This agreement, by its recitals, referred to the agreement of January 15, 1943, by which Steep Rock appointed the respondent its exclusive sales agent, and recited that the respondent had agreed, pursuant to certain paragraphs of that agreement relating to the $1,000,000 loan, to purchase from Steep Rock 267,000 shares of the capital stock of Steep Rock for $600,750. This agreement contained two relevant provisions, (a) Transcontinental agreed that, upon the respondent purchasing 267,000 shares of Steep Rock, it would buy 100,000 of the said shares from

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the respondent for $225,000 plus tax, and (b) the respondent agreed that in each year of the agency contract it would pay Transcontinental "a sum equal to twenty percentum" of all monies paid to the respondent by Steep Rock during such year by way of commission under the agency contract.

Subsequently, Transcontinental assigned its right to be paid an amount equal to twenty percent of the respondent's commissions to Donald M. Hogarth and he assigned that right to John Alexander McFadyn.

The sums in question in the main appeal were received by the respondent under the agreement of January 15, 1943 as commissions for services rendered as sales agent for Steep Rock. They were then paid by the respondent to Mr. McFadyn under the agreement of December 29, 1944.

Evidence was given as to the circumstances in which these agreements were entered into and it is clear that the undertaking by the respondent to purchase Steep Rock shares and to loan money to Steep Rock was part of the same bargain that resulted in the sales agency contract.

It was contended by counsel for the respondent that, as a consequence of the two above described contracts and the circumstances surrounding the entry into such contracts, the relationship of partnership or "joint venture" existed between the respondent and Transcontinental and that, accordingly, the monies to which Transcontinental was entitled were not income of the respondent. Alternatively, it was submitted that the monies received by the respondent from Steep Rock were impressed with a trust to the extent of twenty percent thereof in favour of Transcontinental and therefore did not represent revenue of the respondent. Finally it was submitted that the payments to Transcontinental by the respondent were an outlay or expense by the respondent for the purpose of gaining or producing income from its business within the meaning of section 12(1)(*a*) of the Act.

In my view no such result follows from the clear and unequivocal language employed in the contracts.

After having given these arguments of counsel the most careful consideration, I am unable to find anything in the language of the written contracts from which I can infer a partnership relationship, a joint venture or a trust. Further, after a very careful review of the oral evidence and other documents I am unable to find anything therein that has the effect of changing the import of the two contracts referred to above, or of giving them anything other than their plain ordinary meaning.

The contract of January 15, 1943 clearly provides for the respondent acting as sales agent for Steep Rock and receiving a commission for its services. That commission must be included in computing the respondent's profits.

The contract of December 29, 1944 was an agreement by the respondent to pay to Transcontinental an amount equal to twenty percent of the commissions received by it under its contract of January 15, 1943 with Steep Rock. The apparent consideration for this contract was Transcontinental's agreement to buy Steep Rock shares from the respondent. Payments made for such a consideration cannot be regarded as a current expense of the respondent's business.

In so concluding, I do not overlook the submission that the respondent's business was assisting in the financing and development of Steep Rock. I have not, however, been able to convince myself that the matter can be so regarded. On the one hand, as I view it, the respondent provides services as a sales agent to Steep Rock. On the other hand, the respondent has made an investment in Steep Rock shares. The purchase of such shares is an investment of capital and monies paid to a third party for purchasing some of those shares is equally a capital outlay and cannot be regarded as a current expense of the respondent's business.

In my opinion the Minister was, therefore, right in assessing the respondent as he did and accordingly the appeal herein must be allowed with costs.

Turning to the subject of the cross appeal herein, the respondent was informed in 1950 by an officer of the Internal Revenue Service of the United States, some six years after it had begun to sell iron ore in substantial quantities, that the Internal Revenue Service was making the claim that the respondent was doing business in the United States, that it had a permanent establishment in that country and accordingly that the commissions received by the respondent from sales of Steep Rock ore to consumers in the United States, which comprised all of the sales made by the respondent, were taxable in the United States from the year 1943 forward.

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The amount of the tax claimed to be exigible in the United States was estimated as being slightly in excess of two million dollars.

The amounts in issue in the cross appeal are legal expenses incurred by the respondent, being $12,317.36 paid in 1951, and $8,514.16 in 1952, in connection with this claim by the United States Internal Revenue Service, which claim ultimately was successfully resisted.

It is well settled that the legal costs incurred in disputing a claim for income tax may not be allowed as a deduction in computing business profits. In *Smith's Potato Estates, Ltd. v. Bolland*[1] Lord Simonds said at page 374:

> . . . neither the cost of ascertaining taxable profit nor the cost of disputing it with the revenue authorities is money spent to enable the trader to earn profit in his trade. What profit he has earned, he has earned before ever the voice of the taxgatherer is heard. He would have earned no more and no less if there was no such thing as income tax. . . .

It was submitted by counsel for the respondent that the *Smith* case is not applicable because it dealt with the cost of ascertaining the amount of taxable profit and the cost of disputing it, whereas in the present case the dispute involved the jurisdiction of the United States Revenue authorities to impose taxation.

I cannot accept that argument because in my view the principle of the above case applies equally to a dispute as to taxability.

The decision in the *Smith* case relates to the deduction of the cost of disputing domestic tax impositions in the computation of profits. However, the present problem relates to a claim for income tax made by another country.

Foreign income tax was considered in *I.R.C. v. Dowdell O'Mahoney & Co.*[2], where a company resident in Eire carried on business at two branches in England. The whole of its profits, including those arising from its businesses in England, were subject to income tax in Eire and its profits from the businesses in England were subject to United Kingdom excess profits tax. The company sought to deduct a proportion of the Eire taxes in computing the profits of the businesses in England for assessment to excess profits tax in the United Kingdom. It was held by the House of Lords that the Irish taxes were not paid for the purpose of

[1] [1948] 2 All E R 367. [2] [1952] 1 All E.R. 531.

earning profits, but were an application of profit when made.

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Lord Oaksey said at page 533:

. . , I am of opinion that taxes such as those now in question, viz, income tax, corporation profits tax and excess profits tax, are not, according to the authorities, wholly and exclusively laid out for the purposes of the company's trade in the United Kingdom. Taxes such as these are not paid for the purpose of earning the profits of the trade; they are the application of those profits when made and not the less so that they are exacted by a Dominion or foreign government. No clear distinction in point of principle was suggested to your Lordships between such taxes imposed by the United Kingdom government and those imposed by Dominion or foreign governments. . .

If income taxes payable to a foreign jurisdiction are not deductible as an outlay or expense for the purpose of gaining income, the legal expenses incurred in disputing or attempting to reduce those foreign taxes are not deductible.

The cross appeal is therefore dismissed with costs.

Judgment accordingly.

BETWEEN:

1964

June 22

June 25

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE .... APPELLANT;

AND

J. M. E. FORTIN, INC. .... RESPONDENT.

Revenue—Customs Tariff—Customs Act, R.S C 1952, c 58, as amended, s. 45—Tariff items 409m(1) and 427a—Whether Tariff Board erred in law.

This is an appeal from a declaration of the Tariff Board that a machine described as a tree crusher be classified as a tractor under tariff item 409m(1) and not a specialized machine under tariff item 427a.

Held: That reasonable men, properly understanding the applicable law, could reasonably come to different conclusions in this matter.

2. That while a different conclusion of fact might have been reached because of the greater weight that could have been given to the evidence of the actual use of the machine as opposed to the evidence of its possible uses, the Board did not have to come irresistibly to a different conclusion or determination than it did.

3 That the appeal is dismissed.

APPEAL from a decision of the Tariff Board.

1964

DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE v. J. M. E. FORTIN INC.

The appeal was heard by the Honourable Mr. Justice Gibson at Ottawa.

G. W. Ainslie and *R. A. Wedge* for appellant.

D. G. Blair for respondent.

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

GIBSON J. now (June 24, 1964) delivered the following judgment:

This is an appeal pursuant to s. 45 of the *Customs Act*, R.S.C. 1952, c. 58, as amended, from the Declaration of the Tariff Board in this matter, dated December 10, 1963, allowing an appeal by the respondent from a decision of the appellant dated July 3, 1962, wherein a machine described as a "LeTourneau Model G-40 Tree Crusher" was declared to be classified under tariff item 409*m*(1) and not under tariff item 427*a*.

It is the contention of the appellant on this appeal that this machine should be classified under said tariff item 427*a*.

These tariff items are as follows:

> 427*a*—All machinery composed wholly or in part of iron or steel, n.o.p., of a class or kind not made in Canada, complete parts of the foregoing;
>
> 409*m* (1)—Internal combustion tractors other than highway truck-tractors; accessories for such tractors, n.o.p.; parts of all the foregoing.

Exhibit A-1 filed on the appeal before the Tariff Board is a document prepared by the manufacturer of the machine, R. G. LeTourneau, Inc., Longview, Texas, on which is a picture of the machine, and in which there is set out certain of the specifications of it. The machine is therein described as a "tree crusher", 39′10″ in length, 15′2″ in overall height to top of cab, powered by a Model 12V71 G.M.C. Diesel engine, driving LeTourneau A.C. Generator and LeTourneau D.C. Generator direct coupled inline with engine, and as having other features, as for example, being constructed so that all major components can be assembled and disassembled quickly.

The contention of the appellant is that this machine is a specialized machine and not a "tractor" within its legal meaning; or, more specifically, that this machine was a land clearing machine and not a tractor.

A definition of "tractor" relied on by the appellant in support of this contention was to the effect that to be a "tractor" a machine must be used especially for drawing agricultural or other implements or for bearing or propelling such implements.

The objective criterion, or test, selected by the Tariff Board in its adjudication of this matter resulting in the categorizing of this machine as coming under tariff item 409m(1), was the "versatility" of this machine.

The majority of the Tariff Board in their decision held that:

> Although the tree crusher does not have the versatility of some standard tractors, the Board finds that it conforms in so many respects to the concept of tractor that it is more specifically described in tariff item 409*m* (1) than in the broad, general language of tariff item 427*a*

The dissenting opinion of the Tariff Board held that:

> It is clear that the imported tree crusher has some qualities in common with "tractors" in the broad meaning of dictionary and other definitions However, from all the evidence it appears to me that the tree crusher was designed and built for use in toppling trees and clearing land

Counsel for the appellant conceded that the Tariff Board in this matter properly instructed itself as to the applicable law.

The sole issue between the appellant and the respondent on this appeal was whether the Tariff Board, after properly instructing itself as to the law, acted judicially in coming to the conclusion that it did on the evidence adduced before it.

It was the submission of counsel for appellant that the Tariff Board did not act judicially in reaching the conclusion it did on the evidence that was before it, but on the contrary, it should have been led irresistibly to a contrary conclusion.

Counsel for the respondent, on the other hand, submitted that the evidence was such that the Tariff Board could have reached the conclusion that it did and whether or not a different or another Court would have reached the same conclusion was not in issue.

The appellant's submission in support of its contention concerning the evidence was that on the whole of the evidence there was only proved to be two demonstrated uses of this machine (i.e. land clearing in the hydro Carillon project in Ontario and another substantial land clearing

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Gibson J.

project in New Brunswick) which did not establish an adequate "versatility" for this machine to permit the Board reasonably to come to the conclusion that it should be categorized as a "tractor", but that, on the contrary, this evidence proved that it was a specialized machine and therefore the Board should have categorized it under tariff item 427*a*.

The appellant contended that the other evidence adduced by the witnesses of the respondent (viz. Mr. J. M. E. Fortin of the respondent Company and Professor R. Doré of Montreal, P.Q.) was evidence merely of possible uses of the machine, and did not establish that it could be put to these uses, and that the evidence of Mr. Fortin as to other possible uses for this machine not only was not corroborated by Professor Doré but was contradicted by the only other witness, Mr. W. McGraw, who was called by the appellant.

The respondent contended that the Board in fact found that evidence of Mr. Fortin and Professor Doré was legal proof of the versatility of this machine; that it preferred the evidence of these two witnesses where it conflicted with the evidence of the other witness, Mr. McGraw; and that upon reasonable reading of the whole of the evidence there was sufficient proof in law to have enabled the Tariff Board to have made the findings of fact that it did, which findings the respondent cited, namely:

> The tree crusher has many characteristics associated with the current usage of the word tractor: self-propulsion, locomotion on rough ground, great power, great weight, huge rollers for flotation and traction; capacity to push or pull with enormous force, adequate manoeuverability, locomotion on solid surfaces if equipped with rubber tire wheels, etc.; the presence of the bumper, which can be removed, and the use of the tree crusher to push down or tow away big trees do not exclude it from the tractor category, nor does its relative inefficiency in certain given functions And while the trade literature that has been filed refers to a tree crusher and not a tractor, the witness Fortin testified that the tree crusher bears a plate that says "Tree crusher tractor No. . . . "

Having considered the whole of the evidence adduced, I am of opinion that reasonable men, properly understanding the applicable law, could reasonably come to different conclusions in this matter.

There was legal evidence adduced to support the findings of fact made by the majority of the Tariff Board.

While in my view a different conclusion of fact might have been reached because of the greater weight that could have been given to the evidence of the actual use of this machine as opposed to the evidence of its possible uses, I am not of the opinion that the Board irresistibly had to come to a different conclusion or determination than it did.

In the result, therefore, in my opinion, there was no error in law made by the Board in this matter. *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise*[1]; *Edwards v. Bairstow*[2]; *B. P. Refinery (Kent) Ltd. v. Walker*[3].

The appeal is therefore dismissed with costs.

Judgment accordingly.

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DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE
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J. M. E. FORTIN INC.
Gibson J.

BETWEEN:

ALEXANDER COLE ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

1964
June 25
June 30

Revenue—Income Tax—Purchase and sale of discounted second mortgages by association of which appellant a member—Whether association a partnership—Sale of appellant's interest in association—Income or capital gain—The Partnerships Act, R.S.O. 1960, c. 288.

In 1949 the appellant, a Toronto businessman, entered into an association with a Mr. Minden, a lawyer, and three other persons for the purpose of buying second mortgages at a discount. Each member contributed capital to the association but Minden purchased the mortgages and the accounting for the mortgages was done in his law office. The appellant took no part in selecting the mortgages to be purchased or in the allocation of funds and most of the mortgages were registered in Minden's name. There was no written document to indicate the nature of the association or the relationship existing between the members thereof.

In December 1956 the appellant withdrew from the association and in January 1957 he received payment from Minden in the amount of $32,200 for his interest therein. Of this amount it was agreed by appellant and respondent that $10,916.08 represented the actual accrued entitlement of the appellant to bonuses on the mortgages on a *pro rata* basis in respect of the second mortgages held by the association at the time the appellant withdrew therefrom. The respondent reassessed appellant's 1957 taxable income by adding thereto the sum of $10,916.08.

[1] (1956) 1 D.L.R. (2d) 497.
[2] [1955] 3 All E.R. 48 at 57 (letter F and foll.).
[3] [1957] 1 All E.R. 700 at 715 (letter F and foll.).

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Held: That the arrangement between the appellant, Mr. Minden, and the three other persons was not in law a partnership, Mr. Minden being merely the agent for each of the other parties to the arrangement.

2. That what the appellant sold in December 1956 to the two remaining members of the association was not a capital asset.
3. That the appeal is dismissed.

APPEAL under the *Income Tax Act.*

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

Wolfe D. Goodman for appellant.

W. Z. Estey, Q.C. and *S. Silver* for respondent.

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

GIBSON J. now (June 30, 1964) delivered the following judgment:

This is an appeal from the assessments for income tax made by the respondent, dated March 28, 1962, wherein a tax in the sum of $8,255.56 was levied in respect of the income for the taxation year 1957 of the appellant.

The respondent by the said assessment re-assessed the appellant in such a manner as to include in his income for the taxation year 1957 the sum of $10,916.08 as being profit on the sale of certain second mortgages.

The appellant, at all material times, resided in the City of Toronto and is, and was, President of Aladdin Rug Co. Ltd., a rug company, and of Alexander Cole and Associates, Ltd., which is a managing and holding company. The appellant says that his employment with these companies constitutes his full-time business activities.

In the spring of 1949, the appellant, together with Arthur Minden, a lawyer of the City of Toronto, Zola Morgan, a business associate of the appellant in Aladdin Rug Co. Ltd., and Leon Pape and Ben Pape, accountants, commenced to buy second mortgages at a discount and associated themselves, according to the appellant, in what he described as a syndicate for such purpose.

Originally, the appellant and each of the other four persons put up $4,000 and commenced to buy second mortgages.

Thereafter, the interest earned on these mortgages and the principal sums when such fell due, together with additional capital advanced, were used for the purchase of additional mortgages. During the period of 1949 to 1956, 119 second mortgages having a face value in excess of $250,000 were purchased.

All these mortgages, except for one group of them which were sold *en bloc* in 1954, were held until maturity.

In December, 1954, Leon Pape and Ben Pape withdrew from this arrangement and certain of the mortgages above referred to were sold *en bloc* and they were paid the sums owing to them. This sum represented a figure which included not only the capital invested by these persons and the interest on the second mortgages representing their share in the same, but also a sum equivalent to their respective *pro rata* share, a bonus or discount which accrued to the date of such sale.

After December, 1954, and until December, 1956, the other three persons continued to purchase second mortgages in the same manner.

Then, in December, 1956, the appellant desired to have his interest purchased and he went to Mr. Arthur Minden who bought out his interest for $32,200 and gave him a cheque for this amount in January of 1957.

During the whole of the period, 1949 to 1956, the mortgages were purchased by Mr. Minden and the appellant had nothing to do with choosing any of the mortgages which were purchased or with allocating any particular funds for the purchase of any of these mortgages. The accounting for these mortgages was done in the law office of Mr. Minden, and Messrs. Pape prepared each year certain financial statements respecting these transactions which the appellant used for the purpose of preparing his income tax returns.

The appellant stated that some of the mortgages were registered in his name and in the name of others in the so-called syndicate other than Mr. Arthur Minden, but that, in the main, the mortgages were registered in Mr. Minden's name.

The appellant stated that there was no particular proportion of mortgages registered in the name of any one of the persons who constituted this so-called syndicate.

There was no formal document drawn or executed of any kind evidencing what was the precise nature of this so-called

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syndicate; and there was no such document drawn either when Messrs. Pape withdrew from the arrangement or when the appellant withdrew.

After the appellant received his cheque for $32,200 in January, 1957, he was called upon to sign certain discharges of mortgages which had been registered in his name, and copies of certain of these were filed as exhibits on this appeal. Counsel for the appellant and the respondent agreed that the document which is filed as Exhibit A-1 and which is set out hereunder represents a calculation of the profit made by the appellant on the sale of these mortgages and is in the sum of $10,916.08:

MR. ALEXANDER COLE
650 BRIAR HILL AVENUE
TORONTO 12, ONTARIO

Calculation of Profit:		
Capital invested by taxpayer in 1949		$ 8,700.00
Add: Net Mortgage interest earned by taxpayer in years 1949 to 1956 inclusive—		
1949, 1950	$ 559.13	
1951	563.06	
1952	1,420.29	
1953	2,187 38	
1954	2,012.47	
1955	2,505.40	
1956	2,244 51	11,492.24
Additional capital invested—1951	$ 1,300.00	
—1952	18,000 00	
—1955	2,547.45	21,847.45
		$42,039.69
Deduct: Withdrawals of Capital—1953	$ 1,500 00	
—1954	13,000.00	
—1956	16,500.00	$31,000 00
		$11,039 69
Proceeds of Sale		32,200 00
		$21,160.31
Deduct: Mortgage bonuses and discounts taxed in hands of taxpayer —1953	$ 236.37	
—1954	3,479.83	
—1955	2,440.71	
Mortgage bonuses and discounts not taxed in hands of taxpayer due to Statutory Limitations under Section 46 (4) of the Income Tax Act	$ 4,087.32	$10,244 23
Profit		$10,916 08

It was agreed that the figure $10,916.08 corresponded to the actual accrued entitlement of the appellant of bonuses on the mortgages on a *pro rata* basis in respect to the second mortgages held by this so-called syndicate at this material time.

Exhibit A-2 filed in this appeal was a memorandum, prepared by certain officials of the Department of National Revenue, of all mortgages owned by this so-called syndicate during the period 1949 to 1956; and, as indicated, these mortgages were all registered in the name of one or other of the members of the so-called syndicate and were all held to maturity except the group of mortgages which were sold to pay off or buy out the interests of Messrs. Pape who retired from the syndicate in December, 1954.

It was the contention of the appellant on this appeal that what he sold in December, 1956, to the remaining members of the syndicate, Messrs. Minden and Morgan, was a capital asset in that the syndicate was in law a partnership which was not dissolved at that time but rather continued; and that what was sold was not property *in specie* but rather a *chose in action.*

It was the contention of the respondent firstly, that this arrangement which was called a syndicate was not a partnership in law but that Mr. Arthur Minden was merely the common agent of Messrs. Morgan, Pape and the appellant for the purchase of these mortgages and the carrying on of the business of earning money on these mortgage transactions and also in the liquidation of their respective interests in these mortgages.

In other words, the principals Messrs. Pape were the first to have their agent, Mr. Minden, liquidate their interest; then followed the appellant and finally, Mr. Morgan had Mr. Minden dispose of his interest as his agent (which occurred, according to the evidence, also in the year 1957).

The respondent contends that if this syndicate was in law a partnership, then it was a partnership at will and what took place in December, 1956, or January, 1957, resulted in the dissolution of that partnership among Messrs. Minden, Morgan and the appellant, and the reconstituting of a partnership consisting of only two partners, Messrs. Minden and Morgan.

I am of opinion that the arrangement which is referred to as a syndicate herein was not in law a partnership.

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Instead, Mr. Minden was merely the agent for each of the persons in this arrangement which included the appellant and he acted as such in acquiring these second mortgages throughout the period 1949 to 1956 and the eventual disposition of the appellant's interest in the same in December, 1956.

Arthur Minden's connection with the so-called syndicate and details of the relationship of these members of it with each other during the years 1949 to 1956 are fully set out in the judgment of Cattanach, J. in *Minister of National Revenue v. Minden*[1]. (In this connection, it is relevant to note that there was no mention of partnership in that case).

The fact that more than one person in this group at any one time may have had an interest in each of the said mortgages is immaterial and is not in itself evidence that this was a partnership. Such an arrangement is merely neutral in so far as its legal consequences in this matter are concerned.

In this case there were no formal arrangements of any type and at no time in any public or private document was this arrangement among these persons described as a partnership in law.

Having in mind the provisions of s. 3 of the *Partnerships Act,* R.S.O. 1960, c. 288, there is nothing in this arrangement which would lead one to the conclusion that by virtue of this section of this Act the arrangement was a partnership.

Mr. Justice Duff as he then was, in the case of *Porter and Sons Ltd. v. J. H. Armstrong*[2], laid down a test, which is not met in this subject case, viz:

> Partnership, it is needless to say, does not arise from ownership in common, or from joint ownership. Partnership arises from contract, evidenced either by express declaration or by conduct signifying the same thing It is not sufficient there should be community of interest; there must be contract.

In this particular case, in my view, there is no evidence of any contract, expressed or implied, and any of the evidence adduced from which it might be argued that some of the elements of partnership were present was at best equivocal.

I do not think that it could be said that there was a true intent here on the part of the parties to be partners in law

[1] 63 D.T C. 1235-6.

[2] [1926] S C R. 328 at 329.

in this particular arrangement and thereby attract to themselves not only the advantages in law but all the disadvantages which are the burden of partnerships. If the case were in a different form involving some substantial sort of liability on these persons, including the appellant, by reason of a claim by a third party that it was a partnership, I am sure that the appellant and a court would find no difficulty in holding that no partnership in law existed.

If, however, this was in law a partnership at will, then the sole question arises whether there was dissolution of the partnership at the time the appellant alleges he assigned his interest to the other partners in December, 1956.

The assignment was not put in any formal document but was merely verbal and the appellant received a cheque and it was his allegation that the remaining partners received all rights in the assets constituting the partnership including the right to receive the profit.

If the partnership was dissolved in December, 1956, by what was done, and re-constituted with the remaining three partners, then it would be clear that the profit obtained by the appellant of $10,916.08 would be income in his hands. This was so held in *Minister of National Revenue v. Sedgwick*[1].

If the partnership was not dissolved then it is arguable that this receipt was a capital receipt.

The *Partnerships Act*, R.S.O. 1960, c. 288, is silent as to any provisions which in law constitute dissolution when the partnership is a partnership at will. Section 31 may be applicable in any event but it does not touch on the issue of whether or not the partnership is dissolved.

This matter was considered and left open in the case of *Emanuel v. Symon*[2], and I quote from the judgment of Channell J.

> Whether the assignment of his share by one partner to another operates to dissolve the partnership may be said to be at the present time a matter of very considerable doubt. It is stated at p. 583 of the 5th edition of Lindley on Partnership, which was published before the Partnership Act, in 1890, that in the case of a partnership at will the assignment by a member of an ordinary firm of his share in it operates as a dissolution of the partnership; but in the editions published since the Act the editors indicate that it is their opinion that the Act has made a difference in this respect, because the Act mentions certain specific cases in which a partnership is to be considered to be dissolved, and the

[1] (1964) 42 D.L.R. (2d) 492. [2] [1907] 1 K.B. 235 at 241.

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assignment of partnership shares is not included amongst them. I was referred to a case of *Sturgeon v. Salmon*, 22 Times L.R. 584, in which it was suggested that the point had been decided by Ridley and Darling JJ. in the Divisional Court, but when that case is examined it will be found that the point was not decided, the decision of the Court having proceeded on the special terms of the particular agreement between the parties. There seems to be no real authority on the question where there are more than two partners, though where there are only two partners there is authority: *Heath v. Sansom* (1832) 4 B. & Ad. 172, which shows that an assignment by one partner of his share to the other does put an end to the partnership, as indeed must obviously be the case. Where there are more than two partners and there is an assignment from one to another so that no new partner is introduced, the question is so doubtful that I do not like to express an opinion on it. The Partnership Act, 1890, leaves the matter in doubt, because the Act provides by s. 46 that the rules of equity and common law applicable to partnership shall continue in force except in so far as they are inconsistent with the express provisions of the Act, and it is very arguable whether the addition of other causes of dissolution is inconsistent with a section which expresses certain causes.

Apparently, the sections regarding dissolution of partnership which were included in the English *Partnership Act,* in 1890, have been transposed unchanged into *The Partnerships Act,* R.S.O. 1960, c. 288, and so the statutory enactments are identical in this matter.

If it was necessary to decide this point, which I have held it is not, I would be prepared to hold that a partnership at will is dissolved by a partner assigning his interest in the partnership to the remaining partners, when there are at least two remaining partners.

In the result, therefore, the appeal is dismissed with costs.

Judgment accordingly.

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June 30

July 6

BETWEEN:

SUNWAY FRUIT PRODUCTS, INC. (Opponent) APPELLANT;

AND

PRODUCTOS CASEROS, S.A. ..... (Applicant) RESPONDENT.

Trade Marks—Trade Marks Act, S. of C. 1952-53, c. 49, s. 6—Registrability—Confusion—Trade mark of wares sold wholesale confusing with trade mark of wares sold retail—"Public" includes only those members of public who would probably buy the wares—Trade marks for wares in same category—Phonetic similarity between trade marks—State of trade marks register.

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This is an appeal from the decision of the Registrar of Trade Marks allowing the registration of the respondent's trade mark "Fresk", on the ground that the said trade mark is confusing with the appellant's already registered trade mark "Freshie" and therefore is not registrable. The trade mark "Fresk" had not been used anywhere in Canada prior to the hearing of the appeal nor had the respondent sold any of its products in Canada up to that time. Affidavit evidence was filed on the appeal in addition to the evidence that was before the Registrar of Trade Marks, and this included affidavits of twenty-one persons interviewed on behalf of the appellant. There was evidence that the respondent sold its product only on a wholesale basis whereas the appellant sold "Freshie" at the retail level.

Held: That the matter of whether the wares in question were sold at the wholesale or retail level is irrelevant in deciding whether there is or is not confusion.

2. That the source of manufacture of the wares in question would be confused in the mind of the public, i.e. those members of the public who would probably buy these wares.
3. That there has been a substantial inherent distinctiveness established for the trade mark "Freshie" and the product sold on which it is endorsed and that it is substantially known by the public in Canada.
4. That the product marketed by the respondent under the trade mark "Fresk" is in the same category of wares as those sold by the appellant under its trade mark "Freshie".
5. That there is sufficient phonetic similarity between the trade marks "Freshie" and "Fresk" and in the appearance of the wares and the advertising in respect of each of them to confuse the public.
6. That the state of the Register which indicates that there are registered in the office of the Registrar of Trade Marks at least twenty trade marks which have in them the common word "fresh" is not a reason for holding that no confusion exists, since only a few of the already registered trade marks refer to wares of a similar category as the wares for which the appellant has had its trade mark registered.
7. That the appeal is allowed.

APPEAL from a decision of the Registrar of Trade Marks.

The appeal was heard by the Honourable Mr. Justice Gibson at Ottawa.

Donald F. Sim, Q.C. for appellant (opponent).

J. Devenny for respondent (applicant).

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

GIBSON J. now (July 6, 1964) delivered the following judgment:

This is an appeal by Sunway Fruit Products Inc., from the decision of the Registrar of Trade Marks delivered March 1, 1963, rejecting its opposition to trade mark

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application Serial No. 258,025, whereby the word trade mark of the respondent "FRESK" was registered.

The appellant has two prior registrations, namely, the word trade mark "FRESHIE", numbered NS 167/42703 and the design mark "FRESHIE" trade mark number NS 139/35694, both of which were registered on September 17, 1949. True copies of these registrations were filed on this appeal as exhibits A-1 and A-2.

The appellant contends that both the ware and the design trade mark "FRESHIE" have been used by it in Canada since 1944.

The respondent, on July 21, 1960, applied to the Registrar of Trade Marks to register the trade mark "FRESK", which was for a product which was essentially similar to the product manufactured in Canada by the appellant.

This application was considered by the Registrar of Trade Marks and on November 7, 1960, the Registrar by notice informed the respondent that this application was confusing with the registered trade mark "FRESHIE" (and also the trade mark "FRESH UP", owned by another company not a party to these proceedings). The solicitors for the respondent replied to these notices from the Registrar but on January 19, 1961, the Registrar of Trade Marks decided that the said trade mark "FRESHIE" and the said trade mark "FRESH UP" being applied to the same general class of wares as was the application of the respondent, was sufficiently close in pronunciation to promote a possible confusion within the meaning of s. 6 of the *Trade Marks Act* and, therefore, because of s. 12(1)(*d*) of that Act the mark of the respondent was not registerable.

The solicitors for the respondent filed a reply to this decision of the Registrar on March 17, 1961, and the Registrar in May, 1961, sent a notice to the solicitors for the appellant informing them that he had advertised pursuant to the provisions of s. 36(3) of the *Trade Marks Act*.

The appellant then filed with the Registrar on July 4, 1961, its opposition submitting to the Registrar that in their opinion the trade mark of the respondent was not registerable because it was confusing within the meaning of s. 12(1)(*d*) of the *Trade Marks Act* with the trade marks registered by the appellant under numbers NS 167/42703 and NS 139/35694 being respectively the word mark "FRESHIE", and the design mark for "FRESHIE".

On August 28, 1961, the respondent filed with the Registrar of Trade Marks its counterstatement submitting that the proposed trade mark "FRESK" was not confusing within the meaning of s. 12(1)(*d*) of the *Trade Marks Act* with "FRESHIE" and the "FRESHIE" design; that there was an inherent distinction in the trade marks; that there was no substantial degree of resemblance between the sound and suggested idea in the two marks; and that the nature of the wares of the respondent was different from those of the appellant.

The appellant then filed with the Registrar of Trade Marks an affidavit of one Daniel O. Haskell, which was sworn to on November 24, 1961, which deposed, among other things, that no product of "FRESK" had been sold in Canada up to that time and that, on the contrary, the sales and advertising of the appellant's product "FRESHIE" were most substantial and widespread in Canada. The respondent then filed an affidavit of one Hector J. Arena, which was sworn to on February 9, 1962, in Mexico City. This affiant deposed that the company Productos Caseros, S.A., which was the applicant, had carried on business since April 10, 1958, as manufacturers of preparations for use in making drinks and confectionery; that the applicants had adopted their trade mark in 1957 and have been using the said trade mark continuously since that time in respect to base preparations for use in the manufacture of flavored carbonated and non-carbonated beverages, ice powders, sherbets, ice creams, etc.; that the word "FRESK" is coined and distinctive and does not have any meaning in any language and is not a phonetic equivalent of the Spanish word "fresca" and is not a confusing pronunciation or connotation of the word "fresh"; and that the product "FRESHIE" was sold in a different market than its product, the general consumer public market whereas the applicant sells its "FRESK" product in a completely different market, selling the same in larger sized units through completely different channels of trade, namely, to large manufacturers of food, drink or confectioneries who do not buy casually or on impulse but who are very discriminating in their purchases and exercise care in distinguishing the source of such

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products in view of the large units; and that "most important in view of the different methods of merchandising the wares sold under the trade mark through completely different channels of trade, there should be no confusion between "FRESK" and "FRESHIE" trade marks."

Subsequently to that, there was an oral hearing before the Registrar following which the Registrar registered the trade mark "FRESK" of the respondent.

It is from this decision that the appellant appeals to this Court.

There was filed in this Court as additional evidence a number of affidavits. For the appellant there was filed the affidavit of Daniel J. Haskell, sworn September 23, 1963, the affidavit of C. Robert Folz, sworn February 24, 1964, and the affidavit of Jeremy Clive Forester, sworn February 25, 1962, and twenty-one affidavits from individuals in the Sarnia and Windsor, Ontario, and Montreal, Quebec, areas who were housewives or purchasers of merchandise in supermarkets, except one who was a customs inspector.

There was filed on behalf of the respondent an affidavit of Peter Laur Beck, barrister, sworn on March 16, 1964, which, among other things, attached copies of letters sent to the owners of other trade marks having the common word "fresh" in them and which asked the owners if their respective marks were still being used; the affidavit of Hector J. Arena, sworn on April 14, 1964, in Mexico, which deposed that the product of the respondent was not sold to housewives or other casual grocery shoppers in supermarkets but only to large scale users and manufacturers in relatively large sized units and that "FRESK" was not sold to the public in general.

The particulars of the trade mark of "FRESK" and "FRESHIE" are as follows:

"FRESK"—a base for making flavoured carbonated or non-carbonated beverages, ice pops, sherbets, ice cream, ices, in the form of powder tablets or capsules.

"FRESHIE"—dehydrated fruit crystals and dehydrated preparations for making beverages and dessert mix.

The sole question to be decided on this appeal is whether use of the "FRESK" trade mark would cause confusion with the trade mark "FRESHIE" in the manner and circumstances described in s. 6 of the *Trade Marks Act,* S. of C. 1952-3, c. 49.

In Halsbury's Laws of England, Third Edition, Volume 38, at page 545, the matter is put in this way:

> The scope of the inquiry into the possibility of confusion where one mark is already registered involves consideration of any possible user by the registered proprietor and is, therefore, wider than that under the more general prohibition of registration of similar marks where both marks may be unregistered. . . . In general only the probability of confusion in this country will be considered.

There is one difficulty in the subject case which makes it difficult to adduce completely satisfactory evidence on the issue of confusion and it is the fact that only one of the marks has been used in Canada, namely, the trade mark "FRESHIE". The trade mark "FRESK" has not been used at all in Canada, and the respondent has not sold any of its products in Canada up to the present time.

For this reason, speaking generally, it should be observed that much of the evidence which was before the Registrar of Trade Marks and also much of the evidence which was filed in the way of affidavits on this appeal as additional evidence, is not as cogent as would be desired by the parties.

It is difficult to get direct evidence of confusion in such circumstances as exist here. Witnesses, therefore, can only give evidence as to their state of mind, and, therefore, the probative value of such evidence is less than that of direct evidence.

One other comment should also be made about certain of the evidence filed as supplementary on this appeal, namely, that some of it is hearsay and, therefore, inadmissible. To the extent it is hearsay, I am paying no attention to it in arriving at the decision that I do.

The affidavit of Jeremy Clive Forester establishes that the word "FRESK" is not derived from the Spanish word "fresca", which is an English synonym of the word "fresh".

The affidavit of Daniel J. Haskell and the twenty-one affidavits of the persons interviewed, in my opinion, do establish confusion of the trade mark "FRESK" with the trade mark "FRESHIE" if the use of both these trade marks were in connection with the same category of wares.

I am also of the opinion that the matter of whether the wares were sold at a wholesale or retail level is irrelevant in deciding whether there is or is not confusion within the meaning of s. 6 of the Act. In my view, in this case, the source of manufacture would be confused in the mind of the

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public, that is those members of the public who would probably buy these wares, such members having, as would be expected, at the material times, only a vague recollection of the precise mark.

From the evidence adduced, which shows a wide sale of the product "FRESHIE" over a period of a considerable number of years, which sales have been built up through extensive advertising in most mediums, I find that there has been a substantial inherent distinctiveness established for this trade mark and the product sold on which it is endorsed, and that the same is substantialy known by the public in Canada. I am also of the opinion that the product which the owners of the trade mark "FRESK" are referring to in their trade mark is essentially in the same category of wares sold by "FRESHIE" under its trade mark and that there is sufficient phonetic similarity between these names and in the appearance and the advertising in respect of each of them when applied to their respective goods to confuse the public.

The public to which reference is made are the persons who would reasonably be expected to purchase the product "FRESHIE" or the product "FRESK" and it is their judgment which is the objective test applied in this determination on the evidence of whether or not there is confusion within the meaning of s. 6 of the Act.

I am also of the opinion that the state of the Register is not a reason for holding that no such confusion exists in this case.

It is true that there are registered in the office of the Registrar of Trade Marks at least twenty trade marks which have in them a common word "fresh". Only a relatively few of these, however, refer to wares of a similar category as the wares for which the appellant has had its trade mark registered.

It may be that because of the state of the Register the appellant may be confined or restricted to its present category of wares which it manufactures or sells.

In summary, therefore, I am of opinion that on a reading and consideration of the whole of the evidence that there is a probability of confusion within the meaning of s. 6 of the *Trade Marks Act* of "FRESK" with "FRESHIE".

I am further of the view that in arriving at this conclusion no hardship results to the respondent. The respondent has sold no products in Canada, and can easily obtain another non-confusing mark to use in marketing its products in Canada when it decides to so market them.

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In the result, therefore, the appeal is allowed and the registration of the trade mark application Serial No. 258025 is rejected and the decision of the learned Registrar of Trade Marks in this matter is reversed. The appellant is entitled to its costs.

Judgment accordingly.

BETWEEN:

1964 June 23-26, 29, 30 — July 21

NATIONAL CAPITAL COMMISSION ....PLAINTIFF;

AND

MARION MILLEN ....DEFENDANT.

Expropriation—National Capital Act, S. of C. 1958, c. 37—Determination of amount of compensation—Factors to be considered in determining compensation—Sentimental and emotional factors to be ignored—Only economic and pecuniary aspects to be considered.

This is an action to determine the compensation payable to the defendant for the expropriation by the plaintiff of residential property owned by her, which consists of a house and lot of about 3 5 acres and which has a frontage of 400 feet on Woodroffe Avenue at a point 2.3 miles south of the southerly boundary of the City of Ottawa. The property was in an area that had been zoned for commercial and institutional purposes as well as for residential purposes and which was subject to a subdivision control by-law.

Held: That in determining the value of the expropriated property to the owner at the time of expropriation it must be assumed that the owner is a sensible, prudent person, interested only in the economic and pecuniary aspects of the matter and that any sentimental or emotional elements that might have some bearing on the particular owner's attitude towards the expropriated property must be ignored.

2. That the correct amount of compensation is what a reasonably prudent person in the defendant's position on the date of the expropriation, finding herself in possession but without title, would have paid for the property sooner than be ejected. In determining this amount the defendant would have to consider that if she moved from the property in question she would have to acquire equivalent premises, pay for temporary accommodation and storage of her furniture unless permitted to stay in the expropriated property until she acquired possession of other property and pay for moving expenses. In addition, her rugs, drapes and other furnishings almost certainly could not be fully utilized in another property and there would be the inconvenience and personal effort, miscellaneous expenses and general disruption of family life that are necessarily incidental to moving a family from one residence and neighbourhood to another.

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INFORMATION by the National Capital Commission to have the amount of compensation payable to defendant determined by the Court.

The action was tried by the Honourable Mr. Justice Jackett, President of the Court, at Ottawa.

G. W. Ainslie and *M. L. Ainsley* for plaintiff.

G. J. Gorman and *P. B. Tetro* for defendant.

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

JACKETT P. now (July 21, 1964) delivered the following judgment:

This is an action to determine the compensation payable to the defendant in respect of property expropriated on June 13, 1961 under the *National Capital Act,* chapter 37, of the Statutes of Canada, 1958, which property, immediately, prior to the expropriation, belonged to the defendant.

At the request of the defendant, in which the plaintiff joined, the Court took a view, on the first day of the trial, of the expropriated property and certain properties in respect of which it was anticipated by counsel that evidence would be given by expert witnesses. This view was taken in the presence of counsel for both parties.

The expropriated land is part of a larger parcel, having an area of five acres, that was purchased by the defendant on June 19, 1952 for $1,500. In 1959, the defendant sold four lots off the parcel so purchased by her. The total of the proceeds from the sales of the four lots was $6,800. Each such lot was 100 feet by 150 feet. The portion of the original parcel that was remaining to the defendant after those sales contained 3.462 acres and is the property that was expropriated.

The expropriated land has a frontage of 400 feet on Woodroffe Avenue at a point that is 2.3 miles south from the southerly boundary of the City of Ottawa 3 miles south from the new expressway known as the "Queensway" and 3½ miles south from Carling Avenue. The property has a depth of 377.5 feet. The property was not part of a subdivision but, during the period that the defendant owned it, a residential subdivision, known as "Merivale Gardens", was established and partly built up adjacent to the four lots that were sold by the defendant off her property. The expropriated property was in an area that had been designated as an area of subdivision controlled by a by-law that had the effect of prohibiting any sale of a small parcel or lot outside a subdivision without approval of a planning board. It was also in an area that had been zoned for commercial and institutional purposes as well as for residential purposes.

The property was not served by sanitary sewers, storm sewers or piped in water and any residence on it consequently had to be served by a private water well and septic tank. Under the zoning by-law, no building so served could be built on a property of less than 15,000 square feet.

At the time of the expropriation, there was, to the east of the expropriated property, the four lots that the defendant had sold, on which good residences had been or were being built, and beyond that the subdivision known as Merivale Gardens; to the north, was a property that had recently been acquired by the National Capital Commission and that had been maintained by the previous owner in a park-like state; to the west, across Woodroffe Avenue, which was an arterial highway, was a farm property that had recently been acquired by the plaintiff; and to the south, was a property with a residence, a stable, and an exercise track for horses, occupied by a trucker who kept two trucks there when not in use; and beyond that was a "Gas Bar" where gasoline, oil, soft drinks, etc., were sold.

At the date of the expropriation, there was on the expropriated land a single family residence, an attached garage, a semi-circular asphalt driveway and a swimming pool. The residence and garage were approximately in the middle of the expropriated property being about 179 feet back from Woodroffe Avenue, on which they faced, 160 feet from the rear of the property, 165 feet from the north side of the property, and 144 feet from the south side of the property.

The residence is a one-story, two-bedroom bungalow with a screened porch and an attached two-car garage. It is a wooden structure. The exterior walls are partly composed of log siding and are partly of "featheredge" construction. The roof is covered with asphalt shingles. The exterior walls of the garage are of "featheredge" construction. Its roof is flat and consists of tar and gravel. There is a basement under part only of the house and it has not been finished.

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The house was built by the defendant and her husband, who acted as their own architect in the designing and supervising of construction except that they employed an architect to turn their plans into proper working plans. They also acted as their own main contractor, contracting out certain parts of the work, such as the excavation, stone work, framing, concrete in the basement, floor joists, rafters and plywood on the living-room walls.

The construction of the improvements on the expropriated property commenced in 1954. By 1957, the main part of the work was completed. No evidence was given as to the total cost to the defendants of the improvements, but the following costs were proven:

(a) the swimming pool, installed in the spring of 1959, together with an adjacent patio, cost $5,319.50;

(b) the asphalt driveway cost $995;

(c) an area at the rear of the house was sodded and seeded on June 22, 1959 at a cost of $225.

The expropriated property was assessed in 1960, for 1961, by the Township of Nepean as follows:

Land	$1,475.00
Buildings	3,325.00
	$4,800.00

The defendant remained in possession of the expropriated property after the expropriation and was still in possession at the time of the trial. On September 28, 1961, the plaintiff paid to the defendant $22,500 on account of compensation.

By her pleadings, as amended at trial, the defendant claims the following amounts:

Value to the defendant of the lands (being the cost of acquiring a similar parcel of land in a comparable location)	$ 28,000
Cost of replacing improvements less depreciation	36,000
Inconvenience, loss of benefits due to location of land, moving costs and other expenses	6,200
TOTAL	$ 70,200

During argument, counsel for the defendant submitted that, on the evidence, the defendant was entitled to $59,205, made up as follows:

Land	$ 19,500
Improvements	37,000
Disturbance (goods, chattels and moving expenses)	2,655
	$ 59,205

By the Information, the plaintiff offered $42,000 by way of compensation. This is the full amount of the compensation the plaintiff was willing to pay voluntarily in respect of the expropriation of the property referred to above and there would have to be deducted therefrom the advance payment that I have mentioned.

The basis of "value to the defendant" of the land, apart from improvements, indicated by the Statement of Defence, i.e., "the cost of acquiring a similar parcel of land in a comparable location", has not been supported by the defendant's evidence. Evidence was led that in 1964 the defendant purchased a lot at Hog's Back on the Rideau Canal for a site for a new house at a cost of $10,200. The evidence did not, however, persuade me that this lot was "a similar parcel of land in a comparable location". Quite the contrary, my conclusion was that, apart from size, this lot was quite superior in every way to the expropriated parcel of land, and that its location adjacent to Canal Reserve land belonging to the National Capital Commission probably gave it much of the advantage of size that the expropriated property had. This 1964 transaction is no aid, in my view, to determining the compensation payable for the expropriation of the defendant's property in 1961.

Mr. Henry P. Wright, an appraiser called by the defendant, expressed the opinion that the expropriated property, apart from the improvements, was worth $19,500. In doing so, he took the position that the highest and best use of the land was as three lots for "custom built residences"—a centre one, for the improvements that were there at the time of the expropriation, and one on each side, each slightly narrower than the centre one. He also took the view that these lots were lots of the kind that would interest a very limited class of somewhat egotistical person desiring

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a site on which he could build a spectacular class of residence that would attract the attention of the passer-by. Purchases of lots on which to build houses for speculative purposes or on which more modest custom houses were to be built should therefore, in his opinion, be ignored. Moreover, he ruled out sales by subdividers on the ground that they tended to sell for low prices to get their lots moving. In his search for comparable properties, Mr. Wright went rather far afield, going as far as Rothwell Heights on the far side of Ottawa. I must say immediately that I was not satisfied by the evidence that the expropriated property was of the character that would attract the favourable notice of the limited class of persons to whom Mr. Wright referred. The evidence about the better parts of Rothwell Heights and the evidence about the expropriated property does not convince me that they are in any way comparable. Location, elevation, view and surrounding developments are some of the bases for comparison that indicate to me that sales in Rothwell Heights can be of no help in determining the land value of the expropriated property in 1961.

Mr. Wright also referred to sales of lots in two nearby subdivisions, Pine Glen Annex and Grenfell Glen, certain sales in an area some two or three miles further from Ottawa on Woodroffe Avenue, and a sale of one of the lots that adjoined the expropriated property. I have carefully considered Mr. Wright's evidence about these sales and I have not been able to convince myself that his conclusions based on them as to the value of the expropriated property, divided into hypothetical building lots, represent what a willing purchaser would have paid to a willing vendor for the expropriated property, without any of its improvements, in 1961.

Eldon H. Petry, an appraiser, gave evidence for the plaintiff as to the value of the expropriated land apart from the improvements in 1961. In his view, the land, apart from improvements, had a value at that time of $12,000. He referred to a number of sales of lots in subdivisions in the immediate general area which, in his opinion, had sufficient in common with the expropriated land to make a useful comparison possible. The sales upon which he placed greatest weight were of lots in a nearby good class subdivision, Grenfell Glen, having residences of the same general class as the expropriated residence. These lots had, however, only a 100 foot frontage and a 150 foot depth compared with the 400 foot frontage and 377.5 foot depth of the expropriated land. In the absence of more helpful evidence, I accept Mr. Petry's evidence that the sales upon which he relied are the most useful and I am satisfied that his basis for allowing for the differences between the lots that were sold and the expropriated land is, if anything, favourable to the defendant.

After carefully reviewing the reasoning of the expert witnesses and giving consideration to the relevant characteristics of the expropriated land, I am satisfied that its market value, apart from its improvements, in 1961 was not higher than $12,000. It is inconceivable to me that a reasonably prudent person would, at that time, have paid more than $12,000 for this lot for a single residence on a very busy arterial highway without any real protection against the possibility of inferior developments on surrounding properties. On the other hand, if the property were to be divided into three lots, it would cease, in my view, to have any of the attributes of an "estate like" property on which the defendant bases her claim to a high market value for her land. I, therefore, accept the plaintiff's submission that the value of the land alone was $12,000.

Having concluded that the property, had it been clear of improvements in 1961, would have had a value of $12,000 in the market, I must next consider by what amount the market value was increased by reason of the improvements that were on it at that time.

Four different witnesses gave evidence as to the replacement cost of the improvements. In so far as their evidence depends on their estimate of replacement costs, I do not accept the evidence of Mr. Wright for the defendant or that of Mr. Petry for the plaintiff having regard to the fact that each party has produced an experienced contractor who has given evidence as to actual replacement cost.

Mr. Benson for the defendant gave evidence that, in 1964, he would have undertaken to rebuild the defendant's house and other improvements with materials that were the same as those that were in them for $38,799. In presenting this estimate in the course of his evidence, he said that he had prepared it very rapidly and that there should be deducted from that amount $448 for errors he had since discovered, leaving $38,351. He further expressed the opinion that, in

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1961, the material costs would have been approximately the same as in 1964 but that the cost of labour would have been $840 less, and, on cross examination, he admitted claiming $480 too much for profit, resulting in a 1961 replacement cost, according to Mr. Benson, of about $37,000. (This probably contains an allowance for the swimming pool that, according to Mr. Benson's evidence, is somewhat excessive but I cannot determine how excessive. In the use I make of this evidence, the precise amount is not of very great significance.)

Mr. Johnson, for the plaintiff, gave evidence that he would have tendered to replace the defendant's improvements in 1961 for $29,440. He did not include anything for certain improvements, i.e., sodding, trees and sidewalks. On cross examination, it appeared that he had estimated on a less precise basis than Mr. Benson, had omitted one or two matters entirely and had underestimated on others. On the other hand, he did give evidence that made it appear entirely probable that some of Mr. Benson's allowances were on the excessive side. In addition, Mr. Benson himself gave evidence that his estimate was for a quality of workmanship superior to that which had gone into the improvements on the expropriated property.

The evidence is not such that I can determine replacement cost of the improvements with precision. Weighing all the evidence, I am of opinion that the improvements could have been replaced in 1961 for an amount in the neighbourhood of $34,000.

Having concluded that the cost of replacing the improvements in 1961 was $34,000, I still have to come to some conclusion as to the amount by which the improvements increased the amount that a willing purchaser would have paid to a willing vendor in 1961 over and above the market value of the unimproved land of $12,000.

Evidence that was given as to depreciation was not very helpful. A witness for the plaintiff deducted 5 per cent from cost for depreciation but this did not represent anything other than physical depreciation and was not intended to represent an opinion as to market value. Mr. Wright for the defendant adopted a text book percentage of 8.9 per cent if the assumption is that the improvements were three years old in 1961, and of 11.7 per cent if they were four years old. Considering the history of the construction as detailed in the evidence of the defendant, I think the latter hypothesis is the right one and, on that basis, the depreciation would be 11.7 per cent of 34,000 or close to $4,000. Putting myself in the position of a potential purchaser in 1961, I think that this is not an undue amount to take off replacement cost in deciding how much I would be prepared to pay for this four year old house and other improvements in addition to $12,000 for the value of the land.

My conclusion is that the market value of the expropriated property in 1961 was $42,000. This conclusion, in my view, is supported by Mr. Petry's evidence of four sales of comparable residential properties in nearby subdivisions in 1961. These sales were made at prices ranging from $34,000 to $39,400. Based on these sales, Mr. Petry expressed the opinion that the expropriated property had a value in 1961 of $38,000. Having regard to the very great difficulty involved in making a comparison between residential properties, I am not prepared to agree that this opinion establishes the value of the expropriated property, but this evidence does establish that it is not unreasonable to conceive of such residences having been sold at prices in the neighbourhood of $40,000 and I therefore regard it as supporting evidence for my conclusion on other evidence that the market value of the property in 1961 was $42,000. I obtain some support for my conclusion that the market value of this property does not exceed $42,000 from other evidence of the experts. Mr. Wright said that, if the defendant had gone to him and told him she must sell the property, he would have advised her to divide the land into three lots facing on Woodroffe Avenue and put up for sale the centre one with the improvements on it, keeping the other two lots for future disposition. In his view, she should have put up the residence lot in June, 1961 for $40,000 in the expectation that she might have to reduce it by 5 per cent, that is to $38,000, and indeed, that, by September, she might have to come down to $32,000 or $33,000. Mr. Petry, the plaintiff's expert, says he would have advised the defendant to list the property as it was expropriated at $38,000 and that she would have been wise to accept any offer over $35,000.

I now come to the final question. What was the value of the expropriated property to the defendant in 1961? I am conscious that, in deciding this question, I must do so on the assumption that the defendant is a sensible, prudent

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person interested only in the economic and pecuniary aspects of the matter and that I must ignore any sentimental or emotional elements that might have some bearing on the particular defendant's attitude towards the expropriated property. Having that consideration in mind, I have to decide what a reasonably prudent person in the defendant's position on June 13, 1961, finding herself in possession but without title, would have paid for the property sooner than be ejected.

There are several facts and opinions in the record that have to be taken into consideration in this connection. For example:

(1) if the defendant suddenly ceased to have the right to occupy the expropriated property, she would have to contemplate

(a) acquiring equivalent premises which, in theory at least, she could do for the market value of the expropriated property, i.e., $42,000;

(b) unless she and her family were permitted to remain on in the expropriated property during the period necessarily involved in finding, and acquiring possession of, equivalent premises, paying for temporary accommodation for herself and her family and for storage for her furniture and other goods and effects (in the case of an expropriation, she would know that she would have no right to continue in possession after the expropriation but that, ordinarily, the Crown suffers the former owner to remain for unspecified periods);

(c) paying moving expenses;

(d) the almost certain impossibility of utilizing to advantage in different premises rugs, drapes and furnishings of all kinds that have been acquired for the expropriated property; and

(e) the inconvenience and personal effort, the miscellaneous expenses and the general disruption of family life that are necessarily incidental to moving a family from one residence and neighbourhood to another residence and neighbourhood; and

(2) Mr. Petry says that, if he were advising the defendant on a sale with immediate delivery of possession, he would advise her that it would have to be for

something more than $41,300 and he could not say how much more.

In taking such matters into consideration, the prudent owner would estimate, as well as he could, the factors that can be estimated and would give effect in some rough and ready way to the other factors in deciding on a total lump sum that he would be prepared to pay in addition to market value rather than be ejected from the property. Here, I am in a position to make a finding that the loss in respect of unsuitability of personal property of all kinds and the cost of moving would be somewhere between $2,000 and $2,500. I am of opinion that a prudent person, knowing that it was going to cost him $42,000 to obtain equivalent premises and that it was going to cost between $2,000 and $2,500 to reestablish his family in those premises, and knowing that, if he were to give up the premises he was occupying, he would be embarking on a course of action that might lead him into substantial additional expenses as well as considerable discomfort for, and strain on, all the members of his family, would be prepared to pay $46,000 for title to and immediate right to possession of the property in which he is established rather than give up the premises either immediately, or at some indefinite time according to the whim of a government department. I therefore find that the value of the expropriated property to the defendant in 1961 was $46,000. There will therefore be judgment in favour of the defendant for $46,000 (less the advance payment of $22,500 and without interest) and costs. If there is any difficulty in settling the minutes of judgment, the matter may be spoken to.

Judgment accordingly.

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July 24

BETWEEN:

POPULAR FABRICS INC. ....APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE .... } RESPONDENT.

Revenue—Customs Act, R.S.C. 1952, c. 58, ss. 35(8) and 45 as amended—Limitation on right of appeal to Exchequer Court—Conclusions of Tariff Board supported by evidence.

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POPULAR FABRICS INC. *v.* DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE

The appellant appeals from the declaration of the Tariff Board confirming the decision of the respondent whereby the value for duty of certain goods imported from Japan was reappraised to include amounts described as handling commission and financial charges in determining the amount for which the goods were sold by the vendor abroad to the purchaser in Canada.

Held: That the right of appeal to this Court under s. 45 of the *Customs Act* is limited to a question of law and the record before the Tariff Board.

2. That the conclusions reached by the Tariff Board were open to the Board on the evidence before it.
3. That the appeal is dismissed.

APPEAL from a decision of the Tariff Board.

The appeal was heard by the Honourable Mr. Justice Cattanach at Ottawa.

Peter Meyerovitch, Q.C. and *Keith E. Eaton* for appellant.

C. R. O. Munro, Q.C. for respondent.

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

CATTANACH J. now (July 24, 1964) delivered the following judgment:

This is an appeal, under section 45 of the *Customs Act,* R.S.C. 1952, c. 58 as amended, from a declaration of the Tariff Board, dated February 21, 1962, in appeal No. 595 whereby a decision of the Deputy Minister reappraising the value for duty of ladies' shorts and blouses imported from Japan by the appellant was confirmed.

The issue before the Board was whether or not amounts described as handling and financial charges were properly included by the Deputy Minister in determining "the amount for which the goods were sold by the vendor abroad to the purchaser in Canada" for the purposes of section 35(8) of the *Customs Act* as amended by c. 32 of the Statutes of 1955, being the applicable provision of the Statute at the time of the importations herein.

There were two sets of transactions involving importation of goods from Japan and although substantially the same type of arrangements were made for each set of transactions, the appellant dealt with two different sets of companies.

In each case the appellant purchased goods from a Japanese exporter on ninety days credit. In each case the appellant was invoiced by or on behalf of the exporter for an amount in respect of the goods imported. In each case a company which was affiliated with the exporter and carrying on business in New York rendered a bill for charges, in one case described as "financial charges" and in the other case as "handling commission" for an additional amount. In each case these charges related in some way to the arrangements that were made by the affiliated company with a bank for a letter of credit in favour of the exporter, which letter of credit was a condition precedent, under the law of or commercial practice in Japan, to the exportation of the goods to the appellant on credit.

In these circumstances the Deputy Minister added the amounts of the "financial charges" and the "handling commission" to the respective invoice amounts in determining the amounts for which the goods were sold by the vendors abroad to the appellant in Canada for the purposes of section 35(8) (*supra*). Presumably he did so on the assumption that, in each case, the only thing the appellant received for the two amounts paid by him were the goods purchased by him.

The appellant thereupon appealed to the Tariff Board and, after hearing several witnesses and receiving documentary evidence, the Board delivered a reasoned judgment reading as follows:

> Popular Fabrics Inc deeming itself aggrieved by a decision of the Deputy Minister of National Revenue, Customs and Excise, as to the value for duty of certain ladies' shorts imported from The Gosho Company, Ltd, and certain ladies' blouses imported from Nichimen Co., Ltd, both companies being in Japan, appeals to the Tariff Board from this decision of the Deputy Minister.
>
> The only issue before the Board is whether or not certain amounts described as handling or financial charges were properly included by the Deputy Minister in determining the amount for which the shorts and blouses were sold, within the provisions of subsection 8 of section 35 of the Customs Act as it existed prior to the 1958 amendments.
>
> In the case of the ladies' shorts the original contract, exhibit A-2, dated October 29th, 1957, is between The Gosho Company, Ltd., of Osaka, Japan, hereinafter referred to as Gosho (Japan) and the appellant. The terms of payment are: "as arranged with Gosho Trading Co, Inc., Montreal" Gosho Trading Company, Inc., Montreal, as appears from the evidence, is a branch of Gosho Trading Company, Inc., of New York, hereinafter referred to as Gosho (U S) There is also an invoice dated March 3rd, 1958 from Gosho (U.S.) to the appellant, exhibit A-5, covering the shipment and indicating that the term of payment matured on May 13th, 1958. On March 5th, 1958 a debit note, exhibit A-6, was sent by Gosho (U S.) to the appellant for "financial charges" on several invoices, including that of March 3rd, 1958 for which the "financial charges" were $164.47.

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In the case of the ladies' blouses the original contract dated November 19th, 1957, exhibit A-7, is between Nichimen Co., Ltd. of Osaka, Japan, hereinafter referred to as Nichimen (Japan), as seller, and Nichimen Co, Inc., of New York, hereinafter referred to as Nichimen (U.S.) as buyer though it is confirmed on behalf of the buyer by the appellant. The payment clause requires payment by letter of credit in U.S. dollars and has the further provision: "Popular Fabric Inc. will pay Nichimen Co, Inc., N.Y., total F.O.B. amount 90 days after shipment from Japan". There is a further document dated December 30th, 1957, exhibit A-10, entitled Sales Contract on a printed form of Nichimen (U.S.) showing the blouses as being sold to Segal's Reg'd., of Montreal. Counsel for both parties agreed that for the purpose of this appeal Segal's Reg'd might be considered as being the same person as the appellant; this document bears the notation "Details as per Osaka's relative confirmation" and the further notation that the "seller will charge 2½% handling charge in separate invoice". A further invoice from Nichimen (U.S.) to the appellant, exhibit A-15, shows the handling commission on the goods in issue to be $24.98 and $4 82: a total of $29.80.

Apart from the exhibits filed by the appellant and the respondent the only evidence before the Board was adduced by the appellant. It appeared that much of the relationships between the various companies involved was the result of verbal understandings between the president of the appellant company and certain representatives of the Nichimen and Gosho companies. The president of the appellant company gave no evidence. The representatives of the other companies who gave evidence were men recently attached to the United States companies, whereas those more familiar with the transaction had returned to Japan to take office or employment with the Japanese companies. As a result of this the verbal evidence before the Board was characterized by unfortunate lacunae.

On behalf of the appellant it was urged that the "handling" charges of 2½% in the Nichimen transaction and the "financial" charges in the Gosho transaction were for the obtention of letters of credit; a witness explained that the appellant, not wishing to use up a portion of its line of credit with its bank, was willing to pay these charges to Nichimen (U.S) and Gosho (U.S). The appellant further argued that the two United States firms were agents of the appellant and not of the Japanese vendor firms.

The respondent contended that the "handling" or "financial" charges were an integral part of the whole contract between the appellant and the Japanese companies and that the agreement on this score was made prior to shipment.

An examination of the exhibits mentioned earlier throws interesting light on the problem of agency. Exhibit A-2 provides for terms of payment "as arranged with Gosho Trading Co, Inc., Montreal". Exhibit A-5 is an invoice from Gosho (U.S.) to the appellant for the price of the goods. Exhibit A-7 provides for payment to Nichimen (U.S.). Exhibit A-10 provides two interesting clauses: "Details as per Osaka's relative confirmation" and "Seller will charge 2½% handling charge in separate invoice". This documentation, in both transactions is certainly more consonant with agency of the United States companies on behalf of the Japanese companies than on behalf of the appellant.

In the Nichimen transaction the "handling charge" appears to have been 2½%, there is no evidence to show any specific amount disbursed on behalf of the appellant to meet bank charges for the issue of a letter of credit though it is clear that such charges would not have amounted to the agreed 2½%.

In the Gosho transaction the agreed amount of the "financial charges" does not appear with any clarity; at pages 26 and 27 of the Official Report, the secretary-treasurer of the appellant company, a witness less familiar with all the facts than was desirable, stated that the Gosho charges were "sometimes at a particular rate" and, in relation to the transaction in issue, he answered: "I couldn't say for sure, but it might be in the vicinity of three per cent". There is no documentary evidence of the agreed amount of the "financial charges". At page 92 of the Official Report, the witness Nakamura, Vice-President of Gosho (U S.), stated that about one quarter or one fifth of the total financial charges, "about $30 or $40 might be the expense paid to the bank" for the issue of a letter of credit.

Consequently in neither transaction is there evidence from which the Board could determine the amount, if any, which might have been disbursed on behalf of the appellant to meet any bank charges for the issue of a letter of credit. In the absence of such evidence and because in relation to official decisions there exists a rebuttable presumption of correctness, the decision of the Deputy Minister must be presumed to have been correctly made on the score of such disbursements, if any, made on the appellant's behalf.

The Board further holds that the so-called handling or financial charges, as the evidence showed them to be made in this case, were properly included by the Deputy Minister in determining the amount for which the shorts and blouses were sold, within the provisions of subsection 8 of section 35 of the Customs Act as it existed prior to the 1958 amendments.

Therefore the appeal is dismissed.

It is from this finding that the appellant now appeals to this Court. Under section 45 of the *Customs Act* a party to an appeal to the Tariff Board from a decision of the Deputy Minister has an appeal, as of right, to this Court upon any question of law. The right of appeal conferred by section 45 is, therefore, limited to a question of law and the record before the Board.

While the process by which the Board reached its conclusion upholding the Deputy Minister's decision is not as clear to me as I should have preferred it to have been, I have not been convinced by the argument before me that the Board erred in law.

It seems clear the Board must have found that, in order to have the goods in question exported to the appellant on ninety days credit, it was necessary that the exporter should have a letter of credit covering the transaction and that the U.S. representatives of the Japanese exporters accordingly arranged with the appellant for payment of an additional amount in respect of the particular sales if the sales involved exportation of the goods from Japan on credit.

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There does not seem to be any doubt on the part of the Board that the U.S. companies were acting for the exporters. Similarly there does not seem to be any doubt on the part of the Board that the appellant, in each case, paid the extra charges as well as the invoiced amounts for the goods and that the goods were all that the appellant received for both such amounts. Such conclusions were open to the Board on the evidence before it. On the basis of such conclusions there was no reason for interfering with the Deputy Minister's decision.

The appeal is, therefore, dismissed with costs.

Judgment accordingly.

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BETWEEN:

WILFRED JOSEPH LAWSON ....APPELLANT;

AND

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

Revenue—Income Tax—Income Tax Act, R.S.C. 1952, c. 148, s 14(2)—Inventory—Valuation of closing inventory—Cost to taxpayer or fair market value—Whether Stock Exchange price of stock represents its market value—Immaterial that appellant may have artificially inflated Stock Exchange price of shares—FIFO basis for evaluating inventory no better than average cost basis where no evidence of tendency to use oldest share certificates first.

The appellant carried on business under the name of W J Lawson & Company and during the 1955 taxation year he traded in shares of Maneast Uranium Corporation Ltd. He purchased 1,609,860 of the shares during the year and sold 1,040,960, leaving himself with an inventory of 568,900 shares at the end of the taxation year. The appellant did not include any amount in respect of his profit from trading in the shares when completing his income tax return The respondent, in reassessing the appellant's income, computed his profit from trading in the said shares by deducting from the amount realized on the sale of 1,040,960 of them the cost to the appellant of the total of 1,609,860 shares less the value of the 568,900 shares owned by the appellant at the end of the taxation year calculated on the average cost basis.

Held: That market value is the amount being paid for the shares by those who buy and sell at arm's length in the open market and no evidence was introduced to rebut the presumption or to establish that the prices listed on the Toronto Stock Exchange did not fairly represent that price.

2. That evidence that members of the general public were being incited to buy the shares of this Company in an operation of gambling at prices far in excess of any sensible valuation, by the appellant's carefully planned programme of direct and indirect publicity and market operations, does not make the amount paid by them any less the market price of the shares that they were buying.
3. That since the evidence does not disclose a tendency to use the oldest stock certificates first, it cannot be concluded that the calculation of the cost of the closing inventory on the first in first out (FIFO) basis represents a more realistic assumption than the averaging basis adopted by the respondent.
4. That costing of the closing inventory on the specific identification basis is inapplicable in this case because, although a large proportion of the shares could be traced, some 40,000 of them could not be specifically identified and their cost would have to be fixed by adopting one of the assumptions, so that evidence is not sufficiently precise to permit the costing of the closing inventory on that basis.
5. That the appeal is allowed in part.

APPEAL under the *Income Tax Act*.

The appeal was heard by the Honourable Mr. Justice Cattanach at Toronto.

John G. McDonald, Q.C. and *R. L. Butters* for appellant.

G. D. Watson, Q.C. and *T. Z. Boles* for respondent.

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

CATTANACH J. now (July 30, 1964) delivered the following judgment:

This is an appeal from the assessment of the appellant under the *Income Tax Act*, R.S.C. 1952, c. 148 for the 1955 taxation year.

The sole issue relates to the appellant's profit from a business carried on by him under the name of W. J. Lawson & Company, the financial year of which ended on May 31, 1955. The question is whether the Minister erred in computing the appellant's profit for that year from trading in the shares of a company called Maneast Uranium Corporation Ltd. and commonly referred to as "Maneast". In particular the appellant's complaint is that the Minister, in making that computation, attributed too high an amount to the appellant's closing inventory of those shares.

In completing his income tax return, the appellant did not include any amount in respect of his profit from trading in the shares in question, so that the Minister did not

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have the advantage of having the appellant's computation of his profit therefrom for the year when making the assessment.

The Minister computed the appellant's profit for the 1955 taxation year from trading in Maneast shares as follows:

Revenue		
Proceeds from the sale of 1,040,960 shares		$546,199.58
Cost of Sales		
Opening inventory	nil	
Purchases of 1,609,860 shares	$608,229.62	
Closing inventory		
568,900 shares at average cost of 37½¢ ..	213,337.50	
		394,892.12
Profit from trading		$151,302.46

The appellant questions the accuracy of this calculation in only one respect. He challenges the closing inventory figure of $213,337.50. It is common ground that section 14(2) of the *Income Tax Act* requires that figure to be cost or fair market value, which ever is the lower. In the first place, the appellant says that, notwithstanding that these shares were being traded on the Toronto Stock Exchange in May 1955 at a high of 73 cents and a low of 49 cents and in June 1955 at a high of $1.03 and a low of 63 cents, the market value at the end of May 1955 was 13 cents per share, being the value of the company's assets pro-rated among the shares or the liquidating value, and that the closing inventory figure should therefore have been computed at that rate. As an alternative, the appellant contends that the shares should be valued at the amount by which the total amount paid by the appellant for Maneast shares exceeded his total proceeds from the sales thereof, which is $62,000, or approximately 11 cents per share. A third alternative upon which the appellant appeared to rely, although very little was said about this ground in argument, is that even if market value was higher than cost, the Minister should have fixed the cost of the closing inventory, in accordance with the specific identification method, at 31 cents per share.

I have no difficulty in rejecting the appeal in so far as it rests on the appellant's attempt to show that market value of Maneast shares was less than what they cost the appellant. This contention is based on the hypothesis that, if what is being bought and sold in the market has an intrinsic value less than the price at which it is being bought and sold, the market value is the intrinsic value and not the amount that is being paid in the market. I am of the view that market value is the amount being paid by those who buy and sell at arm's length in the open market and that no evidence was introduced to establish that the prices listed in the Toronto Stock Exchange did not fairly represent that price. Evidence that members of the general public were being incited to buy the shares of this company in an operation of gambling at prices far in excess of any sensible valuation, by the appellant's carefully planned programme of direct and indirect publicity and market operations, does not make the amounts paid by them any less the market price of the shares that they were buying.

It may well be, of course, that a few isolated sales on the market of shares in small quantities can be shown not to be the fair market value of a very large quantity of shares. Here, however, there was a very substantial volume of sales at prices greatly in excess of what the shares cost the appellant and the Toronto Stock Exchange continued to list Maneast shares at prices in excess of cost to the appellant for almost a year after the end of the taxation year. On the other hand, there was no evidence that a reasonable programme of disposition in respect of the appellant's inventory as of the end of May would have brought the market price below cost. It may well be inferred that, if the appellant's whole inventory had been thrown on the market at one time, the price would have dropped to nothing. There was no evidence, however, that by a carefully planned programme, he could not have disposed of all the shares at a price equal to or in excess of his cost. The onus was on the appellant to show that the actual fair market value of the inventory at the end of May 1955 was less than cost and in my opinion the appellant has failed to discharge that onus.

The second position taken by the appellant is based on the evidence of the accounting witness, Ronald Archibald Lachance. In order to give full weight to his evidence, I quote from it at length:

MR. BUTTERS: Q. Mr. Lachance, you stated yesterday that you had heard the testimony of Mr. Lawson and I believe he made reference to certain of these items which you have mentioned today. Considering his testimony as you understood it, could you as an accountant on May 31, 1955, have placed a market value on these shares?

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Cattanach J

A. I could, I think, take a stab at calculating one of the definitions of market value, and that would be—

HIS LORDSHIP: Market value or fair market value?

MR. BUTTERS: Fair market value, my lord.

THE WITNESS: I don't know, sir, that I can distinguish between market value and fair market value, but I would say that I might take a stab at determining the replacement cost, which is an accounting element of market value. I would regard Mr. Lawson as a kind of wholesaler, or at least he buys wholesale, anyway, because he at no time ever bought any shares from the company, treasury stock, at any more than one-half of the quoted market price at any time, and it would seem reasonable to assume that his market value replacement cost was considerably lower than the quoted market price. As to the other element of market, being realizable value, when one takes into consideration the highly speculative nature of this whole venture and the experience—and accountants will use their experience in making judgments—the experience that we have had or see in shares of speculative stocks dropping very suddenly, I wouldn't like to venture a guess as to what the realizable value of these shares might be. I don't think anyone could determine it with any degree of accuracy.

Q. Could fair market value, in your opinion, have been lower than cost, as you have already calculated?

A. It is possible.

MR. WATSON: I think, with respect, that should not have been suggested, my lord.

MR. BUTTERS: Q. I will ask the second question—higher than cost?

A. It could be higher or lower, I wouldn't know.

Q. You don't know what the market value is, I assume, and you have calculated cost on the FIFO basis for us?

A. Yes.

Q. And you stated that you have a choice between these two prices?

A. Yes.

Q. Just what do you do as an accountant when you are faced with a unknown and a known and are asked to compare the two?

A. I view this situation as totally unlike any normal trading business —hardware or foodstuffs, for instance. The only other situation with which I could draw an analogy would be that of a person who, three weeks before Christmas, buys 1,000 Christmas trees for, say, $1,000 and starts to sell them. In my view it would be entirely improper for him to say that he had made a $2 profit after selling his first tree for $3. He knows before he makes any profit he has to recover the $1,000 that he laid out in the first place. It is pretty obvious that he will not be able to determine his profit or loss with accuracy until the day after Christmas, on which day the trees in his inventory will be worthless. One could apply the same generally accepted costing techniques that I described earlier to this Christmas tree merchant on any day during the three-week period and come up with an apparent profit, but I don't believe that is profit, at that time in this case, because the results would not make good sense, and it is my judgment that those techniques can't be applied in Mr. Lawson's circumstances for the same reason. At May 31, 1955, Mr Lawson had some $62,000 of his original investment tied up in the Maneast shares. It would be my view that unless he recovered this money there would be no certainty that he had made a profit. It seems to me that in order to say that someone has made a profit he must have made that profit and have some choice as to how he is going to use it. In this case, because of the nature of this venture, as I understand it, he was locked into it and he didn't have any profit to enjoy. The effect of this approach would be to value the 568,900 shares of Maneast at $62,000, that is about 11 cents a share, being the unrecovered cost of the venture at that date.

Q. Could that $62,000 figure in your opinion represent the cost of closing inventory to Mr. Lawson?

A. I think it would be described as such, although it is more like the cost of his venture to date. I would be satisfied to call it the cost of his inventory to date.

The substance of the foregoing, as the witness puts it, is that he would value the 568,900 shares in the closing inventory at $62,000 being the amount by which the total cost of such shares to the appellant exceeds the proceeds of sale of the shares that the appellant sold before that time.

The simple answer to the opinion of this witness that the closing inventory should be included at $62,000, if such opinion is admissible evidence, is that it is neither the fair market value of the shares in the closing inventory, nor the cost of the shares in the closing inventory and therefore it cannot be the correct amount to use in respect of closing inventory under either section 14(2) of the Act or the regulations made thereunder.

The remaining question is whether the appellant has shown that the figure of $213,337.50 used by the Minister in respect of the closing inventory is excessive on the cost basis.

It would appear that, if the cost of the inventory had been fixed on the first in first out basis (FIFO), the appropriate figure would have been approximately $172,000. No evidence was given, however, that would lead to the conclusion that this assumption was closer to reality than the averaging basis adopted by the Minister. In other words, the evidence as to which stock certificates were used for particular sales did not lead to the conclusion that there was a tendency to use the oldest certificates first. That being so, there is no balance of probability in favour of the view that the certificates on hand at the end of May, 1955 actually cost $172,000 rather than the amount placed on them by the Minister on the averaging basis and the onus of proof to show that the Minister was wrong was on the appellant.

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With regard to costing on the specific identification basis, I have been unable to satisfy myself that this was worked out on the evidence. In argument, counsel for the appellant says:

> The specific identification of the shares on hand at the year-end worked out to 31 cents on an acquisition cost basis. I think Mr. Newton agreed that, assuming the specific identification which appears from Exhibits 8 and 10, the assumption on his calculations would not be appropriate, and following the actual known fact we come up with 31 cents.

A review of the evidence, and in particular that of Mr. Newton, does not show that it was established that certain stock certificates on hand at the brokers on May 31, 1955, representing 568,900 shares, belonged to the appellant and cost him an average of 31 cents per share. While a large proportion of such shares can be traced on the evidence, there remains over 40,000 shares which cannot be specifically identified and the cost thereof would have to be fixed on one of the assumptions. The evidence is not sufficiently precise to enable me to cost the closing inventory on the specific identification basis and, therefore, I do not come to any conclusion as to whether it is appropriate in the circumstances.

Accordingly, I am left with the Minister's assessment and I would dismiss the appeal were it not for the submission made by counsel for the Minister that the proper figure for valuing the appellant's closing inventory is 34.1 cents per share instead of 37.5 cents per share, because of averaging over a lesser period than the entire fiscal year. As this is favourable to the taxpayer, I accept that submission and judgment will therefore go that the appeal is allowed and the assessment is to be varied as indicated. As the appellant is unsuccessful on the issues that occupied the most of the time at trial there will be no costs.

Judgment accordingly.

1963
Mar. 25-29
Apr. 1-5
16-19
23-26
29

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July 31

BETWEEN:

MOLLY JAMES, ELAINE SIMPSON, REVA GOULD, ANITA ROSEN AND JULES JAMES .... PLAINTIFFS;

AND

CANADIAN NATIONAL RAILWAY COMPANY .... DEFENDANT.

Expropriation—Expropriation Act, R.S.C. 1952, c. 106, ss. 31 and 32—Exchequer Court Act, R.S.C. 1952, c. 98, s. 49—General Rules and Orders, Rules 104 and 105—Determination of compensation—Determination of market value of land expropriated—Witnesses giving opinion evidence of land values must have practical experience operating in market as broker or dealer—Determining extent of injurious affection—Any increase in value of remaining lands to be considered in determining amount of injurious affection—Interest on amount of compensation.

The plaintiffs claim compensation for the expropriation by the defendant of about ten acres of land in two parcels, both of which were part of a tract of about three hundred acres of land owned by the plaintiffs in the Township of Vaughan, in the County of York, near Toronto, the defendant proposing to use the said lands for a new railway line in connection with the construction of a marshalling yard.

The evidence established that the plaintiffs were holding the lands for possible future residential development although at the time of expropriation no actual steps had been taken toward such development. There were no water or sewer services available and there were no plans that would provide any assurance that any such services would be available for these lands at any time in the foreseeable future. In addition, the Township of Vaughan had adopted a policy of discouraging residential development in areas including the three hundred acres owned by the plaintiffs until industrial development in the Township became such as to provide tax revenues sufficient to bear the cost of servicing such residential development. The only use that could be made of these lands immediately prior to the expropriation was for agricultural purposes, but it was agreed that the land had a higher value as a speculative holding for potential residential use some time in the future.

Held: That the compensation payable may be correctly determined by deducting from the market value of the lands belonging to the plaintiffs immediately before the expropriation the market value of the lands remaining to them immediately after the expropriation.

2. That in determining the market value of the land expropriated a determination must be made concerning the speculative market in residential land at the time of expropriation on the assumption that buyers and sellers knew the facts that were available at that time to those who conducted reasonably careful investigations and not on the assumption that such buyers and sellers had the benefit of the expert opinions given at trial.

3. That a witness has no status to be expressing opinions as an expert on land values unless he has had practical experience operating in

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the market as a broker or dealer, as opposed to academic training and experience as a valuator or appraiser.

4. That witnesses testifying as real estate experts should not take into account the opinions given by other expert witnesses in determining market values at the time of expropriation except where it has been shown that such opinions were actually factors in the market at that time.
5. That s. 49 of the *Exchequer Court Act* refers only to the advantage or benefit likely to accrue as a result of the expropriation in respect of any lands held by the plaintiffs *with* the lands injuriously affected and there were no such lands in this case.
6. That in estimating the extent of the injurious affection to the lands remaining to the plaintiffs, the deleterious influence of the railway on the potential value of the immediately adjoining land for residential purposes and the possible diminution in the value for subdivision purposes of the remaining lands must be appraised and from this must be deducted the amount by which the prospect of the coming of the railway increased the market value of the remaining lands.
7. That the practice of not allowing interest under s. 32 of the *Expropriation Act* to a former owner who was permitted to remain in possession after the expropriation in respect of the period for which he was permitted to remain in possession has no application in this case because it appears from the evidence that the lands expropriated were not being used at the time of expropriation, nor can the practice have any application to an award for injurious affection since the right to possession of land injuriously affected is not affected by the expropriation.

ACTION to have the amount of compensation payable to plaintiffs determined by the Court.

The action was tried by the Honourable Mr. Justice Cattanach at Toronto.

F. A. Brewin, Q.C. and *Gordon Atlin* for plaintiffs.

G. M. Cooper for defendant.

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

CATTANACH J. now (July 31, 1964) delivered the following judgment:

This is an action for compensation in respect of the expropriation by the defendant of a right of way for a new railway line through certain lands belonging to the plaintiffs in the Township of Vaughan in the County of York in Ontario.

The expropriation was effected by the filing of one plan and description on March 11, 1959 and by the filing of a second plan and description on October 16, 1961. By the first filing, the defendant took 8.34 acres of the plaintiffs' land and by the second took an additional 2.0607 acres of their land. As far as the amount of compensation to which the plaintiffs are entitled is concerned, nothing turns on the fact that the 2.0607 acres were taken on October 16, 1961 instead of on March 11, 1959. I understand it to be common ground, and I so find, that the compensation payable would be exactly the same if the entire 10.4007 acres had been taken on March 11, 1959, and I propose, therefore, to consider the matter on that assumption.

The plaintiffs claim as compensation the market value of the land taken and the amount by which lands of the plaintiffs that were not taken were injuriously affected. In my view, the compensation payable may be correctly determined by deducting from the market value of the lands belonging to the plaintiffs immeditaely before the expropriation the market value of the lands remaining to them immediately after the expropriation.

Immediately prior to the expropriation, the plaintiffs owned 302.839 acres of land in the Township of Vaughan, being part of Lots 1, 2 and 3 in Concession 2. That property was bounded on the south by a road known as Steeles Avenue, which is the boundary between Metropolitan Toronto and the Township of Vaughan and is a major east-west traffic artery. On the east side, the property was bounded by Bathurst Street, which is a major north-south traffic artery. The property was acquired in 1947 or 1948 by the plaintiffs from Charles James who was the husband of one of the plaintiffs and the father of the others. At the time of the expropriation, there were two old barns and two old houses on the property. One barn was not being used, the other was being used for storage and the two houses were being rented at a total rent of about seventy dollars per month. Some hay was being cut by the tenants. Otherwise, the property was not being used. The plaintiffs were holding the property for development as a residential subdivision but no actual steps had been taken towards any such development. At the time of the expropriation, the Township of Vaughan was designated as a rural area and there were various conditions precedent involving various government agencies that had to be complied with before the plaintiffs' land could have been developed as a residential subdivision. Furthermore, at the time of the expropriation, there were no water or sewer services available and

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there were no plans which would provide any assurance, at the time of the expropriation, that any such services would be available for these lands in Concession 2 at any foreseeable time in the future. The Township of Vaughan was undertaking to provide such services in Concession 1, which adjoined Yonge Street and which was a development of many years' standing, but had adopted a policy of discouraging residential development in areas such as Concession 2 until industrial development in the township was such as to provide the tax revenues necessary to bear the cost of servicing further residential development. Immediately prior to the expropriation, the only current use that could be made of the land belonging to the plaintiffs was for agricultural purposes and for such use the land would not have been worth more than three hundred dollars per acre. It is agreed that the land had a higher value as a speculative holding for potential residential use sometime in the future.

When the defendant initiated the railway project that gave rise to the expropriation of some of the plaintiffs' land, namely a marshalling yard in the Township of Vaughan with incidental rail lines, there were two main consequences, as far as value of the plaintiffs' land is concerned (in addition to the actual taking of 10.4007 acres), namely,

a) the project was calculated to attract industry to the Township of Vaughan and thus generally raise the level of activity in the township and increase the demand for land for all purposes, and
b) the prospect of a railway adjoining one side of each of the two parcels of land remaining to the plaintiffs decreased the speculative value of the land that would be next to the railway for residential purposes.

Theoretically, the expropriation of a strip of land through the middle of the plaintiffs' land might have also effected a "severance" damage, that is, it might have decreased the speculative value of the land for residential subdivision purposes because the land might have had a lower speculative value per acre for subdivision purposes in two separate parcels than the speculative value per acre it would have had for subdivision purposes if it had been in a single block. While evidence was given that there was a possibility that severance would lessen the value of the land for subdivision purposes, no evidence was given that would lead to the conclusion that the speculative value per acre of this particular property for subdivision purposes would have been greater if the land had been in a single block than the speculative value per acre that it had divided into the two parcels into which it was in fact divided. In other words, no evidence was given that there was in fact any "severance" damage. In any event, any severance damage that there might have been was, on the evidence, taken into account in the views that were expressed as to the value of the land after the expropriation and the possibility of such damage is taken into account in the conclusion hereafter expressed.

By the Statement of Claim, the plaintiffs claim $700,000 by reason of the two expropriations, plus an additional $100,000 if satisfactory underpasses are not constructed linking the severed portions of the plaintiffs' lands together, with interest on the amounts of the compensation from the respective dates of the expropriations. The Statement of Defence contains no offer of compensation but a Confession of Judgment was filed on March 18, 1963, in the amount of $183,000.

On April 29, 1963, during the trial, the defendant filed an undertaking under section 31 of the *Expropriation Act*, R.S.C. 1952, c. 106, whereby it undertook to grant to the plaintiffs, without charge, such easements as are required for laying and maintaining pipes across or under the railway to be constructed on the expropriated land and undertaking also to consent to installation of such pipes. Pursuant to section 31 of the *Expropriation Act*, this undertaking has been taken into account in the conclusion as to injurious affection hereafter expressed.

Quite apart from evidence about the relevant facts as they existed in 1963 and evidence of persons who were put forward as real estate experts to express opinions as to the market value of the plaintiffs' lands before and after the expropriation, much time was spent at the trial while witnesses having special qualifications or experience expressed opinions on many different subjects. For example, there were scientific opinions concerning the effect of railway noise on persons living near a railway and the prospects of finding water on the plaintiffs' property, there were opinions of officials, past and present, from different government agencies as to whether different types of building development would be permitted or would take place and, if so, when, and there were opinions of railway officials as to the amount of traffic there would be on the proposed railway when it is built. I am unable to appreciate the relevance of much of this opinion evidence. In determining market value, I must make a determination concerning the 1959 speculative market in residential land on the assumption that buyers and sellers knew the facts that were available at that time to those who conducted reasonably careful investigations. I cannot assume that 1959 buyers and sellers had the benefit of the expert opinions that were given before me in 1963. That being so, I must disregard such evidence except to the extent that it has been shown that the opinions in question were readily available in 1959 to speculative buyers and sellers of potential residential property.

I must also make some general comment with reference to the real estate experts. My understanding is that a person qualifies to express an opinion as an expert on land values by having had experience operating in the market as a broker or dealer. By reason of that experience, he is in a position to express an opinion as an "expert" as to what buyers would have paid for the expropriated property at the time of expropriation and as to what sellers would have sold the expropriated property for at that time. Without that experience, I should not have thought that a witness has any status to be expressing such opinions as an expert or otherwise. In this case, the evidence as to the qualifications of the experts has emphasized the academic training and the experience of the witness as a valuator or appraiser and has minimized his practical experience in the market. Indeed, in one instance, the witness did not claim any such experience.

Another comment that should be made concerning the evidence of the real estate experts is that they all appeared to take into account the evidence given by the various other "expert" witnesses to whose evidence I have already referred, and, as I have already said, I am of opinion that opinions expressed by such experts in 1963 should not be taken into account in determining 1959 market value except where it has been shown that such opinions were actually factors in the market in 1959.

My first task is to determine the value of the plaintiffs' property before the expropriation. On this question, there are four expert opinions:

1. *For the plaintiffs*:

(a) Mr. Langer valued 302.839 acres at $4,000 per acre ..	$1,211,556
(b) Mr. Farr valued 145 acres at $4,500 per acre and 157.839 acres at $3,500 per acre	1,205,000

2. *For the defendant*:

(a) Mr. Stewart valued 302.839 acres at $3,750 per acre ..	1,136,000
(b) Mr. Davis valued 302.839 acres at $3,800 per acre	1,151,000

In attempting to assess the relative merits of these opinions as to the 1959 speculative value of this property for residential purposes, one is confronted by the fact that each of the experts bases his opinion on certain sales of other land in the same general area and that there was, to all intents and purposes, no evidence available to them about such transactions except what could be learned from examining the deeds in the registry office. The special features of the land that was sold, the purpose of acquisition and the factors that caused the purchaser to want the particular parcel of land or the vendor to be prepared to sell at that time are unknown. It is therefore exceedingly difficult to intelligently weigh this evidence as to value before the expropriation. I cannot help noting, however, that the evidence of all these witnesses has this in common, that the sales that they rely on that might be regarded as supporting a value of over $3,500 per acre were sales of land that was either in Concession 1, where residential development was an accepted fact, and in a part of Concession 1 where the land got the benefit of the Yonge Street influence, or they were of relatively small parcels of land which may, as far as the evidence shows, have had an immediate use. In these circumstances, having regard to the onus that is on the plaintiffs, I cannot make a finding that the plaintiffs' property immediately before the expropriation was worth any more than the highest value put forward by the defendant. I am not overlooking the reasoning of the experts whereby they applied the Concession 1 transactions to the expropriated property. I realize that there were opinions that, having regard to the trend in prices, the sale prices could be adjusted upward in order to get 1959 Concession 1 prices and that other adjustments could be made to obtain Concession 2 market value. Having regard to the speculative nature of these values and the many imponderables concerning which there was not, and probably could not have been, evidence, and having regard to the generally unconvincing nature of the attempts to establish comparability

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between the expropriated property and the land that was the subject of such transactions, I cannot accept the opinions that the plaintiffs' land had a speculative value of $4,000 per acre before the expropriation. I should also say that I do not accept the evidence of certain unaccepted offers to buy land in the neighbourhood as being of any assistance. Assuming that unaccepted offers are acceptable evidence of value, the circumstances of the Chaplin offer were entirely too vague to be helpful and the other offer was not shown to have been made to a person with whom the offeror was dealing at arms' length. I therefore hold that the plaintiffs' property had a speculative value immediately before the expropriation of $3,800 per acre, or $1,151,000.

The next task is to determine the speculative value, in the market, of the lands remaining to the plaintiffs immediately after the expropriation. The conclusions reached by the various witnesses were as follows:

1. *For the plaintiffs*:	
(a) Mr. Langer	$ 900,000
(b) Mr. Farr	970,000
2. *For the defendants*:	
(a) Mr. Stewart	1,008,750
(b) Mr. Davis ($1,004,000 after the first expropriation less $8,000 for diminished value effected by the second expropriation)	996,000

Of these various amounts, it is clear that the plaintiffs are entitled to be paid for the 10.4007 acres of land actually taken at the market value I have already placed on the property before the expropriation of $3,800 per acre, or $39,522. The vital question is how much must be added to this amount for any decrease in the value of the land not taken by reason of the fact that a railway was to be built so as to separate the two parcels that remained. There is no doubt that the land *immediately* adjoining the site of the proposed railway was in fact seriously depreciated in value for potential residential purposes and it is to be assumed that this would have some effect on what a speculator would pay for it. On the other hand, there is no doubt that the marshalling yard project, of which this railway line was a part, had the effect of improving the value of land in this township for speculative purposes. While much evidence was given, none was of much assistance in respect of either factor on the question of quantum. No matter how each expert computed his amount, it was quite clear that they were all doing what Mr. Farr did: namely, fixing an amount as a matter of judgment after discussing the factors that were, in his opinion, relevant. None of the experts pretended to have any specific experience that aided them in forming their judgment. None of them referred to comparable sales that could be regarded as being of any help. Each one performed arithmetical computations after assigning arbitrary reductions in value to arbitrarily determined areas of land adjoining the railway.

In my opinion, the question I have to decide comes to this: having accepted the view, put forward by the defendant, that a speculator in 1959, before the expropriation, would have paid $1,151,000 for the plaintiffs' property to hold it in the expectation of disposing of it for residential development at some indefinite time in the future, I must form a judgment as to how much less he would have paid immediately after the expropriation for what was remaining to the plaintiffs.

If a speculator would have paid $1,151,000 for this 302.839 acre parcel of land at a time when it was suitable only for future residential purposes and when such purposes were being discouraged by the authorities until supporting industry should come to the township, I find it hard to believe that he would not pay at least $1,000,000 for the 292.4383 acres that were left after the expropriation, when he would have become aware that a large marshalling yard was to be built in the township and that the yard could be calculated to attract a substantial amount of new industry. While he would know, at that time, that he would get some 10 acres less land and that some part of the land would be less valuable for residential purposes, he would also know that the prospect was that residential development would take place much sooner than was otherwise the prospect and that the period he would have to hold the land before he migth hope to realize on his speculation was therefore substantially reduced. I do not think that the matter may be determined any more precisely than that.

This would result in an award, in the total amount of $151,000. As this is less than the award that would have been made on the evidence of the defendant's witness, Davis, and as it is not a matter that can be decided with any exactitude I am adopting his figure of $155,000. I therefore determine that the compensation payable is $155,000 of

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which $39,522 is the value of the land taken and the balance is injurious affection to the land not taken.

Before leaving the question of injurious affection, I must refer to section 49 of the *Exchequer Court Act*, R.S.C. 1952, c. 98, which reads as follows:

> 49. The Court shall, in determining the compensation to be made to any person for land taken for or injuriously affected by the construction of any public work, take into account and consideration, by way of set-off, any advantage or benefit special or general, accrued or likely to accrue, by the construction and operation of the public work, to such person in respect of any lands held by him with the lands so taken or injuriously affected.

There was much argument as to whether this section applies to a Canadian National expropriation, either of its own force or by virtue of the provisions of the *Canadian National Railways Act*, S.C. 1955, c. 29. I do not need to decide this question as, on my reading of section 49, even if it is applicable to a Canadian National expropriation, it has no application to the facts of this particular case. The application contemplated by the parties was that section 49, if applicable, requires that the Court, in determining compensation to be paid to the plaintiffs for the 292.4383 acres injuriously affected by the construction of the new railway project, take into account and consideration by way of set-off any advantage or benefit likely to accrue by the construction and operation of the railway project to those 292.4383 acres of land. What the section says, however, is that what is to be taken into account is the advantage or benefit likely to accrue "in respect of any lands" held by the plaintiffs "*with* the lands so . . . injuriously affected". There were no such lands here and, therefore, section 49 has no application.

That, of course, does not mean that the benefits in respect of the 292.4383 acres of land flowing from the railway project are not to be taken into account. What has to be decided is what was the extent of the injurious affection to the lands remaining to the plaintiffs. On the one hand, the deleterious influence of the railway on the potential value of immediately adjoining land for residential purposes and the possible diminution in value per acre for subdivision purposes of the two remaining blocks must be appraised. On the other hand, there must be deducted from that amount the amount by which the prospect of the coming of the railway increases the market value of those two blocks. The actual injurious affection is the net amount by which the 292.4383 acres of land diminished in value by reason of the expropriation. It would be fallacious to say that there was injurious affection in a greater amount. No statutory provision is necessary to require that all relevant factors be considered in determining what was the actual injurious affection. This is what I have done to the best of my ability in reaching the conclusion that I have expressed above.

The plaintiffs ask for interest on the compensation awarded under section 32 of the *Expropriation Act*, R.S.C. 1952, c. 106, which reads in part as follows:

32. (1) Interest at the rate of five per cent per annum may be allowed on such compensation money from the time when the land or property was acquired, taken or injuriously affected to the date when judgment is given; but no person to whom has been tendered a sum equal to or greater than the amount to which the Court finds him entitled shall be allowed any interest on such compensation money for any time subsequent to the date of such tender.

For all practical purposes, we have here three separate amounts of compensation money in respect of which interest might be awarded under section 32, viz.:

(a) market value of land taken on March 11, 1959, namely 8.39 acres at $3,800 per acre, which is	$ 31,692;
(b) market value of land taken on October 16, 1961, namely 2.0607 acres at $3,800 per acre, which is	7,830;
(c) injurious affection as of March 11, 1959, which is	115,478;
TOTAL	$155,000.

The practice of not allowing interest under section 32 to a former owner who was in possession at the time of the expropriation and who was permitted to remain in possession after the expropriation for the period in respect of which he was allowed to remain in possession has no application here. It can have no application in respect of an award for injurious affection because the former owner's right to possession of land injuriously affected is not affected by the expropriation. It has no application to the compensation for the lands taken because, while the evidence is not as explicit as it might be, it would appear that these lands were not being used at the time of the expropriation. The only evidence of user is that of Mr. James that there were certain buildings on this property which were being rented before the expropriation and were still being so rented by the plaintiffs at the time of the trial in 1963. On the other hand, a railway witness gave evidence that the defendant

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took possession of the expropriated property in November, 1961. The property being rented must therefore have been property that was not expropriated and there is no evidence of the plaintiffs making any use of the expropriated property after the expropriation. Interest is therefore allowed on $7,830 from October 16, 1961, and on to the balance of the award from March 11, 1959, in each case to the date of this judgment.

I come now to the question of costs. On March 18, 1963, a Confession of Judgment was filed by the defendant whereby the defendant confessed judgment "in the amount of $183,000 plus costs to be taxed or fixed". A copy of this document was served on the solicitors for the plaintiffs on March 19, 1963. Prior to that time the case had been set down for trial and, by a consent order, it had been adjourned to the General Sittings that had been fixed to commence at Toronto on March 25, 1963. At the opening of the trial on that day, the plaintiffs moved to strike out the Confession of Judgment on the ground that it did not allow the plaintiffs fifteen days within which to accept or reject. The relevant rules read as follows:

RULE 104
Confession of Judgment

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 had 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.

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 manner.

RULE 105
Effect of offer as to costs

If in the final disposition of any such action, wherein such confession of judgment has been made and refused by the plaintiff as in the preceding rule mentioned, the plaintiff does not recover a larger sum than the one so offered, not including interest from the date of such offer, the defendant, whatever the result of the action, shall be entitled to his costs by him incurred after the date of the filing of such confession.

At that time, the plaintiffs were offered, and refused, an adjournment. Counsel for the plaintiff also indicated to the Court at that time that he was instructed to reject the Confession of Judgment. I took no action on that motion and indicated that I would reserve the question of costs until

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delivering judgment but that my then inclination was to regard Rule 105 as not applying in the circumstances.

As the amount of the award, plus interest at 5% to the date that the Confession of Judgment was served on the plaintiffs exceeds the amount in the Confession of Judgment there is no need to consider further the possible effect of the Confession of Judgment on costs.

Judgment therefore goes in favour of the plaintiffs in the sum of $155,000, with interest at 5% per annum on $7,830 from October 16, 1961, to the date of this judgment and interest at 5% per annum on the balance from March 11, 1959, to the date of this judgment. There will also be a declaration that the plaintiffs are entitled, in addition, to the benefit of an undertaking filed by the defendant at trial respecting an easement and the plaintiffs are entitled to have their costs. If there is any difficulty in settling the minutes of judgment, the matter may be spoken to.

Judgment accordingly.

1964
July 24

THE ONTARIO ADMIRALTY DISTRICT

BETWEEN:

TORONTO WINDOW MANUFACTURING COMPANY LIMITED ... PLAINTIFF;

AND

THE SHIP *AUDREY S* .... DEFENDANT.

Shipping—Practice—Admiralty Act, R.S.C. 1952, c. 1, ss. 2(1) and 18(2)—Meaning of "Towage"—Arrest—Jurisdiction of Court—Unlawful arrest a nullity—Whether parts of day to be considered with regard to time of institution of action.

This is a motion on behalf of the defendant ship and its owner to set aside the writ of summons and warrant of arrest issued in this action on the ground that this Court is without jurisdiction to entertain the action on two grounds, viz. that at the time of the issue of the writ herein and the arrest of the ship, the *Audrey S* was not a ship within the meaning of the *Admiralty Act* and that the ship was not under arrest at the time this action was instituted.

The evidence established that the incomplete hull of the ship was taken by truck from its place of construction to Toronto harbour and shortly thereafter the trucker caused an action to be commenced and the ship to be arrested for non-payment of his claim for "towage charges". The ship was arrested in the present action by the sheriff on the same day as but more than two hours after it had been released from arrest in the first action.

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Held: That the claim in the first action for towage services was without the jurisdiction of this Court because there had been no towing but transportation by truck, and the arrest of the ship in that action was an unlawful exercise of the power of the Court and was a nullity.

2. That there was no arrest of the ship at the time this action was instituted.
3. That even if parts of the day cannot be considered, then because the arrest in the first action was unlawful, it cannot afford a basis by which this action can be supported.
4. Order to go setting aside writ and warrant of arrest in this action and service of same.

MOTION to set aside a writ of summons and warrant of arrest of a ship.

The motion was heard by the Honourable Mr. Justice Wells, District Judge in Admiralty for the Ontario Admiralty District at Toronto.

Peter Wright, Q.C. for the motion.

W. E. MacLatchy contra.

WELLS D.J.A. now (July 24, 1964) delivered the following order:

This is a motion on behalf of the defendant ship and its owner, one Craig H. Brodie, to set aside the writ of summons and the warrant of arrest issued in this action on July 15, 1964, and the service thereof on the ground that this Court has no jurisdiction to entertain the claim asserted in the action. Mr. Wright raises two points,—The first is (1) whether at the time of the issue of this writ and the arrest of the ship, the *Audrey S* was a ship within the meaning of the *Admiralty Act* and of the other statutes relevant thereto, and secondly (2) that the ship was not under arrest at the time the present action was instituted.

The definition of "ship" is found in section 2 of the *Admiralty Act*, being chapter 1 of R.S.C. 1952, and is as follows:

(*i*) "ship" includes any description of vessel used in navigation not propelled by oars.

Mr. Wright argues that at the time of the arrest, this ship, which had been recently transported from the owner's property at Richvale where it was built, and which is an incompleted houseboat, had not attained the state of being a ship within the meaning of the definition in the *Admiralty Act,* which is similar to the definition in the Rules of Court and substantially the same as that found in the *Canada*

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Shipping Act. The condition of the ship at the time is described in an affidavit of Mr. Brodie filed and in paragraphs 2 and 3 he describes the condition of the ship on June 27, 1964, when the hull was taken by truck from Richvale and deposited in the Toronto harbour at Pier No. 7. Paragraphs 2 and 3 of Mr. Brodie's affidavit are as follows:

2. On the 1st day of August, 1963, I left my old employment and began to work on a project for the construction of a wood and metal houseboat for sale to private owners.

3. The work on the hull began on the 1st day of April, 1964, at my premises, 39 Observatory Lane, Richvale, Ontario, and continued until the hull could be floated on the 27th day of June, 1964, after the incomplete hull was taken by truck from Richvale to Toronto Bay by Pier 7.

Fortunately, in the view I take of the matter I do not think that I have to decide at what point of time in its construction a ship becomes a ship within the meaning of the definition in the statute. It may be necessary to do this at some time, but counsel were unable to point to any decisions which would throw light on the problem, and at first blush, on consideration of the matter the problem would appear to be somewhat akin to the theological arguments in the Middle Ages as to the point of time at which the soul entered the body.

Mr. Brodie's affidavit, which is not contradicted in any way or controverted, goes on to set out what happened after the ship was taken to Toronto harbour, and paragraphs 4, 5 and 6 set out the facts as he has been able to ascertain them. They are as follows:

4. On the 14th day of July, 1964, John B. Moran, the trucker, by Writ Number 1338 issued out of this Honourable Court and by Warrant dated the same day, led to the arrest of the incomplete hull for a claim for "towage services" amounting to $318.00.

5. The said vessel was arrested during the morning of July 15th, 1964, and, as a result, I paid Peter E. Brodey, Solicitor for the said John B. Moran, the sum of $375 48 in full settlement of the claim and costs and secured the release of the vessel.

6. I am informed by the Sheriff of York, P. J. Ambrose, and verily believe that he released the arrest of the Defendant vessel on July 15th, 1964, at 3:00 o'clock in the afternoon and that he did not receive a Warrant for the arrest of the Defendant in this action until about 5:00 o'clock on the said 15th day of July, 1964, and that he then proceeded to re-arrest the vessel at about 5:30 o'clock in the afternoon that day.

The plaintiff's claim in this action is set out in the writ in the following words:

THE PLAINTIFF'S CLAIM IS for the sum of $732.60 for aluminum sliding windows, aluminum sliding window frames, glass, enamel molding,

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flashing and calking supplied to Flying Scott House Boat Co. and installed on the ship Audrey S. at the port of Toronto on the 27th day of June, 1964.

It is quite true that, if Mr. Brodie's affidavit is correct, the ship was not under arrest at the time the writ in the present action was issued. It would also appear to be plain that the first claim, by Moran, which purported to be a claim for $318.00 for towage services rendered to the ship on June 25, was, once it became clear there had been no towing but transportation by truck, without the jurisdiction of this Court. It was not for towing, in any sense of the word, but for carrying on land. The word "towage" is defined in the Shorter Oxford English Dictionary as,—the charge or payment for towing a vessel; the action or process of towing or being towed. The word "tow" is said to mean,—to draw by force; to pull; to draw or drag a vessel on the water by a rope; to drag by or as by a line. It is quite true that Mr. Brodie did not dispute the jurisdiction of the Court in this case but paid the bill. But, in my opinion, it is also clear that carrying a vessel by truck or other transport on land is not towage within the meaning of that word as used in the section of the *Admiralty Act* conferring jurisdiction on the Court. As will appear later, there was only a right to arrest the ship in the present action if at the time of the institution of the proceedings the ship is, or the proceeds thereof are, under the arrest of the Court. There is no suggestion at the time the Moran writ was issued that the ship was under any prior arrest for any cause at all. In my opinion, the arrest as a result of the Moran writ was an unlawful exercise of the power of the Court and without its jurisdiction. I do not think that Parliament intended, when it spoke of a ship being under arrest at the time of the issue of a writ, that such arrest to warrant further action should be anything but a lawful arrest, and the arrest under the Moran writ, whatever it was in fact, was in my opinion an unlawful arrest and, as far as the jurisdiction of this Court is concerned, a nullity.

The provision of the statute dealing with jurisdiction for building, equipping or repairing a ship at any time is set out in section 22 of the *Supreme Court of Judicature (Consolidation) Act, 1925,* of the Parliament of the United Kingdom, which by subsection 2 of section 18 of the *Admiralty Act* is imported into the *Admiralty Act* itself and, in so far as it can, apply and is directed to be applied by the Court, *mutatis mutandis,* as if that section of the Act had been re-enacted by section 18. It goes on to provide that the word "Canada" be substituted for the word "England" and the words "Governor in Council" be substituted for "His Majesty in Council" and the words "Canada Shipping Act" (with the proper references to years of enactment and sections) be substituted, except with relation to mortgages, for the words "Merchant Shipping Act" (and any equivalent references to years of enactment and sections) and with the words "or other judicial district" added to the words "body of a county", wherever in such section 22 of such *Supreme Court of Judicature (Consolidation) Act, 1925,* any of the indicated words of that Act appear. Subsection 1(*a*)(x) of section 22 reads as follows:

> 22. (1) The High Court shall, in relation to admiralty matters, have the following jurisdiction (in this Act referred to as "admiralty jurisdiction") that is to say:
>
> (*a*) Jurisdiction to hear and determine any of the following questions or claims:
>
> (x) Any claim for building, equipping or repairing a ship, if at the time of the institution of the proceedings the ship is, or the proceeds thereof are, under the arrest of the Court.

The basis of the Moran action is apparently found in item (vi) of the same set of subsections and gives the jurisdiction in cases of towage, whether the services were rendered within the body of a county or on the high seas. That is apparently meant to cover river towage as well as towage on the ocean and, in the case of Canada, I would think would include towage on the Great Lakes. But the Moran claim was not for towage at all: it was for trucking services rendered for the transporting of the houseboat, which had reached a certain stage of completion, by truck from Richvale, where it was built, to a pier at the City of Toronto harbour. With respect, I do not think trucking services can be called towage. If I am correct in my view that there was no jurisdiction to do what was done in the Moran action, there was then, as I have already pointed out, an unlawful arrest. It is, I think, clear that, from the evidence that Brodie has furnished, there was no arrest of the ship at the time the writ was issued in this action. But if I am not entitled to consider parts of the day in determining whether there was arrest or not, then I think, on the ground that I have just discussed, that is, the matter of jurisdiction in the Moran action, I must conclude that there was no lawful

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arrest of the Court at the time the writ in this action was issued and that an earlier action brought without the jurisdiction cannot afford a basis by which this action can be supported. There must be a lawful foundation to bring the present action within the jurisdiction.

There will, therefore, be an order setting aside the writ and warrant of arrest issued in this action and the service of the same. The applicant should have its costs of these proceedings against the plaintiff.

Order accordingly.

1963 Feb. 21 — 1964 Aug. 4

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

CORINNE M. THIBAULT .... RESPONDENT.

Revenue—Income Tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—Civil Code of Quebec, Article 1851—Sale of real estate—Partnership formed to subdivide vacant land and build houses thereon —Respondent virtually a silent partner—Intent of taxpayer—No intention to sell vacant lots at profit—Partnership had only conditional right to acquire land purchased and owned by respondent—Land not stock-in-trade or inventory of partnership—Not an extraordinary occurrence for taxpayer to be engaged in business in one year but not the next—Profit from sale a capital accretion.

In 1954 the respondent entered into an equal partnership with one Vézina, who claimed wide experience in house building and the ability to secure the funds required to finance the construction of houses. He showed the respondent a tract of some thirteen acres of vacant land in the Parish of Pointe-aux-Trembles on the Island of Montreal which could be purchased for $31,000. The respondent raised the required money, in part by mortgaging her rooming house for $25,000, and purchased the said lands, which, by the terms of the partnership agreement she entered into with Vézina, she agreed to conditionally transfer to the partnership and to sell to it progressively a few lots at a time at cost, when Vézina had carried out his obligations under the agreement which included managing the undertaking, subdividing the property, procuring the necessary credit and finances including building mortgages, constructing the houses and selling them. Vézina was unable to secure building mortgage loans due to his poor credit rating and no houses were built although a total of nine lots were sold by the respondent in 1954 and 1955. In 1955 Vézina sued the respondent in Superior Court, claiming dissolution of the partnership, and accounting and damages. The respondent counterclaimed for annulment of the partnership agreement and other relief. Vézina's action was dismissed but the partnership agreement was declared to be null and void. In 1956 the respondent sold practically all the remainder of the land, consisting of nearly ten acres, to Coté & Lavigueur Construction Ltée, thereby realizing a profit which, the parties hereto have agreed, amounted to $18,000. The appellant reassessed the respondent's income to include this amount as being profit from a business but the Tax Appeal Board upheld the respondent's appeal against the reassessment.

Held: That although the respondent took no part in the management of the partnership and was little if anything more than a silent partner, Vézina was actively managing the business with her knowledge and consent and under the rules of partnership of the Civil Code of Quebec she is presumed to have given him a mandate for the management of the business and his acts are binding on her.

2. That the respondent, on joining the partnership, had no notion of selling vacant lots as such at a profit and indeed she did everything she could do to prevent such an occurrence.
3. That at no time could the land, as it existed in 1956, be regarded as stock-in-trade or inventory of the partnership because the partnership had nothing more than a conditional right to acquire it, and in 1956 the conditions were no longer capable of being performed.
4. That it is no extraordinary occurrence for a taxpayer to be engaged in business in one taxation year and cease to be so engaged in the next, and indeed it would be rather surprising if the respondent did not desire to completely withdraw from business activities, in the face of the reverses which beset her prior to 1956.
5. That the evidence establishes that the respondent had ceased to be engaged in business, within the meaning of the *Income Tax Act*, six months prior to the date of sale of the residue of the property and the profit therefrom had the attributes of a capital accretion and did not constitute income from a business.
6. That the appeal is dismissed.

APPEAL from a decision of the Tax Appeal Board.

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

Paul Boivin, Q.C. and *R. Boudreau* for appellant.

Thomas Calder for respondent.

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

KEARNEY J. now (August 4, 1964) delivered the following judgment:

This is an appeal by the Minister from a decision of the Tax Appeal Board[1] dated January 9, 1962, which maintained to the extent hereinafter mentioned appeals taken by the respondent concerning the income tax reassessments levied upon her for the taxation years 1954, 1955 and 1956.

[1] 28 Tax A.B.C. 248.

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By notices of reassessment dated March 12, 1959, the Minister added to the previously declared income of the respondent amounts of $4,467.61, $282.36 and $27,934.35 for the aforesaid taxation years respectively, on the ground that they constituted income realized by the respondent as a member of a partnership engaged in business within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act.*

The respondent appealed the said reassessments to the Board, which dismissed them in respect of the years 1954 and 1955 because they represented profits arising out of sales of certain lots (seven in 1954 and two in 1955) which were realized before the partnership (Pointe-aux-Trembles Development Reg'd.) of which the respondent was a member, had been dissolved and at a time when she was still struggling to realize the purposes for which it had been formed.

The respondent's appeal in regard to 1956 was maintained because the Board held that the profit which the respondent realized in that year on a bulk sale of the remainder of her property to Côté & Lavigueur Construction Ltée, had occurred after the partnership had been dissolved and that it did not constitute income from a business but was in the nature of a capital gain and therefore not taxable.

No appeal was taken by the respondent in respect of the reassessments from that part of the judgment of the Board which dismissed her appeal concerning the years 1954 and 1955, and it follows that the present appeal relates to the taxation year 1956 alone.

Although the amount of the 1956 profit was contested before the Board, it is no longer in issue because counsel for the parties, at the opening of this case, stated they had agreed that the figure of $27,934.35, as claimed, should be reduced, in round figures, to $18,000.

Counsel also declared that they had no additional evidence to offer and that the proof contained in the record transmitted by the Board in accordance with s. 89(4) of the Act, including a transcript of the evidence, would make up the case before this Court, and it might be said that only in a technical sense did the present appeal constitute a trial *de novo.*

The instant issue reduces itself to the not unfamiliar one of whether the profit of $18,000 realized by the respondent on the sale on May 15, 1956 of certain lots to Côté & Lavigueur Construction Ltée is, as claimed by the appellant, taxable income from a business within the meaning of the relevant sections of the Act or a capital accretion arising from a non-commercial transaction as submitted by the respondent.

As appears by the transmitted record, the proof consists of the testimony given by the respondent and Henri Lavigueur, an officer of Côté & Lavigueur Construction Ltée, together with the documentary evidence, including a copy of a judgment of the Superior Court for the Province of Quebec, which I will have occasion to refer to later.

There is no dispute as to the facts, which are substantially set out in the decision of the Board. It is well established, however, that in endeavouring to resolve an issue such as arises herein each case must be judged on its own facts and circumstances, and I propose, before dealing with the submission of counsel, to examine the relevant events as I see them.

Early in 1954, the respondent, who owned and operated a rooming house for tourists, was approached by one J. A. Vézina, a civil engineer, who represented to her that he had an immediate opportunity to put to use the wide experience which he had acquired in the construction of residential property, on the sale of which he had been accustomed to make a profit of $1,500 to $1,800 per house; that he was able to procure the necessary finances to meet the cost of construction; that he knew of some desirable building lots which were for sale; and that he was anxious to become associated on a 50-50 basis with somebody who had the wherewithal to buy the above-mentioned land upon which it should be feasible to construct about twenty houses per annum.

Mr. Vézina brought her to see the property, which consisted of nearly six hundred thousand square feet of unsubdivided vacant land located in the Parish of Pointe-aux-Trembles on the island of Montreal, the sale price of which amounted to $31,000. The respondent was favourably impressed by the aforesaid proposal. She had $5,000 to $6,000 in liquid funds and on making enquiries she ascertained that by giving a mortgage on her rooming house as collateral security she would be able to procure a bank-loan of $25,000, repayable by instalments together with interest.

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Subsequently, on April 19, 1954, she entered into a partnership agreement with the aforesaid Vézina, which agreement was filed as Exhibit A-1 and reproduced verbatim in the decision of the Board. It was a loosely drawn agreement but particulars which were lacking in it are to be found in other exhibits, particularly Exhibits 3 and 5, and also in the transcript of the testimony and in a copy of the already mentioned judgment of the Superior Court for the district of Montreal.

As a result of the above-mentioned clarification in respect of Exhibit A-1 it is not disputed and it can be said with justification that the respondent's sole obligation to the partnership was first to acquire for $31,000 cash the lands described in Exhibit A-1 hereinafter referred to as "the property" and to conditionally transfer to the partnership the aforesaid property, in whole or in part, for $33,000, by progressively selling to it a few lots at a time at cost and when J. A. Vézina had carried out his obligations under the above-mentioned agreement. It is equally clear that Mr. Vézina was to manage the undertaking first by causing the property to be subdivided, then procuring necessary credit and finances, including a builder's loan, by way of mortgage, from Central Mortgage and Housing Corporation to carry out the construction and subsequent sale of bungalow-type houses as erected on the lots thus transferred.

I might here note that, while the agreement states that the respondent was to purchase the property for $31,000 and sell it to the partnership for $33,000, the difference of $2,000 was not profit but was intended to cover the interest charges which the respondent would have to pay on her bank-loan during the contemplated progressive sale period.

On May 19, 1954, the respondent purchased the property as agreed, which consisted of 572,453 sq. ft. of vacant unsubdivided land. See Exhibit I-3 which also contains particulars of sales of lots subsequently made by the respondent and which was filed by consent of counsel to serve as evidence thereof in lieu of filing copies of notarial deeds.

Soon after J. A. Vézina informed the respondent that he was having difficulties in procuring the necessary finances to commence construction and he suggested to her that it would assist him greatly if she would transfer into his name a couple of lots. She reminded him that she was in no way obliged under their agreement to do so, nevertheless she would make him a present of them. Later he informed her that he was still unable to procure the required financing but that he was confident that a Mr. Gaston R. Miquelon would provide the necessary finances to build two houses if he were given a one-third interest in the existing partnership, and he requested the respondent to consent, like himself, to reduce their existing interest in the partnership from one-half to one-third each. He also suggested that if she would admit Mr. Miquelon into the partnership he would agree that, instead of her transferring two lots to him for nothing, as she had previously agreed, he would be willing to pay $1,200 for them, on the understanding that she would contribute the equivalent of $400 and Mr. Miquelon and himself would each pay her a like amount.

On the above representation, the respondent again gave her consent, and on June 22, 1954, she signed a deed transferring an undivided half-interest in lots 36, 37, 38 and 39 of part of original lot 148 to Mr. Vézina, in which the sale price is stated to be $1,200 (Ex. I-3).

A few days later, she received a promissory note for $800, signed by Mr. Vézina and dated June 25, 1954 (Ex. A-2).

On July 8, 1954, the two partners signed and registered a declaration under the *Partnership Declaration Act* of Quebec in the office of the Prothonotary of the Superior Court for the district of Montreal, in which they certified that they desired to carry on business under the name and style of "Pointe-aux-Trembles Development Reg'd." for the purpose of the construction, sale and exchange of immovables, with a place of business located in Montreal (Ex. A-4).

At some undetermined date (presumably after the registration of Exhibit A-4), Notary Jean R. Miquelon prepared a new 3-member deed of partnership in which the respondent and J. A. Vézina were both said to be doing business under the firm name and style of "Pointe-aux-Trembles Development Reg'd." and are described as party of the first part and Gaston R. Miquelon as party of the second part (Ex. A-3).

It is worth noting that the opening paragraphs of the deed contain the following declarations:

> The said partnership (Pointe-aux-Trembles Development Reg'd.) was formed to exploit lands situated in Pointe-aux-Trembles and the construction of houses thereon.

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The said land was the property of dame Corinne Roy and would be transferred by her in whole or in part to the Pointe-aux-Trembles Development Reg'd.

The said property would be subdivided in whole or in part so that lots could be sold individually with a house erected on each of the said lots.

It goes on to say:

These declarations having been made, the parties agree as follows:

The party of the second part undertakes to finance the construction of two bungalow-type houses which will be constructed entirely by the Party of the First Part.

It is useless to set out the remaining clauses of the deed because, although both J. A. Vézina and the respondent signed the agreement, Gaston R. Miquelon declined to do so because he entertained doubts as to whether the respondent, on account of her marital status, was legally entitled to sign the deed.

It transpired that at no time did Mr. Miquelon sign the new partnership agreement, neither did Mr. Vézina ever honour his note and the undivided half of four lots remained registered in his name.

During the next few months Mr. Vézina continued his efforts to obtain from various sources, including Central Mortgage and Housing Corporation, The Canadian Bank of Commerce and The Prudential Life Insurance Company, loans for construction purposes but due to his poor credit rating he was unsuccessful.

Next, in the expectation or hope that the respondent would use the proceeds to finance house construction he sought purchasers for some of the respondent's lots and including the sale to Mr. Vézina she sold seven lots in the last half of 1954 for $7,925, resulting in taxable profits of $4,467.61 (Ex. I-3).

Mr. Vézina was unable to persuade the respondent to use for house construction the proceeds from the above-mentioned sales. She reminded him of his own obligations in this regard and informed him that she intended to apply them against interest and capital on her bank-loan.

Mr. Vézina then adopted a new attitude and commenced to blame the respondent for his inability to secure a mortgage on the four half-lots which would have enabled him to proceed with house construction. On March 25, 1955, he instituted an action in the Superior Court for the district of Montreal, province of Quebec, in which he claimed that the respondent had failed to fulfil her obligations under the partnership Exhibit A-1 and sought a dissolution of the partnership, an order requiring her to make a rendition of accounts and a condemnation in damages against her for $25,000.

Notwithstanding the above-mentioned proceedings, the respondent came to some sort of understanding with Mr. Vézina about the liquidation of outstanding debts, more particularly an architect's bill for $900 which he had failed to pay. He found one purchaser who bought a lot for $900 on September 15 and a second purchaser who on November 25, 1955 bought another for $950 (Ex. I-3). The profits realized on these sales were sufficient to pay off the debts and leave a surplus of $282.36 as claimed in the appellant's reassessment for 1955.

The two above-mentioned transactions of September and November 1955 were the last in which Mr. Vézina had been instrumental in finding a purchaser and thereafter the partners ceased to have any dealings with each other and the partnership's activities came to an end.

The proof also shows that the respondent had no contact with the purchasers of the lots which she sold in 1954 and 1955 and the only time she met them was when she signed the deeds of sale at the notary's office.

In respect of the Vézina action, as appears by copy of a judgment rendered on October 30, 1961 by the Honourable Mr. Justice C. A. Sylvestre (Ex. A-5), in her defence to the said action and by a cross-demand the respondent, apart from denying the aforesaid allegations, pleaded, *inter alia*, that she was induced to enter into partnership with the said Vézina by his false representations respecting his financial status and qualifications and but for the aforesaid deception she would never have entered into the said partnership; that the said Vézina had failed to fulfil his obligations under the said partnership agreement and she asked for annulment of Exhibit A-1 as well as of the previously mentioned deed of sale of a half interest in four lots for $1,200 (Ex. I-3).

The learned trial judge found that Vézina's aforesaid claim was entirely unfounded in fact and that the respondent's defence was well founded. He dismissed the Vézina action and declared the partnership agreement exhibit A-1 null and void. As to the resiliation of the sale to Vézina

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referred to in Exhibit I-3, the learned judge found that he could not annul it because the widow of the late J. A. Vézina had not been made a party to the action, but he reserved the respondent's rights in respect thereof.

The only sale effected in 1956 occurred on May 25, when Madame Thibeault sold to Côté & Lavigueur Construction Ltée practically all the remainder of the property, amounting to 426,781 sq. ft., for a reported price of $55,000, and, on the profit, was originally reassessed by the Minister at $27,394.35 (Ex. I-3—Annex 2), but, as previously stated, it was reduced to approximately $18,000 by agreement between counsel for the parties.

I might here add that the aforesaid deduction of about $9,000 came about because, as appears by Exhibits I-1 and A-6 and the evidence of Henri Lavigueur, in lieu of receiving $55,000 in cash the respondent received $10,000 cash and 450 preferred shares of the par value of $100 each of Côté & Lavigueur Construction Ltée, which—the parties agreed—had a market value of $80 per share.

The issue concerning the validity of Exhibit A-1 was pending before the Court and the evidence shows that the respondent, during the six months preceding the bulk sale, made no attempt, personally or through real estate agents or otherwise, to sell all or any part of the property. According to the evidence of the respondent, she was informed by Notary Roy that the said company was willing to take all the remainder of the property off her hands and advised her to sell it. Henri Lavigueur, an officer of Côté & Lavigueur Construction Ltée, testified that his company, for a long time, had been looking for a suitable land on which to build and that the instant property was found as a result of his company's efforts.

The question to be resolved is whether in the light of the foregoing facts and circumstances it can be said that the profit of $18,000 made by the respondent in respect of the bulk sale in 1956 can properly be termed "profit from a business", as claimed by the appellant, or was of a capital nature realized at a time when the respondent had ceased to carry on business.

Counsel for the appellant submitted that the evidence clearly indicates that the respondent launched into the world of commerce in partnership with J. A. Vézina. With this statement I wholly agree.

The certificate of registration Exhibit A-4, which the respondent signed, certifies that such is the case and I do not think it matters that she took no part in the management of the partnership and that her only obligation to it was to transfer all or a portion of the property which she had acquired if, as and when her partner carried out his part of the bargain. It may be said that her position in the partnership amounted to little if anything more than a silent partner, but as indicated by counsel for the appellant, J. A. Vézina was actively managing the business with the knowledge and consent of the respondent and under the rules of partnership of the Civil Code of Quebec she is presumed to have given him a mandate for the management of the business and his acts are binding on her. The relevant portion of Art. 1851 C.C. provides:

1851. If there be no stipulation as to the managing of the business of the partnership the following rules apply:

1. The partners are presumed to have mutually given to each other a mandate for the management, and whatever is done by one of them binds the others; saving the right of the latter, together or separately, to object to any act before it is concluded;

Counsel for the appellant, in support of his submission that the $18,000 in issue constituted taxable income relied particularly on the following cases: *Regal Heights Ltd. v. Minister of National Revenue*[1]; *Glen J. Day v. Minister of National Revenue*[2]; *McIntosh v. Minister of National Revenue*[3].

The *Regal Heights* case concerned an incorporated company which acquired property for the purpose of establishing upon it a regional shopping centre. Its promoters and directors were experienced businessmen who, before effecting the purchase, were aware that their scheme, in order to be successful, apart from financing, which would run into several millions of dollars, was dependent on the procurement of a lease from a major departmental store and concerning which they had no previous assurance.

The Court held that it was reasonable to assume that the promoters and directors of the venture, with their knowledge and experience, would not neglect to weigh and consider alternative uses, including resale of the property in an undeveloped state, should their original intention fail to materialize, and I believe it was but natural under the cir-

[1] [1960] S.C.R. 902.
[2] [1958] S.C.R. 119.
[3] [1958] Ex. C.R. 44.

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cumstances that in the above case little or no weight was given to any contrary declaration made on the part of the said promoters and directors.

In the instant case, in my opinion, the respondent believed, not without justification, that Mr. Vézina, a professional man, was telling the truth when he informed her of the status which he possessed and the profits which he had realized in the house construction business. She herself had succeeded in borrowing $25,000 from a bank and undoubtedly considered that he would easily be able to raise $8,000 or $9,000, which was the cost of building single bungalows.

In dealing with intent, credibility I consider plays an important role. A perusal of the transcript clearly shows that the Board was of the opinion that the respondent was a forthright person worthy of belief, and when she stated under oath that on joining the partnership she had no notion of selling vacant lots as such at a profit she was speaking the truth.

I am of opinion that if the respondent had known as subsequent events proved (see Superior Court judgment Ex. A-5), that Mr. Vézina had a poor credit rating and that his testimony did not merit credence, she would never have entered into the partnership. It should also be emphasized that the respondent, in acquiring the property, intended to sell it to the partnership at cost.

Far from entertaining a purpose, will or design, within the usual meaning attributed to "intent", to sell vacant lands, the respondent did everything she could to prevent such an occurrence. In order to make good her partner's deficiency in carrying out his obligations and to assist him in doing so, she placed a one-half undivided interest in four lots in his name, and, when this proved insufficient or unavailing, agreed to admit a new partner and reduce her interest in the partnership from one-half to one-third, so that the original purpose of selling built-up units, instead of vacant lots, might be accomplished.

Apart from any question of intent, a further issue of primary importance must be borne in mind, namely, "Did the claim of $18,000 constitute income from a business which in turn depends upon not only what the respondent actually did in the taxable year 1956 but upon the manner in which she carried it out?". Stated a little differently, this reduces itself to a determination of whether the respondent had ceased to carry on business prior to January 1, 1956, and, if so, did she, in effecting the sale to Côté & Lavigueur Construction Ltée, on May 15, 1956, do so in such a manner as to constitute carrying on a business.

At no time could the instant property, as it existed in 1956, be regarded as stock-in-trade or inventory in the hands of the partnership, because the partnership had nothing more than a conditional right to acquire it, which was contingent on Mr. Vézina fulfilling obligations, which he failed to do. Moreover, during the taxation year 1956 with which we are concerned the implementation of the aforesaid obligations were no longer susceptible of being performed because, prior to January 1, 1956, the partnership had been dissolved by common consent when Mr. Vézina instituted proceedings seeking *inter alia* a dissolution in which the respondent concurred, and the partnership agreement (Ex. A-1) was also declared null and void by the judgment of the Superior Court *supra*.

The *McIntosh* case is closer to the case at bar in as much as, like the respondent, McIntosh, who had no experience in the business of house construction, was asked to enter into a partnership on a 50-50 basis with a person named Laidlaw, for the purpose of constructing houses on the property and, later, selling them and sharing the profits. Unlike the present case, however, it was Laidlaw who had experience in building and who bought the whole property consisting of 165 lots, whereupon, after some hesitation, McIntosh acquired a one-third interest in the partnership by purchasing 55 lots from his partner and obtained a promise of sale by paying $2,500 on account of the purchase price and became entitled to receive his title deed on paying the balance amounting to $1,872. The partners were to be associated in a house-building scheme but differences arose (the nature of which is not disclosed), but it would appear that McIntosh did not want to enter the construction business and Laidlaw did because Laidlaw offered to refund the $2,500 which his partner had paid on account and cancel the purchase. McIntosh refused the offer and took an action, for specific performance, in the Supreme Court of Ontario, which was ultimately settled out of Court. McIntosh paid the balance of the purchase price and took title to 55 lots,

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while Laidlaw kept the remaining 115 lots and the partners then went their respective ways.

McIntosh, apparently, did what he preferred to do and what he intended to do if it could be done, namely, sell his vacant lots, which he did in part, and was taxed on $12,000, representing his profits on the transaction. The Court found that no new situation arose insofar as McIntosh was concerned when he modified his original reluctant intention of sharing in a construction program and decided to sell vacant lots instead.

The *McIntosh* case is also distinguishable because he owned a vested interest in the property belonging to the partnership, as he had already paid $2,500 on account and was able and willing to pay the balance of $1,800, while in the instant case at no time did the Pointe-aux-Trembles Development Reg'd. have anything but a right which was conditioned on J. A. Vézina fulfilling certain obligations, which he failed to do.

The evidence in the *Day* case is briefly to the effect that in June 1950 he purchased a block of land consisting of 125 acres for $105,000 with the idea of turning it into a subdivision and then selling it all in lots, but in May 1951 he gave up this idea because the cost of carrying it out was greater than he anticipated. In November 1951 he sold the property en bloc for $205,000 and was assessed on the resulting profits which he realized in the taxation years 1952, 1953 and 1954.

The offer of $205,000 for the whole property was promptly accepted by Mr. Day and he paid the broker who brought it to him a commission of $10,000, whereupon the new purchaser took over the plans previously prepared by Mr. Day and, with modifications, had them accepted by the Planning Board and proceeded to effectively complete the subdivision.

In the above-mentioned case no partnership existed. Mr. Day alone managed and controlled the property and, before his alleged abandonment of his original plan in May 1951, he had gone about the business of subdividing in the same manner as those ordinarily engaged in the real estate business would do, by causing a subdivision plan to be prepared and which he succeeded in having accepted, subject to some modifications, by the Scarboro Planning Board, and he had also succeeded in obtaining offers for lots or group of lots, which he refused, as apparently they were not sufficiently attractive.

There was no finding in the *Day* case that at any given moment the taxpayer ceased to be engaged in the real estate business. The evidence afforded little or no scope to establish the existence of a split personality such as arose in the instant case, wherein the respondent, in her quality as member of a partnership, was engaged in business but ceased to be so engaged when Mr. Vézina's activities terminated and the partnership was dissolved and the agreement on which it was based was declared by Court decree to be null and void.

The efforts made by a woman who lacked business experience to carry out her original intention is in contrast to the "do little or nothing" attitude of the taxpayer in the *Day* case, wherein he had more skill, ability and freedom than the respondent to dispose of his property in a manner which best suited his purpose.

That a taxpayer should be engaged in business in one taxation year and cease to be so engaged in the next, in my opinion, is by no means an extraordinary occurrence. Indeed, in face of the reverses prior to 1956 which beset the respondent's efforts to develop the property, it would be rather surprising if she did not desire to completely withdraw from business activities.

At no time after the Pratte sale of November 25, 1955 did the respondent or Mr. Vézina offer any part of the residue for sale, nor seek to sell it through real estate agents, and insofar as the bulk sale which occurred on May 15, 1956, as appears by her own evidence and that of Mr. Henri Lavigueur *supra,* the respondent, figuratively, did not raise a finger to bring about the aforesaid sale.

Counsel for the appellant stressed points of similarity between the case at bar and the three cases upon which he relied and recalled—not without justification—that the extended meaning of "business" as defined in s. 139(1)(*e*) of the Act is couched in terms so broad as to embrace "an undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade".

Although it may be said that the case at bar bears a resemblance in several respects to the aforesaid authorities which upheld the reassessments made by the Minister, nevertheless, as observed by counsel for the respondent, on

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closer examination of the facts some striking differences appear which I think afford sufficient grounds for holding that the sum in issue falls on the non-taxable side of the dividing line.

In my opinion, in the light of the exceptional circumstances disclosed in this case the weight of evidence adduced on behalf of the respondent is such as to reasonably establish that the respondent had ceased to be engaged in business, within the meaning of the Act, six months prior to May 15, 1956, when she effected the sale of the property in issue, and that the said profit had the attributes of a capital accretion and did not constitute income from a business.

For the above reasons, I consider that the appeal should be dismissed with costs.

Judgment accordingly.

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Mar. 20, 21

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Aug. 12

BETWEEN:

BRICK CARTAGE LIMITED ....SUPPLIANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Crown—Petition of Right—Negligence—Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3(1) and 4(4) and (5)—Indian Act, R S.C. 1952, c. 149, ss 34, 35 and 39 to 41—Possessory right of Indians in lands of Indian Reserve—Maintenance of bridge on Indian Reserve—Whether Indian Band or Council or employee an agent or servant of Crown in right of Canada—No reason to believe bridge structurally defective—No evidence that those responsible for maintenance of bridge were negligent either as occupiers or as municipality charged with maintenance of highway.

The suppliant claimed compensation for damage to its truck and for loss of use resulting from the collapse of a bridge on the Six Nations Indian Reserve near Brantford, Ontario while the truck was crossing it, alleging that the bridge had been allowed to depreciate and was in a state of disrepair through the failure and default of the Six Nations Band Council, under whose sole jurisdiction it was, to keep it in repair.

Held: That the petition of right does not make out a cause of action under s. 3(1) of the *Crown Liability Act* unless the Six Nations Indian Band Council or its agents or servants are, as a matter of law, servants of Her Majesty in right of Canada, or Her Majesty in right of Canada, as a matter of law, owns, occupies, possesses or controls the bridge in question in such a way as to impose on Her Majesty a duty to maintain it through the operations of the Band Council, its servants or agents.

2. That under the Royal Proclamation of 1763 and the *British North America Act of 1867,* the Crown in right of Ontario has a bare legal title in Indian lands in Ontario, it being subject to a possessory right of the Indians in the lands in which possessory right is vested in the Indian band until some part of the land is allocated to an individual Indian, is surrendered and sold or is expropriated, the Parliament of Canada having exclusive legislative jurisdiction in relation thereto.
3. That for all practical purposes, possession by an Indian band of land is of the same effect in relation to day to day control thereof as possession of land by any person owning the title in fee simple and neither the Crown nor any government official has any right or status to interfere with such possession by the band except when such right or status has been conferred by or under statute.
4. That the bridge in question was in the possession of the Indian band at all relevant times.
5. That maintenance of roads in the reserve was carried on by the band through its elected representatives, with the same help and supervision from the Provincial authorities as a municipal corporation in Ontario received and with the same supervision and control in relation to expenditure of band or public monies as is imposed generally by the *Indian Act.*
6. That no possible basis in law has been put forward for regarding the band, its council or any officer or servant employed by it as being an agent, officer or servant of the Crown in right of Canada.
7. That there is no evidence to support in any way that the Crown in right of Canada or any officer or servant thereof had any authority, responsibility or control, either in fact or in law, in relation to the bridge in question or its maintenance.
8 That there was no basis in law pleaded and no evidence adduced to establish any liability of the respondent under the only statutory authority for such liability to which any reference was made, viz s 3(1) of the *Crown Liability Act.*
9. That the bridge in question was very old and served as a connection in a lightly travelled gravel road but there was no evidence that two surveys that had been made had disclosed any structural defects in it nor was there any evidence that any reasonable inspection of the bridge would have revealed any cause to be apprehensive of its ability to sustain any traffic that might be expected.
10 That the suppliant's truck and the one that immediately preceded it over the bridge were both in excess of the weights permitted by Ontario provincial law on secondary roads.
11. That there is no evidence upon which to base a finding that the authorities responsible for the maintenance of this bridge were guilty of any negligence, whether the matter is viewed from the point of view of the liability of an occupier to an invitee or of an Ontario municipality to maintain a highway within *McReady v. County of Brant* [1939] S C R. 278.
12 That a person who sends a modern vehicle weighing many tons over rural roads that were constructed when vehicles of such great weight were unknown has a very heavy onus to satisfy himself that a particular road is fit to receive his vehicle before moving it over it.
13 That the amount of damages has not been proven since no person with any personal knowledge of all the relevant facts gave evidence with respect thereto

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PETITION OF RIGHT for damage to a motor vehicle.

The action was tried by the Honourable Mr. Justice Cattanach at Brantford.

P. A. Ballachey, Q.C. for suppliant.

N. A. Chalmers for respondent.

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

CATTANACH J. now (August 14, 1964) delivered the following judgment:

This is a Petition of Right for damages to a motor vehicle, known as a "boom transport", sustained when a bridge on the Six Nations Indian Reserve, near Brantford, Ontario, collapsed while the vehicle was crossing it. The Petition of Right, in addition to damages for physical injuries to the vehicle, claimed damages for loss of use, but this claim was abandoned at trial. A Counterclaim by the Crown was also abandoned at trial.

The Petition of Right alleges that the bridge in question was under the sole jurisdiction of the Six Nations Indian Band Council and that it was in a state of disrepair and had been allowed to depreciate to the knowledge of the Council and its servants and agents "to the extent that the supporting abutments of the bridge, had deteriorated to the point that they allowed the bridge to collapse." It also alleges that the damages complained of were caused by the failure and default of the Six Nations Band Council to keep the bridge in repair. On these allegations relief is sought against Her Majesty in right of Canada, under section 3(1) of the *Crown Liability Act,* c. 30, Statutes of Canada, 1952-53, which reads as follows:

3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable

(*a*) in respect of a tort committed by a servant of the Crown, or

(*b*) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

The Petition of Right does not make out a cause of action under this provision unless, on the one hand, the Six Nations Indian Band Council or its agents or servants are, as a matter of law, servants of Her Majesty in right of Canada or, on the other hand, Her Majesty in right of Canada, as a matter of law, owns, occupies, possesses or controls a bridge on the Six Nations Indian Reserve in such a way as to impose on Her Majesty a duty to maintain it through the operations of the Band Council, its servants or agents.

The case was argued by counsel for both parties on the assumption that the Indian Reserve on which the accident occurred was in an area to which the reasoning of the Privy Council in *St. Catherine's Milling and Lumber Company v. The Queen*[1] is applicable. It would have been preferable if there had been evidence to show that the area in question is land that was subject to the Royal Proclamation of 1763 and that it was in the occupation of the Indians at the time of that Proclamation together with evidence that it had never been surrendered by the Indians. However, as the area in question is in Ontario, and as it appears from the evidence that it has not been surrendered, I propose to view the case on the assumption that those facts have been established.

I do not propose to repeat the careful exposition of the legal rights in relation to Indian lands that can be found in Lord Watson's judgment in the above case at pages 53 and those following. It is sufficient for the purposes of this judgment to enumerate the significant points, which are:

(1) the Royal Proclamation of 1763 conferred on the Indians a possessory right in lands occupied by them at that time in the territories to which the Proclamation applied;

(2) those lands (hereafter referred to as "Indian lands") were vested in the Crown subject to the Indians' possessory rights;

(3) upon surrender or other extinguishment of the Indians' possessory right, the Crown's title became a right to full and restricted ownership;

(4) by virtue of the Proclamation of 1763, the Indian possessory right could only be extinguished by a formal contract, duly ratified at a meeting of the Chiefs, for surrender to the Crown;

(5) the Imperial Government assumed the responsibility for the welfare of the Indians and of supervising relations between the Indians and others, to the exclusion of the colonial governments (the Imperial Government did not surrender this function until 1860);

(6) immediately prior to 1867, the Crown title in Indian lands was vested in Her Majesty in the right of the pre-confederation Province of Canada;

(7) by the British North America Act, 1867, the Crown title in Indian land in Ontario became vested in Her Majesty in right of Ontario, with the consequence that, upon a surrender or other extinguishment of the Indian possessory right, the full and

[1] 14 App. Cas. 46.

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unrestricted ownership would become vested in Her Majesty in right of Ontario (since 1924, there has been a Dominion-Provincial agreement designed to ensure to the Indians the full benefit of Indian land—see chapter 48 of the Statutes of 1924);

(8) by the British North America Act, 1867, the Parliament of Canada acquired exclusive legislative jurisdiction in relation to Indians and lands reserved for the Indians.

In the exercise of its legislative authority in relation to "Indians and lands reserved for the Indians," the Parliament of Canada has enacted the *Indian Act,* 1952 R.S.C. c. 149, as amended, by section 18 of which the Crown is declared to hold Indian lands "for the use and benefit" of the respective bands, i.e. the Indians' possessory title under the Proclamation of 1763 is recognized by Parliament and assigned to the respective bands. This Act contains provisions under which a band's possessory right in particular parts of a reserve may be vested in an individual Indian and thus attain, for all practical purposes, all the incidents of common law ownership of land in fee simple. It also contains provisions for electing band councils and confers on a band council power to make by-laws for various purposes, including "the construction and maintenance of . . . roads, bridges . . . and other local works". There is also a provision, being section 34, that a band shall *inter alia* ensure that the roads and bridges within the reserve occupied by the band are maintained in accordance with instructions issued from time to time by the Superintendent, who is an official under the Minister of Citizenship and Immigration. Other provisions in the Act to which reference should be made are section 35, under which lands in a reserve may be taken for public purposes, and sections 39 to 41, under which lands in a reserve may be surrendered by the Indians for disposition to third persons.

The situation appears to be that the Crown in right of Ontario has a bare legal title in Indian lands in Ontario during the continuance of the possessory right of the Indians. It further appears that the possessory right of the Indians is vested in the band, i.e. the particular group of Indians as a group, until some part of the land is allocated to an individual Indian, is surrendered and sold or is expropriated.

For all practical purposes, possession by an Indian band of land is of the same effect in relation to day to day control thereof as possession of land by any person owning the title in fee simple. Neither the Crown nor any government official has any right or status to interfere with such possession by the band except when such right or status has been conferred by or under statute.

There is no evidence that the bridge that is the subject matter of this Petition of Right has ever been allocated to an individual Indian, surrendered or expropriated. I should also say that there is no evidence of any instruction of the Superintendent with regard to the maintenance of bridges under section 34 of the *Indian Act* and there is no evidence of any by-law in that connection passed by the Band Council. I, therefore, find that the bridge was in the possession of the Indian Band at all relevant times.

There is no sufficient evidence as to who constructed and maintained the roads in the reserve and particularily the bridge in question, but what evidence there was convinces me that maintenance, at least, was carried on by the band through its elected representatives, with the same help and supervision from the Provincial authorities as a Municipal Corporation in Ontario received, and with the same supervision and control in relation to expenditure of band or public monies as is imposed generally by or under the *Indian Act*. No possible basis in law has been put forward for regarding the band, its council or any officer or servant employed by them as being an agent, officer or servant of the Crown in right of Canada.

There is no evidence that suggests in any way that the Crown in right of Canada or any officer or servant of the Crown in right of Canada, had any authority, responsibility or control, either in fact or in law, in relation to this bridge or its maintenance.

There is no basis in law pleaded, and no evidence was led, to establish any liability of Her Majesty in right of Canada under the only statutory authority for such liability to which any reference was made, namely, section 3(1) of the *Crown Liability Act*.

The foregoing reasons, effectively conclude the matter and, in my view, the suppliant is not entitled to the relief sought in its Petition of Right.

However, I do not propose to leave the matter without expressing my conclusions on the questions of fact concerning the alleged negligence of those who did have responsibility for the maintenance of the bridge and the quantum of damages.

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The simple facts are that:

(1) the bridge in question was built in the "horse and buggy" days in the early years of this century;

(2) in 1961, the bridge still served as a connection in a lightly travelled gravel road and was maintained to the same standards as were the many other bridges of the same kind that still continued to be used in the province at that time;

(3) the normal capacity of the bridge, according to an expert called by the suppliant, was in the neighbourhood of 30,000 pounds;

(4) the bridge had been recommended for immediate replacement on the grounds that it was poorly located, it was a very old bridge and it was narrow but, notwithstanding, evidence of two different surveys by representatives of the interested authorities, there was no evidence that such surveys had disclosed any defects of a structural nature in the bridge;

(5) there was no evidence that any reasonable inspection of the bridge before its collapse would have revealed any cause to be apprehensive of the ability of the bridge to sustain any traffic that might be expected;

(6) the suppliant's truck was a very large special piece of equipment, with a loading and unloading boom on it, that weighed 17,000 pounds empty and on the day in question carried a load of 27,000 pounds (some part of this load had been removed prior to the accident);

(7) the suppliant's truck crossed the bridge immediately after a truck that had a weight, including its load, between 43,500 and 46,500 pounds;

(8) both of these trucks were, at the time, in excess of the weights permitted by Ontario Provincial law on secondary roads.

The evidence of expert examination of the ruins of the bridge failed to reveal what had happened to cause its collapse. The sixty foot members were intact and had not failed so that the concrete abutments on which they had rested must have moved, crumbled or been gouged out, but there was no evidence to establish which of these had happened. One expert expressed the opinion that the abutments had moved over the years but he did not support his opinion by the evidence (but only as being his conjecture as the most likely thing to have happened) and he did not say that there was anything to indicate that any reasonable inspection would have revealed anything to those responsible for the bridge that should have made them apprehensive that there was any danger of collapse.

I do not overlook the evidence that one Martin, an employee of the Band, had indicated to the drivers of the two trucks that they should proceed by a route over this bridge and had told the driver of the leading truck, with whom he was riding, that he knew of no load limit and that the township or band trucks had gone over the bridge many times. There is, however, no evidence that Martin had any authority or special knowledge in respect of the roads and bridges maintained by the Band. Neither do I overlook the presence of a sign visible to traffic coming from the opposite direction to which these trucks were coming, cautioning the drivers to proceed at their own risk.

I find no evidence upon which to base a finding that the authorities responsible for the maintenance of this bridge were guilty of any negligence, whether the matter is viewed from the point of view of the liability of an occupier to an invitee or from the point of view of the liability of an Ontario municipality to maintain a highway within, *McReady v. County of Brant*[1].

Furthermore, I am of the view that a person who sends a modern vehicle weighing many tons over rural roads that were constructed when vehicles of such great weight were unknown, has a very heavy onus to satisfy himself that a particular road is fit to receive his modern heavy vehicle before moving his vehicle over it. In my view, such a person uses such roads at his own risk and cannot transfer the responsibility to his customer or any other person to whom he directs enquiries for information except, possibly, those responsible for the maintenance of the road.

Finally, with reference to the quantum of damages, I find that, notwithstanding, that there was no admission by the respondent concerning either the nature of the physical damages sustained by the vehicle or the reasonableness of the charges, no person with any personal knowledge of all

[1] [1939] S.C.R. 278.

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the relevant facts gave evidence with respect thereto. I cannot, therefore, find that the amount of the damages has been proven. I must also add that I am not able to find on the evidence that the bill for the specialized adjuster's services can be regarded as representing a cost of repairing the physical damages to the truck.

Having regard to the findings I have made, I do not have to form an opinion under subsection (5) of section 4 of the *Crown Liability Act.* There is, however, a question in my mind as to whether, when lack of notice under subsection (4) of section 4 is pleaded by the Crown, the suppliant can ask the Court to make the required finding under subsection (5) unless its reply pleads both the lack of prejudice and the injustice contemplated by subsection (5). In this case, the reply did not plead the injustice contemplated by subsection (5).

There will, therefore, be judgment that the suppliant is not entitled to any portion of the relief sought by its Petition of Right herein and the respondent is entitled to costs.

Judgment accordingly.

1964
May 4, 6, 7
Aug. 17

BETWEEN:

JOSEPH A. VILLENEUVE ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ....RESPONDENT.

Revenue—Income Tax—Income Tax Act, R.S.C. 1952, c. 148—Profit on sale and expropriation of real estate—Income or capital gain—Onus on taxpayer to disprove basis of assessment—Evidence given by taxpayer at trial of purpose of acquisition of property not conclusive of his true purpose at time of acquisition.

In 1952 and 1953 the appellant purchased two farms about one-half mile apart in the Township of Cornwall on the outskirts of the City of Cornwall, the first being of one hundred acres and the second of eighty-five acres. At no time did he make any attempt to farm either property nor had either property been worked intensively by its previous owner. The houses on both properties were rented by the appellant, who also arranged to have the tenants on the one hundred acre property operate it as a farm, the appellant supplying stock and equipment. In 1955 the Hydro Electric Power Commission of Ontario expropriated a part of each of the properties for relocation of railway lines resulting from the St. Lawrence Seaway development.

The Ontario Hydro also purchased thirty-two acres of the one hundred acre property between the proposed new railway line and an existing line. The appellant sold the eighty-one acres remaining of the eighty-five acre property after the expropriation to land speculators, realizing a substantial profit on that sale, as well as on the sale to the Ontario Hydro of part of the one hundred acre property. The respondent assessed the profit on the sales as income of the appellant.

The evidence established that the appellant had been engaged in speculative real estate transactions immediately before acquiring the two farm properties and went into a speculative real estate business in a comprehensive way very shortly afterwards.

Held: That the onus of disproving the respondent's assumption, when assessing, that the acquisition of the two farms had for its purpose or one of its possible purposes, their subsequent disposition at a profit, was on the appellant.

2. That the appellant's evidence at the trial that his purpose was to farm the properties, although given in all sincerity, still may not reflect the true purpose at the time of acquisition, and must be considered along with the objective facts

3 That the appellant has not established on a balance of probability that he had acquired the two properties for the purpose of farming them to the exclusion of any purpose of disposition at a profit.

4 That the appeal is dismissed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Cattanach at Cornwall.

Paul Rouleau and *Jean Forget* for appellant.

N. A. Chalmers and *R. L. Radley* for respondent.

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

CATTANACH J. now (August 17, 1964) delivered the following judgment:

This is an appeal from a judgment of the Tax Appeal Board[1] dismissing appeals by the appellant from assesments of income tax for the taxation years 1956, 1957 and 1958.

There is no dispute as to the amounts of the assessments but the question for determination is the familiar one as to whether profits realized on the expropriation and sale of two parcels of real estate were income for the purposes of the *Income Tax Act*, R.S.C. 1952 c. 148.

By the Notice of Appeal from the Tax Appeal Board (*supra*) the appellant sets out his case as follows:

(a) In the year 1952, the Appellant purchased from one Marie Anne Daigle certain farm lands, then lying in the Township of Cornwall,

[1] (1963) 31 Tax A B.C. 157.

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County of Stormont. In the year 1953 the Appellant purchased neighboring farm lands from one Albert Cadieux. Both purchases were made by the Appellant for the purposes of dairy farming.

(b) Following the initiation of the St. Lawrence Seaway and Power Development, parts of the aforesaid farms were expropriated by Provincial agencies for Railway and Highway Relocations.

(c) Following the aforesaid expropriations, the Appellant, in the year 1956, sold the Cadieux farm. Subsequent to the year 1956, the Appellant was paid compensation by the Ontario Hydro Electric Power Commission, relative to the said expropriations.

(d) As a result of the Highway and Railway Relocations as aforesaid, the lands in question became unsuitable for farming.

(e) The Appellant submits that the said purchases and sales were not a venture in the nature of trade.

The respondent's Reply insofar as it is relevant, reads as follows:

1. He admits that the Appellant purchased certain lands in the year 1952, hereinafter referred to as the "Daigle Property" and purchased certain lands in the year 1953, hereinafter referred to as the "Cadieux Property", both parcels of land being in the Township of Cornwall, County of Stormont in the Province of Ontario, but does not admit any further allegations of fact contained in Part A of the Notice of Appeal.

2. In assessing the Appellant for his 1956, 1957 and 1958 taxation years he made the following assumptions as to fact:

(a) that in 1952 the Appellant purchased the Daigle Property with the view to trading in, dealing in or otherwise turning to account;

(b) that in 1953 the Appellant purchased the Cadieux Property with the view to trading in, dealing in or otherwise turning to account;

(c) that a portion of the said lands were expropriated by the Hydro Electric Power Commission of Ontario, (hereinafter referred to as the "Commission") and the Appellant realized a profit of $29,447.00 in his 1958 taxation year;

(d) that in 1956 the Appellant sold the Cadieux Property realizing a profit thereon of $30,500.00;

(e) that the profit arising from the expropriation by the Commission and the profit arising from the sale of the Cadieux Property constituted part of the Appellant's income for the relevant years since they were profits from a business or adventures in the nature of trade.

The narrow issue is, therefore, whether the appellant purchased the Daigle property in 1952, and the Cadieux property in 1953, "with the view to trading in, dealing in or otherwise turning to account" such properties. If he did, resulting profits were taxable. If, however, as the appellant alleges, both purchases were made "for the purposes of dairy farming" and as a result of railway and highway relocations, the lands became unsuitable for farming, profits from the disposition of the lands would not be taxable.

The onus of showing that the assumptions so made by the respondent were unfounded, fell on the appellant.

The appellant, by his evidence, gave a complete history of his business career prior to the purchases in question.

The appellant, at the time of the trial, was aged fifty-three. A member of a large family, he was born and raised on a farm in the United County area of Ontario. At the age of twenty he left the family farm for employment as an office-boy in a Montreal industrial firm, but after two years in such employment he returned to the farm which he again left at the age of twenty-four, this time for the City of Cornwall, Ontario, where he became a life insurance agent, which occupation he partially abandoned after approximately ten years, to open and operate a refreshment stand in 1939 at the outer limits of the city in a comparatively sparsely populated area, but in close proximity to a military training establishment. The refreshment stand prospered to the extent that in 1941 the appellant totally abandoned his life insurance activities to devote his entire time to the operation of the refreshment stand.

In 1940 the appellant bought a vacant lot across the street from his refreshment stand upon which he constructed a more substantial building in which to conduct an expanded lunch counter and confectionery business. He subsequently added a second storey which he occupied as living quarters.

In 1945 he converted the lunch counter business to that of a retail grocery, the military training centre having been closed, to cater to a skeleton staff in the military establishment and to families in the immediate area.

From 1939 to 1945 the appellant realized from his grocery business an average annual net income of $6,000 which, during the years 1945 to 1948, decreased to $4,000 and from 1948 to 1955 gradually decreased to $1,100.

In 1946 the appellant bought an adjacent lot, which by previous arrangement with the owner he had used for a garden, presumably for business expansion because of a rumour that the military training centre was to be converted to a low rental project which did not materialize.

In 1947 he sold this lot at a modest profit and subject to the restriction that two buildings accommodating four families should be built thereon.

In 1950, in partnership with one Dejardines, the appellant bought further lands in the immediate locality of his grocery store.

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Various reasons were given by the appellant for this purchase. At that time the creation of a new church parish was contemplated with the construction of a church for the area. A parish priest and a separate school inspector approached the appellant, as a responsible and interested member of the community and latterly an alderman for the area, with the suggestion that it would be expedient to acquire land upon which to build a bilingual separate school in connection with the new church. Further a portion of the land was used as an apiary to the annoyance of the neighbourhood. As it was not taken off their hands for a school, the appellant and his partner subdivided the land into building lots. Difficulties in providing access resulted, according to the appellant, in the partners acquiring additional property for the subdivision. The partners worked out a distribution of the lots by which the appellant received nine which were all sold by him in and about 1952 at a total net profit between $5,500 and $6,000.

The profits realized from the subdivision are not in issue here, but the transactions are relied on by the respondent as indicating a course of conduct that had already been embarked upon by the appellant in 1950 to 1952. On the other hand, it was argued on behalf of the appellant that this was an isolated transaction into which the appellant had been obligated to enter. During the trial I intimated that, if I had to determine the taxability of the profits realized from this subdivision, I would find, without hesitation, that this was an adventure or concern in the nature of trade.

The appellant also dealt at some length with the circumstances surrounding the acquisition of the Daigle and the Cadieux properties.

In 1952, it became obvious to the appellant that his grocery business was becoming increasingly less profitable so that he considered more lucrative endeavours. The appellant stated that, because of his farming background and the fact that three of his brothers, who had continued to farm, were most successful and prosperous he, too, wished to farm.

In August, 1952, the appellant bought the 100 acre property known as the Daigle farm for $11,150. He assumed an existing mortgage of $2,500, placed a mortgage on his grocery property for $8,000 and paid the balance of $650 in cash. He also paid $900 in cash for a small quantity of livestock and antiquated farm machinery. He sold the livestock forthwith. Because the farm machinery was obsolete he was unable to dispose of it and did not use it himself. It was apparent that this farm property had not been worked intensively by the vendor.

Despite his expressed desire to become actively engaged in farming, the appellant did not move onto the premises, the reason advanced therefor being that he was unable to dispose of his grocery business as a going concern and had to liquidate his stock gradually, which operation was not completed until March, 1955.

In November, 1953, the appellant purchased the property known as the Cadieux farm consisting of 85 acres, more or less, about one-half mile from the Daigle farm for $11,500 of which amount $5,000 was paid in cash and he gave back a mortgage on the property for the balance of $6,500. This farm was not worked intensively either since Cadieux, the vendor's husband, had another full time occupation.

Both farms were in the Township of Cornwall at the time of their purchase by the appellant, the Daigle farm being a mile from the city limits. On January 1, 1957 this rural area was annexed bringing the farms within the city limits.

Part of the cash involved in the purchase prices came from the profit realized by the appellant from the sale of lots in the subdivision as well as other resources available to him such as the proceeds of the disposition of the grocery business.

The Daigle farm had a substantial brick house of sixteen rooms which the appellant rented to a succession of Dutch immigrants yielding a monthly rental income between $100 and $115. In addition, the appellant made an arrangement with the tenants to operate the farm, the appellant supplying stock and equipment. Any income from such arrangement was very modest.

There was also a house on the Cadieux farm which the appellant leased at a monthly rental of $90.

The Hydro-Electric Power Commission of Ontario expropriated approximately 2 acres of the Daigle farm, the preliminary plan of the expropriated area being registered on November 10, 1955. In December 1955 a part of the Cadieux farm was also expropriated by the Commission. Such expropriations were the result of the St. Lawrence

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Seaway development by reason of which the Canadian National Railway was obliged to relocate its main east-west line. The Daigle farm was already intersected by a Canadian Pacific Railway line further to the north, which was infrequently used. The new Canadian National line bisected the farm, leaving the farm buildings on a small area to the south of the new railroad and an area of some 32 acres between the old Canadian Pacific line and the new Canadian National line. According to the appellant these circumstances rendered farming impractical on this particular acreage. The Hydro, as the public body primarily responsible for the project, arranged to purchase the 2 acres of land required for the construction of the railroad and in addition the area of some 32 acres between the new railroad line and the former one for a consideration of $33,122, thereby giving the appellant a net gain of $29,447 and leaving him in possession of some 67 acres of the farm, a portion to the north of the Canadian Pacific line and a further portion to the south of the new line.

On the Cadieux property, four acres at the southern extremity had been expropriated for railway purposes. The appellant, forthwith, sold the Cadieux farm, subject to the expropriation of four acres, to Messrs. Shear and Leiberman, acknowledged land speculators, for $42,000, $10,000 of which was paid in cash and a mortgage for the balance of $32,000, a net gain of $30,500.

The appellant says that the reason he did not use these farms for farming when he had completed the liquidation of his grocery business in March, 1955 was that, at that time, it was evident that expropriation was imminent.

In July, 1955, the appellant became a real estate broker, in partnership with a fellow alderman, because, as the appellant put it, he saw an opportunity to benefit from the real estate boom occasioned by the Seaway development as others were doing. It is conceded that from this time forward he was engaged in the business of dealing in real estate.

As indicated above, the question in this case is whether the purpose for which the appellant acquired the two farms in 1952 and 1953 was to operate them himself as a farmer. If that was his exclusive purpose at the time of acquisition, profits from expropriation of part of one of them and from the sale of the other after the farming project had been abandoned would not be profits from a business or an adventure in the nature of trade. If that was not his exclusive purpose at that time there can, in the circumstances, be no doubt that the acquisition of these two farms had for its purpose, or one of its possible purposes, subsequent disposition at a profit and resulting profits are, therefore, taxable. The onus of disproving the respondent's assumption, when assessing, that the latter was the case, was on the appellant and in my view he has failed to discharge that onus.

The question of fact as to what was the appellant's purpose in acquiring these properties is one that must be decided after considering all the evidence. The appellant's evidence at the trial that his purpose was to farm these properties is only part of the evidence. Such evidence may be given in all sincerity and still may not reflect the true purpose at the time of acquisition. Statements now as to intention at the time of acquisition must be considered along with the objective facts. The appellant never did commence farming operations, nor did he give any evidence of having taken the preparatory steps that would have been necessary before he could have commenced farming these properties in a serious way. On the other hand, the appellant was engaged in speculative real estate transactions immediately before the acquisitions in question and went into a speculative real estate business in a comprehensive way very shortly afterwards. Giving careful attention to all the evidence, I am not satisfied that there is a balance of probability that the appellant acquired the two properties for the purpose of farming them to the exclusion of any purpose of disposition at a profit. Accordingly it cannot be said that the assumptions of the Minister in assessing the appellant as he did were not warranted.

The appeal is, therefore, dismissed with costs.

Judgment accordingly.

1961
June 5-8
Nov. 20-23, 27-30

1962
Mar. 28-30

1964
Sept. 9

BETWEEN:

ROSS F. ROWELL .... PLAINTIFF;

AND

S. & S. INDUSTRIES, INC. .... DEFENDANT.

Patents—Validity—Declaration of invalidity—Damages—Workshop improvement—Prior publication and knowledge—Patent Act, R.S.C. 1952, c. 203, s. 28(1)(b).

The plaintiff sues for a declaration that Canadian Letters Patent No. 525-962, relating to a brassière frame, issued June 5, 1956, of which the defendant is the assignee, is invalid on the grounds of ambiguity of the specification and he claims, lack of novelty and lack of invention and damages for loss of trade and commercial goodwill resulting from an action brought by the defendant against one of the retail outlets for the plaintiff's products. The defendant counterclaimed for infringement by the plaintiff of the said Letters Patent, for damages or an account of profits and for delivery up or destruction of the infringing articles.

Held: That the steel ribbon made pursuant to the drawings of the Pons Patent, issued on March 31, 1931 in the United States, shows a nearness to the defendant's brassière frames such that the minute difference is undeserving of the privileged level of monopoly.

2. That a scrutiny of the Pons Patent of 1931 discloses to anyone skilled in the art, information comprehensive enough to relegate the claims of the defendant's patent to the status of workshop improvements.

3. That the defendant's Letters Patent No. 525-962 issued June 5, 1956 by the Canadian Patent Office are null and void.

ACTION to have defendant's Letters Patent declared invalid.

The action was tried by the Honourable Mr. Justice Dumoulin at Ottawa.

G. F. Henderson, Q.C., David Watson and *J. D. Richard* for plaintiff.

G. H. Riches, Q.C. and *W. G. Hopley* for defendant.

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

DUMOULIN J. now (September 9, 1964) delivered the following judgment:

The plaintiff, Ross Frederick Rowell, describes himself as a wire manufacturer, pursuing his trade under the name and style of Hops-Koch Reg'd, in the city of Montreal, P.Q.

The defendant, S. & S. Industries, Inc., is a commercial enterprise incorporated under the laws of the state of New York, U.S.A., with its principal office in that American metropolis.

S. & S. Industries is the assignee of Canadian Letters Patent no. 525-962, issued June 5, 1956, for the alleged invention of one Marcus Schwartz relating to a brassière frame.

This patent, no. 525-962, is presently attacked by the plaintiff as invalid on the following grounds:

1. ambiguity of the specification and claims;
2. lack of novelty;
3. lack of invention.

To this first ground of objection is added the complaint that the defendant threatened an action against the plaintiff and, in fact, instituted legal proceedings in the Supreme Court of Ontario against one of the plaintiff's retail outlets, the Robert Simpson Co. Ltd., under no. 7587-1959 of the Ontario Supreme Court records, thereby jeopardizing the principal source of the plaintiff's income until then derived from the manufacture of brassière wire frames. Ross F. Rowell was also enjoined "to cease and desist from the manufacture, sale and use of flat arcuate wire for use in brassières" in a letter, ex. 10, dated August 13, 1959, emanating from the law office of Irving Seidman, a New York attorney representing S. & S. Industries, Inc.

Paragraph 3 of the amended Particulars of Objection declares that:

> The alleged invention was not new; it was known by others or another before the dates or date it is alleged to have been made as appears from:
>
> (a) the Common Knowledge in the art at the said date and reference is made to Schedule 1;
>
> (b) the prior knowledge of the patentee or inventors named in the patents and applications therefor set forth in Schedule 1;

In para. 5 of the Objections, it is said that Letters Patent 525-962 "give rise to no useful result and do not produce

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the result claimed". The ultimate paragraph of the Particulars of Objections asserts the Letters Patent are defective, deficient and irregular in that the specification fails to disclose what is claimed, contains inaccuracies, is ambiguous, wilfully diffuse for the purpose of misleading and, lastly, fails to disclose patentable subject-matter and does not show inventive steps.

The plaintiff consequently claims:

(*a*) a declaration that the said Letters Patent No. 525,962, dated June 5, 1956, are null, void and of non-effect;

(*b*) an order revoking and annulling the said Letters Patent;

(*c*) damages in the amount of $75,000 against the defendant;

(*d*) costs of this action.

In Schedule 1, annexed to the Particulars of Objection, are listed eleven United States Patents to prove common knowledge in the art and prior knowledge by the patentees or inventors before the Convention date, set at October 20, 1954, in the American Patent Office.

The Statement of Defence necessarily denies the reproach of invalidity levelled at these Letters Patent; states that any protective action taken against Rowell or the Robert Simpson Co., was launched in the *bona fide* assumption that defendant was entitled to do so and disclaims inflicting damages on the plaintiff.

A counter-claim for infringement is joined to the statement of defence with the customary conclusions for an injunction restraining the plaintiff and his servants and agents from manufacturing and selling articles or wares contravening the Letters Patent; for damages or an account of profits as the defendant may elect and for the delivering up or destruction of all infringing articles, the whole with the costs of the counter-claim.

Both parties have filed briefs in which their contending viewpoints are elaborated.

The defendant's written submission, in a style fortunately more concise and understandable than the technical jargon of the specification and claims of its Letters Patent, describes, at page 4, the subject-matter of the instant issue, the Schwartz patent ". . . as a brassière frame of flat steel wire of arcuate shape having a ratio of longitudinal extensibility to lateral flexibility that will give stability to the wire when worn so that torsional twisting does not take place."

The following paragraph, on the same page of the brief, concedes that:

> The defendant, the patentee, does not claim a flat wire brassière "per se" as the invention described in the patent in suit. What the defendant does claim, however, as set forth in each of the claims 1, 2 and 3, is a *steel* wire brassière frame having certain selected characteristics which give advantages not found in the prior art.

This case may be divided in two chapters relating to separate problems:

(1) does the use of a flat steel wire as the supporting frame of a brassière constitute, at the very least, a useful improvement in the art?

(2) does the defendant's Canadian Patent, No 525-962, satisfy the essential conditions of patentable subject-matter required by Section 2(*d*) of the Act (1952, R.S C. c. 203) hereunder cited:

> "2. (*d*) 'invention' means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process machine, manufacture or composition of matter.'"

(1) Since the defendant, as just seen, "does not claim a flat wire brassière 'per se' as the invention described in the patent in suit", it would be superfluous to examine at great length this question. Still, the particularity of a flat wire in the brassière frame so repetitiously occurs throughout the entire proceedings that it cannot be summarily dismissed.

Prior knowledge of the flat wire innovation appears quite plainly in the Pons patent issued to one Hélène Pons by the United States Patent Office on March 31, 1931, under serial number 1,798,274, listed herein as exhibit 5, and in the Gluckin patent also issued by the U.S. Patent Office on November 6, 1945 under numeral 2,388,535.

On page 1 of the Pons Patent, the specification, from line 85 to 100, reveals that:

> In order to achieve the purposes of my invention member 13 must be resilient and sufficiently flexible to conform to any of many curved surfaces characteristic of the chests of different individuals in the vicinity of

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the breasts. If made of metal or of a steel spring, an elongated cross-sectional form such as that illustrated in Fig. 3 is suitable for the broadest dimension 15 affords sufficient surface for a comforatable presentation against the surface of the body and its narrow dimension 16 is a factor enabling the strip to follow the undulations of the surface of the body with which it contacts and thereby distributes pressure transmitted over a greater surface than would be the case if the member were not sufficiently flexible.

Next, on page 2, Claim I specifically mentions a flat wire (lines 115 to 127):

> 1. A body-fitting brassière which supports the breasts individually and without effecting false forms comprising, a pair of breast-forms and limp material connecting the breast-forms and holding them in position upon a wearer, each of the breast-forms being of an individual construction and having an open-ended flat wire loop of resilient material capable of being flexed to lie against the chest of the wearer, the wire of said loop being substantially oblong in cross section with the broad dimension of the cross section substantially in a plane . . .

Claim III, from line 38 to 46, reads:

> 3. A body-fitting brassière which supports the breasts individually and without effecting false forms comprising, a pair of breast-forms, each having a resilient metallic frame in the form of an open-ended loop adapted to conform to the body and breast of the wearer, said loop comprising a steel wire more flexible in directions perpendicular the plane of the loop than in any other direction, . . .

Hélène Pons is a New York theatrical costume designer who testified (cf. Transcript of Evidence, p. 375) that her invention utilized a flat wire to frame the breast cups and also (p. 382) that she applied in 1929 for the patent issued in 1931.

The Gluckin Patent, the last of a folder of patents marked Exhibit 5, at page 2, from lines 15 to 30, specifies that:

> Further, my invention is not limited to brace or supporting members of any particular shape or contour. However, in the present construction, they are in the form of reasonably wide bands which may be sufficiently flexible to take the curved contour, illustrated in the cross-section in Fig. 2 of the drawing, to fit the periphery of the breasts and adjacent part of the body of the wearer. In some instances, these members may be preformed to a curved contour substantially similar to that illustrated in Fig. 2. These members may be composed of metal, plastics or any other type or kind of relatively firm material.

Mr. André Hone, a scientist of high repute, Doctor in Metallurgy, Professor of Engineering at the University of Montreal, heard on behalf of the plaintiff, unhesitatingly stated (cf. Transcript, p. 285) that wire of round or regular cross-section, that is, flat wire, "has been available for a long time, but speaking only of my own experience, for at least 30 years."

It does seem established beyond reasonable doubt that the manufacture and use of flattened wire, of steel or other metallic material, precedes the Convention date of the Schwartz patent, October 20, 1954, and cannot therefore be credited to it as an invention nor a useful improvement in the art.

(2) The validity of Canadian Patent No. 525-962.

One main issue remains to be dealt with, namely, whether or not the quality of the metal used by the defendant, S. & S. Industries, Inc., according to their patent No. 525-962, is of such a composition, or better still, offers to the interested purchasers a technical superiority deserving of the qualification of invention, or at least, that of useful improvement in the art.

This patent, Exhibit 1, utilizes, so it says in the specifications, lines 36 and 37, " . . . a special type of round cross-section hypereutectoid steel . . ." It may be apropos to insert here the definitions of hypereutectoid, hypoeutectoid and eutectoid steels, as mentioned, first, by Dr. Hone (cf. Transcript, p. 223):

Hypereutectoid: implies a carbon content in steel higher than 0 90% by by weight;

Hypoeutectoid: is a steel combination of a carbon content lower than 0.90% by weight;

Eutectoid: implies a carbon content in steel in a range of 0.90% by weight.

Dr. G. H. Johnson, a Bachelor of Science from Bishop's University, presently supervisor of the Warnock-Hersey Company Chemical and Physical Laboratory, at Lachine, P.Q., approves of the above formulae as may be deduced from his evidence on plaintiff's behalf at pages 159, 161, 162, 163 and from his brief written report, exhibit 28.

The defendant's leading expert, Mr. Harold Carlson, a licensed professional engineer, registered as such in the State of New York, "specializing to a large extent in the field

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of spring design, spring manufacturing, use of proper spring materials" (transcript, p. 760) refers to a 1960 bulletin issued by the American National Bureau of Standards wherein ". . . because of better instrumentation, they discovered that hypoeutectoid steel ends at .80 per cent. not .90 . . . ", and continuing thus: "Hypereutectoid steels: more than .80 per cent. of carbon" (transcript, pp. 784-785). Dr. Hone, in rebuttal, counters this opinion on the ground of arbitrariness, saying ". . . by convention, people may agree to call it (i.e. hypereutectoid steel) .80 or .85 or .95; this is not decided by the steel itself, this is decided by a convention . . . Nobody could fix it, but by convention we may agree to call it .80 or .85." (Transcript, pp. 935-936).

Whatever one may think of this learned dissent it has no great bearing here and Mr. Carlson himself brings the discussion to an end when, asked by the defendant's counsel, Mr. G. H. Riches, Q.C., at page 783 of the transcript:

> Q. What advantage, if any would there be in using hypereutectoid steel as against hypoeutectoid in the brassière wire frame industry?
>
> A. There would be the small advantage of having greater resilience, but hypoeutectoid could be used as a substitute.

Dr. Hone, requested by counsel for the plaintiff, Mr. G. F. Henderson, Q.C., to tell the Court "whether rigidity in the lateral and vertical directions is a function of the type and metallurgical condition of the steel or is primarily the function of something else", replied that: "The rigidity of a section is primarily a function of the shape of the section for any one material" and again that "in the range of ordinary common steels, I say the influence of the type of steel is negligible." (cf. p. 239).

Professor Hone testified that where elasticity is important, hypereutectoid steel would offer no real advantage over the hypoeutectoid composition and that torsional twisting would be the same in both kinds of steel. Hypereutectoid is a more expensive metal of superior quality but utilized especially where non-scratching properties are required such as in the manufacture of files, tools, razor blades, etc. (transcript, p. 229).

This assertion of the possible interchangeability, for the purposes of the patent, of hypereutectoid and hypoeutectoid steel was not challenged by the learned counsel for defendant who, in the course of his introductory address, said, conformably to engineer Carlson's future testimony:

> Evidence will also be introduced to show that hypoeutectoid steel can be substituted for hypereutectoid and that the latter is the mechanical equivalent—that is, hypereutectoid is the equivalent of hypoeutectoid steel: hyper and hypo and interchangeable. (trancsript, p. 423)
>
> Evidence will also be heard to prove that while hypereutectoid steel is the best steel for the purpose, it was known to those skilled in the art that hypoeutectoid by proper cold working and heat treatment would give a satisfactory product for the specific use. The "Specific Use" we are speaking of, my lord, is the brassiere frame. (Transcript, p. 424).

If then, hypereutectoid steel, for the present purposes, may be suitably replaced by the hypoeutectoid type, if the latter is a fitting substitute for the former, might not this adaptability negate a claim for any particular advantage characteristic of a genuine invention and simply fall within the limitless class of workaday improvements?

At all events, in due prosecution of this enquiry let us investigate:

(a) the composition and processing technique of the steel utilized in patent No. 525-962;

(b) the moot question of flexibility and torsional deflection or stress of the wire brassière frames manufactured by S. &. S. Industries, Inc.

Mr. G. H. Johnson tested samples of the plaintiff's wire frames, round and flat, exhibits 19, 20, 21, and, similarly some of defendant's, exhibits 22, 23, 24, 25. In his oral evidence, reported at pages 158 to 163 inclusive, the expert declares that all those samples were made of hypo and not hypereutectoid steel, contrary to lines 15, 36, 37, *inter alia,* of the specification and claim 3 of the Patent, ex. 1. Engineer Johnson's analysis, detailed in a written report, ex. 28, shows that (pp. 1 and 2) "All analysis were performed according to the latest methods specified by the American Society for Testing Materials (A.S.T.M. E-30)" and "The apparatus used to perform these tests was a Spring Testing Machine manufactured by Coats Machine Tool Co. Ltd., London . . . The machine was checked using

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dead weights at 1 pound and at 3 ounces and found to give accurate readings."

Professor André Hone, as we have seen, considers the steel in defendant's wares as of hypoeutectoid quality. The one dissenting opinion is that of engineer Harold Carlson, and only as to the scientific composition of hypereutectoid steel, not as to the brand actually used (cf. Transcript, p. 767).

Processing of the steel, outlined in the patent's specification, was scrutinized practically step by step in Mr. Henderson's examination in chief of Dr. Hone. On pages 243 to 246 of the transcript are reproduced this witness' assertions that, about 30 years ago, steel ingots were reduced to wire form by rolling in a hot mill rod; that cold drawing process has been applied to steel for more than 30 years, permitting to bring it "to any particular gauge and finish", together with a more than 30-year old technique of intermittent annealing during the cold drawing process. Mr. Hone is well aware, also, of "an electrically heated annealing furnace", a method occasionally employed "in a controlled atmosphere". Improvement of steel by cold drawing has been known "for more than 30 years". Counsel for plaintiff then asks the witness if:

> Q. . . . in achieving the purpose of cold drawing, as has been known, . . . there [is] any special equipment or skill required?

The answer reads:

> A. No, the technology is well known and standard equipment is supplied by manufacturers who do that type of work.

At pages 245-246 of the transcribed evidence, the examination proceeds thus:

> Q. Let me ask you: if in the heat treatment of spring steel you heat to a temperature of about 1400 degrees f. to 1500 f. and quickly cool to a comparative low temperature between 100 and 200 degrees f., what will that result in? What kind of steel does that result in?
>
> A. That will result in hardening the steel.
>
> Q. How long has that been known?
>
> A. For more than 30 years.

Now, on page 246:

> Q. . . . Would you give us some tempering ranges that are known in the art?

A. Some tempering ranges may be anywhere as low as 350 degrees f.

Q. Up to what?

A. Let us say, maybe 1000.

Lower down the page:

Q. Will you tell the Court whether or not hardening, quenching, tempering of spring steel as a continuous operation has ever been done before?

A. Yes. I have seen it done maybe as long as 30 years ago.

This line of questioning persists for a few pages more extending to all the operations indicated in Exhibit 1. Apparently no rebuttal of Professor Hone's evidence on these points was attempted. For these reasons, it does indeed seem that the formulas appearing in patent 525-962, for the preparation of wire frame steel, do not depart from a standard technique known to the industry for well over three decades. Therefore the element of novelty, if any, the step forward in this particular fabrication, in a word, the "scintilla of invention" must be sought for elsewhere, as no special type of steel has been developed.

Before trying to explore—or delve into—the intricacies inherent to the alleged elimination of so-called "torsional twisting", under a given load, from the patented brassière wire, a reading of the patent's triple claim is necessary if somewhat tedious. In a heavy dosage of technical jargon the would-be inventor, one Marcus Schwartz of New York, lays claim to:

1. A substantially rigid arcuate steel wire brassière frame of substantially rectangular cross-section having its longer dimension extending radially of the curve, and having a greater degree of lateral flexibility than longitudinal extensibility permitting lateral deflection of the wire from the unstressed plane of the wire to fit the contours of the body of the wearer without causing a tortional twisting of the wire along the curve of the arc.

2. A substantially rigid arcuate steel wire brassière frame of substantially rectangular cross-section having its longer dimension extending radially of the curve, and having a greater degree of lateral flexibility than longitudinal extensibility, said lateral flexibility being a minimum of four times the longitudinal flexibility and a maximum of twenty times the longitudinal flexibility of a round wire under the same load and having the same longitudinal extensibility as a round wire of the same cross-sectional area, permitting lateral deflection of the wire from the unstressed plane of the wire to fit the contours of the body of the wearer without causing a tortional twisting of the wire along the curve of the arc.

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3. A substantially rigid arcuate wire brassière frame of hypereutectoid steel of substantially rectangular cross-section having its longer dimension extending radially of the curve, and having a greater degree of lateral flexibility than longitudinal extensibility, said lateral flexibility being approximately fourteen times the lateral flexibility of a round wire under the same load and having the same longitudinal extensibility as a round wire of the same cross-sectional area, permitting lateral deflection of the wire from the unstressed plane of the wire to fit the contours of the body of the wearer without causing a tortional twisting of the wire along the curve of the arc.

Here, I cannot refrain from a moment's pause to assuage common sense. Whether there be or not "tortional twisting" of the wire frame, assuredly anyone, skilled or unskilled in the art, pretending to unravel the ponderous jargon thus inflicted without enduring a distressing "twist of the mind" would hardly be worthy of belief save under oath.

Fortunately for this impression of mine, it is in line with quite a few precedents of the highest authority, amongst which, possibly the most striking, remains Lord Loreburn's statement in *Linotype v. Hopkins*[1], it follows:

I have had occasion to observe that there is a tendency to frame specifications and claims so as to puzzle a student, and to frighten men of business into taking out a licence for fear that their interpretation may be held erroneous and they may be found guilty of infringement That is an abuse of the law and will be checked, if occasion should require, by the simple process of declaring a patent invalid.

I would join to the principle enunciated above this excerpt from Lord Romer's speech in *R.C.A. Photophone Ltd. v. Gaumont British Corporation Ltd. and British Acoustic Films Ltd.*[2]

It is the duty of a patentee by his claim to make quite clear what is the ambit of his monopoly in order that workers in the art be left in no doubt as to the territory that is forbidden them during the life of the patent. *If he fails to do this, his patent becomes a public nuisance.* (emphasis added).

In other and less felicitous words: fencing off to oneself a few acres of some mercantile Garden of Eden has become a human trait, but then, the protective image of an angel of the flaming sword, in the guise of a proper patent, should not be confused with that of a scarecrow.

[1](1910) 27 R.P.C. 109 at 113. [2] (1936) 53 R.P.C. 167 at 195.

A voluminous record of close to 1600 pages, reproducing the evidence, mostly technical, tendered both in and out of Court (Examination on Discovery) reveals together with other complaints, that, in the plaintiff's understanding of the patent, its disclosures and claims, when applied, do not produce the result alleged: avoidance, under specified conditions, of "torsional twisting" of the brassière wire frame. This deficiency, of course fatal if proved, would originate in an unorthodox testing process, the use by Mr. H. Carlson, not illustrated in the patent (cf. Transcript, p. 793), of a rigid fixture or clamp ". . . to hold the wire frame at the mid-point so only one half would be flexible", in lateral and longitudinal tests (Transcript, p. 796). But, of this, more later.

At this stage some chronological information is necessary. Mr. Harold Carlson, a prominent American mechanical engineer, President of the Carlson Company, his own, was approached in the early summer of 1954 by Marcus Schwartz who asked him ". . . to make longitudinal and lateral tests of rectangular wire to determine the fact that rectangular wire (i.e. flat) would have less lateral load", than round wire. (Transcript, p. 764).

Mr. Carlson says these tests "established that a rectangular wire frame made from rectangular wire would give less lateral load and, therefore, less pressure against the body . . . it proved that his contention was correct" (transcript, pp. 764 and 765). The witness merely performed the required experiments, the idea itself was imparted by Marcus Schwartz, the actual patentee, engineer Carlson readily agreeing that he, personally, knows nothing about brassière design (transcript, pp. 846, 847).

At trial, the crux of oral evidence bore precisely on Carlson's tests, leaving the outcome rather inconclusive on the subject of their technical appropriateness. I shall now insert the witness' description of these, tending to show that "a load of 12 ounces" deflects a flat wire frame five eighths of an inch (5/8") in longitudinal and lateral or transverse directions (cf. Ex. 1, fig. 2) as against 28 and 27 ounce loads with round wires.

The exhibit with which Mr. Carlson carried on his tests in Court, was one of plaintiff's flat wires (transcript, pp. 772 and 775); the method is given as hereunder; the instrument being a Pelouze Tension Testing Scale:

> . . . I will file a notch in the outer end and a similar notch will be filed on the other end. These notches have, again, no effect on the operation of the fixture. I will, again, draw a line at the outer extremity. The line I drew before coincides with it so we will mark that as line number 1, then, I will draw a line exactly five eighths of an inch further away parallel to it so that we will have five eighths of an inch deflection. Now, I again place the testing instrument in the notch and I will deflect it exactly five eighths of an inch and the load is exactly 12 ounces and there is no tortional twisting of the wire longitudinally (transcript, p. 775).

Mr. Watson (plaintiff's counsel), at page 775:

> Could the records show that there is a steel ruler?

The witness:

> . . . My lord, you will notice now I have removed the scale and, again, deflected five eighths of an inch and, again, the load is twelve ounces and without the ruler there is still no tortional twisting.

Next, on page 776, Mr. Carlson continues:

> I will now prepare this fixture for the lateral tests.

Five lines below:

> I will do it again. There is a knife edge. Well, I file the notch in the wire and it rests upon the knife edge. The spring testing instrument is applied to the outer end, again deflected five eights of an inch; the load is, again, twelve ounces and there is no tortional twisting.

In the last paragraph of page 776, the witness remarks:

> My lord, I would like you to observe the method of making a flexibility test. Heretofore, all flexibility tests were made from the extremities and the proper method is by holding the frame in the centre because only one half of the wire frame is deflected laterally, not the entire frame.

Similar experiments in the longitudinal and lateral planes with round wire frames resulted, for a .625 or five eights of an inch deflection, in a 28 ounce load longitudinally and a 27 ounce one transversely (transcript, p. 785).

Requested to comment on Professor Smith's results, Mr. Carlson replied:

> . . Professor Smith in the cross-examination was asked what the loads were using a circular arc and for the full 180 degrees, but that is not the method by which these wire frames should be tested. Only half of the arc should be tested and this half is not one circular arc, there are

several arcs in it and with my results the loads are practically the same whereas his, (because) of the complete arc of 180 degrees versus mine of 90 degrees, shows that his was a different ratio than mine. (transcript, p. 786).

To test transverse flexibility, Mr. Carlson includes:

> A fixture or a clamp; a clamp could be called a fixture, merely to hold the wire frame at the midpoint so only one half would be flexible. (transcript, p. 796).

The fixture itself is described as:

> . . . a plate approximately 2 inches wide and, perhaps, 5 or 6 inches long that could be clamped to the platform, that moves upwards and downwards which now holds hook 49 which, of course, could be removed and on this little plate would be a clamp which would hold the wire frame at the mid-section. (transcript, p. 797).

This particular process drew, as said above, a protracted attack from the plaintiff. In cross-examination, the expert witness was shown a copy of his own patent (American) No. 2,670,628 (ex. 54), dated March 2, 1954, for a spring testing machine and asked by Mr. Watson:

> Q. Does this patent as illustrated show any way for mounting arcuate flat springs for making transverse tests?
>
> A. No, a small fixture would have to be made for that or a clamp.
>
> Q. And that is not illustrated in the patent?
>
> A. No, that is not illustrated in the patent, but it is well understood in the industry that many fixtures can be attached to testing instruments. (transcript pp. 793, 794).

Previously, I had asked the witness if this device had "anything to do with the Pelouze Tension Testing scale . . .?" To this question the answer was that although completely different, both could be used (transcript, p. 792).

Another question, in a similar line of cross-examination, soon followed, I quote:

> Mr. Watson: Can you point to any publication, Mr. Carlson, with a description of what you say is the proper way of testing arcuate flat springs?
>
> Answer: I have never heard of such a publication. Ordinarily, the manner of testing is determined by the laboratory and the man who wants it tested, and if it happens to come from the brassiere industry to anyone skilled in the art it is known that a flexural test must consist of the test of one half of the wire frame. (Transcript, p. 798).

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It was also admitted that no standards are set by the American Society for Testing Materials (commonly abbreviated to A.S.T.M.) for the type of test resorted to by Mr. Carlson (transcript, pp. 798, bottom line and top of 799).

Here, the statement that a flexural test of one half the wire frame is known to those skilled in the art of brassière wires appears rather controversial.

Professor I. W. Smith, lecturer in machine designing at the University of Toronto, one of the two distinguished scientists called by the defendant, apparently disapproves of his American colleague's manner of testing the arcuate wire by fixing one half with a rigid beam or clamp and could agree with Dr. Hone's criticism of it.

On page 740, cross-examined by plaintiff's counsel about Dr. Hone's hypothesis that the entire arc had to be taken into account, he answered:

> If he (i.e. Dr. Hone) based his conclusions on the tests and they were properly done, I certainly would have no criticism. My criticism was the use of the straight beam in calculating deflections of the arcuate beam. (transcript, p. 740).

By the expression "straight beam" the expert meant the "fixture or clamp", an essential factor of Mr. Carlson's method.

Professor Smith, referring I believe, to the test mentioned in column 5, lines 13 to 26, page 3, of the patent ex. 1, commented that: ". . . When the beam is not against the table but is up in the air torsional twisting would commence at a lower load . . . load and deflection are tied together so far as I am concerned, so if you want to put it that way, at a smaller deflection, torsional twist would begin."

A practical experiment of this was at once made with, as a medium, exhibit 52, a flat wire of Ross F. Rowell's manufacture, identified by the witness as identical to the frames of the supposedly infringing samples found in Warner Bros' marks of brassières "Wonder Bra" and "Dream Lift", exhibits Z10, Z11 (transcript, pp. 779, 781, 782, 783). The purport of the test is, inferentially, that the legitimate and allegedly offending wares being similar, all discrepancies between the latter and the patent's disclosures must necessarily affect the former. If, then, torsional deflection or stress (improperly termed: torsional twist) occurs at ratios differing from those claimed by the patent, an unfavourable conclusion is unescapable. Wire no. 52 at hand, Professor Smith takes a reading at eleven sixteenths of an inch, and to the cross-examining counsel's question "Would you agree there is torsional twist?", replies "Very distinctly there is, yes." (transcript, p. 739). Opposed to this finding is the statement on page 3, column five, lines 64 to 66 of the patent: "The flat wire did not take a set even at 2″ deflection and could have been deflected more if desired."

Dr. André Hone's criticisms of Mr. Carlson's mode of clamp testing appear on pages 932 to 935 of the transcript; they should be quoted at some length and they form the terminal phase of the oral evidence. In re-examination, the witness is questioned by counsel for plaintiff, Mr. Watson.

> Q. You have studied the patent in suit, Canadian Patent 525,962, did you find in it anything which would indicate to you that a whole wire should be tested in the longitudinal test compared with a half wire in the lateral test?
>
> A. . . . there was no mention in this patent of the length of the arc to be used in one direction or the other direction so I made the test to the best of my ability in comparing similar lengths and not different lengths which would be an abnormal procedure for such testing.
>
> Q. If evidence has been given that no torsional twisting has been observed in a certain series of longitudinal tests which otherwise are generally similar to the tests which you carried out, but that the wire has been confined between a pair of steel plates closely spaced from the wire, what are your comments?
>
> A. . . . I believe I have already mentioned that I have observed twisting in a longitudinal test of a shape of this sort?

Exhibiting a flat wire held in his hand, Professor Hone pursues his evidence:

> . . . I would expect torsion to happen in any case when the longer axis is in the plane of the arc. There is, necessarily, a twisting that takes place because the material tends to fall off from equilibrium into the other direction. This twist, in some cases, might be small, in other cases, it might be large. It all depends on the kind of stretch but it is doomed to exist. (transcript, p. 934).

The appliance of steel rulers, to the sides of a flat arcuate wire "with its long dimension going radially" would restrain

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the lateral forces and, consequently, torsional twisting, but, if those plates were removed, the torsional twist would take place, says Dr. Hone (transcript, pp. 934-935).

Again, the plaintiff's experts are at odds with the defendant's technician, Mr. Carlson, on the topic of torsional twisting, non-existent according to the patent at five-eighths of an inch deflection.

The supervisor of Warnock-Hersey's Chemical and Physical Laboratory, Mr. G. H. Johnston, previously quoted, declares that in his tests of flat wires of either party's make, for instance, ex. 21 (plaintiff's) or ex. 23 (defendant's), none "required 28 ounces to deflect 5/8ths inch." (transcript, p. 176).

Mr. Johnston noticed, furthermore, several inaccuracies in the specifications. For example, after plaintiff's counsel, Mr. Henderson, had read lines 13 to 26, column 5, of exhibit 1, reproduced herein, and put this question:

> Did you find that round wire and flat wire deflected 5/8ths of an inch—do you require the same load?,

the answer reads: "No, they do not." (transcript pp. 177-178). Mr. Henderson proceeds:

> Q. . . . I think what you have told us (is) that what you found did not agree with the statements contained in this paragraph?
>
> A. That is right. (transcript, p. 180)

Counsel now reads lines 27 to 31 of the patent's specifications; they are:

> Inasmuch as the stress caused by the extension was less than the elastic limit for both sections, the frames returned to their normal free position. With this amount of deflection in both instances there was no distortion of either wire.

The ensuing question is:

> Q. Mr. Johnston, I read to you this paragraph. Assuming that the .625 (equivalent to 5/8th of an inch; cf. p. 177) is this amount of deflection, when you deflected the flat wire did you find any distortion or twisting of the flat wire?
>
> A. Yes. (transcript, p. 180, bottom, and 181, top line).

Next, at page 181:

> Q. Then, is the statement that this amount of deflection, should I say .625 (when) observed on a flat wire, there was no distortion

or twisting of the flat wire; is that an accurate statement according to your tests?

A. No, it is not.

The ultimate words on the matter were those of Professor Hone at pages 236 and 237 of the transcribed evidence. Mr. Henderson asks:

Q. If I take a sample of the defendant's wire, exhibit 23, and I seek in any way to deflect it in the lateral plane, would you tell us whether or not twisting is inevitable?

The reply is:

A. In the lateral plane twisting is inevitable.

At the foot of pages 236 and top of 237, the question and answer are:

Q. Now, will you take a sample, or rather, the same wire, exhibit 23, and you put some, however so slight, put some load to give some deflection. Will you tell the Court what, if anything, happens to the wire?

Four lines below:

A. In the longitudinal direction, then, for the slightest load I expect torsion within that body.

I must now survey the practical aspect of the case as it unfolds in conflicting channels.

The first of three witnesses in this series of facts was Mrs. Lillian Hunau Sayers, of New York City, a brassière designer of many years' experience and presently employed by S. & S. Industries, the defendants (transcript, p. 487). From 1944 to about 1959, she was actively engaged in designing brassières for "Exquisite Form Bra", "reputedly the largest manufacturers of brassieres in the world" (pp. 491-492).

Her first knowledge of flat wire frames dates back to ". . . 1954 or 1955 or somewhere around that time"; at all events "approximately two or two and a half weeks before the January market showing of 1955" (transcript, p. 506). Mrs. Sayers waxed enthusiastic at this most promising innovation as one may infer from her emotional recollections hereunder cited (transcript, pp. 506-507):

. . . I, at the time, was planning putting two bras into the line utilizing wire. They were high fashion garments and I became so terribly excited with flat wire when I saw it because immediately upon seeing

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the flat wire I put it into one of the garments I was working on at the time and I tried the garment on myself and I was elated with the feeling that this had. It felt like I was wearing a bra that didn't have wire and I immediately realized that this was a wonderful thing that happened because we could then build a "better mouse trap" actually, as the saying goes, and, really, sell this product very well all through the country.

As a matter of fact, I felt so strongly about it (that) I went immediately to the President of our company and showed him this product. He became so excited that he called all the key executives in and everybody's reaction was the same. We were very, very thrilled and immediate plans . . . a lot of conversation started about a tremendous advertising promotion and so on and the fact is we were figuring how many thousands of brassieres we could manufacture and sell a week. It was quite exciting.

Mrs. Sayers' expectations of a "tremendous advertising promotion" for "a better mouse trap" materialized to the tune of more than two million dollars (transcript, pp. 509-525) including radio flashes and fashion magazine advertisements, some instances of which are exemplified in exhibits U, V, W, X and Y, this latter one deserving a passing comment.

Exhibit Y, a two-page communication on Exquisite Form stationery, undated, but probably of February, 1955, is a newsletter "that was sent out to every fashion editor of every newspaper throughout the country" and addressed "Dear Fashion Expert". It praises in exultant language ". . . the new, flattened wire . . .". After proclaiming its manifold superiorities such as "flexible, adjusting to the body contour, non digging and non poking", the promotional prospectus volunteers the admission that "Yes, it's a very simple idea, but the simplest ideas are always the best". Another paragraph, with a dash of proud generosity, prognosticates that "Ribbon Wire" (the product's designation) "is bound to be copied, too. A year from now it'll be standard with all manufacturers. But meanwhile it's all Exquisite Form."

Coupled with this better than tacit invitation extended in February, 1955, by Exquisite Form's publicity department to all future imitators (transcript, p. 521), is the purchase of this Ribbon Wire stock from, seemingly, no one else than S. & S. Industries, assignees, since October 19, 1954 (cf. ex. 58) of Marcus Schwartz's United States patent, number

270-5800 (ex. 58), whose official date appears as October 20, 1954.

What strikes me as somewhat odd are, on the one hand, the advertising firm's ignorance of their supplier's patent, and, on the other, the patentee's unwonted quiescence in the face of this oblivion of its monopoly. There may be very little in this, still, I deemed it not unworthy of notice.

Mrs. Lillian Sayers' evidence, of a few hours' duration, can be fittingly summarized by stating that it served as an aggressively lucid, but indifferently convincing plea in favour of S. & S. Industries' products, and an unrelenting disparagement of the American pioneering experiment in flat wire brassiere frames, the Pons Bra, exhibit 42, a U.S. patent, no. 1798274, granted to Mrs. Hélène Pons, on March 31, 1931.

Mrs. Pons, a resident of New York City, heard as a witness by the plaintiff, describes her occupation as that of "a theatrical designer, a costumer for almost 40 years" (transcript, pp. 357-358).

Sometime "before 1931" she devised a flat wire brassière frame for which patent no. 1,798,274, issued March 31, 1931, filed as ex. 5A.

Notwithstanding her many years' stay in the United States, Mrs. Pons does not appear to have mastered the vernacular and testified in laborious phrases though her meaning was quite understandable. She identified Exhibit 42 as a brassière nowise different from her 1931 model, and commented thus:

> This is the same because I only believe in flat wire because a wholesale business you can't get that as you need something that follows the ribs of the woman. The stiff wire wouldn't do that and would dig and I was very concerned they would have cancer or something like that and that is why I had the flat wire. (p. 375)

The theatrical costume designer eventually handed over the making of the flat wire to the Buffalo, N.Y. firm of Carry Spring Work. She received a sum of $1,500, seemingly on an experimental basis, from the Van Raalte Company and royalties of 5 per cent. Her regular job in the theater workshop occupied the greater part of her time and she soon

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enough lost interest in the commercial future of her innovating design. Nonetheless, Mrs. Pons obtained a patent, ex. 5, in good and due form, from which and from the drawings annexed an attentive designer could gather both the inventive idea and essential directives presently found in the document at stake.

True, the fabricating stages of the metallic strips are unmentioned in exhibit 5A, but the defendant revendicates none of this as an "ingredient" of his own patent.

Once more, duty compels me to support this notion by abundant corroborative material gleaned from the Pons patent, exhibit 5A. The first quotation goes from lines 84 to 90 in the second column of the specifications; it reads:

In order to achieve the purposes of my invention member 13 must be resilient and sufficiently flexible to conform to any of many curved surfaces characteristic to the chests of different individuals in the vicinity of the breasts. If made of metal or of a steel spring . . .

A few excerpts from four of the five claims follow. Mrs. Pons declares:

I claim:

1. A body-fitting brassière which supports the breasts individually and without effecting false forms comprising a pair of breast-forms and limp material connecting the breast-forms and holding them in position upon a wearer, each of the breast-forms being of an individual construction and having an open-ended flat wire loop of resilient material capable of being flexed to lie against the chest of a wearer, the wire of said loop being substantially oblong in cross section with the broad dimension of the cross section substantially in a plane . . .

2. A body-fitting brassiere which supports the breasts individually and without effecting false forms comprising a pair of breast-forms, each having a resilient frame in the form of an open-ended loop which is more flexible in directions perpendicular the plane of the loop than in directions at right angles to said directions of greater flexibility, said loop being adapted to conform to the contour of the body and breast of a wearer . . .

3. A body-fitting brassière which supports the breasts individually and without effecting false forms comprising, a pair of breast-forms in the form of an open-ended loop adapted to conform to the body and breast of a wearer, said loop comprising a steel wire more flexible in directions perpendicular the plane of the loop than in any other direction . . .

4. A body-fitting brassière which supports the breasts individually and without effecting false forms comprising, a pair of breast-forms and pliant material connecting the breast-forms and holding them in position

upon a wearer, each of the breast forms being of individual construction and having an open-ended loop of resilient material capable of being flexed when in use, said loop being more flexible in directions perpendicular the loop than in directions within the plane of the loop. . .

Several times, during her cross-examination, Mrs. Pons reaffirmed that, when made, the wire of exhibit 5A "was perfectly flat" (pp. 393-394). Exhibit 5A was the wire inserted in exhibit 42, the completed Pons brassière.

Any doubt whatever about the flat or rectangular shape of the metallic ribbon in the Pons brassière would be conclusively dispelled by the defendant's consultant designer, Mrs. Lillian Sayers who, at this question by Mr. Riches, Q.C.:

Q. Would you please first examine that brassière (the Pons model, ex. 42), particularly with respect to the flat wire that is shown in there, it does show a flat wire, I believe?

answers:

A. It does, this wire is flat.

And to a subsequent query:

Q. Does that look like the S. & S. Industries' wire?

the witness acknowledges that:

A. It does look like the S. & S. Industries' wire, but that is where the similarity ceases.

Between those two metal bands, the difference, according to Mrs. Sayers, is that:

. . . this wire (i.e. ex. 5A), you are able to pull this wire at both legs and keep going quite a distance. This sort of thing, there would be no purpose to using this bra. It could not perform; it could not function . . . (transcript, bottom line of p. 532, top of p. 533).

On page 534, by Mr. Riches, Q.C., for defendant:

Q. Having examined the brassiere . . . and the wire, would that wire, in your opinion, support a breast?

A. No, I have just explained it couldn't because it opens too readily. It is very easy; with the slightest bit of pressure you can open this considerably and this defeats the purpose for which the wire is used in a bra.

Previously, Dr. Hone, undergoing his exhaustive examination-in-chief had testified on this identical subject, the Pons brassière, or rather on the peculiarities of its wire looping.

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To do so, Professor Hone had a wire made "with a ratio of 1 to 4 as far as width and thickness were concerned" taking the measurements "right in the drawing" appended to Exhibit 5A, which gave a ratio of 1 to 4. (transcript, p. 330). The tests were carried out "in the same way, using the same testing machine" as in the case of exhibits 36 and 37 (p. 332).

Exhibit 36, by the way, is an arcuate flat wire similar to exhibit 21, of plaintiff's make.

The upshot of those experiments materialized in exhibit 40, a flat wire possessing the same cross-sectional ratio of dimensions as Pons, ex. 5A, and about which the expert witness reported that:

> On the transverse test for a deflection of 5/8ths, a load of one quarter ounce was required. In a longitudinal direction for a deflection of 5/8ths inch, a load of four ounces was required . . . (transcript, p. 331, bottom line, and top of 332),

with a ratio of 1 to 4 for thickness and length, (p. 330) and a ratio of flexibility of 16 to 1 (p. 332). The preceding ratios in the Pons wire approximate closely to those of the 1956 Schwartz patent, ex. 1; and remained unchallenged by the opposing party's technicians.

One disapproving voice only was heard, that of Mrs. Sayers, who, comparing exhibit 40, just described, with the wire (5A) in the Pons brassière, exhibit 42, said:

> A. It (ex. 40) looks like it is approximately the same but this (ex. 40 again) is more rigid. You see the restraining influence (indicating); it seems to pull back.

Then to this remark of mine:

> Q. According to you it would have the qualities which 42 lacked; it is more rigid.

I was told:

> A. Yes, it is more rigid. (with this further explanation relating always to ex. 40) This has more rigidity . . ., there is a restraining influence, in other words you feel the pulling back as you try to pull it out. It is difficult to pull it gently. (transcript, p. 535).

Again, Mrs. Sayers' concluding observation was: "No, I wouldn't care to use it (ex. 40) as a bra wire. This steel does not have the strength that I would require in a bra."

Even though this lady's opinion were not unfounded, the steel ribbon, ex. 40, made pursuant to the drawings of the Pons patent (ex. 5A) shows a nearness to the defendant's brassière frames such that the minute difference is undeserving of the privileged level of monopoly.

At long last, this paragraph brings to an end the review of the evidence.

Ross F. Rowell, successful in his complaint, is entitled to a measure of pecuniary compensation.

On August 13, 1959, the defendant's attorney, Mr. Irving Seidman, of New York, wrote to Hops-Koch Products, Montreal, Rowell's business style, a threatening letter, ex. 10, the ultimate paragraph of which follows:

> You are hereby advised that unless you inform us within the week that you will immediately cease and desist from the manufacture, sale and use of such flat arcuate wires for use in brassières, you will leave me with no other alternative but to forward the matter to my Canadian associates for institution of legal proceedings for infringement of the aforesaid patent.

In 1959, S. & S. Industries instituted an action for infringement of patent No. 525-962, in the Supreme Court of Ontario against the Robert Simpson Co. Ltd. of Toronto, a large department store, one of the retail outlets for the products of the plaintiff.

Next, the December 17, 1959, issue of the fashion paper "Women's Ware Daily", ex. 11, diffused to its widespread clientele the news of these Court proceedings.

Eventually, S. & S. Industries Inc. consented to discontinue their law suit upon the joint undertaking of Robert Simpson Co. Ltd., retailers, and Peter Pan Foundations Inc., a Quebec corporation, manufacturers of the contested brassières, to ". . . acknowledge the validity of the said Patent . . . " and not to ". . . directly or indirectly make, use or sell the rigid arcuate steel wire brassiere frame of the invention described in the said Letters Patent, and known as flat brassiere wire . . . unless manufactured by the plaintiff or its licensees". "Dated at Toronto, this 2nd day of February, 1960." (ex. 64)

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Rowell testified that after publication of the law suit against the Robert Simpson Co. in Women's Ware Daily, ex. 11, he received many telephone calls from alarmed clients, and lost not only Peter Pan Foundations as customers, but also his "American market" comprising Exquisite Form of New York, purchasers of his in the States and in Canada.

Under those circumstances, Rowell's trade and commercial good will surely did suffer serious losses.

Since, however, these damages were not particularized during the trial, their apportionment, if the parties disagree, is referred to the Registrar or a Deputy Registrar of this Court.

In conclusion, the defendant acknowledges that its patent's inventive feature does not consist in the flattening of round wire, something contemporaneous with the discovery of steel itself. It lays no claim to any new species of steel nor to any hitherto unknown processing formula. Neither can S. & S. Industries urge as a novel and useful step the inclusion of rectangular arcuate wire frames in brassières.

So far back as 1931, the Pons Patent admittedly afforded a sample of flat wire brassière frames or "loops", and, possibly also, the Gluckin patent (ex. 5K) of November 6, 1945. Prior publication and knowledge have been proved; antedating at least 23 years the model marketed by the defendant. Therefore, the field left open for any valid monopoly narrows down to S. & S. Industries' restatement, on page 4 of its brief, less assuming in ambit than the three claims, of having devised a brassière frame with "a ratio of longitudinal extensibility to lateral flexibility that will give stability to the wire when worn so that torsional twisting does not take place."

Entrusted by Marcus Schwartz with the practical application of his paper specifications, engineer Carlson impressed me as a thoroughly competent and sincere witness, and in no lesser degree, so did his contradictors, Drs.

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Johnston and Hone, as also Professor I. W. Smith, the other expert for the defence.

At this closing stage, it would be fastidious to do more than allude to the pros and cons of scientific evidence of which I deemed it a duty to reproduce copious passages.

Mr. Carlson upheld the accuracy of his clients' patent. Professors Hone and Johnston pointed out some significant discordances between the printed theory and the material findings.

Both unhesitatingly asserted, after repeated trials and contrarily to the defendant's patent, the existence of torsional twisting at the ratios indicated in exhibit 1. They lay the blame at Mr. Carlson's door, namely, holding "the wire frame at the mid-point (with a fixture or clamp) so only one half would be flexible" (transcript, p. 796).

Dr. Hone's criticism of this test comes anew to my mind: "I would expect torsion to happen in any case when the longer axis is in the plane of the arc. There is necessarily a twisting that takes place because the material tends to fall off from equilibrium into the other direction." (transscript, p. 934).

More significantly still, Professor I. W. Smith, the defendant's other technician, and equally eminent scientist, shares the criticisms of his fellow expert's tests as conducive to inaccurate results.

In my humble opinion, a preponderance of evidence substantiates the view that the claims urged are not vindicated objectively. This patent does not live up to those essential requirements so ably formulated in *Minerals Separation v. Noranda Mines Ltd.*[1] by the late President of this Court, Mr. Justice Thorson, who wrote:

> Two things must be described in the disclosures of a specification, one being the invention, and the other the operation or use of the invention as contemplated by the inventor, and with respect to each the description must be correct and full . . .The description must be correct; this means that it must be both clear and accurate. It must be free from avoidable obscurity or ambiguity and be as simple as the difficulty of description permits. It must not contain erroneous or mistaken statements . . .

[1] [1947] Ex. C.R. 306 at 316.

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Finally, I believe that prior publication, exemplified by the Pons Patent, occurred in 1931. If so, the defendant's application in Canada, dated March 21, 1955, contravenes s. 28 (1)(*b*) of the Act, hereafter cited:

> 28. (1) Subject to the subsequent provisions of this section, any inventor or legal representative of an inventor of an invention that was
>
> (a) . . .
>
> (b) not described in any patent or in any publication printed in Canada or in any other country more than two years before presentation of the petition hereunder mentioned, . . . may obtain a patent.

A scrutiny of the 1931 document discloses, in simple, unassuming language to anyone skilled in the art, information comprehensive enough to subsequently relegate into the anonymity of workshop improvements the sententious dabbling of the later patent.

For the reasons profusely elaborated, the Court orders and enacts as follows: It declares null, void and of no effect Letters Patent number 525-962, issued June 5, 1956, to Marcus Schwartz, and since assigned to S. & S. Industries Inc.; It also declares the plaintiff entitled to damages in such amount as may be found on an inquiry as to damages by the Registrar or a Deputy Registrar if the parties cannot otherwise agree. The Court dismisses the defendant's counterclaim for infringement and its belated motion for contempt of Court directed against Ross Frederick Rowell. The plaintiff is allowed the costs of all proceedings after taxation in due form.

Judgment accordingly.

1962
Apr. 9-11
1963
April 9

BETWEEN:

HER MAJESTY THE QUEEN ....PLAINTIFF;

AND

CANADIAN PACIFIC RAILWAY COMPANY .... DEFENDANT.

Crown—Common carrier—Contract of carriage of goods—Destruction of goods—Derailment of train—Act of God—Duty to take precautions against extraordinary events—Duty of railway company to guard against landslides when tracks pass through mountainous terrain—Burden of proof on party alleging act of God.

The plaintiff's claim is for the recovery of the value of wheat which the defendant as a public carrier had contracted with the Canadian Wheat Board, a Crown company, as agent for the plaintiff, to carry in conformity with the terms of bills of lading to Vancouver, British Columbia from various points in midwestern Canada. As the defendant's train carrying the wheat was travelling through the Rocky Mountains, between Revelstoke and Kamloops, it came in contact with a landslide which covered the tracks to a depth of from two to four feet for a distance of about one hundred feet and was derailed, most of the wheat in question being spilled out of the freight cars and lost. The defendant realized $2,700 by way of salvage of some of the wheat. The defendant denied liability on the ground that the loss was due to an act of God, which was one of the exculpatory provisions of the contract of carriage between the parties.

It was established by the evidence that weathering or rotting of the face of Squilax Mountain caused rock and rock dust to fall onto the 45° sloping mountainside below where it accumulated and formed a "talus" or "talus slope" at the foot of which a gully led down through an area of stones, earth and trees just above the defendant's tracks. Following a hot dry spell a heavy downpour of rain dislodged a large amount of the debris at the foot of the cliff, which gathered mud and stones as it flowed, with the consistency of a sloppy concrete mix, through the trees below and over the defendant's track. It was not disputed that the slide was due to natural causes without human intervention.

Held: That although the landslide, considered by itself, was an act of God, it does not necessarily follow that the cause of the accident was an act of God.

2. That whether there is a duty to take precautions against extraordinary events depends on the facts in each case.

3. That it was entirely reasonable to expect the defendant to ascertain the existence and condition of all potentially dangerous talus slopes, such as the one on Squilax, since for a relatively moderate sum such information was obtainable and, if obtained, it would probably have enabled the defendant, especially when climatic conditions were such as prevailed on the day of the accident, to take appropriate precautions to avoid a collision with a likely landslide.

4 That the defendant's employees failed in their duty to locate potentially dangerous talus slopes such as existed on Squilax Mountain and then to be on the lookout for a sudden termination of any long hot dry spell followed by a heavy rainstorm or cloudburst and to report such

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occurrences immediately, so as to enable despatchers to issue appropriate warnings to train crews.

5. That the evidence offered by the defendant fails to exculpate it from liability because it has not succeeded in discharging the double burden which rested on it of proving beyond reasonable doubt that the damages suffered were solely attributable to an act of God and that it could not have foreseen and guarded against the slide by employment of such amount of care and foresight as might reasonably be expected of it in the circumstances.

6. That the plaintiff's claim is allowed.

INFORMATION by the Crown to recover damages for the loss of wheat as a result of a train wreck.

The action was tried by the Honourable Mr. Justice Kearney at Victoria.

H. D. Monk, Q.C., R. Law and *D. H. Aylen* for plaintiff.

Frank E. Dent for defendant.

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

KEARNEY J. now (April 9, 1963) delivered the following judgment:

This action was instituted on behalf of Her Majesty the Queen on the Information of Wilbur Roy Jackett, Deputy Attorney General of Canada, whereby the plaintiff seeks to recover the sum of $32,655.12, being the value of quantities of Manitoba wheat which The Canadian Wheat Board (sometimes called "the Board"), a Crown company, as agent for the plaintiff, entrusted to the defendant in June 1958 at various points in Midwestern Canada for transportation and delivery to the said Board at the city of Vancouver in British Columbia.

The plaintiff claims that the defendant as a public carrier undertook for reward to safely carry and deliver the aforesaid wheat, as appears by twelve bills of lading which constitute the contract between parties, and that it failed and neglected to do. The defendant admits that the grain did not reach its destination and was never delivered to the Board but denies liability on the ground that its failure to carry out its contract was because of a train wreck which constituted an act of God.

Briefly, it may be said that on June 24, 1958 the defendant's train No. 85, consisting of 65 freight cars powered by four diesel engines, at about 3 p.m. left Revelstoke, British Columbia, which with Kamloops, 128 miles westward, formed the terminal points of the defendant's Shuswap Subdivision. When proceeding towards Kamloops on the defendant's single track main line at about 7 p.m., while rounding what has been dubbed an 8% reverse "S" curve it reached mileage 86.7, which is near the foot of Squilax Mountain, where it came in contact with a landslide which had a depth of four feet on the south side of the track and two feet on the north side and extended along it for 100 feet or more. As a result, the train's four diesel engines and ten of the twelve freight cars, covered by the bills of lading, which were immediately in rear of the locomotives, were derailed, keeled over the northern embankment and slid down it for about 150 feet, spreading their contents as they went. The two other cars though not derailed were badly damaged, which caused their cargo to spill out.

At the commencement of the hearing, it was admitted and agreed between counsel for the parties that the aggregate value of the wheat in question and the loss suffered by the plaintiff amounted to $32,655.12; that the defendant, by way of salvage, realized on the grain which was widely scattered in mud and dirt a sum of $2,700, which it tendered to but which was not accepted by the plaintiff; that the defendant, as a public carrier, by reason of the aforesaid bills of lading, became an insurer thereof; that until the defendant made good its plea that the goods were lost due to an act of God (one of the exculpatory provisions appearing on the reverse side of the bills of lading) the plaintiff is deemed to have established a *prima facie* case that in consequence it was incumbent on the defendant, instead of the plaintiff, to open the proceedings.

Counsel for the plaintiff argued that the evidence in the case disclosed that the defendant had failed in several respects to discharge the burden of proving that it was justified in law and in fact to invoke a defence of act of God, and even if it had succeeded in doing so it remained liable for the amount of the claim because the proof clearly established that its officers and employees were guilty of negligence.

Counsel for the defendant, in his argument, recognized, especially in view of the well established British and

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Canadian jurisprudence, that in order to rebut the presumption which existed in favour of the plaintiff and discharge the onus which rests on the defendant it would be necessary for him to surmount three obstacles. First, the defendant must not only substantiate its plea that the damages claimed were, in the legal sense of the term, due to an act of God—but even assuming this were done there would remain the further burden of proving that the defendant as an insurer of the goods carried was in no way negligent and took every means reasonably possible to avoid or diminish the consequences of such act of God. Lastly, that since the defendant was vis-à-vis the plaintiff in a position of a bailee it was incumbent on the Railway to produce either the grain which was shipped or, in the event of an accident, the equivalent in money of what the defendant was able to realize on whatever grain was salvaged.

As I mentioned during the hearing, this last item presents no difficulty and can be disposed of immediately. It was not contested and I consider that the $2,700 offered by the defendant, but refused by the plaintiff, as appears by the defendant's witness J. C. Oliver, represented the most that could have been realized by way of salvage on the plaintiff's wheat which lay scattered in mud and dirt.

Before examining the proof submitted and in order to better appreciate it, I will refer to two leading cases dealing with the question of when and to what extent a common carrier may effectively make the defence of act of God.

What constitutes an act of God in the legal sense, according to the British jurisprudence, was succinctly defined many years ago in *Nugent v. Smith*[1]. The facts were as follows.

The defendant, a common carrier by sea, received from the plaintiff at London a mare to be carried to Aberdeen for good and valuable consideration. In the course of the voyage the ship encountered rough weather, and the mare received such injuries that she died. The jury found that the death of the mare was to be ascribed to injuries caused partly by the rolling of the vessel, partly by the struggles of the animal occasioned by fright.

Held, reversing the decision of the Court below, that the defendant was not liable for the death of the mare.

[1] (1875-76) L.R. 1 C.P. 423 at 444.

The case has been regarded as the leading one on the subject because of the following rule which it laid down in respect of the responsibility of public carriers. Mellish L. J. stated that James L. J. concurred that the decision of the Court below must be reversed, and desired to add the following observation:

> The act of God is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to have been expected from him.

This case and other British jurisprudence dealing with an Act of God are referred to as follows in Halsbury's Laws of England, 2nd ed., vol. 7, p. 210, para. 294.

> An act of God, in the legal sense of the term, may be defined as an extraordinary occurrence or circumstance which could not have been foreseen and which could not have been guarded against; or, more accurately, as an accident due to natural causes, directly and exclusively without human intervention, and which could not have been avoided by any amount of foresight and pains and care reasonably to be expected of the person sought to be made liable for it, or who seeks to excuse himself on the ground of it.
>
> The occurrence need not be unique, nor need it be one that happens for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated. The mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of a recurrence—when, in other words, it does not imply any law from which its recurrence can be inferred—does not prevent the phenomenon from being an act of God. It must, however, be something overwhelming and not merely an ordinary accidental circumstance, and it must not arise from the act of man.

To the same effect, see also Salmond on Torts, 12th ed., p. 570.

Insofar as the Canadian jurisprudence is concerned, the rule laid down in *Nugent v. Smith, supra,* was followed by the Supreme Court of Canada in *Canadian Northern Quebec Railway Company. v. Pleet*[1]. See particularly p. 1117 where Duff J. (as he then was) quoted with approval the statement made by Mellish L. J. above referred to.

The case was one wherein potatoes had been frozen in transit notwithstanding that the railway had installed lamps in the car in which they were shipped. The Court held (Davies, C. J. dissenting) "that the Railway had failed to see that the lamp wicks were trimmed and kept in good order and thus failed under the circumstances to discharge the onus resting upon it as a public carrier."

[1] [1923] 4 D L R. 1112.

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A convenient digest of the *Pleet* and the *Nugent* cases is also contained in Canadian Encyclopaedic Digest (Western), 2nd ed., vol. 3, p. 295, para. 36, under the heading of "Common-Law Exemptions".

As mentioned by counsel for the parties, notwithstanding that previous wrecks due to slides have occurred on the defendant's track in the rocky mountains, the instant case is the first of its kind to come before this Court, and on that account I propose to review the evidence at greater length than might be otherwise the case.

What might be called the documentary proof consists of sample copies of bills of lading (Ex. 5) which constitute the contract between the parties; a government map (Ex. 6) whereon Civil Engineer G. G. Fyke, one of the defendant's nine witnesses, has indicated where the accident occurred; a bundle of photographs with descriptive titles taken and produced by Dr. H. Q. Golder, C.E., one of two witnesses called by the plaintiff, which, *inter alia,* contain a long range view of Squilax Mountain and the instant railway track (Ex. 8), together with close-ups of scenes and objects some of which gave rise to conflicting evidence.

Insofar as determining what was the cause of the *slide,* I do not think on the evidence this is open to question.

The defendant proved that there was no habitation on the mountain and it was not suggested by the plaintiff that the slide was triggered by any act of man. Furthermore, we have the evidence of G. G. Fyke *(supra),* employed by the defendant as assistant district engineer for its Pacific area and who was delegated to investigate this matter, and that of Dr. H. Q. Golder *(supra),* an experienced expert specializing in soil mechanics and geotechnical processes, who carried out a similar survey on behalf of the plaintiff. Both were of the opinion that it was caused by the following acts of nature: the weathering or rotting of the face of the steep cliff on Squilax Mountain caused rock and rock dust to fall onto the 45° sloping mountain side below, where it accumulated and formed what is called in geological language a "talus" or a "talus slope". At the foot of the above-mentioned accumulation a gully leads down through an area where there are stones of various sizes, earth and some trees, just above the defendant's railway track. Following a hot dry spell, a heavy downpour of rain dislodged a large amount of the debris at the foot of the cliff, which gathered mud and stones as it flowed, with a moisture content likened to a sloppy concrete mix, through the trees below before sweeping onto and over the defendant's railway track where it descended for about 150 feet down the opposite slope towards the public highway, which skirts the bank of the South Thompson River.

I think it is clear that, considered by itself, the slide must be regarded as an act of God. But we must now examine whether on the proof made it can be said that the accident and the consequent loss suffered by the plaintiff was directly and exclusively due to the slide; whether it could have been foreseen or guarded against and in what respect, if any, was the defendant negligent.

As might be expected, of the nine witnesses called by the defendant those who had the most direct knowledge of the circumstances concerning the accident were Engineer V. J. Crosby, Head-end brakeman E. Nellis and Fireman G. Z. Bede, who were located in the cab of the leading locomotive. Two other members of the crew, the tail-end brakeman and the conductor, were located in the caboose and formed the balance of the crew, but they were not heard as witnesses. J. J. Birkheim, who was section foreman and responsible for the maintenance of the track between mileage 83 and mileage 89, although he did not see it until afterwards, was within less than a mile of the accident when it occurred. He was the sole witness to testify in respect to the time and the duration of the rain storm which triggered the slide.

The three occupants of the cab gave evidence which had much in common. They were well-acquainted with the reverse curve "S" where the accident occurred and, except for V. J. Crosby, were easily able to identify it on photos which had been taken in 1960.

Immediately following the accident, under the direction of G. G. Fyke a sharp corner was cut off. See Exhibit 3, which looks east, being the direction whence train No. 85 had come, and on the right-hand of the photo can be seen an excavation where a protruding embankment had been cut back to the extent of fifteen to twenty feet from the track.

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As appears by Exhibit 4, which was taken from about the same place as Exhibit 3 but looking west, being the direction in which the train was going, the fill from the aforesaid cut was used to widen the embankment and was deposited immediately behind the white signal post on the right-hand side of the picture. This extension also marks the place where the locomotives slid down the embankment.

Likewise, on the left side of Exhibit 4 may be seen an electrically operated warning fence which was installed more than a year subsequent to the accident. It functioned as follows: if debris slid down against the fence it would not only light up the two signal posts on each side of the track at the near end of the fence but, according to Albin Thors, roadmaster of the area in question since 1950, it would also put into operation a red danger signal at mileage 85.3 on the east side and a similar one to the west at mileage 87.2.

Engineer Crosby, on being questioned in respect of the above-mentioned exhibits, had some identification difficulties which are readily understandable: Less than a year after the accident, he was given a different run and between then and the date of hearing he had never seen the slide fence which was installed more than a year after the accident.

On examination in chief, engineer Crosby stated that on the date of the accident he had been in the employ of the Railway for 39 years and an engineer for the last fifteen years; that he was sitting in his accustomed place on the right-hand side of the cab of the leading locomotive and his brakeman and fireman were on the left-hand side, sitting one behind the other; that before leaving Revelstoke at 3.10 a terminal test of his train had been made and another inspection was made later at Canoe, and on both occasions the brakes and valves were found to be in satisfactory condition. En route he had several occasions to use his brakes and he found them in good order. He stated that in the area the maximum speed allowed for a freight train was 30 miles an hour and that on arriving at 7 p.m. at the reversed "S" curve his train was on a one per cent downgrade and travelling at 28 miles an hour. Shortly thereafter and when they were some 400 or 450 feet away from the slide, the brakeman and the fireman suddenly shouted, "Slide!", and upon thrusting his head out of the window he saw it and he did all he could to bring the train to a stop by jamming on his brakes. At the same time he shouted to his assistants to get away from the window and hold on on the control panel, which was in the centre of the cab. This timely warning, I have little doubt, was largely instrumental in saving the trio from serious personal injuries because (as subsequent events showed) only the fireman suffered injuries and they consisted of cuts on the head which required but a few stitches.

The witness stated that when the fireman called out "Slide!" the speedometer showed 28 miles per hour and at the time they hit the slide, to the best of his judgment, the train was going about 20 miles per hour. After hitting the slide, he said his engine and the three others keeled over to the right and slid down the embankment.

In his opinion, under good rail conditions he was capable of stopping his train within 1,000 to 1,300 feet; on wet rails some greater distance would be necessary. I might here say that, according to Bruce McGull, supervisor of air brakes for the Pacific region, called by the defendant, was of the opinion that under perfect conditions it would require 1,143 feet to bring the train in question to a stop and that if conditions were adverse a greater distance would be necessary. The defendant also called another expert, Victor Hooley, a former engine driver and foreman of road engines who had been in the employ of the defendant company for over 40 years, who stated that under dry conditions it would require 1,300 to 1,500 feet and on wet rails another 450 to 500 feet to bring the locomotive to a stop.

Speaking of weather conditions, engineer Crosby stated that coming from Revelstoke it was showery and squally. On approaching the scene of the accident he could see across Shuswap Lake and thought that most of the storm was over on the opposite side of it. The area had suffered a long dry spell and to the witness's knowledge the spotting rain which was falling at the time of the accident was the first which had occurred for at least a month to six weeks.

The last train he met before coming to the slide was at Carlin, which is 10 or 11 miles east from the scene of the accident, and it apparently had passed mileage 86.7 successfully. When cross-examined, he stated that he knew

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of no previous mud slides in the area but that about two years previously there was snow and maybe a few rocks which came down east of that point. In answer to the question, "How far east?" the witness answered, "Oh, I would say about 14 car lengths, which would be, maybe, in the neighbourhood of 1,400 feet probably." Since (as the witness stated elsewhere) a car length is 40 feet, his answer is somewhat confusing.

In relation to passenger trains he said that, if there happens to be a bad spot, we have a watchman patrolling the track, but there was no patrol in the area at "that time of year"; a night watchman was there in the spring.

At a dangerous spot, known to be such, a slowdown order is issued. Where the accident occurred was not known as a bad spot, and if it had been, a slowdown order to 15 miles an hour for a distance of 2,000 yards would have been issued. He had received no such order on the day of the accident.

Unlike unit "A" type diesels used in passenger service where the cab is in the forefront and the crew has a clear unobstructed view of the track ahead and the terrain to right and left, the cab of train 85, which is a general purpose one, is in the centre of the locomotive. Owing to the projecting snout of the engine, the vista of the crew is restricted—the engineer being on the right-hand side of the cab has an inferior view of the left-hand side of the track. By the same token, the brakeman and the fireman have a better view of the left side than of the right.

The witness recognized on Exhibit 3 two white posts. The first one, nearest the camera, appears near the belly of the loop in the track, a little on the left of a birch tree, and which, though not measured, appears to be about midway from where the wreck occurred and the post farthest from the camera. This latter white post is a signal block for eastbound traffic; it appears on the left-hand upper corner of the picture, near the gap in the trees and a little to the right of what appears to be the crossbars of a telephone pole and which, by measured distance, was found to be about 1,100 feet from the point of collision.

The witness was asked whether, at the time of the accident, before going into the "S" curve, by looking slightly

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to the right, instead of straight ahead, he could see the site of the slide; his reply was, "Not to my knowledge; I mean, there is trees, obstructions, birch trees and every kind of trees and a line of poles too, and I don't see how any man could ever see it", and he was positive that he could not have seen the slide itself.

The witness stated that at the time of the accident, although it was getting dusk, the visibility was very good, except for some shadows where the slide was.

L. E. Nellis, the brakeman, and G. Z. Bede, the fireman, gave evidence very much along the same lines as the engineer. The brakeman stated that the reason why he could not see the slide from more than three or four pole lengths away from where he was on the left-hand side of the cab was because the bank on the same side blocked his view and as soon as he saw it he shouted, "Slide!" to the engineer, who looked out his window and applied all the brake facilities available.

The accident occurred around 7 p.m. and at that time the weather was cloudy and it was raining slightly. No need of windshield wipers. When they left Revelstoke it was very hot and coming over they ran into rain, "kind of squalls". When they hit the slide they went through it about half way and he thought the weight of the train would pull it through it. The mud on the left side was higher than on the right and the engine was lifted off the track and was veered down the right bank.

He remarked that since the accident a lot of changes had been made—the cutting back of the bank, the widening of the track and the erection of electric fence—and the visibility may be better now. The witness said there are some places more dangerous than others and "we are notified to keep a watchful eye on them."

The fireman (Bede), speaking of the weather at the time of the accident, said it was cloudy and there might have been a few drops of rain but nothing very much. On the way over they had a few showers. Prior to June 24 "we had a dry spell for a month or so."

The witness also stated that, although he had never made a test of it, especially at the speed the train was moving, the slide could not be seen sooner than 300 or 400 feet back. It might be seen from further away now but not at the time of the accident.

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John Jack Birkheim, section foreman, was employed by the defendant to maintain the track between mileage 83 and 89. His hours of work were from 7 a.m. to 4 p.m., subject to be on watch at all times for anything which might happen to the track. Prior to the accident a very dry spell had occurred. He lived at Squilax in a section house at mileage 87.5 and on June 24 he had been working around Elson yard at mileage 84. While passing on his handcar mileage 86.7 about 3.35 p.m. he observed nothing unusual.

Among his duties was to check and keep culverts clear, and at mileage 86 there is a 31-inch wide culvert which goes under the rock at the mouth of the gully, where the subject "mudslide" occurred (Ex. A), which he had cleaned in the spring and which was all clear prior to the occurrence of the slide. When he arrived home at 4 p.m. no rain had yet occurred but the sky was clouding up in the west, something which he welcomed because it had been dry weather for so many weeks. About 6.30 p.m. a heavy rain started which lasted not very much more than 20 minutes but during which the witness said, "She really came down." When asked as a result of the rain did he have any concern for his track, he answered:

> No, I had no concern. As far as the track is concerned, I figured everything was safe; but our duty is when a storm comes up like this, we are supposed to patrol the track.

The witness got ready to go out patrolling and after the storm was over he saw from his house, at about mileage 87.2 or 87.3, a red block signal governing westbound traffic which showed that an approaching train had left Elson, which is four to four and a half miles to the east of Squilax. He waited for about 10 minutes and when it did not show up he "tried to get hold of the operator to find out about trains and I could not get through: there was no line. The line was out." He then walked a little east of his home to the aforesaid red block signal, where there is a dispatcher phone. The line was in good order and he learned that train 85 had been wrecked and 14 cars were supposed to be off the track. He then went up to see it and, omitting details given by other witnesses, he described it as "an awful bad mess" and stated there had been no previous slide within his area which he had patrolled during six years.

The witness stated that the last train which passed his house did so about an hour before the accident. He could not remember the number of it but it was going east and apparently was not involved in any accident. I will have reason to comment on this evidence later.

When it was drawn to his attention that, at any rate, since, changes had been effected apparently one could see the scene of the accident from the gap in the trees on the extreme left of Exhibit 3, the witness answered:

> Maybe you could see now but you could not see then, but it would only be for a split-second, and you could not tell whether there was something on the track or not unless it were marked by a warning signal.

Albin Thors, who had been roadmaster since 1950 and had been 33 years in the employ of the Railway, at the date of the accident was the roadmaster in charge of the maintenance of the track and right-of-way and inspected it once or twice a week. An assistant roadmaster (he has two) patrols the track daily. On the day of the accident he had passed mileage 86.7 at 5 p.m., two hours before the accident. He was sitting in the cupula of the caboose on a train which was moving eastward and was looking over his territory. The weather was very hot and cloudy and after he got home to Salmon Arm at mileage 63.5, roughly 24 miles east of the point of the slide, a cloudburst occurred. In answer to the question whether the section foreman is required to take any special precautions in a rain such as he described took place, he replied, "It is up to the section foreman to use his own judgment in a case like this."

He did not know whether the rain storm he had seen was the same one that John Jack Birkheim, the section foreman, had seen at Squilax.

When on cross-examination the witness was asked if he thought the road-bed on the day in question was safe, he answered, "Yes, the little rain we had didn't seem to amount to anything that anybody would be alarmed over."

> Q. Now you knew of no unusual rain in the area; you knew of none?
>
> A. We had the cloudburst that—
>
> Q. Up at Salmon Arm?
>
> A. Yes.
>
> Q. But I am talking about Squilax.
>
> A. No. I don't know any about Squilax at that time.

Asked what does he do to protect the track against slides, he said, "It is an impossibility to protect it. We always try and prevent the slides, if it can be done." They set up some means of warning at places where there is a serious danger, they sometimes build sheds over the

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track and they have built warning fences, like the one in the instant case, and they usually take down the rocks if it is unsafe, if it is loose rocks; and sometimes build concrete shields to catch a slide before it gets to the track. His Company had never attempted to stabilize the soil by spraying a cement mixture on it such as is sometimes done on highways as well as railways, and sometimes put revetments of concrete to stop it further up the hill.

Q. And mounds to divide the slide so it won't reach the track?

To this last question the witness answered, "It can be done, yes."

All of the foregoing, he admitted, are recognized preventive measures if you know you are in an area where there may be slides. Questioned on use of patrols, he said:

A. Oh yes, it is up to the section foreman to patrol ahead of the passenger train or if the weather is bad. If the weather is—we get a storm—it is up to the section foreman to use his own judgment to get out to protect, to patrol ahead of the passenger train.

Q. And he is expected to do so but he is not expected to patrol ahead of a freight train?

A. If the weather is bad enough.

Q. So that you do some patrols for passenger trains that you probably don't do for freight trains, is that fair?

A. Well, we pay more attention to the passenger, of course, but if the weather is such that if it is a stormy weather and a lot of rain, why the foreman usually goes patrolling in front of the freights as well.

The witness stated that "about a mile east where the accident occurred we get snow slides there at times and insofar as earth slides they had one slide at mileage 85.4 some time in 1961." He did not think anything of it as it only covered the track to the extent of one foot.

Victor Hooley, whose evidence in respect to stopping distance I have already referred to, when asked if, from his past experience as an engineer, he were sitting in the engineer seat he could see the spot where the accident occurred from the signal box (top left corner of Ex. 3; it is more plainly seen on Ex. 12), his reply was, "You can hardly see down there at all and one could not see the rails where the accident has occurred or a mud slide on the track." Notwithstanding the changes which had been made since the date of the accident, he thought the visibility remained much the same as it was before.

He also added that if the emergency brakes were put on at the corner where the eastbound signal appears (1,100 feet away), the train could not be stopped by the time it reached mileage 86.7. When asked:

Q. Do you think it is safe to go around a corner at a speed where, if there is an obstruction before you around the corner, you can't stop?

A. That is not even thought of. If you did, you would go crazy.

He said that to his knowledge "there was no previous large mud slides, that the first mud slide was the one that had occurred at mileage 86.7" and if minor slides had occurred he had never heard of them.

G. G. Fyke, whose evidence I have already mentioned in connection with the cause of the slide, was the last witness called by the defendant.

This witness, who testified at considerable length, stated that he arrived on the scene before 7 a.m. on the morning after the accident and he observed that the slide covered the 30-inch corrugated metal culvert but only penetrated it to the extent of about 18 inches, which shows that prior to the accident no water went through it.

He could find no record of a mud slide at the location of the accident.

In reply to the question, "Why did you recommend the erection of the slide fence—were you fearful of slides?", the witness answered:

No, I don't expect that there will be further slides here unless there are exceptional weather conditions and dry spells for accumulation of rock, dust and small rocks in gulleys on this rock face. But the reason why it was installed there is that we cannot anticipate any slide there. It is entirely dependent on the weather conditions, the nature and the cycle of the weather conditions. And there is no way of protection from this; although it may never actually be used, it is the best protection we could devise to give some warning to the trains coming that there may be a slide in that point, if it does occur.

Q. Was it put in because you had a slide there?

A. Yes, it was put in directly as the result of this one slide.

On cross-examination the witness was asked what he thought of the theory that in areas such as the instant one over a period of years (it may be many years) debris talus rock, and the like, in dry seasons accumulates until ultimately something triggers the slide; he replied, "This point is a very unlikely candidate for a mud slide."

Q. Then also in some areas if you know there is a dangerous area, you could make it slide, could you not trigger it when it is not going to do any damage, as we can do it like they do with snow avalanches?

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A. Well, it is pretty difficult, that is what I am saying. Some rock coming off and you go and scale it or blast it to bring it down under control.

Q. Now what you have done at this site of the slide we are talking about is to put in a slide fence?

A. That is correct.

Q. Now this does not stabilize it, it merely gives a warning if a slide occurs.

A. That is correct.

The witness testified that when the train was in the vicinity of the eastbound block signal (Exhibits 3-12) it was possible for the engineer, on the 24th of June, to see the point of the slide which was 1,160 feet away, but because his cab is set back in the middle of the engine and its nose restricted his view he could do so for less than a second and then only by looking to his right instead of straight in front of him. He added that the excavation on the south side of the track had slightly improved the view.

The witness mentioned that the talus in question was resting on a 40° slope and that a rainstorm would trigger material built up on such a slope. "Quite often you also get slides directly off the rock faces, and quite often where there are water courses."

Survey photographs can be obtained from government sources but in his opinion they are not conclusive.

He said an awful lot of potentially dangerous areas exist in British Columbia. Some railway companies such as the Pacific Great Northern and the Canadian National have systems of finding areas that are potentially dangerous by survey or drilling. The defendant Company is doing it in some places but they don't go into a place where there has not been any history of a slide and unless something has occurred that would lead the Company to believe there is going to be a slide there.

Speaking of maximum speed, the witness said that, although the maximum speed for passenger trains is 35 miles, there are many places where they are required to go slower.

In order to re-establish train service over the scene of the accident required just two days, but to make the cutting and widen the embankment required about two months' work.

The cost of the accident to the defendant was $174,000.

In the opinion of the witness if it had been possible to reduce the striking force of the train to, say, 5 m.p.h., "one or possibly no diesel units would have gone down the bank—one diesel would not drag the whole darn train."

There remains the evidence led by the plaintiff.

I have already dealt with a small portion of the testimony given by Dr. H. Q. Golder which concerned the cause of the slide. The background of the witness is as follows: He received his engineering degree from Liverpool University, England, in 1932 and his doctorate from the same University in 1940. He worked for some years in Government Research Stations in England and for five years at the Building Research Station, where he dealt with soil problems. In 1958 he started his own consulting practice and in that year he made his first study of soil problems in British Columbia. The following year he took up residence in Canada, where he has continued working in his chosen field.

Dr. Golder, in his additional evidence, stated, *inter alia,* that new techniques are available since the war and are used by many highway departments in Canada and the United States in respect of locating and grading potentially dangerous talus slopes the accuracy of which is, to some extent, dependent on the man's experience who is doing the work.

He first visited the scene of the talus slope in issue in March 1960 when he took the instant photographic exhibits. His next visit was in April 1962. Because the slide behaved like fluid as opposed to tumbling rock or soil, the witness described it as a debris flow slide which, due to continued weathering, builds up until, as often happens, the weather triggered it into motion. To the question, "What would you have recommended had you known that the Squilax slide was potentially dangerous", he replied:

> Although there are probably more, the following two remedial measures may be taken:—
>
> 1°—Catch the slide by a deep excavation near the bottom of the slope, where it would be somewhat downhill, so that you make a hollow sort of saucer with a raised lip; and by making provisions for drainage, for water to get away when there is no slide imminent.
>
> 2°—Funnel the several gulleys into a bigger gulley and replace the thirty inch culvert by a bigger opening, e.g., a 50 feet bridge excavating down to rock so that the slide could go through.
>
> On a very rough estimate the cost of the first method would be in the order of $100,000 and the second might be twice that amount.

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On being questioned how potentially dangerous slides not known to be such could be located and graded and whether such a slide like the instant one could be reasonably anticipated, he expressed the following opinion.

To locate potentially dangerous areas, start by using aerial stereoscopic photographs and by studying them, you could certainly check the areas which were not dangerous and you could pick out areas which are most dangerous. Next the findings should be checked on the ground by a soils engineer, and preferably a pleistocene geologist. The third stage, a more detailed investigation and possibly including drawings at the points where the engineers had decided there was a real danger, in order to properly classify the slide.

Assuming five hundred miles of track, aerial photographing would cost about $5,000, and assuming that half the territory were classified as safe, it would cost about a further $20,000 for the more detailed survey.

Railways in England, where a lot of the witness' experience occurred, do this sort of thing.

His experience in railway work is not extensive in Canada, but he knows the problem is similar where highways are concerned, and that a lot of the above type of work is done on a continuing basis in British Columbia.

In respect of foreseeability and locating potential slides, Dr. Golden stated, "Well, one can say in a certain area a slide will happen sooner or later. There are other areas where you think there might be but you are not absolutely certain."

Q. Now, what would be your view in this respect of the area at Squilax which you looked at?

A. There there is a difference between my opinion on the two occasions that I visited it. On the first occasion one area was covered with snow, and I was not able to see the ground, but I saw that last Sunday, and there is there a big talus slope which is potentially very dangerous. It is obviously going to move down at some time. Now, how far it will go when it moves is more difficult to say. Some of the slides may stop on the rather flatter area that I mentioned earlier, but there is a big chance they will come down and through the small gulley where the previous slide occurred and cover the track again.

The witness elaborated on the photostatic exhibits most of which bear descriptive titles. He observed that Exhibit 8 entitled "General view of Squilax mountain looking north" should read "looking south".

When he took the photos in 1960 he repeated that there was snow on the ground, but on his second visit in 1962 it was clear and he investigated for 1000 yards on either side of the slide and found no other talus slope. He saw no leaves covering the debris lying among the trees, a little above the track, and formed the distinct impression that quite a lot of material had moved down in the last two years but stopped short of the track. He also saw along the side of the track at the foot of the gully (Ex. 11) about 100 cubic yards of material which was not there two years before.

In cross-examination he stated that he did not go above the vertical cliff where there is a flat area but only to the foot of it where he saw the instant talus slope 200 yards across and which is the reservoir from which material is fed into the gulleys.

Asked if it was possible that two 50-foot bridges would be required instead of one, he replied, "It is possible. I don't know, I can't say that it is not possible."

Q. That is right. So that it is fair possibility you would have—twice $200,000 of twice whatever the cost each bridge is going to be?

A. Yes, but you could find out information for very little money.

Q. How many talus slopes would you expect to find on the C.P.R. line?

A. I have no idea but I could give you a very fair answer within a month of studying the aerial photographs.

On re-examination, speaking of the eastbound block signal (Ex. 3), the witness measured and paced off the distance between the spot where the accident occurred and the eastbound signal post (Ex. 3), which measured 1100 feet. He then looked in the opposite direction, back to where the pictures had been taken, and he could plainly see the two white posts belonging to the electric warning fence. Although the track itself was not visible, in his opinion a higher object, such as the slide, could be easily discernable.

The second and last witness called for the plaintiff was Reginald Cameron Thurber, civil engineer, a graduate of the University of Alberta in 1949. He specialized in soil mechanics and stabilization. He was with National Research Council and Provincial Research Council, then went to British Columbia, Department of Public Works, as Materials Engineer, where he spent 50% of his time on landslide problems. During the five years preceding the trial he had his own consulting practice. The witness had no personal knowledge of the Squilax slide and spoke from other experiences in British Columbia respecting the means

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available to ascertain when slopes are potentially dangerous in relation to slides.

Q. Now, will you tell us, are there any means available whereby one can ascertain when slopes are potentially dangerous in relation to slides?

A. Yes, definitely.

Q. Will you tell us first of all what types of surveys you make for that type of an area, so to say, a railway line?

A. Yes. Well, taking one particular railway, for example, the railway found that their maintenance costs and difficulties with derailments and slides and so on, was quite excessive; besides they would have to spend money to ascertain what could be done to reduce this problem and asked us to make a survey of it, both the active slide areas and potentially—areas of potential difficulty, which we did, both by the use of aerial photographs and by detailed study, by traversing the track on a *speeder,* stopping at areas where we felt there might be some problem, by visual inspection. We carried out further studies of these various areas, classifying them in quite a few different categories as to their potential danger.

Q. Would it be fair to say you categorized them in degrees of urgency?

A. That is correct, yes, and subsequently the railway have acted upon our recommendations that the most urgent areas be studied first, and we have carried out complete investigations, giving reports on the investigation and what we would recommend to stabilize the area, and then they have carried out the stabilization work.

Q. Do you mind telling us what railway this is?

A. The initial railway we started with five years ago was the Pacific Great Eastern Railway.

Commencing in November 1959, the witness said he did the same type of survey for the Canadian National Railway.

Q. Could you give us some statement as a basis of charging so we could form an estimate of cost on a thing like that?

A. I would say initially, of course, any railway in British Columbia has, I believe, well over 50% where you really can just look at the air photographs quickly and almost eliminate it, therefore half of the railway would require detailed investigation, and I think that—I believe on the PGE, for example, we covered—it has a railway line of about close to 760 miles, and to cover half of that in detail and make a complete list, a plan of the various items required, and we have to give costs on our investigation for each of these sections, I believe we did that for well under about $3 or $4,000, I would say, just on a guess. It was under—I would say it was under $5,000?

For this sum, the witness said, the railway would have obtained the services of witness as a principal soils engineer and the time of his organization's geologist to travel up the line and inspect various areas, detailed notes and a report giving a brief description of the areas that we felt were potentially dangerous, listing the degree of urgency and the reasons why and including the cost for carrying out further work, the whole contained in a bound report complete with maps and photographs. The photographs can be obtained by anybody, the witness had them out on loan from British Columbia Provincial Government Surveys Division, which has pretty well photographed the whole of the Province from a fairly high altitude. Similar ones may be obtained from the Dominion Government.

Q. You have completed both those surveys?

A. Those as far as railways were completed the first season pretty well. For example, on the Canadian National Railway, we were concerned with the section between Jasper and Prince Rupert and we took a section where they were having the highest record of the problems pretty well in the McBride region towards Prince George, and another section from Smithers to Prince Rupert, and there are sections that we have never made this same survey because it was just pretty well a flat river bottom area and there were no history or record of any trouble.

Has the defendant established the first prerequisite of its plea, namely, that the accident was due to natural causes directly and exclusively without human intervention?

As noted earlier, it is not disputed that the *slide* was due to natural causes without human intervention, but one must examine what caused *the accident,* and the two are not necessarily the same.

As pointed out by counsel for the plaintiff, we are not dealing here with a case where a slide engulfed the train, but one wherein the slide had occurred and deposited itself on the railway track and the train ran into it. It clearly follows, I think, that while the slide was an act of nature the operation of the train which resulted in its collision with the debris on the track was a human act.

Now, with respect to the second prerequisite, namely, was the loss suffered by the shipper due to something which could have been prevented or guarded against by any amount of foresight, pains and care reasonably to be expected of the defendant?

In examining the question of foreseeability I would first refer to the evidence of G. G. Fyke because I think as assistant engineer for the Pacific area he possessed a considerable technical knowledge and he and those senior to him in rank and authority in the engineering field of the Company had more responsibility for foreseeing the accident, if this were reasonably possible, than the other witnesses of the defendant who belonged to a lower echelon and looked to their superiors for guidance and direction.

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Referring to foreseeability, Dr. Golder stated that, given a talus slope such as the instant one, the question is not whether but when would a slide occur.

I find Mr. Fyke's evidence lacks consistency. He agreed in his examination in chief with Dr. Golder that the cause of the original slide was a weather cycle consisting of a long dry spell, followed by a heavy downpour of rain, and that whether another slide would likely occur at the same spot was entirely dependent on weather conditions; but on cross-examination he said, "This point is a very unlikely candidate for a mudslide."

I think it is recognized that the safeguarding of the traffic which passes over the defendant's stretch of line through the Rocky Mountains is fraught with formidable difficulties. It is natural that the Railway should concern itself with attending to first things first and give priority to areas where small slides and disturbances have reached its track end, thus giving warning that more dire things may be imminent. The expenditures thus made have doubtless served to protect the person and property of railway users, which is highly commendable, but this is not to say that so-called inactive slides, especially of the type with which we are here concerned need not be reckoned with. In my opinion, the defendant's witnesses, particularly those having the most authority, failed in their duty first of all to locate potentially dangerous talus slopes such as existed at Squilax. On this being accomplished, I consider it would be reasonable to expect the defendant to direct particularly employees concerned with the operation of trains and track maintenance to be on the lookout for a sudden termination of any long hot dry spell likely to be followed by a heavy rainstorm or cloudburst and to report such occurrences immediately, so as to enable despatchers to issue appropriate warnings to train crews effective during the interval necessary to ascertain the consequences (if any) of such unusual occurrences and to take precautions against them.

I consider the aforesaid failure of superior officers contributed to a series of omissions on the part of the defendant's other witnesses of lower rank, as it led them into a false sense of security and, to that extent, relieved them of what otherwise would have been attributed to their own culpability. Thus, for example, the evidence shows that

Engineer Crosby was proceeding at a speed below the maximum limit prescribed by the Company in the subject area. It is also true that, as speeds go, 28 miles an hour would ordinarily be regarded as a safe and moderate speed, but the evidence also discloses that his train was half a mile long, weighed over 5000 tons and was being driven on a wet downgrade track at a speed which, according to his own evidence and that of other experts, was such that it could not be brought to a stop within a shorter distance than somewhere between 1100 to 2000 feet. If the witness, when approaching the "S" curve, had been aware of the existing potentially dangerous talus slope and the ominous significance of the unusual weather conditions then prevailing, in my opinion it is likely that he would have realized that he was travelling far too fast and governed himself accordingly.

Similarly, if section foreman J. J. Birkheim had been likewise informed immediately on perceiving the heavy downpour, instead of waiting to telephone the despatcher until after the heavy rain he witnessed was over and the line was out, it is reasonable to suppose that he would have done so immediately.

It is unfortunately true that slides of all kinds have been all too common "the rough country" with which we are here concerned. As is observed in Salmond on Torts *(supra)*, "whether there is a duty to take precautions against extraordinary events depends on the facts in each case."

As far as the evidence shows, no one in the employ of the Company was aware that a talus slope existed on Squilax Mountain until after the accident. The attitude of the defendant was not to concern itself with potential slides until such time as debris appeared on the track. No one in the employ of the defendant ever set foot on the mountain side at mileage 87.6 to see if some movement had occurred which had not reached the track, although Mr. Thors stated that it was up to the roadmaster and section foreman to look over the hills along the track to make sure that it is safe.

Section foreman J. J. Birkheim, on being asked if he ever made any particular examination of his territory to see if any of it might be unstable, said he never did so since nothing had happened in all the time he had been there to cause him any worry.

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I am disposed to agree with the submission of counsel for the defendant that on Dr. Golder's own evidence the remedies he suggested for eliminating talus slopes, particularly if they are as numerous as counsel would lead the Court to believe, might well be so costly that the defendant could not reasonably be expected to adopt them. On the other hand, I think the unrebutted evidence of Messrs. Golder and Thurber clearly establishes that, as had been done by other railways, it was entirely reasonable to expect the defendant to ascertain the existence and condition of all potentially dangerous talus slopes such as the one at Squilax, since for a relatively moderate sum such information was obtainable. In my opinion, if obtained, it would probably have enabled the defendant, especially when climatic weather conditions such as prevailed on June 24, 1958, to take appropriate precautions to avoid colliding with a likely landslide.

Furthermore, I might add that in a case such as this, I think the character of the evidence directed by the defendant at exculpating himself from the heavy burden which the law cast upon it is important.

Although Albin Thors said he was in the cupula of a train headed west which passed mileage 86.7 about 5 p.m., he did not identify his train by number, nor did he say whether (when or where) it passed train No. 85. The witness said that he learned of the accident when he arrived home at Salmon Arm, about 25 miles from the scene of the accident, and that he arrived back at the scene of the slide between 8 and 9 p.m.

Engineer Crosby said that the last train that his train No. 85 met before he came to the slide was at Carlin, 10 or 11 miles from the scene of the accident, and that he waited for train 948 from Kamloops to pass. None of the crew from train 948 was called to establish when the said train passed mileage 86.7 and when it arrived at Carlin. He began by saying that the train he met had passed Squilax about an hour previous to the time of his arrival there, then added, "No, it would be more", and ended by saying he did not know. Apart from being unable to state how long the said train was in coming from the scene of the accident to Carlin he did not offer any evidence as to what time his own train arrived at Carlin and how long it remained there.

J. J. Birkheim stated that a train headed west passed his place at Squilax at about 6 p.m. but he could not remember the number of it. His was the only evidence as to when the rain began and how long it lasted. He was not a disinterested witness as the closer the rainstorm could be linked with the time the accident occurred the less the likelihood of the witness being taxed with tardiness in investigating and reporting the consequences of the rainstorm. Taking into account that the various times mentioned by the aforesaid witnesses are at best only approximate, I regret the lack of clear-cut corroborative evidence which would establish when the rainstorm occurred and whether two eastbound trains pased mileage 86.7, one at about 5 p.m. and the other at about 6 p.m., or whether only one such train passed somewhere in-between times.

Considerable evidence was devoted to the question of how far was the maximum distance at which Engineer Crosby could have seen the subject landslide.

It is quite evident from photos Exhibits 3 and 12 and the testimony of Dr. Golder that, on the date he took them, the scene of the accident remained visible all the way from the eastbound signal box to the next white post, about 500 feet closer to the camera. I think it is true to say that if the engineer of a westbound train, when proceeding between the two posts, had looked to his right, he could have seen the wire fence signal posts (Ex. 2) which were erected after the accident.

Could the same be said of seeing the slide on the day of the accident?

I believe that, notwithstanding the conflicting evidence which was given on this question, the scene of the accident would have been visible to Engineer Crosby alone, who was on the right-hand side of the cab, but only during such seconds as it would take the train to move from the eastbound signal box to the next white post about 500 feet away. The said evidence is inconclusive because, in my opinion, it would not have been put to the test on June 24, since Engineer Crosby had, at no time, any misgivings about the safety of approaching the reverse "S" turn and did not see fit to reduce his speed the slightest, it was very unlikely that, even though he could have seen the slide on the day of the acident, he would think of taking advantage of the fleeting opportunity of looking to his right and

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leaving the task of looking ahead to his other two crewmen and applied his brakes earlier so as to avoid or minimize the effect of a collision.

As Duff J. said in the *Pleet* case, *supra,* at p. 1117:

> I have come to the conclusion that the proof is not as regards the nature of the precautions taken of that close-knit character which a tribunal charged with the responsibility of deciding that issue might rightly require.

In my opinion, the evidence offered by the defendant fails to exculpate it from liability because it has not succeded in discharging the double burden which rested upon it of proving beyond reasonable doubt that the damages suffered were solely attributable to an act of God and that it could not have foreseen and guarded against the slide by employment of any amount of care and foresight which might reasonably be expected of it in the circumstances.

For the foregoing reasons I would maintain the plaintiff's action for the sum of $29,955.12, to which must be added the $2,700 which was offered by the defendant but refused by the plaintiff, together with taxable costs.

Judgment accordingly.

1962 Dec. 5, 6

1964 July 3

BETWEEN:

DONALD J. PLUMB .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income Tax—Income Tax Act, R.S.C. 1952, c. 148, s. 5(1)—Employee benefits—Insurance premiums paid for taxpayer by employer—Whether properly included in taxpayer's income—Meaning of "Group Insurance Plan".

This appeal results from the inclusion by the respondent in the appellant's income, for the purpose of computing his income tax, of amounts equal to the premiums paid by the Company of which he was an officer and employee for two policies of ordinary life under a scheme of insurance. The scheme of insurance included group insurance coverage available to officers, employees and licencees, for which the Company was reimbursed for payment of premiums on behalf of the licencees but not for those paid on behalf of its officers and employees. The benefit derived by officers and employees was admittedly not taxable in respect of the group insurance coverage. In addition to such group insurance coverage the scheme of insurance also permitted the senior executives, the appellant and his father, and the junior executives, the appellant's wife and mother, to obtain ordinary life insurance policies in amounts of $50,000 and $10,000 respectively. The appellant became insured under the latter part of the plan and the premiums were paid by the Company. The issue was whether coverage under these two ordinary life policies, as part of an overall scheme arranged between the Company and the insurer was pursuant to a "group insurance plan" within the meaning of s. 5(1)(*a*) and therefore a non-taxable benefit.

Held: That the words "group insurance" have an ordinary and popular meaning which involves a contract that provides for the insurance of a number of persons individually, such as a contract between an insurer and an employer providing for the insurance of employees of the employer and the premiums here in question were not paid under such a contract.

2. That the appeal is dismissed.

APPEAL under the *Income Tax Act.*

The appeal was heard by the Honourable Mr. Justice Cattanach at Toronto.

David Ward for appellant.

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

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

CATTANACH J. now (July 3, 1964) delivered the following judgment:

The appellant appeals against his income tax assessments for the 1956, 1957 and 1958 taxation years. The sole issue is whether premiums (the amounts of which are not in dispute) paid on behalf of the appellant by his employer on two insurance policies on his life were properly included in computing the appellant's income for the taxation years in question in accordance with s. 5 (1) of the *Income Tax Act,* c. 148, R.S.C. 1952, which reads, in part, as follows:

5. (1) Income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year plus

(*a*) the value of board, lodging and other benefits of any kind whatsoever (except the benefit he derives from his employer's contributions to or under a registered pension fund or plan, group insurance plan, medical services plan or supplementary unemployment benefit plan) received or enjoyed by him in the year in respect of, in the course of or by virtue of the office or the employment; . . .

Clearly payment of the premiums by his employer was a benefit enjoyed by the appellant by virtue of his employment. The question in issue is whether that benefit was derived from "his employer's contributions to or under a . . . group insurance plan".

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The appellant, during the years in question, was an employee and officer of Federal Trucks (Windsor) Limited, a company carrying on the business of wholesale and retail distribution of gasoline and other petroleum products.

The Company operated a number of gasoline service stations, and in addition marketed its product through licensees.

At a meeting of the directors of the Company held on November 21, 1956 at which the licensees were present, it was decided to adopt a proposal of insurance made by London Life Insurance Company (hereinafter referred to as "the insurer") covering the lives of officers and employees of the Company, its licensees and their employees.

Pursuant to that decision, the Company applied to the insurer for and received a policy of insurance described as Group Policy No. G 3390 effective November 30, 1956 by the terms of which senior executives, junior executives and other employees were eligible to receive insurance on their lives for the respective amounts of $20,000, $10,000 and $2,000, and a further policy of insurance also effective November 30, 1956, described as Group Policy GD 3390 whereby senior executives, junior executives and licensees and other employees were eligible for accidental death and dismemberment insurance in the respective amounts of $5,000, $5,000 and $2,000.

Under these policies, the insurer undertook to send to the Company individual certificates, setting forth the insurance protection to which each person was entitled, for delivery to the person whose life was insured and maintained a register showing the names of all employees so insured. Provision was also made for new employees being insured and for employees to continue their coverage on termination of employment by the exercise of a conversion privilege.

The Company paid the monthly premiums under the two foregoing policies. It was not reimbursed by its own employees, approximately nine in number including the appellant, but it was reimbursed in full with respect to premiums paid on behalf of licensees.

There is no dispute that each of the two foregoing policies constitute a group insurance plan within the meaning of those words as they appear in s. 5(1)(a) of the Act.

However, the proposal for insurance also included a scheme for ordinary life policies in the amount of $50,000 on the lives of senior executives and in the amount of $10,000 on the lives of junior executives and licensees, the policies having a cash surrender value and not being terminable on cessation of employment. The senior executives were the appellant and his father, and the junior executives were his wife and mother.

In accordance with the latter part of the proposal, in December, 1956, the appellant, his father, mother and wife, as well as some of the Company's licensees, each personally applied to the insurer for and received a policy described as a Jubilee whole life policy on his or her life. The monthly premiums on these policies were paid by the Company on behalf of the respective insured persons. The Company was not reimbursed in respect of the premiums paid on the policies issued to the Company executives but was reimbursed for the premiums paid on behalf of the licensees.

In 1958 the appellant applied for and obtained a second Jubilee whole life policy pursuant to a similar arrangement under which the Company paid the premiums thereon.

The issue to be resolved is whether the premiums paid by the appellant's employer on these Jubilee whole life policies fall within the words "contributions to or under a. . .group insurance plan" in s. 5 (1)(a). If they do the assessments were erroneous. If they do not the assessments were correctly made.

Accordingly, the disposition of these appeals is dependent upon ascertaining the meaning of the words "group insurance plan" as used in s. 5 (1)(a).

Bergman, J. A., in *Re Lawton* [1] had occasion to pose and answer the question "What is group insurance". He reviewed all available authorities, mostly American, and concluded that the words "group insurance" mean a type of insurance governed by the rules applicable thereto and with a terminology of its own and that the contract of insurance is comprised of a contract between the insurer and an employer whereby the insurer agrees to provide for the insurance of those employees who are eligible thereto and who apply therefor in accordance with a formula contained in a

[1] [1945] 4 D.L.R. 8 at 33.

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master policy which is the contract between the insurer and the employer.

I am of the view that the words "group insurance" have an ordinary and popular meaning which involves a contract that provides for the insurance of a number of persons individually. A typical example is a contract between an insurer and an employer providing for the insurance of employees of the employer.

The premiums here in question were not paid by the employer under such a contract of insurance and the appeals must therefore be dismissed with costs.

Judgment accordingly.

1963
Sept. 23-25
1964
Aug. 10

BETWEEN:

MARCEL TIMM ....SUPPLIANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Crown—Petition of Right—Crown Liability Act, S. of C. 1952-53, c. 30, s. 3(1)(a) and 4(2)—Negligence of prison authorities—Duty owed to prison inmates—Inmate injured through unforeseeable independent act of violence of fellow prisoner.

The suppliant claims compensation for personal injuries sustained by him when, as an inmate of the Federal Penitentiary at Kingston, Ontario, he fell from an open truck to the roadway while being transported under guard as one of a work party, from the penitentiary to a nearby quarry. The suppliant alleged that the servants of the Crown were negligent in requiring him to ride on the truck in circumstances which they should have realized to have been dangerous, in failing to provide adequate supervision during the journey to the quarry and in failing to deny access to a scrap pile to the prisoner, Mallette, from which he obtained an iron bar with which he struck the suppliant, thereby causing him to fall from the truck.

The evidence established that the truck was being driven carefully and at a moderate rate of speed when the suppliant fell out and that a blow delivered by the prisoner, Mallette, to the suppliant's head with an iron bar was the cause of his fall.

Held: That the duty the prison authorities owe to the suppliant is to take reasonable care for his safety as a person in their custody and it is only if the prison authorities failed to do so that the Crown may be held liable.

2. That while the prisoner, Mallette, had a long record of convictions for crimes, including robbery with violence, his conduct in the penitentiary was not such that the prison authorities would have had any reason to believe that he had extraordinarily violent propensities over and

above those of ordinary prison inmates, so that there was no reason for them to segregate him or to subject him to constant rigorous observation or special precautions and it was reasonable for him to be included in a working party under routine conditions and supervision. There was likewise no reason for the authorities to suspect that Mallette would arm himself to perpetrate an act of violence.

3. That the Petition is dismissed.

PETITION OF RIGHT by a convict for compensation for injuries sustained while in prison.

The action was tried before the Honourable Mr. Justice Cattanach at Toronto.

Eric E. Scott for suppliant.

J. D. Lambert for respondent.

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

CATTANACH J. now (August 10, 1964) delivered the following judgment:

In this petition the suppliant, who was an inmate of a Federal Penitentiary at Kingston, Ontario, serving a sentence for an offence for which he had been convicted, sustained personal injuries, under circumstances to be related, for which he seeks compensation.

On September 26, 1961 the suppliant, in the company of other inmates, was ordered to board a truck to be transported some distance to work in a quarry beyond the prison walls. The truck was one ordinarily used in the work at the quarry, the deck of which was open, surrounded by metal sides approximately 18 inches in height and was ten feet in length by six feet in width, but contained no seating accommodation other than that in the cab for the driver. There were ten prisoners in the working party in addition to the driver and Mr. Corrigan, a guard. The cab was occupied by the driver and a prisoner who was to act as a relief driver so that there were nine prisoners and guard riding in the back of the truck. There were no designated positions in which the inmates were to ride, but they were allowed to select any position they wished. The guard stationed himself in a standing position immediately behind the cab as did two of the inmates. The remaining seven persons comprising the working gang distributed themselves as best suited their individual wishes, the majority of whom appeared to have stood upright in the body of the truck.

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The suppliant sat on the left side of the truck with his feet resting on the floor of the deck.

The first allegation of negligence put forward by the suppliant was that he was required to ride on the truck in circumstances which the servants of the Crown should have realized to have been dangerous. There was no allegation of careless driving. The truck was driven carefully and at a moderate rate of speed. A short distance along a road outside the confines of the prison, the driver came to a complete stop at a crossroad. When it was clear to proceed the driver shifted into forward gear and drove across the intersecting road. When the truck was some two hundred yards beyond that road the suppliant fell from the truck.

The cause of the suppliant's fall was the subject of conjecture. The suppliant testified that he received a jolt, caused by a movement of the truck, by reason of which he fell to the paved roadway thereby receiving the injuries of which he complains.

However, the respondent called as a witness another prisoner, Mallette who was also a member of the working gang and a passenger in the back of the truck who testified, under the protection of the *Canada Evidence Act,* that he struck the suppliant a severe blow on the head with a length of solid iron bar which he had taken for this purpose from a pile of scrap iron and which he had secreted in the waist of his trousers until an opportunity presented itself for him to strike the suppliant with this iron bar.

The suppliant denied being struck by Mallette and persisted in his explanation that his fall was caused by a jolting motion of the truck.

Mallette stated that about a week previously the suppliant threatened to get him and that being activated by motives of self-preservation he decided to get the suppliant first. The suppliant denied having so threatened Mallette and professed to be unaware of any animosity between them. Mallette also stated that during the ride he bided his time until he could make his way to close proximity to the suppliant, with some prisoners between them and the guard and while the guard's attention was directed elsewhere he delivered the blow to the suppliant's head. He apologized for having struck the suppliant on the head thereby injuring him because his intention had been to merely maim the suppliant by breaking his collar bone to which area he had aimed his blow. After the blow was delivered Mallette promptly disposed of the iron bar by throwing it away.

I accept Mallette's version of the incident as being the correct one for a number of reasons. It was not to Mallette's interest to say he had struck the suppliant if he had not done so. He did not come forward with his story voluntarily and forthwith, but only after some investigation of the incident and after he had been permitted to obtain advice from his solicitor. On the other hand, the suppliant may have considered it to have been in his interest to disguise the fact that he had been struck by Mallette.

Further, if Mallette struck the suppliant he would know, whereas, the blow being delivered unexpectedly and by stealth, the suppliant would not know what struck him. In all likelihood he would have been rendered unconscious thereby causing him to topple from the truck.

There were two lacerations in the suppliant's scalp about an inch and one half apart, one more severe than the other and which required eighteen stitches to close. The more severe injury was consistent with being caused by striking with a weapon such as Mallette said he possessed and the second laceration was consistent with the suppliant's head striking the paved roadway.

The truck was being driven carefully. It had come to a complete stop at an intersecting roadway and had been put in motion again. The suppliant fell from the truck when it was a short distance beyond the intersection at a time when the truck would be moving slowly over a smooth surface. There was evidence that no one had fallen from the truck previously. To me, it is inconceivable that, with the truck being so driven, there would have been any movement of sufficient violence to cause the suppliant to lose his balance and fall. Therefore, it is more logical to infer that the suppliant would not have fallen had he not been struck a blow by Mallette.

Further, I had the opportunity of observing the witness Mallette. He impressed me as being the sort of person who, having been threatened or who thought he had been threatened, would instinctively resort to the course of action which I conclude and find he did in this instance.

Having so found, it is unnecessary to consider the first allegation of negligence, namely, that the servants of the

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Crown were negligent in causing the suppliant to ride on the truck in circumstances that they should have realized were dangerous and the defences put forward to such allegation.

The respondent, upon becoming aware of the substance of the testimony to be given by Mallette, applied for and obtained leave to amend the statement of defence by pleading the unforeseeable independent act of Mallette as being the cause of the suppliant's injury.

At trial, I allowed the suppliant to amend his petition to include an allegation of negligence in that the servants of the Crown did not provide adequate supervision during the journey to the quarry and failed to preclude access to the scrap pile from which Mallette obtained the iron bar with which he struck the suppliant.

Section 3(1)(*a*) of the *Crown Liability Act* S.C. 1952-53, c. 30 provides as follows:

> 3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
>
> (*a*) in respect of a tort committed by a servant of the Crown, . . .

and section 4(2) provides,

> 4. (2) No proceedings lie against the Crown by virtue of paragraph (*a*) of subsection (1) of section 3 in respect of any act or omission of a servant of the Crown unless the act or omission would apart from the provisions of this Act have given risen to a cause of action in tort against that servant or his personal representative.

The liability imposed upon the Crown under this Act is vicarious. *Vide The King v. Anthony and Thompson*[1]. For the Crown to be liable the suppliant must establish that an officer of the penitentiary, acting in the course of his employment, as I find the guard in this instance was acting, did something which a reasonable man in his position would not have done thereby creating a foreseeable risk of harm to an inmate and drew upon himself a personal liability to the suppliant.

The duty that the prison authorities owe to the suppliant is to take reasonable care for his safety as a person in their custody and it is only if the prison employees failed to do so that the Crown may be held liable, *vide Ellis v. Home Office*[2].

While the prisoner, Mallette, had a long record of convictions for crimes, including robbery with violence, his conduct in the penitentiary was not such that the prison

[1] [1946] S.C.R. 569. [2] [1953] 2 All.E.R. 149.

authorities would have had any reason to believe that he had extraordinarily violent propensities over and above those of ordinary prison inmates and, therefore, that he might strike the suppliant. Accordingly there was no reason for the prison authorities to segregate Mallette or to subject him to constant rigorous observation or special precautions and it was reasonable that he should be included in a working party under routine conditions and supervision.

Further, since the prison authorities had no reason to suspect violent conduct on the part of Mallette, it also follows that they would have no reason to suspect that he would arm himself to perpetrate an act of violence.

Therefore, I am unable to find negligence on the part of the Crown's servants in the circumstances outlined.

It follows that the suppliant is not entitled to the relief sought by his Petition of Right herein and the respondent is entitled to costs.

Since I have found the respondent not liable, it is not necessary for me to consider the quantum of damages, but if it were obligatory for me to do so I would have fixed an amount of $2,500 as appropriate compensation.

Judgment accordingly.

BETWEEN:

1964
Aug. 11

HOFFMAN-LA ROCHE LTD. ....APPELLANT;

AND

BELL-CRAIG PHARMACEUTICALS DIVISION OF L. D. CRAIG LTD. .. } RESPONDENT.

Patents—Practice—Patent Act, R.S.C. 1952, c. 203, s. 41(3)—Compulsory licence—Appeal under s. 41(3)—Application to suspend operation of licence pending appeal—Authority of Court to affect operation of Order of Commissioner of Patents pending appeal therefrom.

This is an application by the appellant to stay proceedings in relation to the grant of a compulsory licence under s. 41(3) of the *Patent Act* by suspending the operation of the licence pending the disposition of an appeal to this Court from the decision of the Commissioner of Patents to grant the licence.

Held: That it cannot be concluded that there is a probability that this Court will dispose of the appeal upon the ground that the Commissioner erred in not forming the opinion that the risk of danger to the public inherent in permitting the respondent to manufacture the

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patented substance was good reason for refusing the licence, and this is the only ground advanced by the appellant upon which the Court would consider granting a stay, if it has authority to do so.

2. That it is not established that this Court, in an appeal under s. 41(3), has any authority to affect the operation of the Commissioner's Order prior to disposition of the appeal.

3. That the application is dismissed.

APPLICATION for a stay of proceedings in relation to a decision by the Commissioner of Patents under subs. (3) of s. 41 of the *Patent Act,* an appeal having been taken from the decision to this Court.

The application was heard on August 11, 1964 by the Honourable Mr. Justice Jackett, President of the Court, at Ottawa, and was dismissed.

G. F. Henderson, Q.C. for appellant.

I. Goldsmith for respondent.

JACKETT P. now (August 14, 1964) delivered the following reasons for dismissing the application:

This is an application to stay proceedings in relation to a decision by the Commissioner of Patents to grant a compulsory licence under ss. (3) of s. 41 of the *Patent Act,* an appeal having been taken from the decision to this Court. The purpose of the application, as I understand it, is to have an order of this Court issue postponing the effective date of the compulsory licence pending disposition of the appeal.

The only ground, of those that have been urged upon me, upon which I would consider granting a stay, if I have authority to grant a stay, is that the Court might conclude, upon the disposition of the appeal, that the Commissioner of Patents erred in *not* forming the opinion that the risk of danger to the public inherent in permitting the respondent to manufacture the patented substance was good reason for refusing the licence.

In that connection, I refer to a statement by Thurlow J. in *Hoffman-La Roche Limited v. Delmar Chemicals Limited*[1], concerning the duty of the Commissioner in dealing with an application under ss. (3) of s. 41, as follows:

"But, as I read the section, neither the ability of the particular applicant to produce the food or medicine safely nor his ability to produce a safe food or medicine

[1] 27 Fox P.C. 178.

is a matter which the Commissioner is concerned to ensure."

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Having regard to that statement, with which I agree, I cannot conclude that there is a probability that this Court will dispose of this appeal upon the ground that the Commissioner erred in not forming the opinion that the risk of danger to the public inherent in permitting the respondent to manufacture the patented substance was good reason for refusing the licence.

Furthermore, I am not satisfied that this Court, in an appeal under ss. (3) of s. 41, has any authority to affect the operation of the Commissioner's order prior to disposition of the appeal.

1963 Dec. 4, 5 — 1964 Aug. 14

BETWEEN:

ABE POSLUNS .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

AND BETWEEN:

JOSEPH A. POSLUNS .... APPELLANT.

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

AND BETWEEN:

SAMUEL POSLUNS .... APPELLANT.

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

AND BETWEEN:

LOUIS H. POSLUNS .... APPELLANT.

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income Tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3 and 4—Discounts on mortgages purchased by taxpayer—Income or capital gain—Whether purchase of such mortgages an investment.

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The appellants, who are brothers, appealed from the assessment of the respondent as income of amounts realized as discounts on mortgages purchased individually by them at the rate of about one mortgage per year by each appellant during the period 1951 to 1956. The face value of the mortgages ranged from $30,000 to $160,000 and all provided for interest to be paid at or below the prevailing rate for prime first mortgages, although part or all of several of the mortgages in question were second or third mortgages. All were for terms of not more than five years and all were held by the appellants until maturity or payment before maturity. The mortgages were of a highly speculative nature.

Held: That the determination of this issue must depend on the totality of the facts and surrounding circumstances of the case, because no single criterion has been laid down upon which to decide whether the transactions were investments or adventures in the nature of trade.

2 That the multipilicity of transactions may be an important factor when considered in the light of surrounding circumstances and the purchase of one mortgage per year by each of the appellants does not necessarily lead to the conclusion that the transactions were not numerous having regard to the large amount of each purchase.

3. That the mortgages purchased by the appellants were not the kind that would be considered for investment purposes by a person who was primarily concerned with a return on his money by way of interest

4 That the appeal is dismissed.

APPEALS under the *Income Tax Act.*

The appeals were heard by the Honourable Mr. Justice Cattanach at Toronto.

J. J. Robinette, Q.C. and *W. R. Latimer* for appellants.

H. D. Guthrie, Q.C. and *M. Barkin* for respondent.

The fact and question of law raised are stated in the reasons for judgment.

CATTANACH J. now (August 14, 1964) delivered the following judgment:

These are appeals against the appellants' assessments under the *Income Tax Act,* R.S.C. 1952, c. 148 for their respective 1954, 1955 and 1956 taxation years. There are twelve appeals, one for each of the three taxation years by the four appellants and since the identical problem is involved in each, the appeals were heard together. The appeals relate to amounts realized as discounts on mortgages purchased individually by the four appellants. The question for determination is whether the amounts received as discounts were income from the operation of businesses in schemes of profit making within the meaning of sections 3 and 4 of the *Income Tax Act,* as contended by the Minister, or were merely gains upon the realization of investments that had increased in value, as contended by the appellants.

The four appellants are brothers who were originally engaged in the garment and fur trade.

Each appellant, prior to 1951, owned $12\frac{1}{2}$ percent of the shares in Popular Cloak Company Limited, a manufacturer of ladies garments, with head office and factory in Toronto, Ontario, so that the four appellants together owned one half of the shares. The remaining shares were owned by two persons not within the appellant's family group. Because of a disagreement between the appellants and the other shareholders, this company ceased to carry on business in 1961.

In addition, the four appellants at one time also owned, in equal proportions, all the shares of Super Fur Company Limited, a company engaged in the fur trade in Toronto, which ceased operations in 1956.

The appellants at one time also owned equally all the shares of Superior Cloak Company, Limited, which ceased operations in 1959.

In 1948 the appellants acquired 50 percent of the shares in two loan companies, Superior Finance Limited and Superior Discount Limited, the other half being owned by another person. In 1952 the appellants, together with the son of each of two of them, acquired the remaining shares in these companies. Each of the appellants then owned 20 percent of the shares and each of the two sons owned 10 percent.

Superior Finance Limited was in the business of making loans under the *Small Loans Act.* Superior Discount Limited was in the business of making loans exceeding the limit allowed under that statute and of accepting negotiable commercial paper.

Subsequent to the taxation years in question, these two companies, of which the appellants were the directors, adopted a policy of seeking mortgage business, but mortgages, other than chattel mortgages, were not acquired prior thereto except as collateral security to a note for more than $500. It is true that during 1955, notices were inserted in newspapers under the heading "Mortgage Loans" advertising a "Superior Home Owner Plan". These advertisements were explained as being a device to stimulate the loan

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business, although it was a frequent result that, in addition to a note or chattel mortgage on household effects, as assignment of a mortgage was taken as security for a loan. The homeowner plan was actually an invitation to prospective home purchasers to take loans from the appellants' loan company instead of financing by second mortgages. Such loans, if larger than the amount prescribed by the *Small Loans Act,* were often secured by mortgages subsequently.

The companies engaged in the garment and fur business before mentioned, were successful and profitable. However, it was agreed among the appellants that the finance business offered a more lucrative and less arduous future as a long term business than the garment and fur trade resulting in the gradual withdrawal by the appellants from those trades in favour of the loan business. In addition to being directors of the loan companies, the appellant Abe Posluns was a full time employee and the appellants Joseph A. and Louis H. were part-time employees.

The activities of the appellants also included the ownership of office buildings and other real estate and of securities, which were managed and operated through a registered partnership in which the four appellants were equal partners. It was the general principle amongst the appellants that their assets were held in this partnership which assets, at the end of 1954, were in the approximate amount of $1,600,000 comprised of a loan to Superior Cloak Company Limited of $312,000, a loan to Superior Discount Limited of $454,800, stocks in an amount of $109,000, equity capital in a land development project in an amount of $52,000 and other real estate. The foregoing assets were not all liquid. The partnership had borrowed $779,700 from a bank secured by the personal guarantee of the appellants and an assignment of equity in real estate.

In 1951 each of the appellants began to acquire mortgages at a discount. The mortgages were acquired by the appellants individually and not in the name of the partnership. In each instance the funds wherewith to purchase the mortgages were borrowed from the partnership and, because the amounts were invariably substantial, the matter was almost certainly discussed among them. The necessary loan from the partnership was always readily forthcoming. Interest on such loans was paid to the partnership at the current prime rate.

In the case of each acquisition of a mortgage, the purchaser acted upon advice of a solicitor, personally known to him, who had approached him to ascertain whether he would be willing to purchase a mortgage that was available for sale at a discount. None of the appellants investigated the mortgagors or the property which was security for a mortgage, except on rare occasions when the inspection was quite casual. At no time did any of the appellants advertise that he had money available for such purposes. However, the fact that they had money so available was obviously known to the solicitors who approached them and who did all legal work in connection with the transactions. All mortgages acquired by the appellants were of a high risk nature, being mortgages on hotels, motels and licensed premises, construction loans and loans on vacant lands.

The payments on principal and interest received by the appellants were not deposited in the partnership account, but in their respective personal accounts. Payments were made to the appellants at their respective office premises. Records pertaining to payments were kept for them by a Mr. Jackson, a longtime employe of Posluns Brothers, the partnership.

I reproduce in tabular form information respecting the mortgage transactions of each of the appellants for the years 1951 to 1956:

ABE POSLUNS

Date acquired	Type of mtg.	Int. rate	Term of Mtge	Maturity date	Time to maturity	Mtg. security	Face value	Cost	Discount
Oct. 10/51 1.	2nd	5%	2 yrs. 6 mos.	Apr. 28/54	2 yrs. 6 mos.	Hotel Pembroke Limited Pembroke, Ontario	$44,000	$37,000	$7,000
Jan. 17/52 2.	1st	5%	5 yrs.	Nov. 5/57	5 yrs.	Iroquois Hotel Hamilton Ontario	84,612.54	73,850	10,762.54
Sep. 1/53 3.	2nd	6%	5 yrs.	Sep. 1/58	5 yrs.	King Edward Aparts. Toronto Ontario	80,000	64,000	16,000
Jun. 25/54 4.	1st & 2nd	6%	1 yr 2 mos.	May 10/55	1 yr 2 mos.	White & Davis Ltd. Toronto Ontario	116,665	100,000	11,665
Aug. 24/55 5.	Building loan	6%	1 yr.	June 11/56	1 yr.	G. Spoiala Windsor Ontario	60,000	50,000	10,000

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OSEPH A. POSLUNS

Date acquired	Type of mtg.	Int. rate	Term of Mtge.	Maturity date	Time to maturity	Mortgagor	Face value	Cost	Discount
May 1/52 1.	1st	5½%	5 yrs.	Apr. 2/54	5 yrs. 2 yrs. to disc.	G. & I. Spoiala New Ritz Hotel Windsor Ontario	$62,000	$52,000	$10,000
June 28/53 2.	1st & 3rd	5%	5 yrs.	June 15/58	5 yrs.	Moe Koffman Ottawa, Ontario	160,000	125,000	35,000
Dec. 20/54 3.	2nd	6%	1 yr.	Aug. 26/55	1 yr.	Mayzel Realty Ltd. Toronto, Ontario	128,000	117,000	11,000
Nov. 23/55 4.	1st	6%	5 yrs.	Nov. 1/60	5 yrs. seriously in default	Grand Central Hotel Windsor, Ont.	46,000	35,000	10,500

SAMUEL POSLUNS

Date acquired	Type of mtg.	Int. rate	Term of Mtge.	Maturity date	Time to maturity	Mortgagor	Face value	Cost	Discount
Sep. 3/52 1.	1st & 2nd	5%	4 yrs.	Discount rec'd 1954	2 yrs.	Murawsky Furniture Ltd. Kitchener, Ontario	$41,000	36,500	4,500
July 18/51 2.	1st & 2nd	5%	5 yrs.	Jan. 10/56	5 yrs.	Lyle Cook St. Thomas, Ontario	30,000	26,500	3,500
Dec. 15/52 3.	2nd	6%	2 yrs.	Dec. 15/54	2 yrs.	Albert W. Mendelson Toronto Ontario	30,000	30,000	nil
June 23/53 4.	1st	6%	5 yrs.	Discount rec'd Feb. 21 1956		Lincoln Motel North Bay Ontario	58,000	48,000	10,000
Mar. 17/54 5.	2nd	6%	2 yrs.	June 13/56	2 yrs.	Crosstown Construction Ltd. Toronto, Ontario	100,714 28	87,428.56	13,285.72
Mar. 14/55 6.	2nd	6%	5 yrs.	Mar. 14/60	5 yrs. seriously in default	G. Spoiala Ambassador Hotel Windsor, Ontario	85,000	65,000	20,000
Apr. 5/56 7.	1st	6%	5 yrs.	Discount rec'd Apr. 13/57	1 yr.		40,300	31,000	9,300 bonus reduced by 3,905.66 on settlement

LOUIS H. POSLUNS

Date acquired	Type of mtg.	Int. rate	Term of Mtge.	Maturity date	Time to maturity	Mortgagor	Face value	Cost	Discount
Jul. 2/52 1.	1st & 2nd	5%	5 yrs.	Discount rec'd Apr. /54	2 yrs.	G. & I. Spoiala Windsor, Ontario	63,800	52,000	11,800
Feb. 2/53 2.	2nd	6%	5 yrs.	Feb. 1/58	5 yrs.	Mariaggi Hotel Port Arthur	84,000	60,000	24,000
Sep. 15/54 3.	loan	6%	2 yrs. 7 mos	Apr. 26/57	2 yrs. 7 mos.	Rotman Bldg. Co., Ltd. Tor. Ont.	35,850	25,800	10,050
May 3/55 4.	2nd	6%	5 yrs.	June 1/60	5 yrs.	Metropole Hotel Ltd. Windsor Ontario	70,000	50,500	19,500

A review of the information in the foregoing tables discloses that the appellant, Abe Posluns acquired five mortgages at a total cost of $314,850 over a period of five years at the rate of one mortgage a year. Of those five mortgages only those numbered 1, 4 and 5 are involved in the present appeals. Two of the five mortgages were for terms of five years, one for two years and six months and two for one year. The face value of these mortgages exceeded their cost by $55,427.51.

With respect to the transactions of the appellant Joseph A. Posluns the tabular information discloses that he acquired four mortgages in the four years 1952 to 1955 inclusive also at the rate of one mortgage per year at a total cost of $329,000 of which only those numbered 1 and 2 are involved in the present appeals. Of the four mortgages acquired by him three were for five years and one for one year. The face value of these mortgages exceeded their cost by $66,500.

The appellant, Samuel Posluns acquired seven mortgages during the years 1951 to 1956, of which six were at a discount. Those numbered 1, 2, 3 and 4 in the table respecting this appellant are the subject of the present appeals. This appellant also acquired one mortgage at a discount in each of the years 1951 to 1956. Of the seven mortgages so acquired at a total cost of $334,428.56 four were for a term of five years, one for four years and two for two years. The face value of these mortgages exceeded their cost by $51,285.72.

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The table respecting the appellant Louis H. Posluns shows that he acquired four mortgages at a total cost of $188,300 during the years 1952 to 1955 also at the rate of one mortgage per year, three of which were for terms of five years and one for a term of two years and seven months. The face value of these mortgages exceeded their cost by $65,350.

The factors common to each appellant are that each acquired one mortgage per year all for substantial amounts and at substantial discounts. In each case new funds were borrowed for the particular acquisition. In every instance the appellants borrowed money from the partnership, Posluns Brothers, to make their purchases.

It was agreed by counsel that the rates of interest on first mortgages on prime residential property in the Toronto area, where the amount of the loan did not exceed 60 percent of the value of the property, were 5½ percent in 1951, 6 percent in 1952 and 1953 and 6½ percent in 1954 and 1955. A review of the interest rates applicable to the mortgages acquired by the appellants indicates that the greater majority are slightly less than the prevailing rates on prime first mortgages and in a few instances equal thereto.

The appellants did not act in concert with any one else in acquiring these mortgages, or with each other, except in one instance when Joseph A. Posluns acquired a one-half interest in a mortgage on property owned by Mayzel Realty Limited, item No. 4 in the table applicable to him, jointly with Arthur Cohen, who also acquired a one-half interest therein.

None of the appellants set up an organization for the acquisition of these mortgages. None ever advertised for them. Apparently they never bargained over the price to be paid for them because they were content to rely on the advice of the solicitor who recommended them. The records required by the appellants were kept for them by an employee of the partnership.

None of the appellants sold any mortgages purchased by them, but the mortgages were held until maturity or until paid off prior to maturity.

In each and every mortgage there was an obvious and real element of risk. The substantial discounts were explained by the nature of the risk.

I repeat that the issue herein is whether the profits from the mortgage transactions under review were enhancements of the value of investments of profits from a business, including therein transactions that were adventures in the nature of trade and accordingly income within the meaning of sections 3 and 4 of the Act. The determination of this issue must depend on the totality of the facts and surrounding circumstances of the case, which I have set out with all the emphasis given them by counsel for the appellants, because no single criterion has been laid down upon which to decide whether the transactions were investments or adventures in the nature of trade.

Counsel for the appellants in argument put stress particularly on the fact that each of the appellants entered these transactions on his own account, that no organization was set up by any of them to acquire the mortgages and that they never advertised their willingness to purchase mortgages. Above all he pointed to the scant number of transactions—one mortgage per year acquired by each appellant.

There was no need for the appellants to set up an organization or to advertise in order to acquire the mortgages. The mortgages were offered to them by solicitors who did all legal work necessary and who knew that each of the appellants had substantial funds available to purchase mortgages that they had to offer for sale.

While the multiplicity of transactions does not of itself determine that they were operations in a scheme of profit-making, it has been held that it may be an important factor when considered in the light of the surrounding circumstances. I am not persuaded that, so considered, the transactions entered into by the respective appellants were not numerous. During the years in question, the appellants each bought one mortgage in each year which demonstrates a pattern of conduct. Having regard to the large amount of each purchase it is understandable that the purchases were not more numerous.

Each of the appellants had experience in the business of loaning money through the finance and small loan companies owned and actively operated by them and in which mortgages were frequently taken as collateral security. While there are differences between that business and the acquisition of mortgages at a discount, nevertheless, there are areas of similarity.

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Taking all such facts into consideration, I am of the opinion that it would be unrealistic to think of the mortgages purchased by the appellants as being merely investment of capital for the purpose of attaining income by way of interest on the money invested. The appellants were not merely acquiring investments and then choosing to realize them and obtaining greater amounts by way of incidental enhancement of values. The appellants received the amounts that were expected, with minor adjustments, on the discounts when the mortgages were purchased. The mortgages were not the kind that would be considered for investment purposes by a person who was primarily concerned with a return on his money by way of interest. All the mortgages were of an admittedly highly speculative nature. The attraction of the transactions to the appellants was not income return by way of interest. The interest rates on the mortgages in question, all highly speculative, and in many instances second or third mortgages were, in almost every instance, less than the prevailing rates on prime first mortgages. It is fair to infer that the attraction of the transactions to the appellants was the prospect of profits when the discounts were realized within a comparatively short time.

Despite the disparity in the number of transactions involved, which I think is offset by the greater amounts for which the fewer mortgages were purchased, I am of the opinion that it is impossible on the facts to distinguish the character of the transactions in these appeals from the character of those in *Scott v. M.N.R.*[1], in which the decision of the former President of this Court was unanimously confirmed by the Supreme Court of Canada[2]. I am also of the view that it is impossible to distinguish the facts in these cases from the facts in *M.N.R. v. MacInnes*[3], in which the Supreme Court of Canada, by a unanimous decision, reversed the decision of this Court. The Supreme Court of Canada decided that the appellant and respondent in those respective cases were in the highly speculative business of purchasing obligations of this nature at a discount and holding them to maturity in order to realize the maximum profit out of the transactions.

I, therefore, find that the discounts realized by the appellants in the taxation years in question were taxable income

[1] [1963] C.T.C. 176. [2] [1963] S.C.R. 223. [3] [1963] S.C.R. 299.

since they were profits or gains from a trade or business within the meaning of sections 3 and 4 of the *Income Tax Act*.

Accordingly the appeals are dismissed with costs subject to certain changes in the amount of some of the assessments upon which counsel intimated that they were in agreement and required no direction from me.

Judgment accordingly.

1963
Nov. 25, 28-29
Dec. 2, 3
1964
Aug. 28

BETWEEN:

SAM SORBARA .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income Tax—Income Tax Act, R.S.C. 1952, c. 148, s. 85E—Expropriation and sale of lands owned by partnership—Objective in partnership acquiring lands—Partnership not limited to dealing in lands subsequently expropriated and sold—Partnership business not terminated by expropriation and sale—Negotiation of compensation for expropriation an integral part of partnership business—Compensation for expropriated land forming part of assets of a business must be included in profits of business—Whether collection of compensation for lands expropriated and sold took place in course of partnership business.

In 1952 Malton Subdivisions Limited, in which the appellant was a shareholder, purchased 150 acres of land adjoining Malton Airport, near Toronto, Ontario and caused a subdivision plan thereof to be registered. In 1953 a partnership known as Bel-Air Builders, in which the appellant was a partner, acquired an agreement with Malton Subdivisions Limited under which it was entitled to purchase the lots shown on the subdivision plan. On February 12, 1954 a substantial portion of the 150-acre subdivision was expropriated by the Government of Canada but, on March 30, 1954 a large part of the expropriated land was abandoned by the Government and reverted to its former owners. By an agreement dated July 8, 1958 between Her Majesty in right of Canada, Malton Subdivisions Limited and the partners of Bel-Air Builders, Her Majesty agreed to pay $725,000 for a release of all claims arising out of the expropriation and for a conveyance of substantially all the unexpropriated lands in the subdivision. Of this amount $100,000 had been paid in 1954, $610,000 was paid in the latter part of 1955 and the balance was paid in 1958.

The appellant appealed from the re-assessment of his income for 1956 by which his share of the profit from the disposal of the subdivision lands by Bel-Air Builders was included in his taxable income, claiming, *inter alia*, that Bel-Air Builders ceased to carry on business from the

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time of the expropriation on February 12, 1954 and that the sale giving rise to the profit was governed by s. 85E of the *Income Tax Act,* which required the sale to be deemed to have taken place in the last taxation year in which the appellant carried on business through Bel-Air Builders, which was 1954, and that, accordingly, the assessment under appeal must be vacated because it purports to assess the gain on the said sale in the 1956 taxation year of the appellant. He claimed in the alternative that the gain resulting from the said sale was a non-taxable capital gain.

Held: That the objective of the partnership, Bel-Air Builders, in acquiring the rights to buy the subdivision lots was the usual one of making a profit in such a way as might appear from time to time to be most advantageous.

2. That under whatever agreement associated the partners of Bel-Air Builders together when they acquired the subdivision from Malton Subdivisions Limited, there is no doubt that they would have felt quite free to deal with any lands that they could acquire in any way that was calculated to produce a profit, and that being the scope of the partnership business, there is no basis for a finding that the business had ceased at the time of the expropriation or at any time before all the property had been disposed of and the proceeds therefrom had been collected and distributed.
3. That the business of acquiring land for disposition at a profit includes all operations essential to the successful completion of the project, including not only sale or other disposition but collection of the proceeds of disposition.
4. That negotiations leading to settlement of compensation for expropriation of part of the inventory of a business are an integral part of the carrying on of the business.
5. That compensation for land that was part of the assets of such a business and that has been expropriated must be included in computing the profits from the business.
6 That the collection of compensation for the lands expropriated and the sale of the other lands took place in the course of the partnership business.
7. That the appeal is dismissed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Cattanach at Toronto.

P. N. Thorsteinsson for appellant.

N. A. Chalmers for respondent.

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

CATTANACH J. now (August 28, 1964) delivered the following judgment:

This is an appeal under the *Income Tax Act,* 1952 R.S.C., c. 148, from a decision of the Tax Appeal Board[1] dismissing

[1] (1961) 26 Tax A.B.C. 28.

an appeal from a re-assessment of the appellant for the 1956 taxation year. The only question in issue is whether the appellant's portion of a profit made by a partnership of which he was a member was properly included in computing his income for the year.

During the early part of 1952, the appellant and some "associates" acquired 150 acres of land adjoining Malton Airport at $600 per acre, or a total of $90,000. That property became vested in a company, Malton Subdivisions Limited, and, by the latter part of November, 1952, a subdivision plan, known as Plan 454 for the Township of Toronto, had been registered in respect of that land and the appellant and one, N. L. Lorenzetti, had become the owners of all the shares in the company. In order to obtain the necessary approvals of the respective authorities for registration of the subdivision plan, Malton Subdivisions Limited had entered into an agreement with the Township of Toronto whereby it had assumed onerous obligations concerning the installation or erection of water mains, sewers, roads, ditches and a sewage disposal plant. This agreement envisaged that, in order to assist in the financing of the work necessary to carry out these obligations, the company "would sell or mortgage" lots "on which houses are erected or partially erected" prior to the completion of all services but would not allow "use or habitation of any building on any lot until services are completed as herein provided".

The original plan was, apparently, that Malton Subdivisions Limited would sell the lots shown on the subdivision plan and make some additional profit by building some houses as a company project, presumably for resale. At some stage, the appellant associated himself with a number of other persons in a partnership that did business under various names such as "Bel-Air Builders Company", "Bel-Air Builders" and "Bel-Air Builders Co.". This partnership, in which the appellant (who is an admitted speculative trader in lands) was evidently the dominant personality, acquired an agreement with Malton Subdivisions Limited, dated August 4, 1953, that had been entered into with the appellant and some associates as trustees for a proposed company, entitling it to acquire the various lots shown on Plan 454 at a stipulated schedule of prices over a period of ten years.

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On February 12, 1954, a substantial portion of the 150 acres covered by Plan 454 was taken by the Government of Canada under the *Expropriation Act*, 1952, R.S.C., c. 106. A large part of the property so taken was abandoned by the Government on March 30, 1954, and thus reverted to the person or persons who owned it at the time of the expropriation.

By an agreement dated July 8, 1955, between Her Majesty in right of Canada, Malton Subdivisions Limited and the partners constituting "Bel-Air Builders", Her Majesty agreed to pay $725,000 for a release of all claims arising out of the expropriation and for a conveyance of substantially all the unexpropriated lands in Plan 454. Of this amount, $610,000 was paid in the latter part of 1955, $100,000 had been paid as an advance payment in 1954 and the balance was paid in 1958. The major portion was therefor received in the partnership's financial year ending March 30, 1956. (The appellant's share in any profit made by the partnership from its business in that year is required to be included in the appellant's income for the 1956 taxation year.)

Attached to the appellant's income tax return for the 1956 taxation year were financial statements of the "Bel-Air Building Company" partnership showing that the appellant's share of "Net Gain on Disposal of Investment Properties for the Year Ended April 30, 1956" was $30,893.68. No part of this was included in the income shown by his return.

By Notice of Re-Assessment dated May 9, 1958, the appellant was re-assessed for the 1956 taxation year and the explanation of the difference between the income as declared by the appellant's income tax return and the income as fixed by the re-assessment, contained in the attached form T7W-C, showed that the Minister treated as income $30,893.68, being "Bel-Air Builders Co.—Capital gain claimed deemed taxable income".

On June 30, 1958, the appellant filed a Notice of Objection by which he took the position, in effect, that the portion of the Bel-Air Builders' profit applicable to the portions of the subdivision intended for commercial and apartment sites—namely $185,362.07 out of a total profit of $198,837.25—is "capital" because the intention was "to

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retain for rental purposes the commercial and apartment sites as a long-term investment".

The Minister having confirmed the re-assessment, the appellant appealed to the Tax Appeal Board and, by its Notice of Appeal, again took the position that "Participation . . . in the proposed development, in particular in the property acquired for commercial and apartment sites, was in the nature of an investment and any gain realized was capital in nature". The Tax Appeal Board, after reviewing the facts as established by the evidence before it, dismissed the appeal and stated its conclusions in a paragraph which reads:

> Taking stock of what actually happened and the result, I think that it was another case of a buyer of real estate having made money out of it one way, instead of another, but with the result that was hoped for originally, viz., a goodly profit, however it might arise. Here, the appellant increased his receipts for 1956 by nearly $31,000, and it was in his chosen business as a real estate broker that he did so. In my view of the evidence put forward, his activities constituted a highly speculative albeit very enterprising, adventure in the nature of trade rather than an investment project. The speculative nature of the venture was borne out by several witnesses, who even referred to the proposed community site as being like the Gobi desert, it seemed so remote and rough. Hence, it appears to me that the said gain became labelled as taxable income, and I must so find.

Had the issue in this Court been the same as the issue in the Tax Appeal Board, I would have been content to adopt the Board's disposition of the matter. In the main outline, the story as revealed by the evidence in this Court is the same as the story as set out in the Board's judgment although there are differences in detail. However, in this Court, the appeal was presented in a different way.

The appeal to this Court was put forward originally by a Notice of Appeal dated May 19, 1961. By that Notice of Appeal, the substance of the complaint against the assessment was the same as the complaint in the Tax Appeal Board, if, indeed, the words employed were not precisely the same. The original Notice of Appeal was, however, amended on November 12, 1963, and again on November 25, 1963. The significant changes may be summarized as follows:

(a) Paragraph 9 of the Statement of Facts was recast to allege, for the first time, that "From the time of the expropriation by the Crown on February 12, 1954, Bel-Air Builders Company ceased to carry on business".

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(b) Section B of the Notice of Appeal was revised to drop, *inter alia,* the propositions

(i) that participation in the project was an investment and any gain realized was capital in nature,

(ii) that the gain was the result of an accidental and unforeseen cancellation of the project and not income from a business, and

(iii) that the investment in the property was not an adventure or concern in the nature of trade,

and to substitute two grounds only for the appeal, namely:

1. The sale that gave rise to the gain that has been assessed as income was governed by the provisions of section 85E of the *Income Tax Act,* . . . the mandatory provisions of which required the sale to be deemed to have taken place in the last taxation year in which the appellant carried on business through the partnership of Bel-Air Builders Company, which was 1954, and accordingly the assessment hereby appealed from must be vacated because it purports to assess the gain on the said sale in the 1956 taxation year of the appellant.
2. In the alternative if the said sale was not subject to the provisions of section 85E with the result as aforesaid, the gain resulting therefrom was not income to the appellant but was a capital gain not taxable under any of the provisions of the *Income Tax Act.*

Subsection (1) of section 85E of the *Income Tax Act,* which is referred to in the first of the two new grounds of appeal, reads as follows:

85E. (1) Where, upon or after disposing of or ceasing to carry on a business or a part of a business, a taxpayer has sold all or any part of the property that was included in the inventory of the business, the property so sold shall, for the purposes of this Part, be deemed to have been sold by him

(*a*) during the last taxation year in which he carried on the business or the part of the business, and

(*b*) in the course of carrying on the business.

At the opening of the trial in this Court, counsel for the appellant made it clear that the appellant was *not* contending, in this Court

(a) that any part of the amount in issue is "proceeds from the realization of an investment, in the ordinary sense", or

(b) that the appellant is not "a trader in land".

Later, during the course of the trial, counsel said, speaking of the appellant: "I have admitted this man is a trader. . .". The position put forward on behalf of the appellant, as I understand it, is that

(a) the partnership's business ceased at the time of the expropriation in 1954;

(b) that neither the expropriation of part of the partnership's lands nor the sale of the remainder was, in fact, a transaction in the course of the partnership's business, but, on the contrary, each of them either fell into the classification of slump transactions (i.e., transactions whereby a business was terminated) or liquidation sales (i.e., transactions disposing of assets of a business after termination of the business); and

(c) that, while section 85E operates to require that the sale in 1956 be deemed to be in the course of carrying on of the partnership's business, it requires that it be deemed to have taken place in the 1954 taxation year, the last taxation year in which the partnership's business was carried on, and so does not support taxation of the profit therefrom as part of the appellant's 1956 income.

It will be seen, therefore, that the appellant's case is based entirely on the submission that the partnership business came to an end at the time of the expropriation or, alternatively, was brought to an end at the latest by the sale of the remainder of its interest in the land covered by Plan 454 in 1956. If the partnership business was still subsisting and that sale was in the course of the partnership business, the appellant's propositions lack the necessary factual foundation.

Leading counsel for the appellant stated his basic factual submissions as follows:

> Number 1. The business of Bel-Air Builders, the partnership of which the appellant was a member, consisted of the development of a specific subdivision project in Malton with all that that usually entails.
>
> Number 2. Upon expropriation of all but about 16 of the 150 acres involved by the Department of Transport in February, 1954, the business of Bel-Air Builders ceased.

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The first proposition is supported by the following portion of the appellant's testimony:

Q. . . . and Mr. Sorbara, what was the business of Bel-Air Builders?

A. The business of Bel-Air Builders was to develop Aria Bella Village; to build houses, and to build the commercial shopping centre.

Q. Did Bel-Air Builders ever carry on any other business activities, other than the development of Aria Bella Village?

A. None.

It is also supported by the following portion of the appellant's testimony:

A. Bel-Air Builders came to be formed, for the purpose of continuing the development of Ava-Bella Village; to build houses for sale, and to build commercial buildings for rent, which were essential to the completed project.

On the other hand, in the Reply to the Notice of Appeal, there is a statement, that has not been challenged, that, in assessing the appellant, the respondent acted *inter alia* on the assumption that the appellant and his associates acquired the agreement with Malton Subdivisions Limited for the purchase of lots on Plan 454 "with a view to reselling them or otherwise turning them to account at a profit". The onus of disproving the fact so assumed lay on the appellant.

In considering whether the appellant has discharged that onus, I must consider that part of the appellant's evidence quoted above having regard to

(a) such other evidence as there may be as to what the business of the partnership was, and

(b) the weight that may reasonably be attributed to the appellant's evidence given in 1963 by which he attempts to define the precise limits of one of the multitude of businesses with which he was associated some nine or ten years earlier, assessed in the light of my conclusions as to the reliance that may be placed on his recollection of earlier events in circumstances touching his own interests.

With reference to the latter point, I may say that I am of the view that very little weight may be attributed to the appellant's account of earlier events even when given on oath. Not only does he not appear to have appreciated that he had a personal responsibility to be sure of the accuracy of statements sworn by him, but a reading of his evidence as a whole confirms my view, formed during the course of the trial, that his evidence cannot be relied upon.

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Without taking the time to review the other evidence as to what the business of the partnership was, I can express my conclusion that, apart altogether from the onus of disproving the Minister's assumption referred to earlier, the evidence taken as a whole shows that the partnership's objective in acquiring the right to buy lots on Plan 454 was the usual one of making a profit in such a way as might appear from time to time to be most advantageous. Certainly, the partnership had in mind many possibilities, including buying lots and reselling them, buying lots building on them and selling, and buying lots building on them and renting. I do not accept the appellant's evidence that the partnership's business in 1954 was restricted by definition to development of Aria Bella Village. In my view, this statement is nothing more than a convenient way of describing the business after the event when its activities had in fact been so restricted during the first few months of its existence. I have no doubt that the partners, under whatever agreement associated them together when they acquired this subdivision (clearly the "Declaration of Partnership" by which they declared that they were in business "as Builders" is not such agreement) would have felt quite free to turn to adjoining lands as a supplement to, or a substitute for, lands on Plan 454, had any such lands presented themselves as being a potential source of profit, and would have felt quite free under such agreement to deal with any lands that they could so acquire in any way that, in their judgment, was calculated to produce a profit.

That being my finding as to the scope of the partnership business, I find no basis in the evidence, apart from the appellant's bare statement, for a finding that the business had ceased at the time of the expropriation or, indeed that it had ceased before all the property had been disposed of and the proceeds of disposition had been collected and distributed. In my view, the business of acquiring land for disposition at a profit includes all operations essential to the successful completion of the project, including not only sale or other disposition, but collection of the proceeds of disposition. See *International Harvester Company of Canada, Limited v. Provincial Tax Commission*[1], per Lord Morton of Henryton at pp. 51-52. It follows that negotiations leading to settlement of compensation for expropriation of part of

[1] [1949] A.C. 36.

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the inventory of a business is an integral part of the carrying on of the business.

There is, of course, no question that compensation for land that was part of the assets of such a business and that has been expropriated must be included in computing the profits from the business. See *Kennedy v. The Minister of National Revenue*[1], (an appeal to the Supreme Court of Canada from this decision was dismissed without reasons[2].) A question might have been raised as to whether the compensation should have been included in computing the profit from the business for the year in which the land was expropriated. See *Commissioners of Inland Revenue v. Newcastle Breweries, Limited*[3]. However, no such question was raised at any stage of the proceedings, and, if it had been, it might well have given rise to issues of fact as to the method that is appropriate in this case to determine the profits from the business. I note that the accounting witness called by the appellant seemed to be of the view that the partnership profit should be computed in accordance with what is known as the "cash" basis.

As appears from what I have already said, I am of opinion that the collection of compensation for the lands expropriated, and the sale of the other lands, took place in the course of the partnership business. The appeal is, therefore, dismissed with costs.

Judgment accordingly.

1964
June 15, 16
Sept. 4

BETWEEN:

SHELDON IRWIN PORTER ....SUPPLIANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Crown—Petition of Right—Claim for repayment of money paid to Crown under Group Annuity Contract—Authorization and execution of contract by municipal corporation—Lack of knowledge of suppliant of terms of annuity plan—Government Annuities Act, if valid, not subject to Ontario Insurance Act—Conflict between federal and provincial legislation—Object of legislation—Pith and substance of legislation—Federal legislation in the public interest—Declaration of Parliament

1 [1952] Ex. C.R. 258.
2 Memoranda of unreported judgments, [1953] 2 S.C.R. viii.
3 (1917-30) 12 T.C. 927.

as to object of legislation—Civil rights—Government Annuities Act, R.S.C. 1952, c. 132, ss. 4 and 6(3)—Municipal Act, R.S.O. 1937, c. 266, s. 404(41a)—British North America Act, 1867, ss. 91 and 92.

This is a Petition of Right of a former member of the Police Department of the City of Sudbury, Ontario, for a declaration that the *Government Annuities Act,* R.S.C. 1952, c. 132 is *ultra vires* and that the suppliant is entitled to repayment of the contributions made by him under a Group Annuity Contract between the Crown and the City of Sudbury.

The suppliant joined the Sudbury Police Department and applied for participation in the Group Annuity Plan in 1953. In 1960 he left the Police Department, and, in due course, received a Statement of Benefits under the Group Annuity Contract showing that he was entitled to a life annuity of $378.57 commencing October 1, 1990, and guaranteed for five years.

Held: That the suppliant has no right against the Crown by reason of the fact that no copy of the Bylaw pursuant to which application was made by the City of Sudbury for a Group Annuity Contract under the *Government Annuities Act* was given to him because paragraph 4 of Article IV thereof, requiring a copy of the By-law to be given to every employee, has no reference to persons becoming employees after the commencement date of the Plan, paragraph 4 of Article IV is directory only, a breach of the By-law by City officials does not confer any rights against the Crown and the Group Annuity Contract provides that the Government shall have no responsibility for the Plan except as expressly provided in the Contract.

2. That the Group Annuity Contract was duly authorized and executed.

3. That the suppliant's participation in the plan was properly made a condition to his employment as a police constable.

4. That any lack of knowledge on the suppliant's part of the terms of the plan was not such as to affect the validity of his status as a registered member of the plan.

5. That failure to give the suppliant a copy of the By-law cannot operate to vitiate his participation in the plan when such failure is first raised after he left the employment of the City.

6 That if the *Government Annuities Act* is a valid exercise of Parliament's legislative authority, the Crown, in exercising the authority conferred thereby, is not subject to the provisions of the *Ontario Insurance Act*.

7. That when a valid federal enactment comes in conflict with provincial legislation, the federal enactment prevails.

8. That the operations under the *Government Annuities Act* differ from those of a person in private business selling annuities in two respects only, viz. the object of the operations under the *Government Annuities Act* is not to make a profit but to promote thrift so that provision may be made for old age, and the annuities sold under the *Government Annuities Act* cannot be rescinded by agreement between the purchaser and the seller as they could be if the transaction were one between subject and subject.

9. That while the operations authorized by the *Government Annuities Act* are operations that are the ordinary activities of persons engaged in a business that is subject to the legislative jurisdiction of the provincial legislatures, the objective is quite different from that pursued

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by private business and, rather than being one of profit, it is to provide further facilities for the promotion of habits of thrift among the people of Canada so that provision may be made for old age.

10 That whether the "pith and substance" of the *Government Annuities Act* be the authorization of annuity contracts between the Crown and the subject or the provision of further facilities for the promotion of thrift among the Canadian people so that provision may be made for old age, it does not fall under s. 91(1A) of the *British North America Act* nor is it an Act, the pith and substance of which is to enable the Government of Canada to carry on business of a class that is subject to regulation exclusively by the provincial legislatures.

11. That Parliament may employ monies raised by taxation "for making contributions in the public interest to individuals, corporations or public authorities" provided that the law enacted for that purpose is not so framed as to "encroach upon the classes of subjects which are reserved to provincial competence" and it follows that Parliament may authorize the Crown to enter into contracts with individuals in circumstances that do not necessarily involve the expenditure of monies raised by taxation where the dominating reason for the scheme is the "public interest".

12 That the *Government Annuities Act* expressly declares the scheme to be "in the public interest" and there are no circumstances that would constrain the Courts to hold that that declaration is colourable.

13. That the *Government Annuities Act* does not affect the civil rights of any person, nor does it encroach on any of the classes of subjects reserved to the provincial legislatures.

14. That the *Government Annuities Act* is *intra vires* and there is no basis for the suppliant's claim that the Crown holds monies received from him otherwise than subject to and in accordance with the Group Annuity Contract between the Crown and the City of Sudbury.

15. That the suppliant is not entitled to any of the relief sought by the Petition of Right.

PETITION OF RIGHT for repayment of money paid to Crown under a Group Annuity Contract.

The action was tried by the Honourable Mr. Justice Jackett, President of the Court, at Sudbury.

John A. Goodearle and *John Ryan* for suppliant.

D. S. Maxwell, Q.C. and *Peter Sorokan* for respondent.

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

JACKETT P. now (September 4, 1964) delivered the following judgment:

This is a Petition of Right of a former member of the Police Department of the City of Sudbury in the Province of Ontario for a declaration that the *Government Annuities Act*, R.S.C. 1927, chapter 7, consolidated as R.S.C. 1952, chapter 132, was *ultra vires* and for a further declaration, in effect, that he is entitled to be paid by the Crown an amount equal to the contributions made by him under a Group Annuity Contract (No. G. 729) between the Crown and the City of Sudbury.

Other relief is sought by the Petition of Right but was not supported in argument.

The *Government Annuities Act* authorized the Crown in right of Canada to contract for the sale of defined classes of annuities payable to persons resident or domiciled in Canada subject to the conditions and requirements set out in the various provisions of the Act. The principal provisions of the Act are section 4 and subsection (3) of section 6, which read as follows:

4. Her Majesty, represented and acting by the Minister, may, subject to the provisions of this Act and of any Order in Council made under the authority of this Act, contract with any person for the sale

(*a*) of an immediate or deferred annuity to any person resident or domiciled in Canada,

(i) for the life of the annuitant;

(ii) for a term of years certain, not exceeding twenty years, provided the annuitant shall so long live; or

(iii) for a term of years certain, not exceeding twenty years, or for the life of the annuitant, whichever period shall be the longer;

(*b*) of an immediate or deferred annuity to any two persons resident or domiciled in Canada during their joint lives, and with or without continuation to the survivor.

6. (3) Employers of labour may, pursuant to agreement entered into with their employees in that behalf, such agreement to be of a form approved by the Minister, contract with Her Majesty for the sale to such of their employees as are domiciled in Canada of annuities otherwise purchasable by such employees as individuals under this Act; and any sums of money necessary to the carrying out of this object, whether such sums are derived from the wages of the employees solely, or partly from the wages of the employees and partly from contributions of the employers, or from contributions of the employers solely, may be paid by such employers direct to the Minister, or may be deposited in any Post Office Savings Bank to be transferred by the Postmaster General to the Minister; but unless otherwise expressly stipulated, any sums so paid shall be held for the exclusive account of the persons in whose names they were deposited, respectively.

The *Municipal Act*, R.S.O. 1937, chapter 266, as amended by chapter 30 of 1939, chapter 35 of 1941, chapter 39 of 1944, chapter 60 of 1946, and chapter 69 of 1947, authorized the council of a municipality to provide, by by-law, for "pensions for employees . . ." by arrangement with the

Crown under the *Government Annuities Act*. See section 404, paragraph 41*a*.

City of Sudbury By-law No. 2916, passed on February 2, 1948 is a by-law under paragraph 41*a* of section 404 of the *Municipal Act* to provide pensions for full-time employees of the City. A Retirement Annuity Plan was attached to the By-law describing the main features of the pension scheme.

Pursuant to By-law No. 2916, the appropriate City officials, on February 26, 1948, executed, on behalf of the City, an application for a Group Annuity Contract which was, in effect, an offer to contract, which offer was accepted by the issuance by the appropriate officials of the Government of Canada, on behalf of His Majesty, of Group Annuity Contract No. G 729. That contract was designed to implement the retirement plan attached to By-law No. 2916.

By Group Annuity Contract No. G. 729, the Crown agreed to pay to each employee to be registered thereunder an annuity as determined by the provisions and conditions of the contract and the City agreed to pay to the Crown in respect of the respective employees certain amounts known as "Employee Payments", to be deducted from the employee's wages, and other payments to be made by the City on behalf of the employees, known as "Employer Payments". The contract contains a formula to determine an employee's "Normal Retirement Age" or "Retirement Date". The annuity payable to each registered employee (subject to certain options) is a life annuity commencing on his Retirement Date with a five year guarantee. The amount of the annuity is determined by the amount of the payments made in respect of him. Section 11 of the "Terms and Conditions" of the contract, which is referred to by counsel for the suppliant as the "lock-in" clause, provides that, if a Registered Employee leaves his employment before his Retirement Date without having twenty years of service, he shall receive an annuity commencing on his Retirement Date computed by reference only to the Employee Payments.

By-law No. 2916 requires that every person who becomes an employee after the effective date of the plan attached thereto, be required "as a condition of his employment" to join the plan provided for by the By-law.

In due course, after having been appointed a constable in the Police Department, the suppliant on February 3, 1953, applied for participation in the plan and authorized the City to deduct from his wages the contributions which the plan required that he pay.

Sometime in 1960, the suppliant left the Police Department and, in due course, he received a "Statement of Benefits" under the Group Annuity Contract showing that he was entitled to a life annuity of $378.57 commencing October 1, 1990, guaranteed for five years.

One other feature of the case must be set out before outlining the suppliant's contentions. Article IV of By-law No. 2916 reads as follows:

> IV. (1) Every person who is an eligible employee under the plan on the effective date of the plan shall elect in writing within three months after the effective date whether or not he desires to join the plan.
>
> (2) Every employee who elects to join the plan shall sign the Government form of application for registration under the plan and authorize the City in writing to deduct from his salary or wages his payments under the plan.
>
> (3) Any employee who does not join the plan within the said three month period shall not be permitted to do so thereafter and every such employee shall be required to sign and deliver to the City a disclaimer acknowledging that he does not expect any retirement benefits hereunder.
>
> (4) Every employee who applies to be registered under the plan shall be given a copy of this by-law at the time of application.
>
> (5) Every person who becomes an employee after the effective date of the plan shall be required as a condition of his employment to join the plan as provided for therein.
>
> (6) Every employee who joins the plan shall be deemed to have joined it upon the terms and conditions contained in this by-law or in the form of contract set out in the said Appendix "A".

There is no dispute on the evidence that, not only was the suppliant not, in fact, given a copy of the By-law at any time, but, at no time was he informed as to the details of the plan. It is also clear that at no time, prior to his leaving, did he request any such copy or information and indeed, when he applied to join the plan, the document that he signed contained an acknowledgment that he had received a copy of the "Retirement Annuity Plan". The suppliant now contends that his not having been given a copy of the By-law was a very serious "breach" upon which he can found his claim for relief in this Petition. The Crown contends that paragraph (4) of Article IV has no reference to persons becoming employees after the commencement date of the plan because it provides only for

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giving a copy of the By-law to an employee who "applies" to be registered, whereas paragraphs (5) and (6) of Article IV do not provide for applications by new employees. Secondly, the Crown contends that, even if paragraph (4) does apply to new employees, it is directory only. Finally, the Crown contends that, in any event, any such breach of the By-law by the City officials does not confer any rights against the Crown. I agree, for those reasons, that the suppliant has no right against the Crown by reason of the fact that no copy of the By-law was given to him. I also refer to the provision of the Group Annuity Contract that "the Government shall have no responsibility for the Plan except as expressly provided in this Contract" as an additional reason why the suppliant cannot found his claim for relief on the alleged breach of Article IV of the By-law.

The suppliant's position, while put on a number of different bases, is that

(a) the arrangements represented by the transactions outlined above are a nullity, and
(b) the suppliant is entitled therefore to have returned to him the "Employee Payments" made to the Crown by the City on his behalf.

The various grounds on which it is contended that the pension plan arrangements are a nullity may be summarized as follows:

(a) the annuity contract was a *uberrimae fidei* contract under which the Crown and the City had a duty to advise the suppliant of all the terms of the contract before he elected to participate and failure to have so informed him vitiated the contract at his option;
(b) there is a trust of the money paid to the Crown for the suppliant and the "breach" of the By-law defeated the trust;
(c) the annuity contract is an insurance contract subject to the *Ontario Insurance Act* and is vitiated by failure to comply with the requirements of that statute that all the terms of the policy must be in a policy delivered to the insured;
(d) the *Government Annuities Act* is beyond the power of Parliament and void;

(e) the Group Annuities Contract is void because it was never executed on behalf of the City pursuant to an appropriate authorizing by-law;

(f) the suppliant's participation in the contract was void because he was coerced into joining by a threat of dismissal if he did not participate.

The only ground, of those enumerated in the immediately preceding paragraph, that causes me any difficulty is the contention that the *Government Annuities Act* is *ultra vires*. There is no doubt, in my view, that the Group Annuity Contract was duly authorized and executed. Similarly, there is no question that the suppliant's participation in the plan was properly made a condition to his employment as a police constable. Any lack of knowledge on his part of the terms of the plan was not such as to affect the validity of his status as a registered member of the plan. Regardless of what his rights might have been if he had insisted on having a copy of the By-law before agreeing to participate in the plan, it cannot operate to vitiate his participation when the failure to give him a copy is first raised after he left the employment of the City. Finally, if the *Government Annuities Act* is a valid exercise of Parliament's legislative authority, the Crown, in exercising the authority conferred thereby, is not subject to the provisions of the *Ontario Insurance Act,* which, as far as I am aware, is not expressed to be binding on Her Majesty. In any event, when a valid federal enactment comes in conflict with provincial legislation, the federal enactment prevails. See *Attorney General for Ontario v. Attorney General for the Dominions*[1] per Lord Watson, at page 366. This is not a case where the federal statute impliedly adopts the laws of the province as part of the federal enactment as was done, for example, by section 18(*c*) of the *Exchequer Court Act*. See *The King v. Desrosiers*[2] per The Chief Justice, at page 78.

I must, therefore, consider the submission that the *Government Annuities Act* is *ultra vires*.

The *Government Annuities Act* was enacted by Parliament as chapter 5 of the Statutes of Canada, 1908. That Act gives as the statutory reason for the enactment that "it is in the public interest that habits of thrift be promoted and

[1] [1896] A.C. 348. [2] (1908) 41 S.C.R. 71.

that the people of Canada be encouraged and aided thereto so that provision may be made for old age" and that "it is expedient that further facilities be afforded for the attainment of the said objects". Various amendments have been made to the Act since that time but it would not appear that any of them are such as to change the "pith and substance" of the Act in so far as may be relevant to determining whether it is a law in relation to a matter that falls within section 91 of the *British North America Act*.

The "further facilities" afforded to the people of Canada by the *Government Annuities Act* to promote habits of thrift "so that provision may be made for old age" were, as indicated earlier in this judgment, arrangements under which the Government of Canada sold small annuities to persons domiciled or resident in Canada. The effect of the statute is such that when a person has paid in one or more payments under an annuity contract, he cannot change his mind and get his money back but must wait and receive the annuity that he has purchased. (This is subject to an exception when the money paid is not sufficient to buy an annuity under the Act. There are also circumstances in which money is repayable on the death of the annuitant.)

The operations under the *Government Annuities Act* differ from the operations of a person in private business selling annuities in that

(a) the object of the operations under the *Government Annuities Act* is not to make profit but to promote thrift so that provision may be made for old age, and

(b) the annuities sold under the *Government Annuities Act* cannot be rescinded by agreement between the purchaser and the seller as they could be if the transaction were one between subject and subject.

Otherwise, the operations of the Government under the *Government Annuities Act* do not differ in any material respect from that of any private person in the annuities business.

The suppliant supported his contention that the *Government Annuities Act* is *ultra vires* by reference to the line of cases that has established that regulation of the contract of insurance and the insurance trade or business is a matter, in each province, within the exclusive jurisdiction of the provincial legislature. He referred to *Citizens' Insurance*

Company of Canada v. Parsons[1]; *Attorney-General for Canada v. Attorney-General for Alberta*[2]; *Attorney-General for Ontario v. Reciprocal Insurers*[3]; and *In re The Insurance Act of Canada*[4]. He might also have referred to *Reference as to Validity of Section 16 of the Special War Revenue Act*[5].

It is well established that legislation in relation to the regulation, or prohibition, of "individual forms of trade and commerce confined to the province" is not included in Parliament's power under section 91(2) of the *British North America Act* to make laws in relation to the "Regulation of Trade and Commerce". See *Canadian Federation of Agriculture v. Attorney-General for Quebec*[6] per Lord Morton of Henryton at pages 192 to 195.

Furthermore, it would not seem that Parliament can, by an Act applicable to all Canada, make laws "in relation to matters which in each province are substantially of local or private interest" unless such matters fall within an enumerated head of section 91. See *Attorney-General for Ontario v. Attorney-General for the Dominion*[7] per Lord Watson at pages 360-1.

However, the *Government Annuities Act* does not purport to be a law in relation to the annuities trade in Canada and I am satisfied that its validity is not determined by the authorities to which I have referred.

What the *Government Annuities Act* does is to authorize the Government of Canada, or more precisely, Her Majesty acting upon the advice of Her Federal Ministers, to enter into contracts under which payments are made to Her Majesty in consideration of Her Majesty undertaking to pay annuities to persons resident or domiciled in Canada, the avowed object of which activity is not to make a profit but is to provide further facilities for the promotion of habits of thrift among the people of Canada so that provision may be made for old age. While, therefore, the operations that the Government of Canada is authorized to carry on are operations that are the ordinary activities of persons engaged in a business that is subject to the legislative jurisdiction of the provincial legislatures, the objective is quite different from that pursued by private business.

[1] (1881) 7 A.C 96. [2] [1916] 1 A C. 588. [3] [1924] A C. 328.
[4] [1932] A C. 41. [5] [1942] S C.R. 429 [6] [1951] A.C. 179.
[7] [1896] A.C. 348.

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It would appear, therefore, that the *Government Annuities Act* is valid if

(a) Parliament may authorize the Government of Canada to engage in a business, the regulation of which is within the exclusive legislative jurisdiction of a provincial legislature, or

(b) Parliament may, by the means adopted by this law, enact a law to provide further facilities for the promotion of thrift among the Canadian people so that provision may be made for old age.

The relevant provisions of the *British North America Act* are as follows:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the fore-going Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subject next herein-after enumerated; that is to say,—

* * *

1A. The Public Debt and Property.

* * *

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—

* * *

13. Property and Civil Rights in the Province.

* * *

16 Generally all Matters of a merely local or private Nature in the Province.

Whether the "pith and substance" of the *Government Annuities Act* be the authorization of annuity contracts between the Crown and the subject or the provision of further facilities for the promotion of thrift among the Canadian people so that provision may be made for old age, I am of opinion that it does not fall under Head 1A of section 91 and no other head of section 91 has been suggested as supporting this legislation. If the "matter" in relation to which that legislation was made does not fall within any of the enumerated heads of section 91, the sole question is whether that "matter" falls within any of the enumerated heads of section 92. If it does, the legislation is beyond the powers of Parliament and, if it does not, then it is a valid enactment. Parliament is authorized by section 91 to make laws in relation to any "matter" not coming within the classes of subjects assigned exclusively to the legislatures of the provinces and it has not been suggested that there is any relevant class of matter assigned exclusively to the legislatures of the provinces elsewhere than in section 92.

I am of opinion that the *Government Annuities Act* is not an Act the pith and substance of which is to enable the Government of Canada to carry on business of a class that is subject to regulation exclusively by the provincial legislature. Whether Parliament can authorize the federal executive to carry on such a business, or conversely, whether a provincial legislature can authorize the provincial executive to carry on a business that is subject to regulation exclusively by Parliament, is a question of difficulty and importance concerning which, as far as I am aware, there is no authority. Having regard to the view that I have formed concerning the *Government Annuities Act*, I need express no opinion on that question.

The pith and substance of the *Government Annuities Act*, as I understand that Act, is that the federal executive is authorized to enter into contractual relations, with persons who desire to enter into such relations, of a kind designed to promote thrift among the Canadian public so that provision may be made for old age. The question I have to decide is whether this is a law in relation to "property and civil rights in the provinces" or in relation to a matter "of a merely local or private nature in the province".

Some help, in answering this question, may be found in the decision of the Judicial Committee of the Privy Council in *Attorney-General for Canada v. Attorney-General for Ontario*[1], where Lord Atkin dealt with one of the arguments used to support the *Employment and Social Insurance Act*, at page 366, as follows:

[1] [1937] A C. 355.

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It only remains to deal with the argument which found favour with the Chief Justice and Davis J, that the legislation can be supported under the enumerated heads, 1 and 3 of s 91 of the British North America Act, 1867 (1) The public debt and property, namely (3) The raising of money by any mode or system of taxation Shortly stated, the argument is that the obligation imposed upon employers and persons employed is a mode of taxation that the money so raised becomes public property, and that the Dominion have then complete legislative authority to direct that the money so raised, together with assistance from money raised by general taxation, shall be applied in forming an insurance fund and generally in accordance with the provisions of the Act

That the Dominion may impose taxation for the purpose of creating a fund for special purposes, and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities, could not as a general proposition be denied Whether in such an Act as the present compulsion applied to an employed person to make a contribution to an insurance fund out of which he will receive benefit for a period proportionate to the number of his contributions is in fact taxation it is not necessary finally to decide It might seem difficult to discern how it differs from a form of compulsory insurance, or what the difference is between a statutory obligation to pay insurance premiums to the State or to an insurance company But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence

It may still be legislation affecting the classes of subjects enumerated in s 92, and, if so, would be ultra vires In other words, Dominion legislation even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid To hold otherwise would afford the Dominion an easy passage into the Provincial domain. In the present case, their Lordships agree with the majority of the Supreme Court in holding that in pith and substance this Act is an insurance Act affecting the civil rights of employers and employed in each Province, and as such is invalid.

I conclude from this that, in the view of the learned law lords constituting the Judicial Committee at that time, Parliament may employ monies raised by taxation "for making contributions in the public interest to individuals, corporations or public authorities" provided that the law enacted for that purpose is not so framed as to "encroach upon the classes of subjects which are reserved to Provincial competence".

The *Government Annuities Act* is not a law raising money by taxation. However, if Parliament may apply money raised by taxation "for making contributions in the public interest to individuals, corporations or public authorities", I am of opinion that Parliament may authorize the Crown to enter into contracts with individuals in circumstances that do not necessarily involve the expenditure of monies raised by taxation where the dominating reason for the scheme is the "public interest". Here Parliament expressly declared that the scheme was "in the public interest" and there are no circumstances that would constrain the Courts to hold that that declaration is colourable. (It must be recognized that it is inherent in the scheme that the monies payable by way of annuity may, depending on experience, exceed the payments received for the annuities and, indeed, that they probably will, having regard to the interest allowance in the calculation of annuities, and that, to that extent the statute does involve the expenditure of monies raised by taxation.)

The only remaining question is whether, as in the case of the *Employment and Social Insurance Act*, the *Government Annuities Act* has been so framed as to invade civil rights within the province or otherwise to encroach upon the classes of subjects which are reserved to provincial competence. The *Employment and Social Insurance Act* was "an insurance Act affecting the civil rights of employers and employees in each province" and as such was invalid. The *Government Annuities Act* is not an insurance scheme nor does it affect the civil rights of any person. It merely enables any person who desires to do so to enter into a contract with the Crown that is designed to promote thrift in such a way that provision will be made for old age. I am of opinion that it does not encroach upon any of the classes of subjects reserved to the provincial legislatures.

For the above reasons, I am of opinion that the *Government Annuities Act* is *intra vires* and that there is no basis for the suppliant's claim that the Crown holds monies received from him otherwise than subject to and in accordance with Group Annuity Contract No. G. 729.

Having come to that conclusion, I do not need to decide whether the suppliant would have had a legal right against the Crown for repayment of his contributions if the arrangements under which the Crown had received them were, in law, null and void. One of the traditional purposes of the Petition of Right is, however, to recover money or other

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property of the suppliant that is in the possession of the Crown. See Halsbury's Laws of England, 2nd Ed., Vol. 9, page 688, and *Miller v. The King*[1] at page 178.

There will therefore be judgment that the suppliant is not entitled to any of the relief sought by the Petition of Right and that the respondent is entitled to costs.

Judgment accordingly.

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Jan. 16

Sept. 8

BETWEEN:

GORDON WILLIAM LADE ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—General rule of taxation—Employees profit-sharing plan—Meaning of "Employees profit-sharing plan"—Meaning of "computed by reference to profits"—Meaning of "profits from his business"—Income Tax Act, R S.C. 1952, c. 148, s. 79.

The appellant in 1959 was an employee of the Richfield Oil Corporation, an American corporation, and, as such, was a participant in the company's stock purchase plan under which both he and the company made contributions to a trustee who was required by the terms of the plan to purchase stock in the company on behalf of the appellant. In 1959 the appellant paid to the trustee of the plan the sum of \$630 00 by way of payroll deduction and the company paid to the trustee the sum of \$315 00 on behalf of the appellant and the sum of \$3 24 as a dividend in respect of stock which had been allocated to the appellant's member account.

The question to be determined is whether or not the stock purchase plan is an employees profit-sharing plan as defined in s 79(1) of the *Income Tax Act*.

Held· That because s 79 of the *Income Tax Act* allows a deduction of the employee's contributions, exempts the income from the trust investments, creates a shift in the income tax burden and includes in the employee's income amounts allocated which amounts, however, he has not received and may never receive but on which he is called upon to pay taxes, which also is a departure from the general rule that taxation is based on "receivability", it must be strictly construed.

2 That the definition in s 79(1) of the *Income Tax Act* of an employees profit-sharing plan as "an arrangement under which payments computed by reference to profits . . . are made by an employer to a trustee" restricts the ordinary meaning of an employees profit-sharing plan, being one under which employees are given a share in the profits of their employer if and when such profits are realized, by limiting

[1] [1950] S C R. 168.

the plan to one only where the payments of the employer are computed by reference to profits and paid into trust.

3 That the exclusion by s. 79(1) of a plan based merely on the employees' contributions being made "out of profits" points out that something else than a mere contribution out of profits is required to qualify a plan under the section.

4. That the words in parenthesis in s. 79(1) "(whether or not payments are also made to the trustee by the officers or employees)" go beyond the ordinary concept of an employees' profit-sharing plan, extend the meaning of the heading of the section, as well as the definition contained in s 79(1) by allowing officers and employees to contribute, and have the effect of not only confirming that the ordinary meaning of a profit-sharing plan was contemplated by the legislators but also support the view that if these words had not been mentioned then a plan where the employees contributed would not have been considered as a profit-sharing plan under the *Income Tax Act*; and the definition of a profit-sharing plan under the Act is, therefore, except to the extent it is or may be affected by what has been pointed out, to be taken to mean what it says, which is that a set formula is worked out by reference to the employer's profits whereby a total amount of profits to be distributed to the employees or shared by the employer with them is determined and must be paid to a trustee when there is such a profit.

5 That what is required is a binding obligation by the employer to make payments in accordance with a formula which refers to profits and which must be paid in the event of profits. It is in this sense only that it can be "computed by reference to profits" and paid as required under this section.

6 That the words "computed by reference to profits" cannot mean that profits must be used only as a means of calculating the employer's contributions which is only a mathematical calculation, but they must also mean that the amount so calculated or computed must be paid under the plan when the profit is realized which is how the employer shares his profits with his employees.

7. That "payments computed by reference to profits . . . and make . . . to a trustee" cannot mean a plan such as here where the contributions of the employer are predicated upon payments being made by the employees as a prerequisite to the employer contributing a percentage of the contributions of the employees even if such percentage will increase with an increase of the ratio of profits to the capital invested.

8 That while employees' contributions are permitted under s. 79(1) there is nothing which permits them to be made a *"sine qua non"* of the contributions of the employer.

9. That although the contribution of the employer in this case is computed in one sense by reference to profits, there is no predetermined proportion necessarily shared with the employees and paid to them in the event of profits as it is dependent upon the employees' contributions and not upon profits, and the plan involved here cannot therefore be said to be an "employees profit-sharing plan" under the *Income Tax Act*.

10 That a plan would not fail to qualify under s. 79(1) merely because the employer made a contribution from funds other than profits or made a contribution in a year when there was no profit provided that under the plan the payments be computed by reference to profits and the proportions so calculated be paid into the trust in the event of profits.

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11 That the words in s 79(1) "profits from his business" should be given a wide interpretation and would go so far as to include therein, at least in the case of a corporation, the latter's net income after taxes.

12 That the appeal is allowed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Noël at Ottawa.

P. N. Thorsteinsson for appellant.

G. W. Ainslie and *D. G. H. Bowman* for respondent.

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

NOËL J. now (September 8, 1964) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board[1] confirming the addition by a reassessment of the Minister to the appellant's income for the 1959 taxation year of an amount of $315 paid by the appellant's employer, Richfield Oil Corporation, under what is termed a stock purchase plan for its employees and allocated to the appellant's TRUSTEED ACCOUNT as well as an additional sum of $3.24 dividends also allocated to the said account pursuant to the provisions of the said plan.

The question to be determined here is whether or not the above mentioned stock purchase plan is an employees profit-sharing plan as defined in s. 79(1) of the *Income Tax Act,* R.S.C. 1952, c. 148. If the said plan does not qualify under the above section, then the amounts cannot be added to the appellant's taxable income; on the other hand, if it does, as held by the Board, these amounts should be added to the appellant's income and are taxable.

The present appeal is a test case of special interest to a number of employees who, like the appellant, do not wish to be taxed on amounts allocated to them on a contingent basis under this plan, which amounts the employees would never see if they were to retire or leave the company within five years from the time they entered the plan.

At the beginning of the hearing of this appeal, counsel for the appellant filed an Agreed Statement of Facts as Ex. A, to which are attached, as Exs. 1 and 2 respectively, the stock purchase plan for employees, the appellant's tax

[1] 30 Tax A B C 397.

return for 1959 and the published annual report of the appellant's employer, Richfield Oil Corporation for the year 1958 as Ex. B. This Agreed Statement of Facts is reproduced hereunder:

AGREED STATEMENT OF FACTS

The parties hereto admit the several facts respectively specified, provided that these facts are admitted for the purposes of this cause only and the admission thereof is not to be used against either party on any other occasion or by anyone other than the parties hereto

1. The Appellant at all times material to this appeal was resident in Canada and was employed by Richfield Oil Corporation (hereinafter referred to as "the Company")

2 The Company is a body corporate, incorporated in the State of Delaware, one of the United States of America, registered to carry on business and carries on business in the Province of Alberta and elsewhere in Canada, and the substantial part of its business is carried on outside Canada

3 Attached hereto and marked as Exhibit 1, is a document entitled "Stock Purchase Plan for Employees—Richfield Oil Corporation", which document comprises two parts, viz: "PART I—THE PLAN", "PART II—DECLARATION OF TRUST".

4 Prior to the commencement of the 1959 calendar year the Appellant had complied with the eligibility requirements of sec 2, Part I of Exhibit 1, and at all times material to this appeal was a member of the Plan

5 During the 1959 calendar year, the Appellant authorized the Company to deduct and withhold from his salary the sum of $630 00, and to pay this sum to the trustee of the Plan as his contribution under sec 3 of Part I of Exhibit 1 The Company, during the 1959 calendar year, withheld the sum of $630 00 and paid the amount to the trustee pursuant to Article I of Part II of Exhibit 1, which amount was credited by the trustee to the Appellant's member account.

6 The Company since the inception of the Plan up to the end of 1959, has made the following contributions as company contributions pursuant to the provisions of Part I of Exhibit 1.

	Contribution in respect of Canadian members only		*Total contributions in respect of all members*	
	Section IV	*Section IV*	*Section IV*	*Section IV*
Year	Part A Monthly	Part B Annual	Part A Monthly	Part B Annual
1953	$ 120	None	$ 135,762	None
1954	388	None	289,828	None
1955	903	None	295,604	None
1956	1,738	84	315,885	30,515
1957	3,146	None	350,358	None
1958	4,175	None	391,839	None
1959	8,592	None	431,033	None
	$ 19,062	$84	$ 2,210,309	$ 30,515

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All of the above contributions were delivered by the Company to the trustee pursuant to Article I of Part II of Exhibit 1, and were held by the trustee upon trusts set forth and declared in Part II of Exhibit 1. During the 1959 calendar year the Company did not make any annual contributions pursuant to para B, sec. IV, Part I of Exhibit 1, since during the year the percentage of its profits to invested capital was less than 11%.

7 Of the sum of $431,033 00, referred to in paragraph 6, the sum of $315 was allocated by the trustee during the 1959 calendar year to the Appellant's trusteed account.

8. During the 1959 calendar year a cash dividend of $1.62 was received by the trustee in respect of stock which had been allocated to the Appellant's member account and was credited to the Appellant's member account and a further cash dividend of $1.62 was received by the trustee in respect of stock which had been allocated to the Appellant's trusteed account and was credited to the Appellant's trusteed account.

9. Attached hereto and marked as Exhibit 2 is a true copy of the return of income filed by the Appellant with the Respondent for his 1959 taxation year The sum of $12,900.00 shown under "Salaries, Wages, Bonuses and Pensions", included the sum of $630 00 referred to in paragraph 5 hereof, but did not include the sum of $315 00 referred to in paragraph 7 hereof, nor the sums of $1 62 and $1 62 referred to in paragraph 8 hereof.

For a proper understanding of the issue involved here, the following excerpts from the plan, Ex. 1, should be set out. Paragraph A of section I spells out the purpose of the plan as follows:

A. Purpose. Moved by a desire to foster a closer and continuing association with the business, your Company offers you voluntary participation in a Stock Purchase Plan. Under the PLAN contributions by you and the Company will be invested in Richfield common stock through a Trustee and accumulated in your accounts over the years of your employment

Section III of the plan deals with the contributions by members as follows:

You will contribute monthly a sum determined by yourself, but not less than $5 nor more than 5% of your monthly salary, to be paid through authorized payroll deductions . . .

The contributions of the employer are dealt with by section IV of the plan under Part A and Part B thereof which read as follows:

A. Monthly Contribution. The Company will make a monthly contribution of a sum equal to 50% of the member contributions made each month. These monthly contributions by the Company shall be reduced by amounts forfeited, if any, during the preceding month by members withdrawing from the PLAN.

B. Annual Contribution. The Company will make an annual contribution of a sum based upon the ratio of its profits to invested capital which will adjust the total monthly contributions made by the Company to the following schedule:

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Per cent of Profits to Invested Capital	Company Contribution as per cent of Member Contribution
Up to but less than 11%	50%
11% but less than 12%	55%
12% but less than 13%	60%
13% but less than 14%	65%
14% but less than 15%	70%
15% or over	75%

The plan further provides that "Invested Capital shall mean the total of all Capital Stock and Surplus (or equivalent) accounts and Long Term Debt of the Company as of the beginning of the preceding calender year, as reflected in its printed Annual Report to stockholders."

"Profits" for the purposes of the plan "shall mean the Company's Net Income after taxes for the preceding calendar year, as shown in its printed Annual Report to stockholders."

Section V A of the plan provides that "Member contributions will be paid to the Trustee by the Company within 20 days after the end of each month, for credit to each participant's MEMBER ACCOUNT as at the end of said month."

Under section V B "the Company's monthly contributions will be paid to the Trustee within 20 days after the end of each month, for allocation as of the end of said month to each member's TRUSTEED ACCOUNT".

Under section V C "the Company's annual contribution will be paid to the Trustee within 20 days after each March 31, for allocation as of said March 31 to each member's TRUSTEED ACCOUNT."

The rights under the said plan are set out in section VII as follows:

A. It is a fundamental rule that no cash or stock will be distributed to anyone while a member of the PLAN.

B. Upon termination of service the rules will be as follows:

1. At or after Age 55 if a Man or Age 50 if a Woman (regardless of years of membership in the PLAN):

   You will receive all cash and stock credited to your MEMBER ACCOUNT and TRUSTEED ACCOUNT as of your settlement date

2. Due to Death or Total and Permanent Disability or Mental Incompetency (at any age):

   You or your legal representative or your beneficiary will receive all cash and stock credited to your MEMBER

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ACCOUNT and TRUSTEED ACCOUNT as of your settlement date

3 Before Age 55 if a Man or Age 50 if a Woman (except by reason of death or total and permanent disability or mental incompetency)

You will receive, as of your settlement date, all cash and stock credited to your MEMBER ACCOUNT and the percentage of cash and stock credited to your TRUSTEED ACCOUNT indicated below.

Years in PLAN	*Percentage*
Less than 5 . . .	None
5 or more	100%

It therefore appears from the above that if, for instance, the appellant were to retire or leave the company within five years from his entry into the plan, he would only get his own money back and not the amounts contributed by the company, on which amounts, however, he would have been taxed. This can also be expressed by saying, as already stated, that this allocation to the employee each year is made on a contingent basis.

Before examining the question as to whether the present plan falls under an "Employees profit-sharing plan" as defined by s. 79(1) of the Act, it may be useful to point out that as the employer of the present taxpayer is an American corporation, the plan, which is called a stock purchasing plan, was not prepared for the purpose of taking advantage of s. 79(1). I might also say that although in the United States of America there are special provisions in their tax legislation dealing with stock purchasing plans and profit-sharing plans, which are two different things, we have nothing dealing with stock purchasing plans as such but a stock purchasing plan may, if it fulfills the definition of s. 79(1) be considered as a "profit-sharing plan".

Section 79 of the Canadian Act which deals with an employee's profit-sharing plan provides that if the plan comes within the definition of the section, the following tax consequences will ensue. The employer may deduct the amounts paid by it into the plan provided they are paid during the taxation year or within 120 days after it. Otherwise, such amounts might be considered as a payment out of profits after they have been earned and not an incidence of earning the profits. The trust set up to receive the contributions of both the employer and the employees is exempt from tax on the income from the investments it holds from time to time. All contributions and profits of the trust must be allocated by the trustee each year to individual officers or employees either absolutely or contingently and the officers or employees to which such allocations are credited must include the amounts allocated to them in calculating their incomes for tax purposes in the year in which they are so allocated but may deduct a dividend tax credit for the portion of these allocations representing dividends received by the trust from taxable corporations. When, however, the employees receive the amounts accumulated in the trust at some future date, they are then tax free to the extent that they (1) represent the employee's own contributions and have been previously included in calculating the income of an employee or officer, or (2) are out of "capital gains made by the trust".

As pointed out by Mr. Fordham, Q.C., in the Tax Appeal Board decision "Whatever may be the outcome of this appeal, there is no all-around avoidance of tax; there is simply a shift, as appellant's counsel aptly put it, in the incidence of the income tax burden. If the Plan comes within the ambit of s. 79(1), the trust is exempt, but the appellant must pay tax on the allocations to him. If, as the appellant submits, the Plan is not within the definition found in s. 79(1), the trust is taxable, but the employee then need not pay tax on the amount allocated because, in that case, the allocation is not regarded as made pursuant to s. 6(1)(*k*)."

The appellant, by counsel, has submitted a number of reasons why the present plan does not fall under s. 79(1) which can be summarized as follows: (1) the present plan is not an arrangement under which the employer's payments are computed by reference to profits at all, as for the year 1959, which is the sole period under review in the present appeal and during which the employer made no profit, the only matter considered was the employee's contributions and the employer's contribution was solely determined on the basis of 50 per cent thereof and had nothing to do with profit at all. The appellant's argument that the period under review should be so restricted is based on the fact that income tax is a phenomenon of annual incidence and not something that flows on indefinitely and that furthermore there is nothing in the said section which implies that if in one year the section covers a given plan that such

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a situation will exist forever; (2) the section states that the employer's payments are made and not are to be made. This, counsel for the appellant says, is important because the only payments made in 1959 are under Part A of the plan which, as we have seen, are solely computed by reference to the amount contributed by the employees and are on a monthly basis. The contribution under Part B is not made until after March 31 of the following year, so that even if a Part B contribution had been made in the present case, the plan still would not qualify under s. 79 of the Act because this section requires that the payments be made in the taxation year under review and not in the following year, as required under the plan. (3) Even if we go beyond or outside of the year 1959 and look at the year 1956 for instance, when the employer made a profit and when a contribution under B of $84 was made by the employer, the plan would not qualify either as s. 79(1) requires computation by reference to the employer's profits and not by reference to profits and also to something else so that even if a Part B contribution was made we would still have the employer's contribution based on a compound formula. And finally, (4), s. 79(1) states that the said payments are to be computed by reference to the employer's profits from his business and not the employer's profits as set down in the plan which is not the same thing. Indeed, the plan says the B contribution is to be calculated upon the ratio of its profits to invested capital, and the profits are defined in the plan as being the company's net income after taxes for the preceding calendar year as shown in its annual report to shareholders which comprises profits on sales and interest income and loss on equipment which are items which normally would enter into the determining of the employer's profits but not into the employer's profits from his business, as set out in the statute.

Counsel for the respondent, on the other hand, argues that the definition of s. 79(1) is such that it includes plans which one might not normally describe as profit sharing plans or which would not come within the true meaning of the heading of s. 79 "Employees profit-sharing plan" and that the words "payments computed by reference to profits" have a very extensive meaning; that if profits are a factor or a variable in determining the scheme of the payments, then it is a profit-sharing plan within the statute; that under the present plan there is merely more than one variable, the two primary requirements being both the amount of contributions made by the employees and the amount of profit earned by the employer, but that if the profits are a variable in determining the amount then it is correct to say that it is computed by reference to profits; that the payments of the employer here are computed by reference to profits because there is a direct relationship between the profits and the amount of the payments the company is required to make.

Those parts of s. 79, the reproduction of which will suffice for the proper determination of the present issue, are set down hereunder:

79 (1) In this Act, an "employees profit sharing plan" means an arrangement under which payments computed by reference to his profits from his business or by reference to his profits from his business and the profits, if any, from the business of a corporation with whom he does not deal at arm's length are made by an employer to a trustee in trust for the benefit of officers or employees of the employer or of a corporation with whom the employer does not deal at arm's length (whether or not payments are also made to the trustee by the officers or employees), and under which the trustee has, since the commencement of the plan or the end of 1949, whichever is the later, each year allocated either contingently or absolutely to individual officers or employees,

(*a*) all amounts received by him from the employer or from a corporation with whom the employer does not deal at arm's length, and

(*b*) all profits from the trust property (computed without regard to any capital gain made by the trust or capital loss sustained by it at any time since the end of 1955),

in such manner that the aggregate of all such amounts and such profits minus such portion thereof as has been paid to beneficiaries under the trust is allocated either contingently or absolutely to officers or employees who are beneficiaries thereunder.

* * *

(7) Where the terms of an arrangement under which an employer makes payments to a trustee specifically provide that the payments shall be made "out of profits", such arrangement shall, if the employer has so elected in prescribed manner, be deemed, for the purpose of subsection (1), to be an arrangement for payments "computed by reference to his profits from his business".

Before examining the above section, I might mention that because, as we have seen, it allows a deduction of the employer's contributions, exempts the income from the trust investments, creates a shift in the income tax burden and includes in the employee's income amounts allocated which amounts, however, he has not received and may

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never receive but on which he is called upon to pay taxes, which also is a departure from the general rule that taxation is based on "receivability", it must be strictly construed. Indeed, if a plan does not meet with all the conditions set down in the section, it should not be considered as an "Employees profit-sharing plan" under the Act.

It is with this in mind that I now turn to s. 79 of the Act for the purpose of determining how far if at all the said section or its subsections have deviated from the ordinary meaning of an employees profit-sharing plan which, I believe, is one under which employees are given a share in the profits of their employer if and when such profits are realized.

Such indeed is the type of plan contemplated by the heading of s. 79 "Employees profit-sharing plan" unless, of course, the contents of the section or of its subsections extend or limit such a plan.

The definition contained in s. 79(1) "an arrangement under which payments computed by reference to profits... are made by an employer to a trustee" restricts the above conception by limiting the plan to one only where the payments of the employer are computed by reference to profits and paid into the trust. This limitation is such that it apparently became necessary to insure by s. 79(7) that a plan, which merely says that the employer's contributions will be made "out of profits" be deemed an employees profit sharing plan if the employer so elects in accordance with the regulations, be brought back under the definition as, although such a plan would have qualified under the heading of the section, it would not without s. 79(7) have qualified under the definition. Indeed, had this not been done, such a plan would not have been considered an employees profit-sharing plan under the Act although it would have been one under the ordinary concept of an employees profit-sharing plan. This exclusion by the definition of s-s. (1) of s. 79 of a plan based merely on the employer's contributions being made "out of profits" points out that something else than a mere contribution out of profits is required to qualify a plan under the section.

On the other hand, the parenthesis in s. 79(1) "(whether or not payments are also made to the trustee by the officers or employees)" goes beyond the ordinary concept of an employees profit-sharing plan, extends the meaning of the heading of the section as well as the definition contained in s. 79(1) by allowing officers and employees to contribute and has the effect of not only confirming that the ordinary meaning of a profit-sharing plan was contemplated by the legislator but also supports the view that if these words had not been mentioned, then a plan where employees contributed would not have been considered as a profit-sharing plan under the Act. It might of course be an investment plan or a stock purchasing plan or even a thrift plan but not a profit-sharing plan where the employer merely shares his profits with his employees.

The definition of a profit-sharing plan under the Act is therefore, except to the extent it is or may be affected by what I have just pointed out above, to be taken to mean what it says which is that a set formula is worked out by reference to the employer's profits whereby a total amount of profits to be distributed to his employees or shared by the employer with them is determined and must be paid to a trustee when there is such a profit.

It may be useful here to reproduce the definition of such a plan under s. 79(1):

79 (1) In this Act "an employees profit-sharing plan" means an arrangement under which *payments* computed by reference to his profits from his business . . . are *made* by an employer to a trustee in trust for the benefit of officers or employees . . . (the emphasis is mine).

What indeed appears to be required is a binding obligation by the employer to make payments in accordance with a formula which refers to profits and which must be paid in the event of profits. It is in this sense only, I believe, that it can be "computed by reference to profits" and *paid* as required under the section.

Bearing in mind that we are dealing with an "employees profit-sharing plan" these words cannot mean that profits must be used only as a means of calculating the employer's contributions which is only a mathematical calculation but they must also mean that the amount so calculated or computed must be paid under the plan when the profit is realized which is how the employer shares his profits with his employees.

It therefore follows that "payments computed by reference to profits . . . and made . . . to a trustee" cannot mean a plan such as here where the contributions of the employer

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are predicated upon payments being made by the employees as a prerequisite to the employer contributing a percentage of the contributions of the employees even if such percentage will increase with an increase of the ratio of profits to the capital invested. Employees' contributions, it is true, are permitted under the section but there is nothing which permits them to be made a "*sine qua non*" of the contributions of the employer.

The employer's contributions would be computed by reference to profits in the present plan, I believe, if they were computed by reference to a percentage of the employer's operating profit for instance instead of being a quantum of the employees' contributions and dependent thereon. Although the contribution of the employer, in the present instance, is computed in one sense by reference to profits, there is no predetermined proportion necessarily shared with the employees and paid to them in the event of profits as it is dependent upon the employees' contributions and not upon profits.

The plan involved herein cannot, therefore, in my opinion, be said to be an "employees profit-sharing plan" under the Act.

In view of the above it becomes unnecessary for me to deal with the other matters raised in this appeal except to say that I should not think a plan would fail to qualify under this section merely because the employer made a contribution from funds other than from profits or made a contribution in a year when there was no profit provided that, under the plan, the payments be computed by reference to profits and the proportions so calculated be paid into the trust in the event of profits. I might also add that I would be inclined to give the words in s. 79(1) "profits from his business" a wide interpretation and would go so far as to include therein, at least in the case of a corporation, the latter's net income after taxes.

It therefore follows that the appeal herein from the decision of the Tax Appeal Board and the income tax assessment for the year 1959 must be allowed and that the assessment appealed against be set aside. The appellant will be entitled to his costs to be taxed in the usual way.

Judgment accordingly.

BETWEEN:

THE DEPUTY ATTORNEY GENERAL OF CANADA .... APPELLANT;

1964
Sept 10, 11
Sept. 11

AND

JANTZEN OF CANADA LIMITED ......RESPONDENT.

Trade Marks—Registration—Opposition to application for registration of word trade mark—Whether trade mark descriptive or misdescriptive —Connotation of trade mark one of impression and not to be based on research into meaning of words—Trade Marks Act, c. 49, S. of C. 1953, ss. 2(t), 7(d), 12(1)(b), 55 and 58(3).

This is an appeal by the Deputy Attorney General of Canada from a decision of the Registrar of Trade Marks rejecting the appellant's opposition to an application by the respondent for registration of the word "Waterwool" as a trade mark intended by the respondent to be used in association with ladies' and men's sweaters, ladies' and men's shorts, ladies' skirts, ladies' slacks and ladies' knitted suits and dresses, limited to such garments made of wool or in which the majority of the fibres or textiles are composed of wool

Held That the word "Waterwool" when used in relation to garments does not connote that the garment has a certain appearance, i e, a wavy lustrous finish or an undulating sheen.

2 That the word "Waterwool" may mystify the person who is confronted with it in association with a garment and it may even vaguely suggest some association with wool, but it does not describe the garment as being made of the wool of any animal.

3. That the decision as to the connotation of a trade mark must be one of impression and must not be based on research into the meaning of words.

4. That the proposed mark, having no specific descriptive connotation, is capable of distinguishing the wares of the respondent from the wares of others.

5 That on the facts of this case at least, if the trade mark does not fall within s 12(1)(*b*) of the *Trade Marks Act* and meets the requirements of s 2(*t*), its use will not necessarily contravene s. 7(*d*).

6 That the appeal is dismissed.

APPEAL from a decision of the Registrar of Trade Marks.

The appeal was heard by the Honourable Mr. Justice Jackett, President of the Court at Ottawa.

G. W. Ainslie for appellant.

J. A. Devenny for respondent.

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

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JACKETT P. at the conclusion of the argument (September 11, 1964) delivered the following judgment:

Having regard to the nature of this case, I do not see any reason for reserving my judgment, and I propose therefore to deliver my reasons at once.

This is an appeal by the Deputy Attorney General of Canada under section 55 of the *Trade Marks Act,* chapter 49 of the Statutes of Canada, 1953, from a decision of the Registrar of Trade Marks dated August 26, 1963, rejecting the appellant's opposition to an application by the respondent for the registration of a word spelled "W-a-t-e-r-w-o-o-l" as a trade mark.

In March 1962, the respondent applied under the *Trade Marks Act* for registration of the word "Waterwool". The applicant stated that it intended to use the mark in Canada in association with ladies' and men's sweaters, ladies' and men's shorts, ladies' skirts, ladies' slacks, and ladies' knitted suits and dresses, and it requested registration in respect of such wares.

In September 1962, there was filed a revised application identical in all respects with the first except that the classes of wares to which the proposed mark would apply were further restricted by inserting the words "limited to such garments made of wool or in which the majority of the fibres or textiles are composed of wool" to modify all the classes of wares as originally described.

An opposition to the respondent's application, dated September 26, 1962, was filed by the International Wool Secretariat. As, however, it appears that each opposition is regarded as a separate proceeding under the Act in respect of which the Registrar gives a separate decision, there is no need for me to refer further to such opposition.

In October 1962, the appellant filed a Statement of Opposition. This statement put forward the following grounds of opposition:

(a) the application as amended discloses that the applicant intends to use the mark in Canada in association with a class of clothes or articles of wearing apparel such as ladies' and men's sweaters; ladies' and men's shorts; ladies' skirts; ladies' slacks; and ladies' knitted suits and dresses; limited to such garments made of wool or in which the majority of the fibres or textiles are composed of wool, but the application does not limit the use of the mark to fabrics having a material content of 100% wool;

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(b) the applicant is a manufacturer of ladies' and men's sportswear which in the course of its manufacture uses fabrics, but the applicant is not a manufacturer of any fabric, cloth or material;

(c) the use of the word "wool" alone or in combination with any other word as a trade mark in association with any fabric having a material content of a combination of wool and some other material, and not of 100% wool, is a description which is false in a material respect and which is likely to mislead the public as to the character, quality or composition of the fabric and use of which is prohibited by virtue of para. (d) of section 7 of the Trade Marks Act, Ch. 49, S. of C, 1952-53;

(d) the use of the word "wool" alone or in combination with any other word as a trade mark in association with any fabric having a material content of a combination of wool and some other material and not of 100% wool, is prohibited by virtue of section 10 of the said Trade Marks Act since it is a mark which has by ordinary and bona fide commercial usage become recognized in Canada as designating the kind or quality of the fabric with which it is associated;

(e) the proposed use by the applicant of the word "Waterwool" in association with any fabric is not a trade mark within the meaning of para (t) of section 2 of the said Trade Marks Act because the applicant does not intend to use the mark for the purpose of distinguishing the ladies' and men's sportswear which are the applicant's wares from those manufactured by others;

(f) the use of the word "wool" alone or in combination with any other word as a trade mark in association with any fabric having a material content of a combination of wool and some other material and not of 100% wool is a trade mark which is not registrable under the said Trade Marks Act by virtue of para (b) of ss 1 of section 12 since it is a trade mark which is deceptively misdescriptive;

(g) the use of the word "wool" alone or in combination with any other word as a trade mark in association with any fabric having a material content of 100% wool, is a trade mark which is not registrable under the said Trade Marks Act by virtue of para (b) of ss 1 of section 12 since it is a trade mark which is clearly descriptive,

(h) the proposed use by the applicant of the word "Waterwooll" in association with any fabric is not a distinctive mark and not registrable by virtue of para (d) of ss 2 of section 37 of the said Trade Marks Act

In November 1962, the respondent filed a Counter-Statement, taking the position *inter alia* that "Waterwool" is a coined word that has no meaning and that it is quite distinctive and quite capable of distinguishing the respondent's wares from the wares of others. It also alleged there are a large number of registrations on the records of the Trade Marks Office covering trade marks including the word "wool" or a phonetic spelling thereof as applied to fabrics, clothing, blankets, piece goods and the like.

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In January 1963, the respondent filed in the Trade Marks Office evidence of a number of such registrations.

On August 26, 1963, the Registrar delivered reasons for dismissing the opposition.

The appellant appealed under section 55 of the *Trade Marks Act* by Notice of Appeal dated October 11, 1963, on the following grounds:

1. That the learned Registrar erred in holding that he only had jurisdiction to deal with objections to an application within the terms of section 37 of the Trade Marks Act.

2. That the learned Registrar erred in holding that the proposed trade mark "Waterwool" is registrable.

3. That the learned Registrar erred in holding that the proposed trade mark "Waterwool" is distinctive.

4. That the learned Registrar erred in rejecting the Opposition.

The respondent filed a Reply dated November 21, 1963, taking the contrary position to that taken by the appellant on each of his grounds and alleging that the onus is on the appellant to satisfy the Court that the Registrar erred.

On March 26, 1964, an order was made permitting the parties to file affidavit evidence. Affidavits have been filed by the respondent as follows:

1. The affidavit of Aaron E. Kline who says that he is an officer of the respondent company; that he has been associated with the textile business for the past forty-five years; that during the course of his association with the textile business he has never heard of or seen the words "Water-Silk" used to describe any textile; that during the course of his association with the textile business he has never seen or heard of a woollen fabric having a wavy lustrous pattern, and has never seen the word "water" used, in the textile trade, in association with the name of any fabric to denote that the fabric has a wavy lustrous pattern; and that in so far as his knowledge of the textile industry is concerned he knows of no method which has been devised to develop and retain a wavy lustrous pattern on a woollen fabric; and in his opinion any attempt to form a wavy lustrous pattern in a woollen fabric would not be successful as wool has a non-static quality.

2. The affidavit of Joseph H. R. Tourigny who says that he has been associated with the textile business for the past eighteen years, during which time he has been

engaged in the selling and handling of cotton, woollen and synthetic fabrics; that during the course of his association with the textile business he has never heard of a fabric called "Water-Silk", and that during the course of his association with the textile business he has never seen or heard of a woollen fabric having a wavy lustrous pattern.

3. The affidavit of Albert N. Fox who says that he is the owner of a company dealing in men's furnishings in Vancouver; that he has been associated with the textile business for the past thirty years, and that the word "Waterwool" as applied to garments does not connote to him that the garments would have a wavy lustrous pattern.

There was a fourth affidavit filed by the respondent, setting out information obtained by the deponent Hilda Nezan by a search at the Canadian Trade Marks Office concerning registrations in respect of which the words "wool" or "water" might be considered to have a descriptive or misdescriptive connotation. During the course of the hearing, pursuant to a direction given under subsection (3) of section 58 of the *Trade Marks Act*, the respondent filed certified copies of certain trade marks as more specific evidence of the same character. These have been filed as Exhibits R-1 to R-9 inclusive. The appellant made a motion during trial to strike out or reject both the Nezan affidavit and Exhibits R-1 to R-9 inclusive on the ground that the past practice of the Registrar is not relevant to the determination of the issues in this appeal. I regarded the question raised by this motion as being of considerable importance and some difficulty. I therefore reserved my decision on the motion and indicated that I would allow counsel time to file written argument on the point.

As I have now decided to dismiss the appeal without taking the evidence concerning prior registrations into account, I do not propose to render any decision on the appellant's motion. I should also say that I have not taken into account in any way, in reaching my conclusion, the similar evidence that is to be found on the official file of the Registrar of Trade Marks.

I come now to the merits of the appeal. It is common ground, I believe, that if the proposed mark falls within

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paragraph (*b*) of section 12(1) of the *Trade Marks Act,* it is not "registrable" and the appeal should be allowed. It is also clear that to be a trade mark under the Act, section 2(*t*) requires a mark to be a mark that is used by a person for the purpose of distinguishing or so as to distinguish the wares manufactured, sold, etc., by him, from the wares manufactured, sold, etc., by others.

The main attack made on the proposed mark in this case is that the proposed mark falls within the ban of section 12(1)(*b*), which reads as follows:

> 12. (1) Subject to section 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;

Allied to the attack under section 12(1)(*b*) was the contention that, when used, the proposed mark would not distinguish the goods of the respondent from the goods of others.

The appellant's first endeavour to bring the word "Waterwool" within the words "descriptive" or "misdescriptive", depending on the wares in respect of which it might be used, was an argument that the word "water" in relation to fabrics connotes "a wavy lustrous finish" or "an undulating sheen", and that "Waterwool" used in relation to garments, means, therefore, that the garment has a certain appearance, that is, a wavy lustrous pattern.

While the dictionary definitions of "water" put before me by counsel for the appellant may establish that when the word "water" is used in relation to fabrics such as silk, it connotes that they have an undulating sheen or a wavy lustrous pattern, it is a matter on which I need make no finding, because I am unable to appreciate any such application of the word "water" in relation to woollen fabrics having regard to the very nature of such fabrics. In this view I am supported by the affidavit evidence the admissibility of which has not been objected to by the appellant. I therefore reject the submission that "Waterwool" when used in relation to garments connotes that the garment has a certain appearance, that is, a wavy lustrous finish or an undulating sheen.

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The appellant's second endeavour to bring the word "Waterwool" within section 12(1)(*b*) as being either "descriptive" or "misdescriptive" was his submission that this word, when used in relation to a garment, connotes that the garment is made of wool.

Clearly the word "wool" or "woollen" would, if used in relation to garments, indicate that they were made of wool. The question is whether the presence of the four letters "w-o-o-l" in the word "Waterwool" conveys the same idea. In other words, does the appearance and the sound of the word "wool" in the coined word "Waterwool" so dominate that coined word that it conveys the clear cut idea of being made of wool, notwithstanding the presence of the letters "w-a-t-e-r" which are completely meaningless in the context? Put another way, does the combination of the word "water" with the word "wool"—a combination which in my view is either meaningless or nonsensical—neutralize the word "wool" so that it no longer conveys the idea that a garment is made of wool?

My first impression, and my present impression, is that "Waterwool" may mystify the person who is confronted with it in association with a garment; it may even vaguely suggest some association with wool; but it does not describe the garment as being made of the wool of any animal.

I accept the appellant's submission that the decision must be one of impression and must not be based on research into the meaning of words, and I find that the second attempt to bring the proposed trade mark under section 12(1)(*b*) also fails.

I also find that the proposed mark, having no specific descriptive connotation, is capable of distinguishing the wares of the respondent from the wares of others.

I do not find it necessary to deal with the argument that the Registrar erred in holding that he only had jurisdiction to deal with objections to the application that fall within the terms of section 37 of the *Trade Marks Act,* as, even if the objections made by the appellant under section 7(*d*) and section 10 of the Act were open to him, I would reject them. On the facts of this case at least, if the trade mark does not fall within section 12(1)(*b*) and meets the requirements of section 2(*t*), its use will not necessarily contravene

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section 7(*d*). No submission was made to me by the appellant in support of the contention that section 10 prohibits the grant of registration, and I cannot appreciate its application to the facts of this case.

The appeal is dismissed with costs.

Judgment accordingly.

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BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

THE PORTAGE LA PRAIRIE MUTUAL INSURANCE COMPANY RESPONDENT.

Revenue—Income—Income tax—Special payments by employer on account of employees' superannuation or pension fund—Deductibility of special payments in computing employer's income—Special payments on account of employees' superannuation fund in year when employer's income exempt from taxation—Income Tax Act, S of C. 1948, c. 5, s 69(1)—Income Tax Act, R.S C. 1952, c. 148, ss. 62(1)(5) and 76(1)—Income Tax Act, S. of C. 1958, c. 32, s. 26(2).

This is an appeal from a decision of the Tax Appeal Board allowing an appeal by the respondent from its assessment under the *Income Tax Act* for the 1958 taxation year The only question involved in the appeal is whether the deduction allowed by s. 26(2) of c. 32 of S. of C. 1958 in computing the respondent's income by reason of a special payment made in a previous year in respect of an employees' superannuation fund or plan should be calculated as an amount equal to the special payment less amounts actually deducted under s. 76 of the *Income Tax Act* in determining taxable income in respect of which the taxpayer was liable to pay income tax in previous years, or whether it is an amount equal to the special payment less amounts the deduction of which was permitted by s. 76 of the *Income Tax Act* in determining the income or loss of the taxpayer for previous years whether or not the taxpayer was liable to pay income tax for any or all of those years and whether or not the taxpayer actually claimed and was allowed to take such deduction in computing its income for any or all of those years.

Held: That under s 76(1) of the *Income Tax Act,* R S C 1952, the amount that could be deducted for any year, in the case of a single special payment, being the amount that was recommended by the actuary, was one-tenth of the amount of the payment or the amount of the payment less amounts deductible for previous years, whichever was the lesser, and the deduction was permitted only in computing incomes for the ten years commencing with the year during which the special payment was made.

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2. That there is nothing in the language of s. 62(1) of the *Income Tax Act* that negatives the deductibility of the amounts referred to in s 76 or any other amounts in computing the respondent's income for a year merely because the taxable income for that year or some portion of that year is exempt.
3. That the deduction of such an amount for a year of exemption is not necessarily academic because for a particular "exempt" year, it may well result in a loss that will be deductible in computing the taxable income for some other year in respect of which the respondent is not exempt under s 62.
4. That the conclusion as to what was "deductible" under s. 76 in computing income for a particular year is supported by the fact that when Parliament intended that amounts should not be regarded as "deductible" to such an extent as to create a loss, it went to some pains to define the amount deductible as not exceeding what the income for the year would be if the deduction in question were not allowed.
5. That the appeal is allowed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Jackett, President of the Court, at Winnipeg.

F. J. Cross for appellant.

W. P. Fillmore, Q.C. and *Joseph C. Miller, Q.C.* for respondent.

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

JACKETT P. at the conclusion of the argument (September 15, 1964) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Tax Appeal Board allowing an appeal by the respondent from its assessment under the *Income Tax Act* for the 1958 taxation year. The only question involved in the appeal is what deduction is allowed by subsection (2) of section 26, of chapter 32 of the Statutes of 1958, in computing income for the 1958 taxation year, by reason of a special payment made in a previous year in respect of an employee's superannuation fund or plan. The question is whether the deduction so allowed is an amount equal to the special payment less amounts actually deducted under section 76 of the *Income Tax Act* in determining taxable income in respect of which the taxpayer was liable to pay income tax in previous years, as the respondent contends and the Tax Appeal Board has held, or whether it is an amount equal to the

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special payment less amounts the deduction of which was permitted by section 76 of the *Income Tax Act,* in determining the income, or loss, of the taxpayer for previous years whether or not the taxpayer was liable to pay income tax for any or all of those years and whether or not the taxpayer actually claimed and was allowed to take such deduction in computing its income for any or all of those years, as the Minister contends.

In 1951 the respondent made, in respect of an employees' superannuation or pension fund or plan, a payment in the sum of $81,007.79 that met the requirements of subsection (1) of section 69 of the 1948 *Income Tax Act,* chapter 5 of the Statutes of 1948, as amended, which subsection as applicable to the 1951 taxation year, read as follows:

> 69. Where a taxpayer is an employer and has made a special payment (or payments) on account of an employees' superannuation or pension fund or plan in respect of the past services of employees pursuant to a recommendation by a qualified actuary in whose opinion the resources of the fund or plan required to be augmented by the amount of one or more special payments to ensure that all the obligations of the fund or plan to the employees may be discharged in full and has made the payment so that it is irrevocably vested in or for the fund or plan and the payment has been approved by the Minister on the advice of the Superintendent of Insurance, there may be deducted in computing the income for the taxation year the lesser of
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> (*a*) 1/10 of the whole amount so recommended to be paid, or
>
> (*b*) the amount by which the aggregate of the amounts so paid during a period not exceeding 10 years ending with the end of the taxation year exceeds the aggregate of the amounts that were deductible under this section in respect thereof in computing the income of the taxpayer for the previous years

In the Consolidation of the *Income Tax Act* to be found in chapter 148 of the Revised Statutes of 1952, which is applicable to 1953 and subsequent taxation years, section 69 of the 1948 *Income Tax Act* became subsection (1) of section 76. Hereafter, when I refer to the "old" section 76, I shall be referring to subsection (1) of section 69 for the 1950, 1951 and 1952 taxation years, and to subsection (1) of section 76 for the 1953 and subsequent taxation years.

By virtue of the principle established by the Supreme Court of Canada in *Stanley Mutual Fire Insurance Company v. Minister of National Revenue*[1], the respondent was not liable to pay income tax for the taxation years 1951, 1952 and 1953 in respect of profit for its under-

[1] [1953] 1 S C R 442

writing business. It paid income tax in respect of investment income for each of those years but it did not claim any allowance in respect of the special payment under old section 76, and the Minister accordingly made no such allowance when assessing the respondent for those years.

In the computation of the respondent's income for 1954 under the *Income Tax Act,* in respect of which it was liable to pay income tax, a deduction was made of $8,100.78. A similar deduction was made in determining the respondent's income for 1955, in respect of which it was also liable to pay income tax. These deductions were made under the old section 76.

The respondent was not liable to pay income tax for 1956 or 1957, because it was exempt by paragraph (*s*) of subsection (1) of section 62 of the *Income Tax Act,* which reads as follows:

> 62. (1) No tax is payable under this Part upon the taxable income of a person for a period when that person was
>
> * * *
>
> (*s*) an insurer, who was engaged during the period in no business other than insurance, if, in the opinion of the Minister on the advice of the Superintendent of Insurance, 50% of its gross premium income for the period was in respect of the insurance of farm property, property used in fishing or residences of farmers or fishermen

The respondent is liable to pay income tax for the 1958 taxation year. As indicated above, the only question in dispute with regard thereto is what deduction the respondent is entitled to make in computing its income for 1958 by virtue of subsection (2) of section 26 of chapter 32 of the Statutes of that year. Subsection (1) of section 26 repealed the old section 76 and re-enacted it so worded as to permit, in respect of a special contribution to a pension or superannuation fund or plan made in 1958 or a subsequent year, the deduction of the full amount of the special payment in computing the income of the taxpayer for the taxation year in which the payment was made.

Subsection (2) of section 26, which is the provision concerning the interpretation of which the parties to this appeal differ, reads as follows:

> 26. (2) This section is applicable to the 1958 and subsequent taxation years, and in the case of any special payment made before the commencement of the 1958 taxation year in respect of which an amount would, but for this section, have been deductible under section 76 of the said

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Act in computing the income of a taxpayer for the 1958 or any subsequent taxation year, notwithstanding paragraphs (*a*) and (*b*) of subsection (1) of section 12 of the said Act there may be deducted in computing the income of the taxpayer for the 1958 taxation year for the purposes of Part I of the said Act an amount not exceeding the amount of the special payment minus the aggregate of the amounts that were deductible in respect thereof under section 76 of the said Act or section 69 of the *Income Tax Act* in computing the income of the taxpayer for taxation years previous to the 1958 taxation year.

It will be noted that this provision permits a final deduction in computing income for 1958 in respect of a special payment made before 1958. That deduction is an amount not exceeding

(a) the amount of the special payment, minus

(b) the aggregate of the amounts that were "deductible" in respect of the special payment under the old section 76, in computing the income of the taxpayer for years before 1958.

In reporting its income for purposes of the *Income Tax Act* for 1958, the respondent deducted, in accordance with its understanding of subsection (2) of section 26 *supra,* an amount equal to the special payment made in 1951, $81,007.79, less the aggregate of the amounts actually deducted in computing its incomes for the two years for which it had paid income tax, namely, $16,201.56, making a deduction of $64,806.23. The Minister, by his assessment for the 1958 taxation year, only allowed $48,604.67. The difference between the two amounts is the aggregate of the amounts that would have been deducted under subsection (1) of section 76 if the respondent had been taxable for the years 1956 and 1957 and had claimed deductions under that provision in computing its incomes for those years.

It appears, therefore, that the Minister regarded the amounts of $8,100.78 that the respondent could have deducted in computing its income for 1956 and 1957, if it had computed its incomes for those years, as "deductible" within the meaning of that word in section 26(2), *supra,* but did not regard similar amounts that could have been deducted in computing the respondent's incomes for 1951, 1952 and 1953, if they had been claimed, as "deductible" within the meaning of that word in the same subsection.

The respondent appealed from the assessment for 1958 to the Tax Appeal Board and the Board allowed the appeal.

The Board's reasoning appears in that part of Mr. St-Onge's reasons for judgment, reading as follows:

> According to an amendment of 1958, part of Section 76(2) reads as follows:
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> ". . . an amount not exceeding the amount of the special payment minus the aggregate of the amounts that *were deductible* in respect thereof . . ."
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> Something is deductible, according to the *Income Tax Act*, insofar as it is permitted thereby. In the matter at stake, Section 62(1) renders the income of the appellant not taxable, as the latter complies with the said section. Therefore, why should the appellant deduct an amount that would not lessen its taxable income in any way? Furthermore, why should the respondent be so adamant when Section 69 states there "may" be deducted, instead of there "must" be deducted? Evidently, the respondent has interpreted "may" as "must". According to Section 76(2), the appellant, in 1958, had the right to deduct. "There may be deducted" an amount not exceeding the amount of the special payment minus the aggregate of the amounts that were deductible. Therefore, the amounts deductible were those in fact deducted in 1954 and 1955. Otherwise, they would not have been deductible. "Deductible" implies the right to deduct. That right should not be lost because, in a particular year, there was no taxable income from which to make a deduction. To deduct from non-taxable income would be an abortive step, no advantage resulting to the taxpayer.
>
> Section 76(1) of the *Income Tax Act* speaks of amounts that "were deductible", not "were deducted". Clearly, the employer is to have the right to deduct periodically, in instalments over a period of years, the equivalent of the total paid initially, and to treat the word "deductible" as though meaning "deducted" would defeat the employer's right under the *Income Tax Act* to deduct the equivalent of what had been paid in. The intendment of Section 76 was to permit the appellant to deduct what had been paid initially and, to this end, it must be permitted to subtract in recovering the balance of the initial amount paid, the total of the periodic deductions allowable, as well as those actually made

Before considering the question that I have to decide, I might say that, as I understand the submission of counsel for the appellant, it is such that, if it is valid, there was an amount "deductible" in respect of each of the years 1951, 1952 and 1953, as well as in respect of each of the years 1956 and 1957, within the meaning of the word "deductible" in subsection (2) of section 26 of the 1958 statute. If he is correct, the fact that the assessment is less than what would be required to implement his submission to the full extent, does not impede the acceptance of his submission and its application to support the assessment as made.

I might also say a word at this point concerning the interpretation of the latter portion of subsection (1) of the old section 76. The subsection is difficult, and, during argument, there was some question raised as to whether certain

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portions of it made sense. However, further study has convinced me that its meaning is reasonably clear. The difficulty arises from the fact that the subsection contemplates, in addition to the more obvious possibilities, the possibility of one or more special payments having been made pursuant to a recommendation that may, or may not, have provided for even more payments than the one or more that have been made at the time that the section is invoked. To cover the complete range of possibilities, a formula has been adopted that is not as easy to read as it might be. The more complicated possibility is exemplified by a hypothetical case where the actuarial report contemplated by the section recommends five annual special payments and a deduction is being made in computing the income for the third year when only three of the payments have been made. The deduction allowed in such a case by the old section 76 is the lesser of

(a) 1/10 of the aggregate of the five payments recommended, or

(b) the amount by which the aggregate of the three payments that have been in fact made exceeds the aggregate of the amounts that were deductible under the old section 76 in computing the taxpayer's income for the two previous years.

When this complicated formula is applied to the simple case of a single payment being the whole of the amount recommended by the actuary, the deduction allowed is the lesser of

(a) 1/10 of the payment recommended, or

(b) the payment so made less the aggregate of the amounts deductible under the section for previous years, if the payment was made in the ten year period ending with the current year, or nothing, if the payment was made earlier than that ten year period.

A little consideration shows therefore that, in the case of a single special payment, being the amount that was recommended by the actuary, the amount that could be deducted under old section 76 for any year was one-tenth of the amount of the payment or the amount of the payment less amounts deductible for previous years, whichever was the lesser, and that the deduction was only permitted in computing incomes for the ten years commencing with the year during which the special payment was made. There is no doubt, therefore, in my mind that, in the case of a single special payment, being the amount recommended by the actuary, the deductions were restricted to a ten year period. It is also clear that the maximum amount that could be deducted in each year was 10 per cent. of the amount of the special payment.

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I turn now to subsection (2) of section 26 of the 1958 Act. The portion of subsection (2) of section 26 on which the respondent's contention and the Board's decision depend, if one omits words irrelevant to the present problem, reads as follows:

> . . . in the case of any special payment made before the commencement of the 1958 taxation year in respect of which an amount would, but for this section, have been deductible under section 76 of the said Act in computing the income of a taxpayer for the 1958 or any subsequent taxation year, . . . there may be deducted in computing the income of the taxpayer for the 1958 taxation year for the purposes of Part I of the said Act an amount not exceeding the amount of the special payment minus the aggregate of the amounts that were deductible in respect thereof under section 76 of the said Act or section 69 of the *Income Tax Act* in computing the income of the taxpayer for taxation years previous to the 1958 taxation year.

The question to be decided here may be stated as follows: "What amount, if any, was 'deductible' under old section 76 in computing the respondent's incomes for the 1956 and 1957 taxation years?"

Before coming to the consideration of this question, it is well to review briefly the basic scheme of Part I of the *Income Tax Act,* in so far as it is relevant for, in my view, the meaning in subsection (2) of section 26 of the 1958 Act of the words "amounts that were deductible . . . under section 76 . . . in computing the income of the taxpayer for taxation years previous to the 1958 taxation year" can only be properly appreciated in the light of that scheme.

The scheme may be stated briefly as follows:

(1) Division A of Part I *inter alia* imposes an income tax on taxable income for each taxation year of each person resident in Canada;

(2) Division B lays down certain rules to be applied in determining the "income" of a taxpayer for a taxation year; these rules are supplemented by additional rules to be found in Division H which deals with "Exceptional Cases and Special Rules", and old section 76

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contains one of those rules for computing income of a taxpayer for a taxation year;

(3) Division C lays down the rules as to what deductions may be made from "income", as so determined, to ascertain "taxable income";

(4) Division E provides for computing the income tax imposed by Division A by applying certain computations to the "taxable income" determined under Division C;

(5) Division F makes provision for the necessary machinery to impose and collect the tax, and section 44 thereof requires every corporation to file a return of "income" for "each taxation year";

(6) Division G provides that no tax is payable under Part I upon the "taxable income" of a person for a period when that person comes within one of the classes enumerated therein and section 62(1)(*s*) describes one of these classes;

(7) one of the amounts that may be deducted from income for a year in determining taxable income for the year is business losses incurred in certain other years and losses are computed, under section 139(1)(*x*), by applying the provisions of the Act respecting computation of income.

That is a sufficient review of the general scheme of Part I for the purpose of the present problem and I come back to that problem: What amount, if any, was "deductible" under old section 76, in computing the respondent's incomes for 1956 and 1957? This must be determined by an interpretation of old section 76.

Old section 76 provided, in effect, that when a special payment has been made pursuant to an actuarial recommendation to the required effect and with the necessary approval (either in the taxation year in respect of which the section is being applied or in a previous taxation year) "there may be deducted in computing the income for the taxation year the lesser of"

(*a*) 1/10 of the whole amount so recommended to be paid, or (*b*) the amount by which the aggregate of the amounts so paid during a period not exceeding ten years ending with the end of the taxation year exceeds the aggregate of the amounts that were deductible under this section in respect thereof in computing the income of the taxpayer for the previous years.

When we apply this formula to the facts of this case for 1956 and 1957 in the manner that I have already indicated we come to the amount of $8,100.78. What this provision says therefore in respect of the 1956 taxation year, for example is

"there may be deducted in computing the income for the 1956 taxation year, $8,100.78."

In my opinion, this language *prima facie* makes the amount of $8,100.78 "deductible" in computing the respondent's income for the 1956 taxation year.

The respondent says, however, that the fact that paragraph (*s*) of subsection (1) of section 62 says that no tax is payable upon the respondent's "taxable income" for 1956, in some way, makes the section 76 amount not deductible in computing its income for that year. Surely, however, the taxable income that is exempt by section 62(1)(*s*) is the result obtained by making appropriate deductions from the respondent's income as determined *inter alia* by deducting $8,100.78 under old section 76.

I cannot find anything in the language of section 62(1) that negatives the deductibility of section 76 amounts or any other amounts in computing the respondent's income for a year merely because the taxable income for that year or some portion of that year is exempt. Moreover, the deduction of that amount for a year of exemption is not necessarily academic. It may well, for a particular "exempt" year, result in a loss that will be deductible in computing the taxable income for some other year in respect of which the respondent is not "exempt" under section 62.

I find further support for my view as to what was "deductible" under old section 76 in computing income for a particular year in the fact that, when Parliament intended that amounts shall not be regarded as "deductible" to such

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an extent as to create a loss, it went to some pains to define the amount deductible as not exceeding what the income for the year would be if the deduction in question were not allowed. See, for example, section 83A(1).

The appeal is allowed with costs, and the assessment for the 1958 taxation year from which the respondent appealed to the Tax Appeal Board is restored.

Judgment accordingly.

1962 Sept. 17-21, 24-27

1964 Sept. 18

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

LYON HENRY APPLEBY ....RESPONDENT.

Revenue—Income—Income tax—Misrepresentation or fraud on part of taxpayer—Meaning of "with all due despatch" as used in s. 58(3) of the Income Tax Act—Income War Tax Act, R.S.C. 1927, c. 97, s. 55 as amended by S. of C. 1944-45, c. 43, s. 15— Income Tax Act, R.S.C. 1952, c. 148, ss. 4, 46(4) and 58(3); S. of C. 1956, c. 39, s. 11.

The appellant is a general surgeon who has practiced in Vancouver, B.C. since 1924, by himself until 1947, in partnership from 1947 to 1954, and by himself again since 1954. His taxable income for the years 1941 to 1954 inclusive was reassessed, the notices of reassessment being dated November 20, 1957. The notices of objection were received by the appellant on January 10, 1958 and confirmations of the reassessments were dated November 4, 1959, some twenty-two months later. The reassessments were made under s. 46(4) of the *Income Tax Act,* R.S.C. 1952, c. 148, which authorizes the appellant to reassess the tax payable by a taxpayer at any time in the event of misrepresentation or commission of fraud by the taxpayer in filing his return or supplying information under the *Income Tax Act.*

Held: That it has been shown that wilful misrepresentation occurred repeatedly throughout the fourteen material years, not only, as would suffice, according to the balance of probability, but beyond a reasonable doubt.

2. That if misrepresentation on the part of the taxpayer is established, as it has been in this case, the Minister's right to ascertain the true situation becomes coextensive with the origin of the misrepresentation.

3. That although the lapse of twenty-two months between the receipt by the Minister of the notices of objection and the delivery of the confirmation of the reassessment exceeds even a very liberal interpretation of the words "all due despatch" as used in s. 58(3) of the *Income Tax Act,* the otherwise unwarrantable delay can be overlooked because of the period of fourteen years that had to be gone over, the piles of accountancy records, deposit slips and clients' cards and the extensive

dealings in ranching and horse races that had to be investigated, sorted and classified before the definite confirmation of the reassessments could be made.

4. That the appeal is allowed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Dumoulin at Victoria.

A. W. Mercer, L. A. Williams and *R. L. Radley* for appellant.

John L. Farris, Q.C. and *P. W. Butler* for respondent.

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

DUMOULIN J. now (September 18, 1964) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board dated November 23, 1960, respecting an income tax assessment for the 1946 taxation year of the respondent.

Before I begin writing my reasons for judgment, some preliminary particulars are required.

The respondent, Lyon Henry Appleby, is and was at all material times a medical doctor practicing his profession of general surgery in the City of Vancouver, B.C., since 1924.

Following an exhaustive examination of Dr. Appleby's professional earnings, in the course of which his bank accounts, stock investments, and a hobby of considerable pecuniary importance, breeding and raising thoroughbred horses, were investigated, the Minister of National Revenue, on November 20, 1957, issued Notices of Reassessments for the period 1941 to 1954 inclusive, covering fourteen taxation years.

The case at bar may well be divided in three chapters, corresponding, respectively, to the years 1941-1945, for which Dr. Appleby is the appellant; 1946-1952, during which the Minister of National Revenue is appellant; and 1953-1954, with Dr. Appleby as appellant.

To all practical intents, the written averments of both parties throughout these long proceedings are identical, save for minor allegations of suitability according to their status as appellant or respondent.

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It was understood at the start of the hearing that the whole matter should be disposed of on a joint evidence applicable to all fourteen cases, no specific record being singled out but most if not all of them referred to whenever necessary.

A lucid and exact outline of the preliminary steps taken by the departmental officers can be read in the two first pages of the Memorandum of Argument prepared by Mr. A. W. Mercer, counsel for the Department of National Revenue. These introductory paragraphs, on pages 1, 2 and 3 of the Memorandum, entitled "Historical Background", relate that:

> The Reassessments were made as a result of certain discoveries and subsequent investigations by the Vancouver Division of the Department of National Revenue. In October 1955, the witness MacGregor, then a Group Supervisor of Assessment in the Vancouver Division of the Income Tax Department, made a routine examination of tax returns for Dr. Appleby for the period 1953 to 1954. This examination resulted in a field audit being made for those years The field audit was conducted by the witness, Miss Lock. As a result of the information discovered during the audit, the matter was turned over to the Special Investigation Branch of the Vancouver Office of the Department of National Revenue
>
> The Special Investigation Branch was then under the direction of the witness, A. C Collins. An order of search and seizure was obtained on January 25th, 1956, from this Honourable Court. The search was conducted on February 15th, 1956, and resulted in the seizure of all the books and records of Dr. Appleby found in the Doctor's office and his home In addition to the search, both before and after the field audit, investigations were carried on through Dr. Appleby's Bank, Stockbroker, Accountant and others with whom he had dealings relating to his personal finances The Department found evidence of unreported income and schedules of these findings were prepared.

The next move consisted in three meetings at the Income Tax Office, in May and June, 1956, with the Taxpayer, his Accountant and Solicitor, when the Department officials disclosed their intention of pursuing their inquiries back to the year 1940, as there were indications of misrepresentation to that time. The taxpayer was offered ample freedom to examine the detailed lists of apparent discrepancies, prepared by Miss Alma Lock, an Assessor, and I must say, a most diligent one, at the Vancouver Taxation Office. This checking was done, eventually, by Miss Annabelle MacGowan, an accountant, who, in February of 1953, entered Dr. Appleby's service as a bookkeeper. Miss MacGowan attended "at the Vancouver offices of the Department of National Revenue, from the month of June through to the month of December, 1956".

She testified that Miss Lock exhibited to her the schedules of supposedly unreported revenue and the Doctor's income tax returns for the corresponding years. Discussions ensued on that score between these ladies but Miss MacGowan ignores what measures, if any, were taken in consequence of those talks, whilst Miss Lock explained that the records seized and the discrepancies noted were made available to Dr. Appleby's employee, whose occasional objections to items for undeclared income were carefully probed and the matter put aside in the event of reasonable doubt.

The Minister's authority to look so far back as 14 years and decide upon as many reassessments totalizing, according to exhibit 60 (hereafter called Schedule "A"), in "Tax and Interest on Unreported Income", a sum of $126,030.75, derives from s. 46(4) of the *Income Tax Act*, R.S.C. 1952, c. 148, as amended, which reads:

> (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,
>
> reassess or make additional reassessments

In 1956, but effective only from January 1, 1957, s. 46(4) was amended by c. 39, s. 11, substituting "four years" to the erstwhile period of "six years". Consequently, the assessment time limitation, prior to January 1, 1957, was six years, a delay that equally applies to s. 55 of the *Income War Tax Act*, 1927, R.S.C. c. 97, as amended in 1944-45 by S.C., c. 43, s. 15.

This statutory enactment, then, imposed upon the Minister, as a condition precedent to the reopening of taxation files beyond the prohibited limit of six years, the obligation of alleging and proving fraud or misrepresentation.

The text, in its absolute clarity (a rare and refreshing instance let it be said) speaks by itself, still, *ex majore cautela,* should confirmative authority be apropos, I could rely upon none better than Mr. Justice Cameron's dictum in *Minister of National Revenue v. Taylor*[1], where he says:

> 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

[1] [1961] Ex. C.R. 318 at 320-321-322.

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 return or in supplying any information under this Act . . .

Further, on p. 322, the learned Judge concludes in these terms:

> 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.

Regarding the nature or extent of the proof in civil proceedings to establish allegations of fraud or misrepresentation, Mr. Justice Cameron opined that:

> 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.

To meet this onus, the Department produced the T-1 General Income Tax forms for the 14 years, 1941-1954, under attack, and Schedules "B" and "C" prepared by Miss Alma Lock, assisted, I believe, by Messrs. Howard W. Kellond and Lewis Alexander O'Leary, respectively Supervisor of Accounts and Special Investigation Officer in the Vancouver Bureau.

A minute and protracted sifting of these and other exhibits—the trial lasting eight whole days—revealed, as will be more amply seen later on, numberless omissions, incomplete entries in the Doctor's very simple method of accountancy, in his annual income tax reports, cash books and system of dual deposit slips.

The probative value of exhibits 19 (hereafter referred to as Schedule "B") and 62 (hereafter called Schedule "C"), convincingly established, with the deletion of some errors, by the testimonies of Miss Alma Lock and Mr. L. A. O'Leary, consists in itemizing the alleged unreported income of the taxpayer in the course of the total revision of his medical earnings. In the Department's own words, sworn to in Court and repeated in its Memorandum of Argument (pp. 5 & 6) this was the line of action adopted:

> It commenced its investigation by a review of the Doctor's records relating to his medical practice which are:

(a) Patients' cards showing fees charged and amounts paid; (*inter alia* Schedule B, pages 8 to 18, inclusive, Schedule C, exhibits 29-30-31);
(b) Cash books for the sole proprietorship (of the medical clientele) and the partnership (from 1947 onwards);
(c) Bank deposit books and bank records similarly for the Doctor's sole proprietorship and for the period of his partnership;
(d) Original and duplicate receipts issued for fees;
(e) Correspondence and records for the collection of accounts receivable.

Having reviewed all these sources of income, the Department compared the individual items disclosed by each different record, one to the other and eliminated any duplications; the Department checked the bank deposits against the income tax returns to eliminate income from investments.

2. A review was made of the records found in Dr. Appleby's office relating to the monies received by him for prizes, purses and sales of horses and the disposition of such monies was traced and found to have gone to his bank accounts or to have been paid out for expenses and all these items were eliminated from the Schedules of alleged income. In this respect the Schedule prepared by the witness, O'Leary, ex. 74, shows certain items marked with an asterisk (21 in number). These were amounts deposited to Dr. Appleby's Savings Account which, by reason of the size of the payment, were also eliminated even though these may have been payment of medical fees.

As to the sport deeply indulged in by the taxpayer, the Minister's intention to exclude the proceeds and inherent expenditures, for instance the costs of maintaining Appleby's Running Horse Ranch and remuneration of experienced trainers, is categorically repeated on page 16 of the Argument, thus:

So far as purses, prizes and the sale of horses is concerned the Department's examination of Dr. Appleby's own records in this regard shows that $81,473 20 was traced to expenses of horse racing activities; $77,637 60 was traced to Dr. Appleby, his bank accounts or the Running Horse Ranch and this total sum was not treated as income in the preparation of Schedules "B" and "C". The total income from this source accounted for by the Department is $150,110 80 . . . and it is not proven that any proceeds from racing or the sale of horses has been included in Schedules "B" and "C" of unreported income.

Returning now to page 6, we are told that in the preparation of the schedules of discrepancies:

3. All monies received by Dr. Appleby in cash from whatever source, whether deposited in his bank or not, were eliminated. This may have included a considerable amount of fees paid in cash, but these cash items have not been treated as income from medical practice in compiling the schedules. In Dr. Appleby's own evidence he admitted he had received fees in cash (an exact statement).

The concluding paragraph to this explanatory recital submits that:

. . . the result of the precautions taken, the checks and cross-checks made, and eliminations of duplications is that Schedules "B" and "C" are

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a compilation of gross income received by Dr. Appleby for each of the years under review (1941-1954) from his medical practice only, with the sole exception of monies paid in cash, which as a precaution, have not been credited to the Doctor as income from his practice.

The unbroken trend of the evidence fully bears out both the methodical compilation and consequent findings listed in the two master schedules just described.

For the sake of convenience, I have chosen for this "pattern" decision applicable, *mutatis mutandis,* to the whole series of claims, the taxation year 1946, with, according to exhibit 60 (hereafter called Schedule A), the largest unreported income, and in which the Minister of National Revenue is appellant and Dr. Appleby, respondent. Henceforward, the litigants, to avoid confusion, will be designated by their procedural status, when occasion allows.

In his Notices of Appeal and Statements of Facts, or in his Replies to similar Notices, the Minister puts forward that: "The Respondent wilfully made misrepresentations by concealing from the Appellant (or Respondent as the situation requires) or alternatively made innocent misrepresentations by failing to include in the said return of income certain amounts received during the . . . taxation year in the course of his business, . . . which made the statements contained in the said return of income false and misleading . . ." The wording varies somewhat in the Department's Replies for the years 1953, 1954; it is attenuated in its allegation that: "The Appellant (Dr. Appleby) failed to include in his said return of income his share of amounts received by the partnership known as Dr. L. H. Appleby and Associates . . ." At least, then, everything points to a reproach of misrepresentation which as quoted in *Minister of National Revenue v. Taylor* (*supra,* at 324):

> . . . 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* (1889), 14 A.C. per Lord Herschell).

The quotation above deals with positive or affirmative misrepresentation, but it is equally true that it may lie in an omission, as held by Mr. Justice Walsh of the Alberta Supreme Court, in *Stearns v. Stearns*[1]; I cite:

> A misrepresentation may consist just as well in the concealment of that which should be disclosed as in the statement of that which is

[1] 56 D.L.R. 700 at 708.

false, for misrepresentation unquestionably may be made by concealment. If the non-disclosure of a material fact which the representor is bound to communicate is deliberate the misrepresentation is a fraudulent one; if it is unintentional it is nonetheless a misrepresentation though an innocent one.

In the case more especially examined presently, that of taxation year 1946, let it be said for the last time, the appellant introduced a proof of misrepresentation by resorting to evidence of similar facts, an unnecessary precaution in my mind. For so doing, counsel relied on Ex. 77, a handwritten Cash Book, containing entries of medical fees from January, 1935, to December, 1938, and Ex. 20, a typed Cash Book covering the period from January, 1937, carefully enough up to January of 1948, and, desultorily from then on until June, 1954.

The "pedigree" of these books, if I may be permitted the expression, was given by Mrs. Alice Herring (formerly Miss Aspell) who, from 1941 to 1953 remained in the respondent's service as a doctor's nurse and receptionist, also keeping her employer's books of accounts. When Miss Aspell (as she then was) took over in 1941, she continued the bookkeeping practices of the departing nurse, Miss Sadd, which the new incumbent describes in these terms, more or less: "There was a handwritten Cash Book (filed as exhibit 77) and when the correspondence arrived, I would slit open the letters, give them to Dr. Appleby who handed back the cheques to me. I then carried on payments on the clients' cards with corresponding entries in a black Cash Book. I put the cheques in a box and when they were in sufficient quantity, I wrote duplicate slips and made a deposit at the Nova Scotia Bank. I had a Power of Attorney for the Doctor's bank affairs and paid all expenses".

The witness identifies exhibit 20 as a Cash Book typewritten by herself in 1944 when, on Dr. Appleby's instructions, she recopied receipts dating back to 1937. The Doctor told her, at the time, that some names inscribed in the handwritten Cash Book (ex. 77) should not be there and directed nurse Aspell to delete them from the record book she would type. Dr. Appleby handed to Miss Aspell "many patients' cards from 1941 to 1944" which she was not to list in the new book (ex. 20).

Correlated with the preceding testimony was that of Miss Alma Lock, the Vancouver Tax Assessor, who, in an evidence of many hours, singled out as typical of dozens of

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others, this specific instance of omissions in the respondent's accountancy. On Schedule B, itemizing Dr. Appleby's supposedly unreported income during sole proprietorship, the witness points out, at page 1, the first entry under the name of Mrs. George Major, credited with a payment of $100. The treatment to this patient, says Miss Lock, really cost $200 in deduction of which a cash previous payment of $100 had been made and although the client's card eventually mentions full acquittance, noted in nine entries, only four of these were transcribed in the Cash Book, ex. 20. Against the notation of $100, as corrected by Miss Lock, there appears in ex. 20 an entry of $35, dated August 15, 1941.

This selfsame habit of inscribing only part of the payments received in cash book, ex. 20, and never reporting the omitted instalments in the corresponding income tax returns obtained throughout the material times at issue, concludes the witness, and is particularly noticeable on exhibits 27, 28, 29, 30, 31, five series of patients' cards.

A fair résumé of Dr. Appleby's explanations about this aspect of the case is that in 1941 and some years after, Miss Alice Aspell "was primarily a nurse instructed to look after my patients during my absences from the office. I took no part in the accountancy business of my practice. I did not attend to my bills, did not receive payments, did not write up my cash books, neither did I supervise the bank deposits, nor check my ledgers, nor prepare my income tax returns, since from 1941 to 1946 my books were kept by a Mr. Wild".

Exhibit 20 (typewritten cash book) declares the respondent, was first seen by him at his examination on Discovery, held June 27, 1962, and he had just lately been shown exhibit 77, the handwritten record for January, 1935, to December, 1938.

"In 1944", adds the Doctor, "I gave Miss Aspell certain amounts of cards I did not want extended in the cash book and suggested she should therefore re-type it. Never did I ask her to re-write the book in going so far behind as 1935, neither did I instruct her to destroy some stacks of cards. Exhibit 20 was removed to the basement of my home with piles of other papers. I never gave instructions to anyone to omit or falsify entries in my books".

From 1941 to 1946, this leading Vancouver surgeon averaged between 50 and 60 operations a month passed on to him by doctors, mainly by one William John MacKenzie, who describes himself as a "contract doctor". "I, therefore, told my office nurse", says Dr. Appleby, "to deduct from my income the pay-off share since no tax was due on such sums".

Cross-examined by Mr. Mercer, on another symptomatic indication of the unreliability of his office bookkeeping, a payment of $250 from one Alfred Westerlund, dated September 19, 1950, the witness replies that it was made to his hospital nurse, Miss Anabelle McGowan, who signed a receipt, by a patient anxious to settle his bill on leaving the hospital, adding that occurrences of this sort or payments made to him personally at the hospital would account for omissions in the office ledgers. A reasonable explanation in fact, possibly, but of no avail as a justification in law.

At the beginning of his testimony, the afternoon of September 26, the respondent mentioned giving Miss Aspell patients' cards to be deleted from exhibit 20, the cash book she was to typewrite. The next morning, referring to that matter, Dr. Appleby motivated this request by stating that "he wished to take out all cards of clients sent to him by other doctors to whom he should hand back a proportion of fees; one third to Dr. MacKenzie, one half to Dr. Moffatt, and to some others proportions ranging between one-third and one-quarter." Even so, all that precedes leaves us far away from the hard unrebutted facts, revealed on this particular point by Mr. O'Leary's findings, that from 1941 to 1954 inclusively, the total sum of fees to Dr. MacKenzie, the respondent's most regular "purveyor" of patients, amounted to $3,652.29. It leaves us farther still from the figures on Schedule C, the recapitulatory tableau of Dr. Appleby and Associates' unreported income, wherein, after deduction of the respondent's percentages of fees, he is charged for the period 1947-1954, with unreported income of no less than $22,706.96. On the part of a medical man who, from 1921 to 1962, in England and Canada, performed 31,800 major operations, something like two and a fraction a day, fiscal oversights—to a degree—are understandable, but I repeat, nonetheless unexcusable legally, and, in the instant cases, seem of criticizable inspiration and persisting frequency.

Disinterestedness from practical concerns should wear a different aspect and, above all, cannot be condoned if derogatory to a statutory obligation.

However busy one may be, it is imperative to remember that in the unrelenting gaze of the Revenue Department, he or she merely becomes thereby a taxpayer of enlarged proportions. If so, then, the respondent's avowed unconcern for material matters verged on actual imprudence. Not only does he ignore everything of items 6, 7 and 8 of Schedule B, but when asked in cross-examination "if he agrees that Schedules B and C offer accurate computations of his income for the relevant years", he replies: "I neither deny nor admit that statement having no personal knowledge of those schedules." Had he deemed it worth while to look at those exhibits, it can be presumed he could have done so, as Schedule B was deposited in Court on September 18, Schedule C two days later, the trial lasting until September 27 inclusively. The recurring excuse for such aloofness was: "I had engaged people, particularly Mr. Hopkins, to attend to that."

Some words now about this gentleman's evidence. Mr. Ronald William Hopkins is a chartered accountant practicing his profession in Vancouver. In June, 1946, he began working as accountant and "income tax advisor" for Dr. Appleby, "who wished to be kept out of trouble." He personally prepared the Doctor's income tax returns for the years 1937 to 1945 and, we are told, "included all amounts received." Despite this assurance, Mr. Hopkins, shortly afterwards admitted that, for 1950, he left out "payments obtained belatedly from the years of sole proprietorship of the clientele, because they were offset by certain expenses which the Department subsequently disallowed." The witness, required to elucidate item 12 of Schedule C "Payment to accountant debited to fees account in General Ledger not allowable as an expense: $500", answers that this was an advance to him for fees and travelling expenses. The accountant winds up his testimony by this declaration: "I take full responsibility for Dr. Appleby's income tax returns during the years 1946 to 1954"; but a few moments previously, Hopkins had also said that which might suggest a solution to many things so painstakingly reported in Schedules B and C: "I attended to the bookkeeping *except the Cash Book.*"

At this stage, the groundwork had been laid for itemized proof of the respondent's allegations and it was forthcoming mainly in three documents, two already known, Schedules B and C, and a third one, exhibit 60 (Schedule A) a general recapitulation labelled "Increase in Income Taxes, Penalties and Interest." It would be an unwarrantable waste of time to quote at length from the 54 sheets of "B" and the 44 of "C", replete with names, dates, figures and minutiae appended to them. Significant notations gleaned here and there will suffice for the purpose of my notes.

In this line of thought the comparison of Dr. Appleby's annual earnings entered by Miss Aspell in the typed ledger (ex. 20) with their mention in the corresponding income tax returns, signed by the respondent, for the 1941-1946 period, is indubitably revealing:

Exhibit 20—Respondent's Cash Book		*Income Tax Returns*
1941:	$16,445.48	$ 8,184 88 (ex. 1)
1942:	23,471 33	17,346 25 (ex. 2)
1943:	30,355.68	24,414.79 (ex. 3)
1944:	35,017.16	26,265 78 (ex. 4)
1945:	53,543 25	40,997 82 (ex. 9)
1946:	36,411.49	33,588 91 (ex. 7)

For the ensuing years up to 1954, the comparison is between Schedule A and the yearly reports:

Schedule A (ex. 60) Revised Taxable Income		*Income Tax Returns of Respondent*
1947:	$34,854 24	$29,932.17 (ex. 15)
1948:	45,386.59	41,305.25 (ex. 49)
1949:	27,999.71	25,269 68 (ex. 50)
1950:	41,744.31	37,145 00 (ex. 51)
1951:	$49,841.00	$45,743.39 (ex. 52)
1952:	56,272.43	51,599 39 (ex. 53)
1953:	50,102 23	46,552.63 (ex. 54)
1954:	39,724 36	38,820 05 (ex. 55).

The unreported income for the whole 14 years, reconstituted from the tax returns, the office bookkeeping, clients' receipts, duplicate deposit slips and sundry other data, reproduced meticulously in the master schedules B and C reaches a grand total of $119,122.24.

The protracted evidence heard so far vindicated on all points the appellant's averments of misrepresentation, which, whatever its subjective qualification might be, did not impress the Court as technically innocent.

Due to their major probative significance, I will cite, as examples, two items listed on each of the master schedules B and C. There are nine such chapter heads on B and 12 on C, followed in the former case by 54 particularized explanatory pages and 44 in the latter. On Schedule B, paragraph (3), recapitulating the fourteen years, and this is so throughout, reads:

> (3) Amounts credited on the Patients' account cards with no corresponding entry in the Cash Book
>
> Total: $17,651.94
>
> (6) Amounts shown in duplicate Bank Deposit Books as deposited to Dr. Appleby's personal Bank accounts for which there is no corresponding entry in the Cash Book. The duplicate deposit books show amounts only with no corresponding identifying annotation against each amount.
>
> Total $53,331.32

On C, the partnership years, 1947 to 1954, the closely resembling titles are:

> (4) Amounts credited on the Patients' account cards with no corresponding entry in the Cash Books:
>
> Total $ 9,187.68
>
> (7) Amounts shown on Duplicate Bank Deposit Books as deposited to Dr. Appleby's personal bank accounts for which there is no corresponding entry in the Cash Books. The duplicate deposit books show amounts with corresponding name against each amount:
>
> Total $11,207.36

All the above totals were left out of the annual computations of income.

Misrepresentation convincingly established, the onus of disproving any of the entries charged against him devolved upon the respondent. His endeavours in this attempt were more tenacious than successful, and appear, faithfully related, at pages 14 and 18 of the appellant's Memorandum and are hereunder quoted:

> 7. Dr. Appleby himself has stated that he knew nothing about the books and therefore was not able to rebut the contention of the Minister except as to certain specific items which are found in Schedule C, page C-15:

1949

Jan. 12	J. Farris	$ 50 00	(Dr. Appleby had testified this represented losses incurred at "snooker" games)
Jan. 18	H. R. Robertson ..	$122.00	
	Dom. of Canada ..	$179.52	(Savings Bond coupons).

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July 14	J. D. Volen	$ 30 00	(repayment of loan)
Sept. 30	F. Kilroy	$ 66.78	(Kilroy's share of horse racing expenses)

These five entries amount to $448.30

On page C-18 of the Schedule "C" for the year 1950, the items referred to are:

April 15	George Sweny	$283.00	(Respondent excused this entry as gains made in poker games at the Vancouver Club)
July 31	W. H. West	$500.00	(sale price of a horse)
Sept. 15	N. Meeks	$ 19.00	(bridge winnings)
Sept. 19	Clay Pluett	$ 50 00	(his share of hunting excursion costs)
	Dom. of Canada ..	$600.00	($150 repeated four times)

A total of $1,452 and not $1,152 as stated in the Memorandum.

On page C-24 of Schedule C, for the year 1951, the items referred to are:

Nov. 6	F. Smith	$ 30 00	(losses at poker games)
	P. T. Soames	$157.50	(partial payment of loan)

A total of $187.50.

At page C-30 of Schedule "C" for the year 1952, the items referred to are:

Aug. 24	Trav. Ins.	$254.29	(readjustment of premiums)
Jan. 3	R. Henderson	$200.00	(refunding of a loan)
Feb. 22	Associated Courses .	$ 28.00	(refund of subscription to a magazine)

amounting to $482.29; an overall total of $2,570.09 for admissible deductions.

My numerous reviews of the literal and oral evidence brought to light some other items that should, I believe, be allowed to the respondent, thereby extending to him, and to the largest degree, the benefit of a reasonable doubt.

We are aware of the appellant's stand regarding Dr. Appleby's Running Horse Ranch and all correlated matters, that ". . . monies received by him for prizes, purses and sales of horses . . . and found to have gone to his Bank accounts or to have been paid out for expenses . . . were eliminated from the Schedules of alleged income" (cf. Memorandum, pages 5, 6, 16 and page 6 of the Reply). This "policy", adopted presumably after due reflection, should,

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then, obtain and prove decisive whenever doubt arises. Such would be the case with a charge of $1,975.74, listed on C-19 of Schedule C, entitled:

> Running Horse Ranch Ltd. Payments made on behalf of Running Horse Ranch Limited by Dr Appleby, credited by them (?) to Dr. Appleby's account. It was determined some cheques received in payment of fees were endorsed by Dr. Appleby and, in other cases, source of payment could not be determined.

Provided this amount of $1,975.74 is classified by the appellant as a payment on behalf of Running Horse Ranch, it should be excused. For similar reasons, a $635 charge on page C-26, said to be:

> Payments made to Gordon Campbell, horse trainer—source of payments could not be determined.

is also deleted from the final total on Schedule A. And I also strike out, at page C-43, an entry of March 26, 1954, reading: "Purity Feed, $500", admittedly a payment "on behalf of Running Horse Ranch Limited . . ."

Finally, counsel for the appellant, on the last day of the trial, September 27, formally withdrew a Penalty claim for $3,650.

These eight deductions add up to the sum of $9,330.83 against the recapitulative figure on Schedule A of $129,-793.70, leaving an outstanding balance of $120,462.87.

Shortly before the oral arguments, Mr. J. C. Farris, Q.C., the respondent's counsel, prepared for my use a "Schedule Showing that the Cash Book (exhibit 20) was not copied from exhibit 77 for the years 1937 and 1938". I need not comment on this document (not of record) for the obvious reasons that a proof of similar facts was not required; misrepresentation, in the Court's opinion, resulted overwhelmingly from a mass of other incidents. Furthermore both Cash Books, exhibits 77 and 20, were written, the former, and typed, the latter, by the Misses Sadd and Aspell, Dr. Appleby's employees, under his responsibility; lastly, no reassessment issued for those two years.

In reply to the appellant's generalized complaint of misrepresentation, based on the evidence analyzed *supra,* Farris, Q.C., rested his argument on six main grounds, which will be dealt with in order and succinctly:

> 1. The Minister of National Revenue did not establish any fraud or wilful misrepresentation.

On the contrary, it was shown that, at least, the second of the statutory faults just mentioned occurred repeatedly throughout the fourteen material years, not only, as would suffice, according to the balance of probability, but beyond a reasonable doubt.

2. Innocent misrepresentation is not sufficient.

Presently, holding as I must, that the misrepresentation proved was anything but innocent, a discussion of the view taken on this point in the *Taylor* case (*supra*) would be purely academic.

3 Alternatively, if innocent misrepresentation is sufficient, the burden of proof rests upon the Minister to establish each misrepresentation alleged.

The Court agrees with this enunciation of the rules of evidence, but is satisfied that the Minister successfully acquitted himself of this condition precedent, with the possible exception of eight amounts juridically deleted.

4. In the further alternative that the burden of proof is on the Taxpayer, this obligation was discharged by proving that the method of assessment adopted brought into tax receipts for unassessable income.

The Court granted the taxpayer, to the extent of some $9,330.83, the largest benefit of doubt, and, for the surplus, it feels assured that no untaxable revenue entered in the computation of unreported income.

5 In exercising the powers conferred upon him by section 46(4)(a), the Minister, acting in a quasi-judicial capacity, must decide in accordance with legal principles and has failed to do so.

The permissive, optional, language of section 46(4) of the Act "The Minister may at any time . . ." is hardly reconcilable with the usually accepted notions, characterizing judicial or even quasi-judicial determinations, that ordinarily terminate contradictory debates aired in some sort of open Court. Mr. Justice Thorson, in the affair of *Pure Spring Company Limited v. Minister of National Revenue*[1] elaborating the differences between judicial, quasi-judicial and administrative decisions, wrote:

The difference between judicial and quasi-judicial decisions was dealt with in the Report of the Committee on Ministers' Powers. This Committee was appointed by the Lord High Chancellor of Great Britain on October 30, 1929, to consider the powers exercised by or under the directions of . . . Ministers of the Crown by way of (a) delegated legislation and (b) judicial or quasi-judicial decision... It made its report on March 17, 1932 . . . The Committee, at page 88, puts the difference as follows: A quasi-judicial decision differs from a judicial decision in that it is governed, not by a stautory direction to the Minister to apply the law of the land to the facts and act accordingly, but by a statutory direction

[1] [1946] Ex.C.R. 471 at 480-481

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or permission to use his administrative discretion and to be guided by considerations of public policy, after he has ascertained the facts, and, it may be, the bearing of the law on the facts so ascertained.

The learned President was then discussing the discretional allowance or disallowance of operating expenses by the Commissioner of Income Tax under s. 6(2) of the *Income War Tax Act*; on page 481, the report continues thus:

> The Minister's discretionary determination, so far as it is an administrative act, and apart from whether it is quasi-legislative, may involve duties of a quasi-judicial nature to be discharged in the manner prescribed by law, but at most such duties relate to matters antecedent, ancillary or incidental to the determination, and when the Minister actually makes his determination he passes from the position of a quasi-judge to that of an administrator and his determination is an administrative act based on consideration of public policy with no judicial or even quasi-judicial aspects.

Independently of their specific nature, the Ministerial decisions at issue, even though tainted with irregularity, which is not the case here, were contradictorily and at great length revised before this Court, thereby remedying initial defects had any existed.

> 6. The Minister's failure to comply with section 58(3) concerning the use of "all due despatch" would of itself void these re-assessments.

The preceding objection would possibly, at first reading, give rise to a certain amount of doubt. A span of fourteen years is indeed a long stretch of time to tread back. Yet, at second glance, this hesitation cannot withstand the rebuttal of facts and law. Misrepresentation having been established, s. 46(4) empowers the Minister, if the taxpayer or person filing the return has made "any" misrepresentation, to assess, upon the infringer, tax, interest or penalties "at any time". This is the paramount delegation of authority inspired by the age-long maxim *"fraus omnia corrumpit"*. If misrepresentation there be, then, the Minister's right to ascertain the true situation becomes coextensive with the origin of the misrepresentation. The principle, however, is restricted by a procedural rule as to its exercise, enacted in s. 58(3) of the Act:

> 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.

Receipt of the Notices of Objection was set at January 10, 1958, and all confirmations of re-assessments bear the date of November 4, 1959 (cf. exhibits 58-59).

A lapse of 22 months, in ordinary conditions, exceeds even a very liberal interpretation of "all due despatch".

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The question raised, presently, seems of a different order; a period of fourteen years had to be gone over, piles of accountancy records, deposit slips, clients' cards, as also extensive dealings in ranching and horse races, were investigated anew, sorted and classified, before the definite confirmation of re-assessments destined to constitute eventually the basic essentials of judicial proceedings.

Discussing the scope of the statutory recommendation "with all due despatch", Mr. Justice North in *Colley v. Hart*[1] wrote at page 184:

> 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.

Due to extraordinary circumstances prevalent here, and for that motive alone, I feel justified to overlook an otherwise unwarrantable delay.

Accordingly, for the reasons given, the Minister's appeal will be allowed, the decision of the Tax Appeal Board set aside, and the re-assessment made upon the respondent for 1946 affirmed, but without any penalty. The appellant is entitled to his costs after taxation.

Judgment accordingly.

ENTRE:

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SA MAJESTÉ LA REINE .... DEMANDERESSE;

ET

Dr J.-L. SYLVAIN *ET AL.* .... DÉFENDEURS.

Couronne—Collision d'automobiles—Membres des forces armées canadiennes blessés au cours de la collision—Recours par la Couronne pour recouvrer les dommages encourus—Application des lois de la province où la faute est commise—Action directe sous l'art. 1053 du Code Civil de Québec—Action «per quod servitium amisit»—Droit commun anglais—Telle action irrécevable dans le Québec—Enréchissement sans cause—Subrogation conventionnelle—Action récursoire—Arts. 1075, 1154 et 1155 du Code Civil de Québec.

Entendant fonder sa réclamation sur l'article 1053 du Code Civil de Québec, la Couronne cherche à recouvrer des dommages-intérêts qu'elle aurait

[1] 44 Ch.D. 179 at 184.

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subis à la suite d'une collision entre la voiture dans laquelle se trouvaient des membres des forces armées canadiennes et celle appartenant à l'un des défendeurs, alors conduite par son fils mineur, et au cours de laquelle ces militaires furent blessés. Par son action la demanderesse réclame les dépenses encourues représentant les frais médicaux déboursés pour et les soldes versées aux accidentés. Au début de l'instruction, la défense, tout en admettant sa responsabilité quant à la collision et quant au montant des dommages réclamés, concluait au rejet de l'action pour le motif de l'absence de tout lien de droit entre les parties, une, entre autres, des défenses soulevées dans l'instance *The Queen v. Poudrier et Boulet Ltd.* [1960] Ex. C.R. 261.

Jugé: De l'admission par la demanderesse que l'action *per quod servitium amisit* n'existe pas sous le Code Civil de Québec il s'en suit, bien que cette admission ne lie pas nécessairement la Cour, que la jurisprudence (*Attorney General of Canada v. Jackson* [1946] S.C.R. 489; *The King v. Richardson* [1948] S.C.R. 57; et *Nykorak v. Attorney General of Canada* [1962] S.C.R. 331) invoquée par la demanderesse devrait être ignorée exception faite de l'énonciation de principe dans l'instance *Jackson* (*supra*) à la page 493.

2° C'est donc la législation de la province où la faute aura été commise qui, seule, doit décider de la responsabilité.

3° L'article 1053 du Code Civil de Québec ne peut recevoir un sens d'extensibilité presque indéfinie comme l'interpréta la Cour Suprême du Canada dans l'instance *Regent Taxi v. Frères Maristes* [1929] S.C.R. 650

4° La notion de l'enréchissement sans cause doit être écartée puisque la demanderesse disposait d'une action récursoire au moyen de la subrogation, si elle l'eût adoptée en temps utile. Telle action est d'autant plus indiquée en l'espèce que les dommages postulés par la Couronne ne procéderaient pas du quasi-délit incriminé selon la liaison de causalité directe exigé par l'art. 1075 du Code Civil. *Regent Taxi* (*supra*) aux pages 681 et 682.

5° Il est impossible d'attribuer à l'acte matériel intervenu entre la demanderesse et ses employés une autre interprétation que celle de paiement effectué par une tierce personne aux créanciers d'une obligation de dommages-intérêts prévue à l'article 1154 du Code Civil.

ACTION par la Couronne en recouvrement de dommages-intérêts qu'elle aurait subis par suite de la négligence des défendeurs au cours d'une collision entre automobiles.

La cause fut instruite devant l'Honorable Juge Dumoulin, à Montréal.

Rodrigue Bédard, c.r. et *Raymond Roger* pour la demanderesse.

Richard Drouin pour les défendeurs.

Les faits et questions de droit sont exposés dans les motivés que rend maintenant (19 septembre 1963) monsieur le Juge Dumoulin:

Le Sous-procureur général du Canada, aux droits de Sa Majesté la Reine, réclame par la présente information, des dommages-intérêts au montant de $4,661.28, des défendeurs, Guy Sylvain, auteur du quasi-délit causal, et de son père, le docteur J.-L. Sylvain, personnellement et en sa qualité de tuteur à son fils mineur. La demanderesse conclut à une condamnation conjointe et solidaire.

L'admission de faute et du total des dommages-intérêts consignée au début de l'audition par le procureur des défendeurs, qui opposait uniquement l'absence de tout lien de droit entre les parties (voir l'exposé des défendeurs, article 32), me dispensera d'une narration minutieuse des faits.

L'incident n'est rien autre chose qu'une banale collision d'automobiles, survenue dans une rue de la cité de Québec, quartier Limoilou, vers 1:00h. a.m., la nuit du 2 mai 1959.

La voiture du docteur J.-L. Sylvain, au volant de laquelle se trouvait son jeune fils, «après avoir doublé ou dépassé à la gauche du véhicule conduit par le Caporal L.-P.-E. Leblanc . . .» tenta «de virer à droite immédiatement en avant du véhicule qu'elle venait à peine de dépasser, venant ainsi frapper le côté gauche avant du véhicule dans lequel étaient passagers les militaires plus haut mentionnés», c'est-à-dire, outre le Caporal Leblanc, les soldats F. Prévost, J.-H.-J. Clermont, J.-J.-G. Beaulieu et J.-H.-Y. Lamarre, «tous membres des Forces Armées de Sa Majesté la Reine, au droit du Canada» (voir les articles 4 et 5 (1)(a) de l'information). Plusieurs autres alinéas de l'article 5 reprochent au juvénile chauffeur de l'auto paternelle les négligences et les fautes que l'on impute habituellement en semblable occurrence au conducteur délinquant.

L'article 4 de l'information précise que:

> 4. A cause et en conséquence de cet accident, les cinq militaires plus haut mentionnés ont été blessés, causant ainsi des dommages à Sa Majesté la Reine, qui a dû encourir des dépenses s'élevant au montant de $4,661 28, représentant des frais médicaux et la perte de service tels que détaillés ci-après:

puis suivent les relevés particularisés des soins prodigués: $3,145.05, et des soldes versées aux accidentés: $1,516.23, au total précité de $4.661.28.

L'exposé des défendeurs, dont les 33 allégués, un seul excepté, le 32^{e}, n'offre désormais, vu l'admission, qu'un intérêt épisodique, niaient tous les griefs de la poursuite.

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Comme susdit, la défense, abandonnant la discussion contradictoire des faits, ne soumit à l'enquête qu'un plaidoyer en droit qui concluait au rejet de l'action pour les raisons et motifs allégués dans l'instance *The Queen v. Poudrier & Boulet Ltd.*[1], une décision du soussigné. Il va sans dire, une fois pour toutes, que cette coïncidence fortuite ne facilite pas ma tâche en m'obligeant de déroger à la sage étiquette d'abstention que l'on sait, mais non pas, je l'espère, à la modestie qui s'impose dans mon cas. Mon excuse sera: Devoir oblige.

Je noterai tout d'abord que le débouté de la demande en dommages-intérêts quasi délictuels dans la cause ci-haut me semblait motivé par l'absence de preuve suffisante. Après décision négative de cet élément essentiel, je faisais la critique, possiblement superflue, d'un recours admis par la «Common Law», le droit coutumier des provinces anglaises, mais, selon moi, étranger au code civil de la province de Québec, l'action *per quod servitium amisit.*

Au sommaire de l'arrêtiste, nous lisons que:

Held: . . . as the action had to do with the civil rights of the parties, it must be decided according to the law of the Province of Quebec.

3. That the Crown bases its claim on an action per quod servitium amisit, a proceeding peculiar to the English Law, and acceptable in the sister provinces adhering to the common law but having no counterpart under the Quebec Civil Code.

La Cour suprême[2] rejeta l'appel faute de preuve prépondérante et, comme l'on pouvait dès lors s'y attendre, omit de trancher la question de droit.

Une dernière remarque au sujet de l'affaire Poudrier & Boulet; je transcris sans commentaire la conclusion qui me parut alors s'imposer. A la page 273 du rapport officiel, on voit que:

Sous l'empire du code civil cette action (quod servitium amisit) transposerait les situations respectives de l'employeur et de son employé quant à l'exercice du recours pour salaire. En effet, si le maître discontinuait le traitement non gagné, le serviteur en inclurait avec raison la demande dans sa réclamation en dommages-intérêts contre l'auteur du délit. Or, ici, c'est le maître qui, ayant payé, réclame personnellement ce salaire de la partie en faute, mais le code civil, à l'article 1075, ne voit point en de tels dommages «une suite immédiate et directe . . .» du quasi-délit, en ce qui concerne l'employeur.

Cette analyse n'établit-elle pas que l'action "servitium amisit" est en définitive une manière de subrogation tacite du commettant aux droits du serviteur? A tout événement, le code civil (article 1154), autorisant deux

[1] [1960] Ex. C.R. 261. [2] [1963] S.C.R. 194.

formes seulement de subrogation: conventionnelle et légale, omet toute mention d'une troisième.

Le titre de créance que la demanderesse prétend faire valoir pourrait être aisément régularisé au regard du code civil du Québec par le truchement fort simple de la subrogation conventionnelle, l'Etat obtenant du fonctionnaire, soldat ou commis, un transport en bonne et due forme de leur droits et recours individuels contre le tiers délinquant.

Voilà pour le litige de 1960, dont seules les incidences pratiques furent arbitrées par notre Cour suprême.

Le débat actuel procède donc d'un quasi-délit admis et analogue, juridiquement, à celui que la demanderesse dans l'autre cause avait allégué en vain, à cette différence près toutefois, qu'on voudrait l'envisager dans une optique tout autre, sans aucune connexité avec la procédure «quod servitium amisit».

Dans un mémoire d'une remarquable clarté, le savant procureur de la poursuivante établit ses positions; je cite les passages principaux:

L'affaire présentement devant le tribunal pose la question de l'existence dans la province de Québec d'une action directe en indemnité au profit de la Couronne dont le pendant—quoique l'analogie ne soit pas parfaite—serait, pour les provinces de la *Common Law,* l'action *per quod servitium amisit.*

La question doit être posée avec la plus grande précision. Il ne s'agit pas en l'espèce d'une indemnité appartenant à la victime du délit et que la Couronne tenterait de recouvrer par le truchement de la subrogation. Ni du recouvrement de dépenses ou de déboursés faits par la Couronne en vertu d'une loi spéciale, telle la Loi sur l'indemnisation des employés de l'Etat, c. 134, S.R.C. 1952.

Il s'agit d'une demande en dommages-intérêts que la Couronne fonde sur l'article 1053 du Code civil en réparation du préjudice que l'auteur du délit lui a causé à elle, directement.

Puis à la page 2:

La question que pose l'affaire présentement devant le tribunal est donc celle de l'existence dans la province de Québec d'une action au profit de la Couronne qui, dans les provinces de la *Common Law* et dans des circonstances identiques, serait l'action *per quod servitium amisit. De toute évidence celle-ci n'existe pas sous le code civil.* Aussi la Couronne, dans l'espèce présente, fonde-t-elle sa réclamation sur l'article 1053 C.C.

De cette reconnaissance formelle, répétons-la, «que de toute évidence celle-ci (l'action *quod servitium amisit*) n'existe pas sous le Code civil», découle une conséquence de primordiale importance, à savoir que, dorénavant, l'on devra éliminer et tenir pour non avenue toute cette jurisprudence qui prétendait appliquer une doctrine que la demanderesse repousse comme irrécevable sous l'autorité de la loi québecoise. Cet aveu ne lie pas nécessairement la

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Cour, mais l'on se rappellera qu'il souscrit sans réserve à l'une des conclusions de l'affaire Poudrier & Boulet. Devront donc disparaître de l'ambiance de cette cause certains arrêts invoqués par la demanderesse, ceux, entre autres, de *The King v. Richardson*[1], *Attorney General of Canada v. Jackson*[2] et *Nykorak v. Attorney General of Canada*[3].

Je consignerai néanmoins mon adhésion à l'énonciation de principe de M. Le Juge Rand dans l'instance Jackson (supra) à la page 493:

> The amendment, Section 50A (maintenant l'article 50 de la Loi sur la Cour de l'Échiquier, c. 98, S R C. 1952), does not purport to create a direct and specific right in the Crown: it places the Crown in a recognized common law relation only, and its rights are those arising from that relation under the rules of law. *The Crown's right is of the same nature as that of a private person: it can arise here* only from a wrong to the servant *over which the jurisdiction of the province is exclusive.*

Ce sera donc la législation de la province où la faute aura été commise qui, seule, décidera de la responsabilité.

Nous atteignons maintenant au vif du problème. D'une part le distingué avocat de la Couronne soutient que (page 4 du mémoire):

> . . . le patron, souffrant préjudice à raison de la perte des services de son employé par la faute d'un tiers a, contre celui-ci, une action en indemnité en vertu de l'article 1053 C.C.

A cela, le savant procureur des défendeurs oppose cette fin de non recevoir à l'article 32 de l'exposé de défense:

> 32. La réclamation de la demanderesse est tardive, irrégulière, illégale et nulle, et il n'y a aucun lien de droit entre la demanderesse et les défendeurs.

Tel n'est pas l'avis de Me Rodrigue Bédard, c.r., qui affirme que (p. 4):

> La question ne souffre pas de difficultés depuis l'arrêt de la Cour suprême dans *Regent Taxi v. Frères Maristes* [1929] S.C R. 650, dont le principe a été réaffirmé par l'arrêt de la même Cour dans *Driver v. Coca-Cola Ltd.* [1961] S C R. 201.

Je regrette de ne pouvoir d'emblée partager cette assurance, ayant à l'esprit, d'abord, l'opinion dissidente et puissamment étayée des Juges Mignault et Rinfret, deux civilistes, nul ne l'ignore, de la plus haute compétence, puis, davantage, dans l'ordre hiérarchique et astreignant des juridictions, par suite de cette autre conjoncture que le Conseil privé, alors tribunal de dernier ressort, infirmait la décision

[1] [1948] S C R. 57. [2] [1946] S C R 489 [3] [1962] S C.R. 331.

de la Cour suprême in re: *Regent Taxi and Transport Company Limited,* and *Congrégation des Petits Frères de Marie*[1] par un jugement ainsi motivé:

The respondents were a religious community, incorporated by a Quebec statute and bound by rules to maintain its members; the members, by their vows, owned no property, everything acquired by them vesting in the community A member of the community sustained serious bodily injuries by the negligence of the appellant's servant. More than one year after the accident the respondents brought an action in the Courts of the Province against the appellants claiming damages in respect of disbursements for medical attendance and loss of the member's services. By art. 2262(2) of the Civil code an action "for bodily injuries" is prescribed by one year subject to exceptions. If the action was not prescribed by art. 2262(2) it was within time under art. 2261.

Held, that the action was barred, as having regard to the exceptions to art 2262(2), it could not be construed as applying only where the bodily injuries had been sustained by the person suing. Upon the facts the respondents were under a legal obligation to make the disbursements claimed, but as the suit was barred *it was not necessary to determine whether they had a right of suit under the Civil Code.*

Puis les mots de la fin:

Judgment of the Supreme Court of Canada [1929] S.C.R. 650 reversed

Le Conseil privé, statuant que la prescription annale devait recevoir son application, maintint l'appel sans se prononcer sur l'interprétation extensive ou limitative de l'article 1053, point névralgique de l'instance *Regent Taxi et Frères Maristes,* tout ainsi que la Cour suprême dans la Reine contre Poudrier & Boulet, décidant le fait, s'abstenait en droit.

Il ne reste pas moins que le débat réel, vieux d'un tiers de siècle, n'est pas clos, et attend encore une décision définitive de notre tribunal de dernière instance.

Quant au prétendu précédent, *Driver et Coca Cola Limited*[2], il ne s'apparente aucunement à la clause célébre de 1929 et 1932, mais voyons plutôt. Dans l'incident Driver, une fillette de huit ans, fatalement heurtée par un camion, décédait le jour même de l'accident. Le père et la mère intentèrent une réclamation personnelle, comme les y autorisait l'article 1056 C.C., mais, le père, outrepassant les données spécifiques de ce texte, joignait aussi une poursuite de $4,752.37 au nom de ses dix enfants mineurs dont il était le tuteur.

[1] [1932] A.C. 295

[2] [1961] S.C.R. 201.

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Une solution inéluctable s'imposait, voici comment elle se lit:

> *Per curiam.* Only the father and mother had a claim under art. 1056 of the Code, this claim was limited to the damages they suffered as a consequence of the death of their daughter . . .

L'on conviendra que la Cour suprême décidait alors d'un tout autre point que celui à l'étude ici.

Après cet indispensable émondage d'une jurisprudence inapplicable au cas présent, un seul obstacle demeure: le sens imprimé à l'article 1053, en 1929, par trois juges du plus haut tribunal canadien.

C'était là donner à l'article 1053 une extensiblité presque indéfinie résumée en ces termes de l'arrêtiste (*Regent Taxi supra* p. 651).

> Article 1053 C.C. confers on every person, who suffers injury directly attributable to the fault of a third person as its legal cause, the right to recover from the latter the damages sustained. The suggestion that the right of recovery under that article should be restricted to the "immediate victim" of the tort involves a departure from the golden rule of legal interpretation (Beal, Legal Interpretation, 3rd ed., p. 80) by refusing to the word "another" ("autrui") in article 1053 its ordinary meaning; and such interpretation would be highly dangerous and would result in the rejection of meritorious claims.

Bien que la cassation de cette décision par le Conseil privé n'en rendrait pas messéante la discussion, je me limiterai à d'assez brefs extraits des notes de jugement de M. le Juge Mignault (page 686-687 du rapport officiel):

> Je ne puis accepter ce système (celui de l'extension illimitée du vocable «autrui» à l'article 1053 C C.), écrivait l'éminent juriste. Il rendrait, je l'ai déjà dit, l'article 1056 inutile, et cette disposition serait de plus déraisonnable, puisque, dans un cas grave, celui de la mort de la victime, le recours des intéressés serait strictement limité à certains proches, et une personne dans la situation de l'intimée serait exclue; tandis que dans un cas moins grave où la victime survit à ses blessures, toute personne qui pourrait attribuer un préjudice personnel à la faute primitive, aurait, en vertu de l'article 1053 C.C., un recours contre l'auteur de cette faute . . .
>
> Et en définitive le raisonnement qu'on nous oppose s'appuie moins sur les textes—car on établit une véritable antinomie entre l'article 1053 C.C. et l'article 1056 C.C.—que sur l'autorité qu'on attribue à des arrêts des tribunaux français qui ne nous lient en aucune façon. Du reste, ces tribunaux font l'application d'un code qui ne contient aucune disposition de la portée de l'article 1056 C.C.

Feu le Juge en Chef Anglin, parlant au nom de la majorité, eut recours à la règle bien connue d'interprétation légale à l'effet que, si rien ne s'y oppose, le sens grammatical et ordinaire des mots doit prévaloir (vide: Beal, Legal Interpretation, 3rd ed. p. 80). Assurément, c'est la logique même, circonscrite, cependant, par certaines exceptions non moins valables, telles ces autres maximes suggérées à la Section III, de l'interprétation des contrats, où il est dit, à l'article 1018, que: «toutes les clauses d'un contrat s'interprètent les unes par les autres, en donnant à chacune le sens qui résulte de l'acte entier». Il est permissible par analogie d'étendre la convenance de cette règle à des cas non contractuels. Par contre, et en toute déférence, la mention par M. le Juge Lamont (Regent Taxi v. Frères Maristes, supra p. 710) d'un passage de l'ouvrage de Clerk et Lindsell «On Torts» 8e édition, page 201, me laisse plutôt sceptique. Ces auteurs écrivent que:

> Where the relation of master and servant exists the right which the one has to the service of the other is regarded by the law as a species of property or interest, a wrongful infringement of which causing actual damage is a good cause of action.

Ainsi s'exprimerait un profane, peut soucieux de la valeur juridique des termes. Est-ce à dire que cette prétendue propriété des services du domestique pourrait être vendue ou louée par le maître? Étrange droit de propriété que celui dont on ne saurait disposer. Messieurs Clerk et Lindsell paraissent confondre le *jus ad rem* et le *jus in re*. Devrais-je rappeler que, depuis l'abolition du servage, les relations de maître à serviteur confèrent à celui-là un *jus ad servitium* et non un *jus in servo*.

Une dernière hypothèse mérite un moment d'attention, celle de l'enrichissement sans cause. Les débours de $4,661.28 consentis par l'État ont appauvri d'autant sans juste cause le trésor public, enrichissant ainsi des défendeurs qui s'avouent fautifs. A priori nous réunissons trois des conditions du recours *de in rem verso*. Toutefois la pratique la plus autorisée en surajoute impérativement une quatrième (Auby & Ran, 4e ed., t. VI, p. 246.) «... à savoir que la personne lésée n'ait, pour obtenir satisfaction, la disposition d'aucune action naissant d'un contrat, d'un quasi-contrat, d'un délit ou d'un quasi-délit». Cet avis est partagé par le très estimé juriste français, M. Rouast, qui, dans sa brillante étude «L'enrichissement sans cause et la jurisprudence civile (Revue trimestrielle de droit civil, 1922 t. XXI)», enseigne que:

> L'action de *in rem verso* a un caractère subsidiaire; elle ne peut être exercée qu'à défaut d'une autre action ... Telle est la portée du caractère subsidiaire que la jurisprudence semble reconnaître à notre action. On pourrait la résumer en disant que l'action, «*de in rem verso*» ne peut être

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exercée qu'à défaut de toute autre action de droit commun ouverte au demandeur . . elle est ouverte si l'action de droit commun est inopérante à la suite d'un obstacle de fait étranger au demandeur.

Tel est aussi le sentiment du professeur Julien Bonnecase, auquel nous sommes redevables du tome troisième en supplément au grand traité de droit civil de Beaudry-Lacantinerie (Supplément III, pages 289, n° 147 et 306, n° 153.) Force nous est donc d'écarter la notion de l'enrichissement sans cause puisque, à mon humble avis, la demanderesse disposait d'une procédure fort simple pour autoriser son action récursoire: la subrogation, si elle l'eut adoptée en temps utile.

L'action subrogatoire paraît d'autant plus de mise en l'espèce que les dommages-intérêts postulés ne procéderaient pas du quasi-délit incriminé selon la liaison de causalité directe exigée par l'article 1075C.C., qui inspirait ces commentaires au Juge Mignault (Regent Taxi pages 681-682); dans un cas semblable:

> Le principe qui me paraît dominer en matière de dommages-intérêts, c'est que seuls les dommages directs, à l'exclusion des dommages indirects ou éloignés, peuvent faire la base d'une action en justice. Le code en a une disposition expresse quand il s'agit de l'inexécution des obligations . . . Il est vrai qu'il s'agit là surtout, mais non pas uniquement, cependant, de l'inexécution d'une obligation contractuelle, mais il n'y a pas plus de raison d'accorder des dommages indirects ou éloignés, surtout à des tiers, lorsque l'obligation découle d'un délit ou quasi-délit, que lorsqu'elle provient d'un contrat.

Si donc les cinq militaires, blessés par l'acte imprudent du fils mineur du co-défendeur, doivent être considérés comme les seuls créanciers des dommages-intérêts qui en résultent, l'indemnisation pécuniaire versée volontairement par une autre partie la situe dans la qualité juridique de la «tierce personne» désignée à l'art. 1154, et au premier paragraphe de 1155, dont voici la teneur:

> 1155. La subrogation est conventionnelle:
>
> 1. Lorsque le créancier en recevant son paiement d'une tierce personne, la subroge dans tous ses droits contre le débiteur. Cette subrogation doit être expresse et faite en même temps que le paiement.

Je le répète, puisque de l'aveu de la demanderesse le recours «*per quod servitium amisit* n'existe pas sous le Code civil»; qu'il ne s'agirait pas «. . . du recouvrement de dépenses ou déboursés faits par la Couronne en vertu d'une loi spéciale . . .», et que par surcroît, comme le déclare le juge Rand in re: Jackson (supra), le litige complète exclusivement à la loi provinciale, je suis incapable d'attribuer à l'acte matériel intervenu entre la Couronne et ses employés une autre interprétation que celle de paiement effectué par une tierce personne aux créanciers d'une obligation de dommages-intérêts conformément à l'article 1154. Ainsi le veut la loi de la province de Québec, loi à laquelle la demanderesse, par inadvertance ou erreur, n'a pas obtempéré, avec cette conséquence qu'elle devra être déboutée de sa demande.

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Pour les motifs précédemment explicités, l'information de Sa Majesté la Reine est rejetée. Les défendeurs conjoints et solidaires auront droit à tous les frais et dépens après taxation.

Jugement en conséquence.

BETWEEN:

1962
Oct. 1, 2, 3

WILLIAM C. MAINWARING .... APPELLANT;

AND

1964
Sept. 24

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Income or capital gain—Promoter of oil and natural gas company—Promotional techniques focused upon profit-making—Long term investment belied by appellant's small cash payment to company—Customary pattern and style of profit-making schemes—Profit-seeking venture—Income Tax Act, R S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e).

This is an appeal from the income tax assessments of the appellant for the taxation years 1951, 1952, 1953, 1955 and 1956. The appellant, who at the time, was a senior official of British Columbia Electric Company, joined in 1949 with George H. Cloakey, Stanley E. Slipper, Alexander Bruce Robertson, the appellant in *Robertson v. Minister of National Revenue* [1964] Ex C.R. 444 and Robert H. B. Ker, the appellant in *Ker v Minister of National Revenue,* (unreported) to form a company called Britalta Petroleums Limited, incorporated as a private company under the laws of the Province of British Columbia. The appellant entered into an agreement with his colleagues, by the terms of which he agreed to subscribe to 41,667 shares in the capital stock of the company at (½) one-half cent per share, with an option to purchase additional shares at the same price in accordance with the terms of the agreement Subsequently, during the years 1951 to 1956, the appellant sold some of his shares in many different transactions and his profits thereon were assessed as income by the respondent.

The evidence established that throughout the entire period under review the appellant devoted constant and diligent attention to the financial requirements of Britalta Petroleums Limited

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Held: That sufficient evidence had been adduced to legally and factually consider each of the original subscribers to the memorandum of association and particularly the appellant as the promoters of the oil drilling engaged in by the company.

2. That the inceptive stages undergone by Britalta Petroleums Limited and its subsequent successful evolution were in all aspects identical to the promotional technique of similar enterprises, focused upon profit making.
3. That the appellant's admission that the only cash he ever paid for his shares in Britalta Petroleums Limited was the original disbursement of $200 or $300 hardly connotes a notion of a long term investment.
4. That the whole record of transactions, dealings, allotments and pooling of shares, the more or less complex incentives devised to obtain underwriting assistance, consistently adopted the customary pattern and style of profit-making schemes.
5. That the analogy between the facts of this case and those of *Alexander Bruce Robertson v. Minister of National Revenue* [1964] Ex. C.R. 444 is absolute.
6. That the appellant's relationship with Britalta Petroleums Limited was similar to that of an ordinary dealer and it appears clearly that the appellant and his partners had in mind, as a set objective, the pursuit of a profit-seeking venture envisaged by s. 139(1)(*e*) of the *Income Tax Act.*
7. That the appeal is dismissed.

APPEAL under the *Income Tax Act.*

The appeal was heard by the Honourable Mr. Justice Dumoulin at Victoria.

C. C. Locke, Q.C. and *W. N. Carlyle* for appellant.
W. J. Wallace for respondent.

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

DUMOULIN J. now (September 24, 1964) delivered the following judgment:

This is an appeal from the income tax assessments for the taxation years 1951, 1952, 1953, 1955 and 1956 of William C. Mainwaring, a resident of the City of Vancouver, B.C.

The appellant, 68 years of age in 1962, had for several decades figured in his native province of British Columbia as one of its leading business men, whose particular concerns were in the gas and oil production enterprises. During the period 1932 to 1958, when he retired on pension, he was employed by British Columbia Electric Company in which he occupied the highly responsible posts of Vice

President and Assistant to the President for the ten years preceding his retirement, from 1948 to 1958.

In January, 1949, Mainwaring, on his company's behalf, attended, in the City of Calgary, the sittings of the Dinning Commission; this engagement brought him into contact with one George Cloakey, an expert in oil and gas lands, and also with Stanley E. Slipper, a highly reputed geological expert. These three gentlemen then and there agreed to pool their respective experience and scientific knowledge for the setting up of a company whose objective would be the search of oil and natural gas, both on Graham Island, one of the Charlotte group, and more so within the confines of the Province of Alberta.

Shortly afterwards, the appellant used his personal connections with Mr. Bruce Robertson, another Vice President and also Chief Counsel of the British Columbia Electric Co., and with Mr. R. H. Ker of Victoria, described as "one of the most successful business men in British Columbia through the years", to have them join the budding syndicate.

On April 12, 1949, the projected company was incorporated as a private one under the laws of British Columbia with the name Britalta Petroleums Limited.

On May 5, 1949, (ex. 4) an agreement was reached by Britalta Petroleums Ltd. and George H. Cloakey, Stanley E. Slipper, William C. Mainwaring, Robert Henry Brockman Ker and Alexander Bruce Robertson, whereby:

1. The Subscribers hereby agree that they will severally subscribe forthwith for the respective numbers of shares in the capital of the Company set out opposite their names below:

George H. Cloakey	62,500	shares
Stanley E. Slipper	62,500	"
William C. Mainwaring .	41,667	" (including the share subscribed for by him in the Company's Memorandum of Association)
R. H. B. Ker	41,666	shares
A. Bruce Robertson	41,667	" (including the share subscribed for by him in the Company's Memorandum of Association).
	250,000	shares

2. The full price at which the said shares shall be allotted shall be one-half cent (½¢) per share and it shall be payable in cash forthwith after allotment.

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The subscribers obtained the additional right of an option exercisable from time to time whenever hereafter the company might decide to allot shares beyond the first 500,000 initially allotted by it, at a price of ½¢ per share to an amount and conformably with terms and conditions set out in the aforesaid agreement.

Mr. Mainwaring, as shown in ex. 9, had purchased, in November, 1949, 125,000 Britalta shares at ½¢ per unit and in the same month of November, same year, resold a block of 33,333 to his wife, Mrs. Gladys Mainwaring, at the above stated price of ½¢ per share.

At this point of my notes, it seems imperative to further clarify the appellant's relationship with the newly-formed Britalta Company.

In an Examination on Discovery, at Vancouver, February 13, 1962, the exchange of questions and replies between counsel for the appellant, Mr. C. C. Locke, Q.C., and Mr. Mainwaring, at page 14 of the transcript, reads thus:

61. And would it be correct to say your part in such a venture would be to assist in the high level management of such a company and to find the necessary financing for it?

A. No, it was not—it was never intended that I would be connected with the high level management of the company. My responsibility was to form a company, endeavour to secure the finances the company needed, set it up as a corporate structure and see that capable management was secured; but it was never intended that I would take an outstanding position inasfar as management was concerned.

62. Well, perhaps I was using a wrong terminology. I didn't mean a day to day management, but at a directorial level.

A. Yes, at a directorial level I would say, yes.

Next, at the bottom of page 16 and top line of page 17, we have the following question and answer:

72. So in a sense you formed this board, at least you brought them all together?

A. That's correct, yes, I did.

On the March 31, 1949, (ex. B), a Memorandum was drafted and agreed upon, setting out an "understanding reached between the undersigned" (G. H. Cloakey, Stanley E. Slipper, W. C. Mainwaring, R. H. B. Ker and A. B. Robertson), clauses 3 and 6 of which state that:

3. Messrs. Mainwaring and Ker are to concentrate on obtaining finances for the Company.

6. The shares in the capital of the Company which will be subscribed for by the promoters in order to provide funds for incorporation and other preliminary expenses will be divided among and be the property of the parties in the following proportions:

   Mr. Cloakey .... $\frac{1}{4}$
   Mr. Slipper ..... $\frac{1}{4}$
   Mr. Mainwaring . $\frac{1}{6}$
   Mr. Ker .... $\frac{1}{6}$
   Mr. Robertson .. $\frac{1}{6}$

   and the monies payable to the Company therefore will be paid by the parties in the same proportions.

This same quality of "promoters" is mentioned in a communication, dated May 13, 1949, from the Company's secretary, A. Bruce Robertson, addressed to W. C. Mainwaring, Esq., in connection with the Britalta Petroleums Ltd., of which the first three lines follow:

Dear Sir:

I hand you herewith for your personal file a duplicate original of the agreement dated 5th May, 1949 between the above Company and the five promoters.

The appellant in his evidence said that "within a week after the company was formed at my endeavours and request, I put up of my own money $12,000 and obtained a digging permit on the Charlotte Islands."

Thus far, sufficient material had been adduced to legally and factually consider each of the original subscribers, and more particularly so the only party I need be concerned with, the appellant, as the promoters of this oil digging.

Reverting now to the chronological sequence of events, it should be said that in the autumn of 1949, Britalta sorely needed exploitation capital in the sum of at least $500,000; its directors, Mr. Mainwaring one of these, started negotiations with a New York financier, Mr. R. L. Reed, represented in British Columbia by James Chisholm Ralston, a local solicitor, as his duly accredited agent.

Pursuant to this need, a tripartite agreement, ex. 6, dated December 23, 1949, was drawn up between Britalta, James Chisholm Ralston representing the Reed group, and the five initial partners, in which the original shareholders undertook to have their company converted into a public company and to increase its capital from 1,000,000 to 3,000,000 shares without nominal or par value. The

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company also agreed in this covenant "to issue to the purchaser 500,000 shares of the Company and to grant the purchaser, i.e., James C. Ralston, agent, an option to purchase 750,000 other shares at the prices and on the terms and conditions hereinafter set out." Those terms and conditions for the eventual exercise of the option to purchase 750,000 additional shares were as follows:

All or any part of two hundred and fifty thousand (250,000) shares at forty cents (40¢) per share on or before the 2nd day of January, 1951;

All or any part of two hundred and fifty thousand (250,000) shares at fifty cents (50¢) per share on or before the 2nd day of July, 1951; and

All or any part of two hundred and fifty thousand (250,000) shares at sixty cents (60¢) per share on or before the 2nd day of January, 1952.

It may be of some interest to note that a further instrument of the same date, (December 23, 1949) (ex. 7), obligated the vendors so designated in ex. 6, Mainwaring and associates, to deposit with the Royal Trust Company in escrow share certificates covering 750,000 shares of the company owned by these vendors; of such certificates, 300,000 should be endorsed by the transferors in blank for delivery by the Royal Trust Company to the Purchaser (J. C. Ralston) upon payment by him of the purchase price of such shares, as provided for in the deed ex. 6.

Previously however, on November 5, 1949, Britalta had issued 83,333 shares to the appellant, again at ½¢ per share, totalizing his holdings at 125,000.

In the meantime, and before December 23, Mr. Mainwaring had actively pursued his task of procuring working capital for Britalta. Documentary evidence of this is quite abundant and two samples, if I may be permitted the expression, amply suffice to enhance the fact. On May 4, 1949 (ex. F) Mainwaring informed his co-director, Mr. George H. Cloakey, that their colleague, Robbie Ker, had arranged a meeting at his office with one Mr. Clements who apparently acted as a financial counsellor to the Marshall Field group.

Paragraph 2 of that letter mentions the possibility of inducing that powerful mercantile firm to invest capital "in our company".

Another letter, dated May 25, 1949, from Charles E. Clements to W. C. Mainwaring, raises the joint possibility of obtaining exploration funds from the Bronfman Distilleries.

Throughout the entire period under review, the appellant devoted constant and diligent attention to the financial requirements of Britalta Petroleums. As revealed in the numerous written exhibits filed by both parties, the inceptive stages undergone by this oil company and, in no smaller a degree, the subsequent phases of its successful evolution, the peak level attained by the shares being in the vicinity of $10, were in all aspects identical to the promotional technique of similar enterprises, focused upon profit making.

Mainwaring, for instance, according to ex. 18, listing 26 sales, from October 5, 1951, to August 17, 1955, would have disposed of some 70,000 Britalta shares at prices rising from a low of $2.65 to a high of $9.35.

In October, 1951, as stated in his evidence, the appellant consented to sell 25,000 shares to Dillon, Reed and Co., the New York brokers and purveyors of working funds to Britalta, at 25¢ below the current market price, which then stood at $3.75 a unit, thereby sustaining a loss of some $6,250. Dillon, Reed & Co., at the time, insisted on obtaining a block of 75,000 shares at $3.50 a piece as the condition of extending pecuniary support for the operation of Britalta Petroleums.

Mr. Mainwaring was faced a second time with the obligation of shouldering a loss of about $3,000 when Robert Reed, in a letter dated April 25, 1952 (ex. 19), addressed, amongst others, to the appellant, requested he should transfer 1,429 shares at the price of $4 per unit, the market prices then fluctuating between $5.50 and $6, in order to obtain for the company the services of one Kendall Hert.

More could be written concerning the trading course of Britalta until the end of 1955, but it would be along lines identical to the preceding ones and, moreover, this corroborative material may be found in the voluminous record of exhibits.

The instant appeal is essentially predicated on the argument submitted in paragraphs 23 and 24 of the Notice of Appeal to the effect that:

23. The appellant further says that the gains realized by the appellant on the disposal of Britalta shares in the aforesaid years are not income but constitute capital.

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24. The appellant further says that the Britalta shares were not acquired by the appellant in or pursuant to, or in relation to any class of profit-making operation of the appellant previously contemplated or carried on, or then or afterward intended to be carried on, or as a profit-making scheme, but were acquired by the appellant for investment purposes.

This case, as most others of a like nature, derives its legal characteristics from a set of facts each of which, taken separately, might remain inconclusive.

An initial suggestion that the five promoters above mentioned intended to launch a profit-making scheme and inadvertently or otherwise assumed the *de facto* quality of traders could possibly be derived from the undergoing excerpt in clause 21 (ex. 2) of the Articles of Association of Britalta Petroleums Limited:

The basis on which the Company is established is that the Company shall allot shares and give an option to subscribe from time to time for further shares on the terms set forth in the said agreement subject to any such modification and accordingly it shall be no objection to the said agreement that all or some of the individual parties to the said agreement are or may be promoters of the Company or that in the circumstances the Directors of the Company do not constitute an independent Board and every member of the Company both present and future is to be deemed to join the Company on this basis.

And, again, Mr. Mainwaring's admission, consigned on page 27 of the Examination on Discovery, that the only cash he ever paid for his shares in Britalta Petroleums was the original disbursement of $200 or $300, hardly connotes a notion of a long term investment.

Subsequently, the whole record of transactions, dealings, allotments and pooling of shares, the more or less complex incentives devised to obtain underwriting assistance, consistently adopted the customary pattern and style of profit-making schemes.

Counsel for the appellant relied mainly on the authority of *Irrigation Industries Limited v. Minister of National Revenue*[1], wherein a majority in the Supreme Court decided, *inter alia*, as written by Mr. Justice Martland at page 352, that:

The positive tests to which he (Thorson, P.) refers as being derived from the decided cases as indicative of an adventure in the nature of trade are: (1) Whether the person dealt with the property purchased by him in the same way as a dealer would ordinarily do and (2) whether the nature and quantity of the subject-matter of the transaction may exclude the possibility that its sale was the realization of an investment, or otherwise

[1] [1962] S C R. 346 at 352.

of a capital nature, or that it could have been disposed of otherwise than as a trade transaction.

The circumstances and incidents here seem completely different from those obtaining in Irrigation Industries. The latter Company, in 1953, purchased directly from a mining concern 4,000 Treasury Shares of an initial issue of 500,000. Irrigation Industries Ltd. resold those shares within a few months at a profit of $26,897.50. Manifestly, the aforementioned deal consisted in an isolated transaction and the Directors of Irrigation Industries took no participation whatsoever in the organization of the mining company and had nothing to do with its financing, promotion or management.

On less compelling grounds, in *re Regal Reights Limited v. Minister of National Revenue*[1], Mr. Justice Judson, who spoke for the majority of the Supreme Court, held that this was a venture in the nature of trade and the profit from it taxable within the meaning of ss. 3, 4 and 139 (1) (*e*) of the *Income Tax Act* (R.S.C. 1952, c. 148).

Moreover, the Court is unable to differentiate the matter at issue from the decision of Mr. Justice Kearney in *Alexander Bruce Robertson v. Minister of National Revenue*[2]. The analogy between both suits is absolute.

I have no hesitation in finding that appellant's relationships with Britalta were similar to those of an ordinary dealer and, furthermore, it appears clearly that W. C. Mainwaring and his partners had in mind, as a set objective, the pursuit of a profit-seeking venture envisaged by s. 139 (1) (*e*) of the *Income Tax Act.* Then, should this assumption be correct, ss. 3 and 4 of the Statute, decreeing that income derived from a business is assessable to income taxation, should apply.

Consequently, the appeal is dismissed and the re-assessments made up the appellant are affirmed. The respondent is entitled to costs after taxation.

Judgment accordingly.

[1] [1960] S.C.R. 902. [2] [1964] Ex. C.R. 444.

1964
Jan. 27-30
Oct. 8

BETWEEN:

TVRTKO HARDY MARUN ....SUPPLIANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

AND BETWEEN:

REGINALD JAMES MINOGUE ....SUPPLIANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Crown—Petitions of Right—Forfeiture of goods under the Customs Act—Unlawful importation of goods—Tax on imported goods under the Excise Tax Act—Burden of proof that Crown has no right to retain possession of goods seized under Customs Act—Goods taxable although not sold—Goods need not be dutiable to be taxable—Meaning of "jewellery" and "including diamonds for personal use or for adornment of the person"—Taxability of goods re-imported after having been previously imported then exported—Obligation of person bringing goods into Canada—Goods may be forfeited although not found in custody of importer—Forfeiture of goods automatic upon unlawful importation—Title to unlawfully imported goods—"Unusual treatment" within meaning of s. 2(b) of the Canadian Bill of Rights—Old Age Security Act, R.S.C. 1952, c. 200, s. 10—Customs Act, R.S.C. 1952, c. 58, ss. 2(1)(q), 18, 20, 21, 22, 36, 47, 160, 178(1) and (2), 183, 190(1)(a) and (c), 203, 248—Excise Tax Act R.S.C. 1952, c. 100, ss. 23, 29(1)(a) and (f), 30, 33, 35, 44, 46, 56 and Schedule I, s. 9(c)—Canadian Bill of Rights, S. of C. 1960, c. 44, s. 2(b).

The petitioners pray for the return of certain diamonds which are in the possession of the Crown as having been forfeited under the provisions of the *Customs Act*, on the ground that they had been unlawfully imported into Canada, and for other relief. The respondent counterclaimed for taxes alleged to be payable by the suppliants under the *Excise Tax Act* and the *Old Age Security Act*.

Held: That by virtue of s. 248 of the *Customs Act*, the burden is on the suppliants to prove that the Crown has no right, under any provision of the *Customs Act*, to retain the goods in its possession.

2. That the two large diamonds are subject to tax at the rate of 21 per cent of their value, payable upon importation, and the tax is payable on the sale price although the goods do not have to be sold to be taxable.

3. That the goods do not have to be subject to any duty imposed by the customs tariff to be taxable.

4. That the words "including diamonds for personal use or for adornment of the person" as used in Schedule I, s. 9(*c*) of the *Excise Tax Act*, are an extension of the meaning of the word "jewellery" and refer to a kind of goods.

5. That the two large diamonds in question are of gem quality and fall within the meaning of the words in Schedule I of the *Excise Tax Act*.

6. That because the diamond had been previously imported into Canada under license with no tax being paid, then exported, it cannot be

subsequently reimported, either in identical or altered form, without tax becoming payable.

7. That there is a threefold obligation on any person bringing goods into Canada, (1) to report the goods to Customs, (2) to make due entry of them, and (3) to pay the taxes.
8. That it was not established that the Customs officials have adopted an accepted practice of permitting persons not to declare items such as the diamonds in question, nor can Customs officials waive compliance with statutory obligations upon an importer, nor is an importer so relieved from the consequences of his failure to comply with these obligations.
9. That the fact that the suppliant, Marun, was acquitted by a police magistrate of a charge that, without lawful excuse, he was in possession of goods unlawfully imported into Canada, contrary to s. 203 of the *Customs Act,* which acquittal was sustained on appeal, is not *res judicata* in his favour of the fact that the goods had not been illegally imported and cannot be invoked by him in the present case.
10. That since no application for refund of any tax paid under the *Excise Tax Act* was ever made by the suppliant, Marun, as required by s. 46 thereof as a condition precedent thereto, it follows, without the necessity of deciding the questions whether the goods were properly taxable and whether the tax was paid in error, that the suppliant is not entitled to a refund of the tax.
11. That the suppliant, Marun, by his failure to comply with the positive duties imposed by s. 18 of the *Customs Act* falls precisely within the language of s. 183 of the *Customs Act.*
12. That if the person importing goods fails to comply with s. 18 of the *Customs Act,* the goods are forfeited if found and it matters not where they are found The language of the section does not require that the goods be found in the custody of that particular person.
13. That forfeiture under ss. 178 and 183 of the *Customs Act* is automatic and occurs immediately upon the unlawful importation by virtue of s 2(1)(*q*) of the *Customs Act,* and the goods thereupon become the property of the Crown and no act by any officer of the Crown can undo that forfeiture. Therefore any defect, if such existed, in the notifications and procedure adopted by the Department of National Revenue under s. 150 and 158 of the *Customs Act* is not material.
14. That s. 203 of the *Customs Act* does not mean that if a possessor of goods unlawfully imported has a lawful excuse, then the goods are not forfeited under other provisions of the *Customs Act,* and the suppliant, Marun, could not divest the property in the Crown by delivering one of the diamonds to Minogue no matter how innocent Minogue was.
15. That s 203 of the *Customs Act* is clearly to protect a person who innocently comes into possession of unlawfully imported goods and without means of knowing they were unlawfully imported, from prosecution and possible liability to a penalty equal to the value of the goods and imprisonment, but certainly not to vest title to unlawfully imported goods in such person.
16. That the fact that the *Customs Act* provides that goods unlawfully imported are forfeit to the Crown without power of remission and that the person who unlawfully imported such goods is liable for the tax payable thereon does not constitute "unusual treatment" within the meaning of s. 2(*b*) of the *Canadian Bill of Rights.*

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17. That neither suppliant is entitled to the relief sought in his Petition of Right.

PETITIONS OF RIGHT for the return, *inter alia,* of goods in possession of Crown as having been forfeited under the provisions of the *Customs Act*. Counterclaims by Crown for taxes alleged payable.

The actions were tried by the Honourable Mr. Justice Cattanach at Toronto.

Leonard Noble for suppliant Marun.

R. D. Tafel for suppliant Minogue.

D. H. Aylen for respondent.

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

CATTANACH J. now (October 8, 1964) delivered the following judgment:

These are Petitions of Right whereby the respective suppliants pray, in addition to other relief, the return of certain goods which are in possession of the Crown as having been forfeited under the provisions of the *Customs Act,* 1952, R.S.C., c. 58.

The suppliant, Marun, prays the return of a diamond of approximately seven carats mounted in a tie pin setting and twenty small industrial diamonds as well as a refund of $151.80 paid by him upon the importation of a quantity of industrial diamonds on July 12, 1960.

The Crown, by counterclaim, seeks judgment against the suppliant, Marun, for taxes alleged to be payable under section 30 of the *Excise Tax Act,* 1952, R.S.C., c. 100, section 10 of the *Old Age Security Act,* 1952, R.S.C., c. 200, as amended and section 23 of the *Excise Tax Act,* on the seven carat diamond, a five carat diamond and on the twenty industrial diamonds. It is is conceded by the Crown that no excise tax is exigible on the twenty industrial diamonds under section 23 of the *Excise Tax Act.*

The suppliant, Minogue, prays the return of a diamond of approximately five carats.

By order the petitions were heard together.

The suppliant, Marun, is a diamond prospector who was born in Yugoslavia, and had few educational advantages, either in his native country or in Canada. He is not wholly proficient in the English language but has no great difficulty in understanding or being understood. In 1959 he engaged in diamond prospecting in British Guiana where he acquired prospecting licenses on Crown lands with authority to stake claims upon and occupy such lands for the purpose of mining for precious and semi-precious stones.

The suppliant, Marun, is the president and manager of R. J. Minogue & Co., Limited and Packsack Diamond Drill, Limited. Both these companies carry on business in North Bay, Ontario as manufacturers and distributors of diamond drill tools and equipment. The manufacture of the bits for such equipment involves the use of industrial diamonds for cutting surfaces.

The suppliants, respectively, as a consumer and producer of industrial diamonds became known to each other through their business relationship which ripened into a friendship.

Because of their mutual business interest in industrial diamonds, Marun and Minogue applied for and obtained the incorporation of a joint stock company, pursuant to the laws of the Province of Ontario under the name of Marun-Pakaraima Diamond Mining Company, Limited, by Letters Patent dated February 16, 1960. Mr. Minogue, personally and through R. J. Minogue & Co., Limited, made a small contribution to the capital of the company so formed by the purchase of shares of its capital stock as did Mr. Marun. At the organization meeting of the company, which was apparently the only meeting held, Marun was elected the president and Minogue the secretary. It was expected that capital would be raised through this company to purchase the equipment necessary to extend the diamond mining activities of Marun in British Guiana.

In the meantime, Marun continued his mining activities in his personal capacity.

In 1960 Marun mined 160 carats of industrial diamonds, consisting of about 900 pieces which he mailed on July 2, 1960 under a British Guiana export licence and on which he paid an export duty.

Marun then returned to Canada and cleared this shipment through Customs in Toronto on July 12, 1960 after

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some difficulty and considerable delay. He paid an amount of $151.80 claimed by the Customs officials as being exigible after first protesting that taxes were not payable. Mr. Minogue was of the same opinion and subsequently so advised Marun. However, at no time subsequent to July 12, 1960 did Marun make an application for a refund of the amount of $151.80 paid by him on the importation of the industrial diamonds.

Because of this experience and in order to facilitate the clearance of imported goods through Customs and to be relieved of the obligation to pay taxes at the time of importation, Marun as president of Marun-Pakaraima Diamond Mining Company, Limited, made application on October 14, 1960 in the name of the company for a wholesaler's sales tax license under the provisions of the *Excise Act*. By letter dated October 21, 1960, the Department of National Revenue, Customs and Excise, advised that the business of the company was not substantial enough to warrant the issuance of a license at that time.

Prior to this application Minogue had advised Marun that the policy to be adopted by the company should be that industrial diamonds be shipped to Canada by air through a Customs broker.

Both Marun and Minogue had been supplied with copies of the *Excise Act* by the Department, receipt of which was personally acknowledged by each of them.

Marun sold a portion of the industrial diamonds to Minogue. He gave some to persons interested in them as specimens. The balance he constantly carried on his person in a plastic vial and during his travels frequently crossed the Canadian border with these industrial diamonds in his possession. One particular diamond was polished in the expectation that it might be raised to gem quality but such experiment proved impractical.

In October, 1960, Marun returned to British Guiana. At that time one of the native labourers working on Marun's mining claims found a diamond weighing 27 carats. The working arrangements were that the finder was entitled to a 95 percent interest in any stones found and Marun was entitled to a 5 percent interest in stones found on his claims.

On a visit to Canada shortly after the finding of this 27 carat diamond, Marun told Minogue about it expressing the view that it was a valuable stone. It was agreed by Minogue and one Zouzelka that Marun should purchase the finder's 95 percent interest in the diamond. For this purpose Minogue advanced $10,000 and Zouzelka $5,000. Marun thereupon returned to British Guiana and acquired the native's 95 percent interest in the stone for $20,000, the balance of the purchase price over the advances of $15,000 being put up by Marun.

The precise nature of the arrangements among the three purchasers was not clear, that is whether they became joint owners of the diamond or whether Minogue and Zouzelka loaned the respective amount of $10,000 and $5,000 to Marun on the security of the diamond. The conduct of the parties was indicative of either such relationship dependent on their mood at any particular time. However, it was understood among them that the diamond should be sold, the three to share in any profit realized or to bear any loss incurred in proportion to their contributions, although Marun considered himself indebted to his partners in the amounts advanced by them and they, in turn, considered him so indebted.

On January 4, 1961, Marun shipped the diamond from Georgetown, British Guiana, through the Royal Bank to its branch in New York, U.S.A. For this service Marun paid the bank 247.14 West Indian dollars including postage, export tax, commission, bank charges and insurance.

Minogue, Zouzelka and Marun then met in New York where they obtained release of the diamond. Marun immediately returned to British Guiana and Minogue to North Bay while Zouzelka remained in New York to negotiate a sale of the diamond. Zouzelka's efforts were unsuccessful and accordingly he returned to Canada leaving the diamond in the custody of Freed Industrial Diamond Corporation in New York.

In February, 1961, Freed Industrial Diamond Corporation shipped the diamond to Murray Scheinman, an importer of and dealer in diamonds in Toronto, Ontario. Scheinman was the holder of an Excise Tax license and accordingly no tax was paid by him at the time of this importation. The diamond was placed on display in a

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leading departmental store in Toronto. Scheinman was not interested in purchasing the diamond himself nor did he find a purchaser for it.

On April 5, 1961 Scheinman returned the diamond by registered mail to Freed Industrial Diamond Corporation in New York.

Marun returned to Toronto shortly thereafter when he learned of these transactions and was informed by Zouzelka there was an outstanding account payable to Scheinman for his services in the amount of $26 which Marun forthwith paid without inquiring what was covered by this account. He testified that he thought it was for "a service passing through the Customs office".

In July 1961 Zouzelka apparently became disillusioned with the deal, and being in need of money, asked for his money back. Marun paid him $1,000 in cash and gave him a promissory note for $4,000. Marun and Zouzelka then entered into an agreement by which Zouzelka transferred his interest in the diamond to Marun, the agreement then stating that Marun and Minogue were each owner of a 50 percent portion of the total ownership in the diamond.

Marun then undertook to dispose of the diamond. At the end of August, 1961 he went to New York and picked up the diamond from the Freed Company and took it to Miami, Florida. There a window was cut in the exterior skin to determine the quality of the diamond which proved to be not up to expectations.

Marun then decided, with the concurrence of Minogue, that the prospects of selling the diamond would be greater if the diamond were cut, but Minogue, whose ardour about the transaction had somewhat cooled, in giving his concurrence reminded Marun that he still considered him indebted to the extent of $10,000.

Marun took the rough diamond to a Mr. Berliner, who had been a diamond cutter, but no longer practised that trade, and who recommended Baumgold Brothers of New York as being experts by whom the diamond was cut into a 7 carat stone and a 5 carat stone, the remainder of the 27 carats becoming waste.

Marun took delivery of the cut stones from Baumgold Brothers on the morning of October 8, 1961 and immediately flew with them in his possession to Toronto. At the Customs inspection at the airport in Toronto, Marun did not declare the two diamonds he now had, nor the twenty industrial diamonds which were still in his possession. He explained his reason for failure to do so as being his belief that the two cut diamonds were no longer commercial but that he intended to display them as specimens of what his mines in British Guiana produced in order to raise funds for further development. It did not occur to him to declare the twenty industrial diamonds upon which he had paid duty on July 12, 1960.

Marun telephoned Minogue in North Bay to advise him of his return to Toronto with the two cut stones, arranging to meet Minogue shortly thereafter.

The two suppliants did meet about ten days later. In a hurried session Marun offered Minogue both the diamonds or his choice of the larger or smaller one. Minogue chose the 5 carat stone. Minogue stated that he took the 5 carat diamond because he had no security for his $10,000 advance to Marun and because he felt he had better facilities for its safe-keeping. He was concerned about the diamonds being carried about by Marun without insurance. He gave Marun a handwritten document dated October 25, 1961 stating that he had a 5 carat diamond in his possession. Upon his return to North Bay he insured the 5 carat diamond for $3,000.

Meanwhile Marun obtained a certificate of appraisal for insurance purposes on the 7 carat diamond, the value of which was appraised at $15,800. However he did not insure the diamond because he could not pay the premium. Instead he had the diamond set in a tie pin at a cost of $30 as a means of safe-keeping (it being under his constant observation) and to display the diamond.

The diamond in this setting was appraised at $13,500 for insurance purposes by the same appraiser who had fixed a value of $15,800 on the same unset diamond.

Marun at the suggestion of Minogue and with his assistance attempted to borrow $5,000 on the security of the 7 carat diamond from the Toronto-Dominion Bank, the manager of which was personally known to Minogue, for

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the purpose of buying equipment to conduct further mining operations. The Manager expressed a willingness to make the loan provided Minogue joined in signing a demand note.

This bank loan never materialized because in the meantime Royal Canadian Mounted Police officers posing as agents of a millionaire principal, approached Marun purportedly to buy the diamond.

Marun was arrested on December 4, 1961 and charged with having in his possession goods unlawfully imported into Canada contrary to section 203 of the *Customs Act*. The 7 carat diamond in its setting and twenty industrial diamonds were seized by the police. This charge was dismissed by a police magistrate on January 17, 1962 and an appeal against such acquittal was also dismissed.

On being released on bail on December 4, 1961 Marun immediately telephoned Minogue advising him that he had been arrested for not declaring the diamond at Customs and that the diamond had been seized. There was an exchange of recriminations with Marun, in exculpation, explaining to Minogue that because of lack of funds he could not stay in New York to arrange proper customs documents.

I might add that Mr. Minogue entertained some misgivings about Mr. Marun's complete honesty which were since dispelled to his satisfaction, but he did take steps to protect his interests as best he could by taking from Marun, 30.50 carats of industrial diamonds at $10 per carat, $500 in cash and 450 of shares held by Marun in the Company and later the 5 carat diamond in the circumstances before recited.

The consent given by him to Marun to cut the 27 carat rough stone was given in writing, which document also stated that any sale of the cut stones was to be with Minogue's consent and that the money received was to be divided evenly between them after the deduction of expenses. It was again recited that Minogue and Marun were joint owners of the stone.

After being advised by Marun on December 4, 1961 that the police had seized the 7 carat diamond Minogue did not deliver the 5 carat diamond in his possession to the police or Customs officials, but on December 21, 1961 officers of the police attended upon Minogue at North Bay where he delivered the 5 carat diamond to them and accepted a receipt therefor.

A notice dated January 5, 1962 was received by Marun from the Department of National Revenue advising that a report of the seizure of one diamond tie pin and twenty rough diamonds had been made on December 4, 1961 on the ground that the said goods were smuggled or clandestinely introduced into Canada and that such goods were liable to forfeiture. This notice also pointed out that Marun had 30 days to present evidence by affidavit in rebuttal upon receipt of which the matter would be presented to the Minister for his decision on the merits of the case in accordance with section 160 of the *Customs Act* and that such decision would be final unless that decision was not accepted by Marun. A copy of sections 158 to 166 of the *Customs Act* was attached to this notice.

Marun forwarded an affidavit, pursuant to such notification stating, in part, that he was willing to pay all required duties.

By letter dated September 17, 1962 the Department advised Marun that a decision had been rendered to the effect that the tie pin setting was released unconditionally and that the 7 carat diamond and the twenty industrial diamonds would be released on payment of $9,710.25, failing payment of this amount within 30 days the diamonds would be forfeited.

A notice dated January 23, 1962 similar to that directed to Marun dated January 5, 1962 was received by Minogue who replied by letter dated February 14, 1962 in which he related the circumstances under which he came into possession of the 5 carat diamond.

On October 26, 1962 Minogue was advised that the 5 carat diamond would be released on payment of $3,817.55, and failing payment of this amount within 30 days the diamond would be forfeited.

Both suppliants objected to the foregoing decisions and since the goods were not returned to them, launched the present Petitions of Right for the relief above described. The suppliant, Marun, refused to accept the return of the tie pin setting when delivery was proffered by officers of the Royal Canadian Mounted Police.

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By virtue of section 248 of the *Customs Act*, the burden is on the suppliants to prove that the Crown has no right, under any provision of the *Customs Act*, to retain the goods in its possession.

There is no doubt that the 7 carat diamond and the 5 carat diamond are subject to tax at the rate of 21 percent of their value payable upon importation. A consumption or sales tax at the rate of 8 percent is imposed by section 30 of the *Excise Tax Act* to which a further tax of 3 percent is added under the *Old Age Security Act* making a total combined tax of 11 percent on the sale price of goods imported into Canada except those specifically exempted. The diamonds in question are not so exempted. While the tax is payable on the sale price the goods do not have to be sold to be taxable. Section 29 (1) (*f*) of the *Excise Tax Act* defines "sale price" for the purpose of determining the consumption or sales tax in the case of imported goods as being deemed to be the duty paid value thereof. Neither do the goods have to be subject to any duty imposed by the customs tariff to be taxable. Section 29(1)(*a*) provides:

29. (1) In this Part,

(*a*) "duty paid value" means the value of the article as it would be determined for the purpose of calculating an *ad valorem* duty upon the importation of such article into Canada under the laws relating to the Customs and the *Customs Tariff* whether such article is in fact subject to *ad valorem* or other duty or not, plus the amount of the Customs duties, if any, payable thereon;

. . .

In addition to the consumption or sales tax at the rate of 11 percent, the two diamonds in question are also subject to excise tax by virtue of section 23 of the *Excise Tax Act* as being goods mentioned in Schedule I thereto at the rate opposite the mentioned item. Schedule I, section 9(*c*) specifically mentioned "articles commonly or commercially known as jewellery, whether real or imitation, including diamonds...for personal use or for adornment of the person...ten percent."

It was contended that the two cut diamonds in question particularly the 7 carat diamond were not to be used for personal use or adornment of the person, but were to be used as a specimen or sample indicative of the product of the suppliant Marun's mining operations in British Guiana. I do not accede to such contention because

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in my view the words "including diamonds for personal use or for adornment of the person" in Schedule I are an extension of the meaning of the word "Jewellery" and refer to a kind of goods. The evidence was clear there are two kinds of diamonds, industrial diamonds and diamonds of gem quality. The two diamonds here in question are of the latter kind and therefore fall within the meaning of the words in Schedule I and are subject to an excise tax of 10 percent payable upon importation on the duty paid value as defined by section 29(1)(*a*) of the *Excise Tax Act* quoted above.

56. Where an excise tax is payable under this Act upon the importation of any article into Canada, the provisions of the *Customs Act* are applicable in the same way and to the same extent as if that tax were payable under the Customs Tariff, 1948, c. 50, s. 9.

Therefore, the taxes imposed under the *Excise Tax Act* are to be treated as duties under the Customs Tariff.

It was also submitted on behalf of the suppliants that the 27 carat rough diamond when first imported by Scheinman in February 1961, it was properly imported from which it followed that the two diamonds cut therefrom when subsequently imported were tax free. The simple answer to such contention is that when the rough diamond was first imported by Murray Scheinman, it was imported under license granted to Scheinman by the Minister under sections 33 and 35 of the *Excise Tax Act,* as a consequence of which no tax was payable, nor was any tax paid, at that time. Mr. Scheinman then exported the rough diamond to New York and being a licensed manufacturer he could do so without being subjected to tax by reason of section 44 of the *Excise Tax Act*. However, it does not follow that the stone having been imported under license with no tax being paid, then exported, that it can be subsequently reimported, either in identical or altered form, without tax becoming payable. Such a result would be absurd and in my opinion, was clearly not the intention of Parliament.

Section 18 of the *Customs Act* imposes a clear obligation upon every person arriving in Canada to report in writing to the collector or proper officer at the nearest Customs House all goods in his custody and the quantity and values of such goods, to answer all questions respecting such articles and to make due entry thereof as required by law. What

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constitutes due entry is set out in sections 20, 21 and 47 of the *Customs Act* which consists of filing an invoice describing the goods, giving the quantity and value thereof which, by section 21, is also required to be stated in the bill of entry although such goods may not be subject to duty. Section 22 imposes an obligation to pay duty which, by section 56 of the *Excise Tax Act,* includes taxes payable thereunder, at the time of entry, unless the goods are to be warehoused.

Accordingly there is a threefold obligation on any person bringing goods into Canada, (1) to report the goods to Customs, (2) to make due entry of them, and (3) to pay the taxes. None of these obligations were carried out by the suppliant Marun when he imported the two cut diamonds and the twenty industrial diamonds into Canada at the airport in Toronto on October 8, 1961, from which it follows that the goods were unlawfully imported on the person of Marun.

During the trial much evidence was led to establish, and it was argued, that the foregoing obligations so imposed by the *Customs Act* are more honoured in their breach than in their observance. It is quite true that travellers returning to Canada do not declare in writing but only verbally or on occasion not at all, a great many articles such as clothing and jewellery being worn, their suitcases and the like goods acquired in Canada, nor are they required to do so by Customs officials for the very practical reason that every person has these items and they are not subject to tax or duty in any event. However, any importer could readily distinguish between such items and those acquired abroad and more particularly between such items as two large and valuable diamonds which had just been cut in the United States and it was not established to my satisfaction that the Customs officials had adopted an accepted practice of permitting persons not to declare items such as these, nor can any Customs official waive compliance with statutory obligations upon an importer, nor is an importer so relieved from the consequences of his failure to comply with these obligations. I, therefore, reject the contention that under the circumstances the two cut diamonds and the twenty industrial diamonds were lawfully imported.

The fact that the suppliant, Marun, was acquitted by a police magistrate of a charge that, without lawful excuse, he was in possession of goods unlawfully imported into Canada, namely, a diamond tie pin, contrary to section 203 of the *Customs Act*, which acquittal was sustained on appeal, is not *res judicata* in his favour of the fact that the goods had not been illegally imported and cannot be invoked by him in the present case. See *Rex v. Bureau*[1].

The suppliant, Marun, in his petition prays the refund of $151.80 paid by him upon the importation of a quantity of industrial diamonds on July 12, 1960.

Section 46 of the *Excise Tax Act* provides that a refund of any tax imposed thereunder may be granted where the tax was paid in error, but by subsection 5 of section 46 no refund shall be paid unless application in writing is made for the same by the person entitled thereto within two years of the time when any such refund first became payable.

Since no application for refund was ever made by the suppliant, Marun, as required by section 46 *(supra)* as a condition precedent thereto, it follows, without the necessity of deciding the question whether the goods were properly taxable and whether the tax was paid in error, that the suppliant is not entitled to a refund of the amount of $151.80 as prayed in his Petition of Right.

I am satisfied that the twenty industrial diamonds found in the possession of Marun and seized were, in fact, pieces remaining from the 900 imported by him on July 12, 1960 upon which taxes had been paid. However, Marun did not report such goods as required by section 18 of the *Customs Act* and was in technical breach thereof.

While section 18 imposes the duties previously outlined upon persons arriving in Canada and having with them goods, whether dutiable or not, the section does not state the consequences of the failure of such persons to fulfill such duties. The consequences are found in other provisions of the *Customs Act*.

Section 190(1)(*a*) and (*c*) is as follows:

190 (1) If any person

(*a*) smuggles or clandestinely introduces into Canada any goods subject to duty under the value for duty of two hundred dollars;

[1] [1949] S.C.R. 367 at 374.

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. . .

(c) in any way attempts to defraud the revenue by avoiding the payment of the duty or any part of the duty on any goods of whatever value;

such goods if found shall be seized and forfeited, or if not found but the value thereof has been ascertained, the person so offending shall forfeit the value thereof as ascertained, such forfeiture to be without power of remission in cases of offences under paragraph (a).

Section 178(1) and (2) reads in part, as follows:

178. (1) Where the person in charge or custody of any article mentioned in paragraph (b) of section 18 has failed to comply with any of the requirements of that section, all the articles mentioned in paragraph (b) of that section in the charge or custody of such person shall be forfeited and may be seized and dealt with accordingly.

(2) If the articles so forfeited or any of them are not found, the owner at the time of importation and the importer, and every other person who has been in any way connected with the unlawful importation of such articles shall forfeit a sum equal to the value of the articles, and, whether such articles are found or not, . . .

Section 183 reads as follows:

183. If any goods are unlawfully imported on the person, or as baggage, or among the baggage of any one arriving in Canada, on foot or otherwise, such goods shall be seized and forfeited.

Section 203 reads as follows:

203. (1) If any person, whether the owner or not, without lawful excuse, the proof of which shall be on the person accused, has in possession, harbours, keeps, conceals, purchases, sells or exchanges any goods unlawfully imported into Canada, whether such goods are dutiable or not, or whereon the duties lawfully payable have not been paid, such goods, if found, shall be seized and forfeited without power of remission, and, if such goods are not found, the person so offending shall forfeit the value thereof without powers of remission.

Of the sections above quoted only sections 190 and 203 require the presence of a *mens rea* on the part of the person importing or retaining the imported goods.

There is no question that the suppliant, Marun, by his failure to comply with the positive duties imposed by section 18 falls precisely within the language of section 183 quoted above.

Similarly so, the actions of the suppliant, Marun, in importing the 7 carat and 5 carat diamonds also bring him with the operation of section 178. It was contended on behalf the suppliant, Minogue, that the words, "in the charge or custody of such person shall be forfeited and dealt with accordingly" render this section applicable only if the goods were found in the custody or possession of the person who failed to comply with section 18 when the goods were imported. In my view such is not the proper interpretation of the section. If the person importing the goods fails to comply with section 18, the goods are forfeited if found and it matters not where they are found. The language of the section does not require that the goods be found in the custody of that particular person.

The forfeiture under sections 178 and 183 is automatic and occurs immediately upon the unlawful importation by virtue of section 2(1)(*q*) of the *Customs Act* reading as follows:

> 2. (1) In this Act, or in any other law relating to the Customs,
>
> . . .
>
> (*q*) "seized and forfeited", "liable to forfeiture" or "subject to forfeiture", or any other expression that might of itself imply that some act subsequent to the commission of the offence is necessary to work the forfeiture, shall not be construed as rendering any such subsequent act necessary, but the forfeiture shall accrue at the time and by the commission of the offence, in respect of which the penalty of forfeiture is imposed;
>
> . . .

The forfeiture is not brought about by any act of the Customs officials or officers of the Department, but it is the legal unescapable consequence of the unlawful importation of the goods by the suppliant, Marun. The goods thereupon became the property of the Crown and no act by any officer of the Crown can undo that forfeiture. Therefore, any defect, if such existed, in the notifications and procedure adopted by the Department under sections 150 and 158 is not material.

I am not convinced that the suppliant, Marun, by his action in failing to comply with the provisions of section 18 of the *Customs Act,* does not fall within the four corners of section 190(1)(*c*) of the *Customs Act* above quoted. The section contemplates the presence of a *mens rea* which I find was present despite the acquittal of Marun on a criminal charge under such section by a police magistrate.

From the evidence adduced it is clear that Marun, being a diamond prospector, had imported industrial diamonds on July 12, 1960 and had paid duty on them. He was, therefore, familiar with the requisite custom procedure. The company incorporated by him and Minogue had decided as a matter of policy, industrial diamonds mined in South America should be shipped to Canada by air

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through a Customs broker. There was a discussion of such policy between Marun and Minogue and it was Minogue's advice to Marun that such method of importation should be followed. Marun, as president of the company, applied for a license under the *Excise Tax Act* to permit of importation without payment of tax at that time, which license was not granted. Marun, when arrested on December 4, 1961 did not tell the police about the 5 carat diamond in Minogue's possession, but he did telephone Minogue and explained that he had been unable to stay in New York to complete documentation for customs importation because of lack of funds. It follows logically, because he was without funds at that time, he imported the diamonds without paying the tax which he must have known was payable. I cannot accept as credible the suggestion that since Marun had paid an account of $26 to Scheinman, he therefore believed that duty had been paid on the diamonds.

As to the 5 carat diamond found in the possession of the suppliant, Minogue, it follows that such stone was forfeited under sections 178 and 183 when unlawfully imported by Marun who could not divest the property in the Crown by delivering the 5 carat stone to Minogue no matter how innocent Minogue was.

Section 203 of the Act does not mean that if a possessor of goods unlawfully imported has a lawful excuse, then the goods are not forfeited under other provisions of the *Customs Act*. In *Smith v. Goral*[1] the plaintiff purchased a motor car from the defendant who had purchased it from a third party. The motor car was seized by the Crown from the plaintiff as forfeit under the *Customs Act* for unlawful importation into Canada without payment of custom duty. None of the parties knew of the claim for duty and all were innocent of the unlawful importation. The plaintiff sought to recover the purchase price relying on the implied warranties under the *Ontario Sale of Goods Act*. The plaintiff succeeded because under section 2(1)(*q*) of the *Customs Act*, the forfeiture occurred at the time the car was unlawfully imported as a consequence of the commission of the Customs offence. Therefore, the seller had no title to the car when he sold it, although it was not physically seized until later.

[1] [1952] 3 D.L.R. 328.

The purpose of section 203 is clearly to protect a person who innocently comes into possession of unlawfully imported goods and without means of knowing they were unlawfully imported, from prosecution and the possible liability to a penalty equal to the value of the goods and imprisonment, but certainly not to vest title to unlawfully imported goods in such person.

I now turn to the counterclaim of the Crown for judgment for the amount of taxes payable upon the importation of the 7 carat diamond, the 5 carat diamond and the twenty industrial diamonds against the suppliant Marun.

Under section 36 of the *Customs Act* the value for duty shall be the fair market value, at the time when and place from which the goods were shipped directly to Canada, of like goods when sold to purchasers who at the same trade level as the importer, namely the price at which Marun, the importer, could have purchased the 7 and 5 carat stones in New York on October 8, 1961.

There was evidence adduced by expert witnesses as to the value of the 7 carat diamond and the 5 carat diamond.

I disregard the evidence of the per carat valuations of the diamonds in their rough state, i.e., the 27 carat rough diamond, for the reason that an accurate appraisal of the cut diamonds could not be made in the original state. Similarly, I disregard, as being unrealistic, the valuation for insurance purposes and for the purpose of a bank loan of the 7 carat diamond at $15,800 and $13,500 and the insurance value of $3,000 on the 5 carat diamond.

An appraiser called by the suppliant, Marun gave a value of between $2,800 and $3,500 for the 7 carat stone and between $2,000 and $2,500 for the 5 carat stone.

A witness called by the Crown estimated the retail value of the 7 carat stone as being between $7,000 and $10,000 and the 5 carat stone as being between $4,000 and $6,000. The wholesale values were estimated by this witness at between $600 to $800 per carat for the 7 carat stone being an amount between $4,200 and $5,600 and the 5 carat stone at an amount between $2,400 to $2,600. This witness fixed the price in Canada in 1963. He stated that the New York price would be the same after allowing

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for exchange and that in 1961 the prices would be 10 percent less.

It was apparent that the diamonds were of inferior colour and marred by flaws. Therefore the market for them would be extremely limited. The suppliant, Marun, being a producer of diamonds would deal at the wholesale level.

Accordingly, I would fix the value for duty of the 7 carat stone at $3,200 and of the 5 carat stone at $2,300. The respondent is, therefore, entitled to judgment against the suppliant Marun in the amount of $1,156.75 which I arrive at by calculating the tax payable at 21 percent on the aforesaid values and a tax at 11 percent on the value of $25 for the industrial diamonds. The respondent is also entitled to the costs of the counterclaim.

It was submitted by counsel for the suppliant, Marun, that to declare the diamonds forfeited and also to exact the tax payable thereon, constitutes cruel and harsh treatment contrary to the *Canadian Bill of Rights*, 1960 Statutes of Canada, chapter 44 and that it is not fair for the Crown to retain the diamonds if the suppliant pays the tax thereon.

Section 2 of the *Bill of Rights* reads in part as follows:

> . . . no law of Canada shall be construed or applied so as to
> (*b*) impose or authorize the imposition of cruel and unusual treatment or punishment.

It will be observed that the pertinent words of the section are "cruel and unusual treatment". The fact that the *Customs Act* provides that goods unlawfully imported are forfeit to the Crown without power of remission and that the person who unlawfully imported such goods is liable for the tax payable thereon, does not constitute "unusual treatment". Therefore the *Bill of Rights* cannot be invoked as an aid to the interpretation of the *Customs Act* to reach a contrary result.

For the foregoing reasons, the suppliant, Minogue, is not entitled to the relief sought in his Petition of Right herein and Her Majesty the Queen is entitled to costs.

Similarly, the suppliant, Marun, is not entitled to the relief sought in his Petition of Right and Her Majesty the Queen is entitled to costs.

Judgment accordingly.

BETWEEN: 1964 Oct. 13 — Oct. 14

BUCKERFIELD'S LIMITED, GREEN VALLEY FERTILIZER & CHEMICAL CO. LTD., WESTLAND ELEVATORS LIMITED, and BURRARD TERMINALS LIMITED ....APPELLANTS;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Associated companies—Control of corporation within meaning of s. 39(4)(b) of the Income Tax Act—Meaning of "group of persons" as used in s. 39(4) of the Income Tax Act—Income Tax Act, R S C. 1952, c. 148, s. 39(1),(2) and (4).

In 1961 two companies, Pioneer Grain Company Limited and Federal Grain Company, each owned one-half of the issued shares of the appellant companies, Buckerfield's Limited and Green Valley Fertilizer & Chemical Co. Ltd. Federal Grain Company also held one-third of the shares of Westland Elevators Limited and The Alberta Pacific Grain Company (1943) Limited, a wholly owned subsidiary of Federal Grain Company, owned one-third of the shares of Burrard Terminals Limited. Searle Grain Company Limited held one-third of the shares of Westland Elevators Limited and Burrard Terminals Limited and Pioneer Grain Company Limited held the remaining one-third of the shares of these two companies.

The question to be decided is whether the appellants, Buckerfield's Limited and Green Valley Fertilizer & Chemical Co. Ltd, in the one case, and Westland Elevators Limited and Burrard Terminals Limited in the other, are "controlled by the same . . . group of persons" within the meaning of those words in s. 39(4)(*b*) of the *Income Tax Act.*

Held: That the word "controlled" as used in s. 39 of the *Income Tax Act* contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors.

2. That where, in the application of s. 39(4) of the *Income Tax Act,* a single person does not own sufficient shares to have control in the sense indicated in s. 39, it becomes a question of fact as to whether any "group of persons" does own such a number of shares.

3. That the phrase "group of persons", as used in s. 39(4)(*b*) of the *Income Tax Act,* is apt to encompass the companies holding the shares of Buckerfield's Limited and Green Valley Fertilizer & Chemical Co. Ltd. and the companies holding the shares of Westland Elevators Limited and Burrard Terminals Limited.

4. That the appeals are dismissed.

APPEALS under the *Income Tax Act.*

The appeals were heard by the Honourable Mr. Justice Jackett, President of the Court, at Ottawa.

H. H. Stikeman, Q.C. and *James Grant* for appellants.

F. J. Cross and *D. G. H. Bowman* for respondent.

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

JACKETT P. at the conclusion of the argument (October 14, 1964) delivered the following judgment:

I shall deliver a single set of reasons for judgment in *Buckerfield's Limited v. Minister of National Revenue, Green Valley Fertilizer & Chemical Co. Ltd. v. Minister of National Revenue, Westland Elevators Limited v. Minister of National Revenue and Burrard Terminals Limited v. Minister of National Revenue.*

These four appeals are appeals against the assessments of the respective appellants under the *Income Tax Act* for the 1961 taxation year. The appellant in each case challenges the assessment on the ground that the Minister erred when, in making the assessment, he assumed that the appellant and another company were "associated with each other" in 1961 within the meaning of these words in subsection (2) of section 39 of the *Income Tax Act.*

As the Minister's assumption was that Buckerfield's Limited (hereinafter referred to as "Buckerfield's") was associated with Green Valley Fertilizer & Chemical Company Limited (hereinafter referred to as "Green Valley"), the questions in the appeals of those two companies are identical and those appeals were therefore heard together. Similarly, as the Minister's assumption was that Burrard Terminals Limited (hereinafter referred to as "Burrard") was associated with Westland Elevators Limited (hereinafter referred to as "Westland"), the questions in the appeals of those two companies are identical and those appeals were therefore heard together.

The argument submitted in support of the appeal is the same in all four cases.

In 1961, one-half of the issued shares of Buckerfield's belonged to Pioneer Grain Company Limited (hereinafter referred to as "Pioneer") and one-half belonged to Federal Grain Company (hereinafter referred to as "Federal"). The same two companies each owned one-half of the issued shares of Green Valley. The shares in Buckerfield's were acquired by Pioneer and Federal under written agreement dated December 24, 1951, under which they agreed in effect,

(a) that their share holdings in Buckerfield's were to be maintained at the same level,
(b) that, notwithstanding the number of shares held or controlled by either of them, each of them was to have "an equal voice...in the control and operation of Buckerfield's",
(c) that each of them was to be entitled to nominate 50 per cent of the Board of Directors of Buckerfield's,
(d) that "the management of Buckerfield's . . . shall be such as shall at all times...be acceptable to both parties", and
(e) that each of them should have a right of first refusal in respect of the other's shares in Buckerfield's.

The parties had verbally agreed to the same terms in relation to Green Valley. Buckerfield and Green Valley were controlled in accordance with the respective agreements.

The basic facts in respect of Burrard and Westland were in substance the same as the basic facts that I have just recited in relation to Buckerfield's and Green Valley except that, in the case of Burrard, its shares were held one-third by Pioneer, one-third by The Alberta Pacific Grain Company (1943) Limited (a wholly owned subsidiary of Federal hereinafter referred to as "Alberta Pacific") and one-third by Searle Grain Company Limited (hereinafter referred to as "Searle"), and, in the case of Westland, its shares were held one-third by Federal, one-third by Pioneer and one-third by Searle.

Buckerfield's and Green Valley were each carrying on a business unrelated to the businesses of their shareholders. They both sold, among other things, fertilizer, and were in active competition with each other. There seems to have been no reason for acquisition of their shares by Pioneer and Federal except that the shares were regarded as a good investment. Burrard and Westland, on the other hand, operated terminal elevators and had facilities which, at certain seasons of the year, were of some considerable importance to the three companies which had acquired their shares.

Apart from their mutual interests in the appellant companies, the evidence is that Pioneer, Federal and Searle

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are vigorous competitors. They are each in the grain business in Western Canada and operate completely independently of each other. The evidence is further that, in three cases at least, the management of the appellants is left to the officers employed for the purpose and that there is, in fact, no control exercised over the management of the appellants by Pioneer, Federal or Searle or by any one or more of them acting in combination.

On these facts, the question to be determined in each appeal arises under section 39 of the *Income Tax Act* as applicable to the 1961 taxation year. That section reads in part as follows:

39. (1) The tax payable by a corporation under this Part upon its taxable income or taxable income earned in Canada, as the case may be, (in this section referred to as the "amount taxable") for a taxation year is, except where otherwise provided,

(*a*) 18% of the amount taxable, if the amount taxable does not exceed $35,000, and

(*b*) $6,300 plus 47% of the amount by which the amount taxable exceeds $35,000, if the amount taxable exceeds $35,000.

(2) Where two or more corporations are associated with each other in a taxation year, the tax payable by each of them under this Part for the year is, except where otherwise provided by another section, 47% of the amount taxable for the year.

* * *

(4) For the purpose of this section, one corporation is associated with another in a taxation year if, at any time in the year,

* * *

(*b*) both of the corporations were controlled by the same person or group of persons,

The question in the one set of appeals is simply whether Buckerfield's and Green Valley are "controlled by the same ...group of persons" within the meaning of those words in section 39(4)(*b*) and the question in the other set of appeals is whether Burrard and Westland are "controlled by the same...group of persons" within the meaning of those words in section 39(4)(*b*).

Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation. It might, for example, refer to control by "management", where management and the Board of Directors are separate, or it might refer to control by the Board of Directors. The kind of control exercised by management officials or the Board of Directors is, however, clearly not intended by section 39 when it contemplates control of one corporation by another as well as control of a corporation by individuals (see subsection (6) of section 39). The word "control" might conceivably refer to *de facto* control by one or more shareholders whether or not they hold a majority of shares. I am of the view, however, that, in section 39 of the *Income Tax Act,* the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors. See *British American Tobacco Co. v. I. R. C.*[1] where Viscount Simon L. C., at page 15, says:

> The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes.

See also *Minister of National Revenue v. Wrights' Canadian Ropes Ld.*[2] per Lord Greene M.R. at page 118, where it was held that the mere fact that one corporation had less than 50 per cent of the shares of another was "conclusive" that the one corporation was not "controlled" by the other within section 6 of the *Income War Tax Act.*

Where, in the application of section 39(4) a single person does not own sufficient shares to have control in the sense to which I have just referred, it becomes a question of fact as to whether any "group of persons" does own such a number of shares.

In these appeals, there is no doubt that Pioneer and Federal, in the one pair of appeals, and Pioneer, Federal (including its subsidiary Alberta Pacific) and Searle, in the other pair of appeals, have control of the two appellants. If Pioneer and Federal are, in relation to the ownership of the shares of Buckerfield's and Green Valley, aptly described by the words, "group of persons", Buckerfield's and Green Valley are "associated with each other" within the meaning of those words in section 39(2). Similarly, if Pioneer, Federal (including its subsidiary Alberta Pacific) and Searle are, in relation to the ownership of the shares of Burrard and Westland, aptly described by the words "group of persons", Burrard and Westland are "associated with each other" within the meaning of those words in section 39(2).

[1] [1943] 1 A.E.R. 13.

[2] [1947] A.C. 109.

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Jackett P.

The applicable sense of the word "group" as defined by the Shorter Oxford English Dictionary (1959) is

2. gen. An assemblage of objects standing near together, and forming a collective unity; a knot (of people), a cluster (of things). In early use there is often a notion of confused aggregation.

The only other sense that might be applicable is

3. A number of persons or things in a certain relation, or having a certain degree of similarity.

Counsel for the appellants referred to other dictionary definitions but I do not find any conflict among them. Apart from the argument on these appeals, the phrase "group of persons" is apt to encompass the companies holding the shares of Buckerfield's and Green Valley or the companies holding the shares of Burrard and Westland, within my understanding of the meaning of that phrase whether or not I seek the aid of dictionaries.

Counsel for the appellants, however, put forward two submissions. These two submissions, as I understand them, are

(a) that the word "group" in its ordinary sense does not include any number of persons less than four; and

(b) in section 39(4), the word "group" means a group of persons who come together to take advantage of the low rate of tax under section 39 and not a group of persons who come together for any other particular common purpose.

In support of the first of these two submissions, as I understand him, counsel submitted that, if Parliament had intended to include two, reference would have been made to a couple or a pair and, if it had intended to include three, reference would have been made to a trio. I cannot accept this submission. The word "group" in its ordinary meaning as I understand it, can refer to any number of persons from two to infinity. There is nothing in section 39(4) to suggest that there is any intention to omit any of them. Any omission of particular numbers would be, moreover, an obvious gap in the legislative scheme.

I have equal difficulty in appreciating the force of counsel's other submission. It is that, in section 39(4), "group" means a group of persons who come together to take advantage of the low rates of tax under section 39. I have difficulty in conceiving of a group of shareholders holding shares in two or more companies having joined together in their share holdings in order to get the benefit of the lower tax rate in section 39. The course of action that section 39 has been designed to discourage is the multiplication of corporations carrying on a business in order to get greater advantage from the lower tax rate. If a group were a party to such activity, presumably it would, as a group, have controlled a single company carrying on the business before the business was divided among a number of companies each controlled by the group. In such a case, the group would not have come together for the purpose of getting the low rate under section 39. Indeed, I can conceive of no case in which the group would have come together for that purpose. In any event, I am unable to appreciate the cogency of the argument in support of the submission that such an artificial limitation should be read into section 39(4) so as to cut down the ambit of the clear words of that subsection.

The appeals are dismissed with costs.

Judgment accordingly.

1964
Sept. 17, 18
Oct. 16

BETWEEN:

LAVERNE CLIFFORD KINDREE ...... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Practice of medicine—Physician entering into contract of employment with limited company—Corporation holding itself out as authorized to practice medicine—Physician precluded from practicing medicine as agent of a body corporate—Fees received by corporation for professional services performed by physician not earned income of corporation—Fees assigned by physician to corporation purportedly employing him are income of physician—Income Tax Act, R.S.C. 1952, c. 148 s. 21(2)—Medical Act, R.S.B.C. 1960, c. 239, s. 71.

The appellant, a medical doctor practicing in the Village of Squamish, British Columbia, incorporated a Company called Squamish Holdings Limited which employed the appellant as a doctor and appellant's wife as a nurse and which company also entered into contracts of employment with a succession of doctors who assisted the appellant in the practice of medicine.

The evidence established that there was no real change in the manner in which the appellant's practice was conducted after the incorporation

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of the Company from the manner in which it was conducted prior thereto insofar as the supplying of medical attention to patients was concerned.

The respondent assessed the appellant for income tax on the income credited to the Company over the percentage thereof to which the appellant and the other doctors in the clinic were entitled by virtue of the respective contracts into which they had entered with the Company, on the ground that such revenue represents income of the appellant and not of the Company.

Held: That Squamish Holdings Limited was not entered in The British Columbia Medical Register maintained by The College of Physicians and Surgeons of British Columbia in accordance with the *Medical Act,* 1960, R.S.B C., c. 239 and could not be so registered, and, by s. 71 of that Act any person not so registered is prohibited from engaging in the practice of medicine, surgery or midwifery, so that it is clear that a corporation cannot hold itself out as being authorized to practice medicine in any way whatever.

2. That the appellant is precluded in fact and in law and as a matter of public policy from practicing the profession of medicine in any of its forms as agent of a body corporate and the document purporting to be a contract of employment between the appellant and the Company did not establish an employer-employee relationship; and, similarly, the documents purporting to be contracts of employment between the other doctors and the Company did not establish an employer-employee relationship as between them and the Company but rather such relationship subsisted between them and the appellant.

3. That the monies received by the Company for services rendered by the appellant and the other doctors were fees already earned by him either personally or through the doctors employed by him, and the Company was merely the assignee of these fees which the Company did not and could not earn and to which it had no right other than as assignee of the appellant's earnings.

4. That since the monies in the hands of the Company are income of the appellant which his wife, by her services, assisted him in earning, it follows that sums paid by the Company to the appellant's wife were remuneration received by her as an employee of her spouse and as such are not properly deductible in computing the appellant's income.

5. That the appeal is dismissed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Cattanach at Victoria.

L. C. Kindree on his own behalf.

Alan F. Campney and *F. D. Jones* for respondent.

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

CATTANACH J. now (October 16, 1964) delivered the following judgment:

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This is an appeal from a decision of the Tax Appeal Board[1] dated December 27, 1962 whereby the assessment by the Minister of the appellant's liability under the *Income Tax Act,* R.S.C. 1952, c. 148 for the taxation year ending December 31, 1957 was confirmed, together with appeals from the assessments under the *Income Tax Act* for the taxation years 1958, 1959, 1960, 1961 and 1962.

The appellant is a duly qualified physician and surgeon who, upon completion of his medical training in 1948, began the practice of his profession in the Village of Squamish, situated in an area of limited access in the Province of British Columbia. He was accompanied by his recent bride who was a registered nurse and who assisted him in the conduct of his profession.

The appellant conducted his profession, at the outset, in rented quarters, which with the expansion of his clientele became inadequate. Accordingly the appellant contracted for the construction of larger premises in which to establish a medical clinic. Because of the increase in the number of patients and because the appellant supervised the construction of the clinic premises in addition to doing the cabinet work himself, on June 27, 1957, he employed one, Dr. D'Appolonia to assist him in the conduct of his profession at a remuneration of 35 percent of the net profits for the first year, 40 percent for the second year, 45 percent for the third year and 50 percent in each year thereafter. For a period of approximately 6 months Dr. D'Appolonia was in sole charge of the practice, the appellant devoting himself exclusively to the supervision of the construction of the clinic premises.

For reasons best known to himself and conceivably upon the advice of his chartered accountant and his solicitor, the appellant applied for and obtained the incorporation of a private company pursuant to the laws of the Province of British Columbia, under the name of Squamish Holdings Limited (hereinafter sometimes referred to as the Company) the certificate of incorporation bearing date June 28, 1957. Paragraph 3 of the Memorandum of Association sets out the objects for which incorporation was obtained in seven clauses, the pertinent clauses reading as follows:

[1] (1963) 30 Tax A.B.C. 333.

(a) To purchase or otherwise acquire and hold, or otherwise deal in, real and personal property and rights, and in particular land, buildings, medical and hospital equipment and supplies, furniture, supplies of all kinds, hotels, motels, trailer courts and equipment for the same.

(b) To enter into contracts or arrangements with any person, firm or corporation or agency for the furnishing and supply of medical and surgical aid and treatment of all kinds including hospital care, house care, drugs, medicines, medical apparatus.

(e) To employ duly registered physicians, surgeons and nurses as required in order to carry out any contracts entered into by the company.

The authorized capital of the Company consists of 20,000 preferred shares of the par value of $1 each and 10,000 shares without nominal or par value, the maximum consideration for which shares can be issued being $1 per share. Of the 10,000 shares without nominal or par value, 100 were issued to Mrs. Kindree, the appellant's wife, which were paid for by a loan from the Company to Mrs. Kindree, repayable from her salary as an employee of the Company, and 200 were issued as fully paid to the appellant.

The authorized preferred shares were all issued, 2,000 to Mrs. Kindree and 18,000 to the appellant. A substantial number of the preferred shares have been transferred to their children, five in number and all of tender years.

The appellant admitted in his testimony that he was the only shareholder who injected capital into the Company, the consideration for the issuance of shares to him being the transfer of assets owned by the appellant to the Company.

Immediately upon the Company coming into existence the appellant and his wife executed a Bill of Sale dated July 2, 1957 transferring to the Company their goods and chattels, comprising office equipment and furnishings, surgical instruments, medical equipment and two automobiles, all set forth in detail in a schedule to the Bill of Sale, for a consideration of $6,368.32. In addition two blocks of real property, owned by the appellant and his wife, were transferred to the Company on the same date, one block being land occupied by a trailer court and the other being the land upon which the medical clinic had been constructed.

The construction of the building housing the medical clinic was begun in 1956 and completed in January 1957 from which time the appellant carried on his medical practice in those premises.

The contract of employment between the appellant and Dr. D'Appolonia, dated June 27, 1957 was assigned by the appellant to the Company, also on July 2, 1957.

On June 27, 1957 the appellant purported to enter into a written contract of employment with the Company whereby he was to enter its service at a salary of $7,200 per year plus a bonus to be fixed on the basis of the net profit of the Company for the year. A similar contract was made on the same date between the Company and Mrs. Kindree whereby she was to receive a monthly salary of $200 for her services in connection with the operation of the medical clinic and $100 per month for her services in connection with the trailer court.

The Company maintained two bank accounts with the local branch of the Bank of Nova Scotia designated as Squamish Holdings Limited accounts "A" and "B". All receipts of the medical clinic were deposited in account "A" and all disbursements pertaining to the medical practice were made therefrom. The "B" account was used exclusively for deposits and withdrawals pertaining to the operation of the trailer court.

The operation of the trailer court was temporary in nature and was terminated well before the taxation years here in question so that the revenues therefrom and expenditures in connection therewith do not enter into the consideration of the present appeals.

The appellant and Mrs. Kindree also had a joint bank account into which their salaries were deposited and from which withdrawals were made for their personal needs.

The corporate name of Squamish Holdings Limited was not displayed on the medical clinic premises, it was not listed in the telephone directory, nor was the Company entered in The British Columbia Medical Register maintained by The College of Physicians and Surgeons of British Columbia in accordance with the *Medical Act,* 1960, R.S.B.C., c. 239. The Company could not be so registered because membership in the College is predicated upon a prescribed period of study and passing qualifying examinations. From their very nature these requirements can only be met by natural persons. Further, section 71 of this

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Act prohibits any person not registered thereunder from engaging in the practice of medicine, surgery or midwifery. Nowhere in the Act is it provided that the word "person" where it is used, shall include a corporation. It is clear that a corporation cannot hold itself out as being authorized to practise medicine in any way whatever.

Throughout the taxation years in question, the appellant was assisted in the medical practice by a succession of doctors, usually one at a time, all of whom had signed documents purporting to be contracts of employment with the Company. Each of such contracts contained a provision that the employee, (the doctor) was not limited or impeded in the practise of medicine to the best of his skill, knowledge and ability.

From the evidence adduced, it is clear that there was no real change in the manner in which the practice was conducted after the incorporation of the Company from the manner in which it was conducted prior thereto, insofar as the supplying of medical attention to patients was concerned.

After the incorporation of the Company, however, bills for professional services were rendered in the name of Squamish Holdings Limited. The corporate name was printed on the bills in bold type and below it the words "Medical Clinic of Dr. L. C. Kindree and Associates" appeared in smaller type. The account designated the professional services as having been rendered by the doctor who, in fact, performed the services and ended with a request that cheques be made payable to Squamish Holdings Limited.

Despite such admonition many cheques were made payable to the doctor who attended the patient, which cheques were invariably endorsed by the payee to the Company and credited to its "A" account.

Cheques drawn on the Company's bank account were signed "L. C. Kindree M.D." beneath which manual signature the words, "Medical Clinic: Squamish Holdings Ltd." were either stamped or written.

Under date of January 22, 1959 there was a contract between the Company and Howe Sound Company, a Company engaged in mining operations, whereby employees of that Company were to be given pre-employment medical examinations, an annual examination and medical treatment in the event of industrial accidents, in medical quarters supplied by the mining company at a nominal rental. This contract was effected by means of a letter addressed in the first instance to Dr. Kindree, the appellant herein, but was subsequently amended by consent of both parties, so that the letter was addressed to Squamish Holdings Limited and the terms embodied in the letter were accepted by the appellant in his capacity as president of Squamish Holdings Limited.

The appellant, who appeared on his own behalf without counsel, strenuously contended that his income was limited, by virtue of the foregoing arrangements, to salary and bonuses received by him from the Company and that he is entitled to adopt any method for the conduct of his medical practice which he, in his absolute discretion, should determine as being best suited thereto.

On the other hand, counsel for the Minister contended that the revenue arising from the medical services performed by the appellant and other doctors in the clinic over the percentage to which they were entitled by virtue of the respective contracts into which they had entered, and credited to the Company, represents income of the appellant and not that of the Company and that the monies in the hands of the Company came into its possession simply by assignment.

In my view there is no doubt whatsoever that the practice of medicine can only be carried on by a natural person involving a personal responsibility to the patient and to the governing body of the profession, such conclusion being obvious from the general tenor of the *Medical Act (supra)* and the code of ethics of the medical profession to which the appellant subscribed. In so far as clause (*b*) of the objects of the Company purports to authorize the Company to conduct the practice of medicine it must be ineffective.

As indicated by the evidence, the incorporation of the Company did not alter in substance the conduct of the business. In my opinion the crucial test is whom the patients thought they were consulting and were in fact consulting. They had no knowledge, or any means of knowledge, of the Company until accounts were rendered to them in the name of the Company after treatment.

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Cattanach J.

In my opinion, the appellant is precluded in fact and in law and as a matter of public policy from practising the profession of medicine in any of its forms as agent of a body corporate and the document purporting to be a contract of employment between the appellant and the Company, did not establish an employer-employee relationship. Similarly so the documents purporting to be contracts of employment between the other doctors and the Company did not establish an employer-employee relationship as between them and the Company, but rather such relationship subsisted between them and the appellant.

It is, therefore, my understanding of the facts that the monies received by the Company for services rendered by the appellant and the other doctors were fees already earned by him either personally or through the doctors employed by him and the Company was merely the assignee of these fees which the Company did not and could not earn and to which it had no right other than as assignee of the appellant's earnings.

There was no dispute between the appellant and the Minister as to the accuracy of the figures by which the appellant's income has been increased in the taxation years in question.

Since I have found that the monies in the hands of the Company are income of the appellant which his wife, by her services, assisted him in earning, it follows that sums paid by the Company to the appellant's wife were remuneration received by her as an employee of her spouse and as such are not properly deductible in computing the appellant's income by reason of s-s (2) of s. 21 of the *Income Tax Act* which reads as follows:

> 21. . . .
>
> (2) Where a person has received remuneration as an employee of his spouse, the amount thereof shall not be deducted in computing the spouse's income and shall not be included in computing the employee's income. . . .

The Minister was, therefore, right in assessing the appellant as he did and the appeals herein must be dismissed with costs.

Judgment accordingly.

BETWEEN: 1964

Sept. 21, 22, 23

Oct. 19

INLAND RESOURCES CO. LTD. (Non-Personal Liability) (In Voluntary Liquidation) .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Adventure or concern in nature of trade—Intention or motive of taxpayer—Preferred and secondary intention in purchase of asset—Purchase of asset to create an investment—Purchase of asset a speculation looking to resale—Onus of proving assessment wrong—Determination of market value of asset when purchased—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—British Columbia Companies Act, R.S.B.C. 1960, c. 67, s. 23(1).

The appellant, a mining company incorporated under the laws of British Columbia on March 28, 1951, acquired a mining property known as Hat Creek Coal Mine in British Columbia from St. Eugene Mining Corporation Ltd., which had purchased it for $19,000 in 1944. The appellant agreed to issue 900,000 fully paid and non-assessable shares of $1.00 par value to St. Eugene Mining Corporation Ltd. for the property, and by the same agreement Wilson Mining Corporation Ltd. agreed to underwrite or arrange a firm underwriting to provide the sum of $34,000 to appellant for the purchase of 400,000 shares of appellant company to yield 8½ cents per share to appellant. By the same agreement, Wilson Mining Corporation Ltd. obtained an option from St. Eugene Mining Corporation Ltd. to purchase 450,000 of the 900,000 shares issued by appellant to St. Eugene for the cost of such shares to St. Eugene, 7.4 cents per share.

There was no development of the Hat Creek property from 1951 until 1956, when negotiations were instituted with B.C. Electric Co. Ltd., which led to an option agreement being executed by the appellant and Western Development and Power Ltd., a wholly owned subsidiary of B.C. Electric Co. Ltd. This agreement led to the sale of the property by the appellant to Western Development and Power Co. Ltd. in 1960 for $1,570,000 and 320,000 shares of Van-Tor Oil and Explorations Ltd.

The respondent reassessed the appellant for income tax on the profit realized from the sale, calculated as the selling price of $1,570,000, plus the market value of the Van-Tor Oil shares of $163,200, less the initial cost of the mining property calculated at $110,499.83 (being the value of 300,000 shares at 8½ cents per share) plus $13,504.49, being the development and carrying expenses borne by the appellant.

It was found on the evidence that at the time the option to purchase the property was given to Western Development and Power Ltd. the estimate of the size of the ore body was less than 100,000,000 tons. Later, but before the property was purchased by Western Development and Power Ltd., that company determined that the ore body was probably of about 700,000,000 tons. The evidence also disclosed

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that Wilson Mining Corporation Ltd. had considerable coal mining experience, and its officers and employees knew that in 1947 and 1951 it would be most difficult to successfully market lignite coal from the Hat Creek property; that they were fully aware of the fact that the oil and gas industry was developing in Alberta and British Columbia and would be competing and that the market for coal was dwindling.

Held: That in this type of case the test of whether there is an adventure or concern in the nature of trade is objective and the intention or motive of the taxpayer, although relevant, cannot alone determine what the acts amounted to and in some cases may be given very little weight.

2. That whether the alternative taken by the taxpayer in the event that his preferred intention becomes for some reason unrealizable, is taxable or not depends on whether the evidence discloses that this chosen alternative is or is not the operation of a trade, and this situation arises in all cases where assets such as those under review in this case are purchased for the alleged purpose of using the same to create an investment and there is a secondary alternative intention which by proper evidence can be inferred.
3. That the evidence in a case such as this must of necessity detail all the surrounding circumstances including the knowledge and skill of the taxpayer and any other facts or circumstances sufficient to indicate whether or not the purchasing of assets was a speculation looking to resale which must have been in contemplation in the event that the preferred intention could not be carried out.
4. That although the intention of the appellant may have been incidentally to develop the Hat Creek property as a mine its main intent was to sell the asset either outright or on some royalty basis along some other contractual arrangement of substantially the same category of transaction; and this constitutes an adventure or concern in the nature of trade within the meaning of the *Income Tax Act* and the profit therefrom is income within the meaning of the Act.
5. That the onus is on the appellant to prove on the balance of probabilities that the respondent's assessment is wrong and in this case that has been done.
6. That the most cogent evidence available in the determination of the fair market value in 1951 of the Hat Creek property was the actual price paid for it by Western Development and Power Ltd. in 1960.
7. That the fair market value of the Hat Creek property in 1951 was $1,300,000, which was the value placed on this mine by the directors of the appellant at the material time.
8. That the appeal is allowed in part.

APPEAL under the provisions of the *Income Tax Act*.

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

J. S. Maguire, Q.C. and *R. C. Bray* for appellant.

R. A. C. McColl and *F. D. Jones* for respondent.

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

GIBSON J. now (October 19, 1964) delivered the following judgment.

This is an appeal by the appellant against a reassessment of income tax made by the respondent by notice dated May 16, 1963, for the taxation year 1960 whereby it was assessed tax in the sum of $797,347.84.

The appellant is a specially limited mining company which was incorporated under the laws of British Columbia on March 28, 1951, and has its head office in the City of Vancouver, B.C., and at the present is in voluntary liquidation having disposed of its physical assets to Western Development and Power Ltd. which was at the material time a wholly owned subsidiary of B.C. Electric Co. Ltd.

Upon its incorporation, the appellant acquired a coal mine known as Hat Creek Coal Mine which was situated near the Town of Ashcroft in the Province of British Columbia.

This coal mine was originally owned by a company known as St. Eugene Mining Corporation Ltd. which had acquired it by agreement dated August 4, 1944, from one Manfred McGeer for $19,000.

By agreement dated January 13, 1947, which was filed as Exhibit A-16 on this appeal, St. Eugene Mining Corporation Ltd. agreed to sell to the appellant company (then yet to be incorporated) the Hat Creek Coal Mine for the issuance of 900,000 fully paid and non-assessable par value shares of the appellant company; and by the same agreement the Wilson Mining Corporation Ltd. agreed by the contract to underwrite or arrange a firm underwriting to provide the sum of $34,000 to the appellant company for the purchase of 400,000 shares of the appellant company to be incorporated to yield the price of $8\frac{1}{2}$¢ per share to the appellant company.

In addition, by the same agreement, the Wilson Mining Corporation Ltd. obtained an option from St. Eugene Mining Corporation Ltd. to purchase 450,000 shares of the 900,000 shares to be issued to St. Eugene Mining Corporation Ltd. (pursuant to arrangements above stated) for the price of the cost of such shares to St. Eugene

Mining Corporation Ltd., namely, one-half of $32,753.91 or the price of about 7.4¢ per share.

The said sum of $32,753.91 represented the money which St. Eugene Mining Corporation Ltd. had spent on the property between the time of its acquisition of this mine in 1944 and January 13, 1947, the date of this agreement.

No name was chosen for the company to be incorporated at the date of this agreement, *viz.*, January 13, 1947, but subsequently in 1951 when the company was incorporated the name chosen for the appellant company and granted by way of provincial Charter from the Province of British Columbia was Inland Resources Company Ltd. (Non-personal Liability).

Between 1947 and 1951 the evidence was that Mr. R. R. Wilson and his two sons, Mr. R. W. Wilson, an engineer, and Mr. Keith Wilson, the secretary of Wilson Mining Corporation Ltd., had written a considerable number of letters to various corporations and to others trying to get them interested in markets for the products of the mine, which in the main was coal, but which also included limestone, tile and other by-products.

Then in the year 1953, the appellant company was successful in obtaining a Crown grant of the Hat Creek Mine.

Shortly after 1951, according to the evidence, the situation was that oil and gas were being put on the market in British Columbia and in the Province of Alberta, and the coal business was in the decline, and the possibility of establishing another cement plant diminished with the establishment of Lafarge Cement Company Ltd. on the Fraser River in Vancouver.

There was no development of the Hat Creek Mine from 1951, but in 1956, one Sharp attempted to obtain an option to buy on a royalty basis the mine from the appellant but the St. Eugene Mining Corporation Ltd. interests in the appellant company were not in favour, and nothing came of the Sharp offer.

Subsequent to that, in the year 1956, and continuing into the year 1957, negotiations were had with B.C. Electric Co. Ltd. for the purpose of getting them interested in this mine for the purpose of producing a thermal plant fired with the coal from it.

As a result of these negotiations, an option agreement was entered into dated August 7, 1957, between the appellant and Western Development and Power Co. Ltd., which was a wholly owned subsidiary of B.C. Electric Co. Ltd. This option agreement was filed as Exhibit A-85 on this appeal.

This option gave Western Development and Power Co. Ltd. the right to do certain exploratory work on the Hat Creek Mine of the appellant for the purpose of ascertaining the extent and quality of the coal bed, and this they did and it was necessary for them to extend this option to complete their exploratory work, and an agreement extending this option was entered into dated August 8, 1958, between the parties, which was filed as Exhibit A-140 on this appeal. By this option extension Western Development and Power Co. Ltd. obtained three periods of extension, namely, to February 9, 1959, to August 10, 1959, and thirdly, to February 8, 1960, for each of which successive extensions they paid the appellant certain monies, as more particularly set out in the agreement. In the agreement, also, there was spelled out what exploratory work Western Development and Power Co. Ltd. proposed to do during each of the periods of such extension if, in fact, they wished to obtain the benefit of each of these extensions for their enquiry work.

As a result of this exploratory work done by Western Development and Power Co. Ltd., it ascertained that there probably were deposits of about 700,000,000 tons of coal. Prior to this the actual extent of this deposit was not known but the appellant company through Wilson Mining Corporation Ltd. had done some but not very extensive exploratory work and the estimate they made of the probable tonnage of coal was substantially less than that proven by the exploratory work of Western Development and Power Ltd. Their highest estimate was something under 100,000,000 tons of coal.

The sale was finally completed in 1960 with the subsidiary of B.C. Electric Company Ltd. for the sum of $1,570,000, Exhibit A-144, which was filed and was an excerpt from the meeting of the Directors of the appellant

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company held on February 26, 1960. The resolution passed at that meeting read as follows:

> Be it resolved that the sale of all of the Company's properties known as the "Hat Creek Group" to Western Development and Power Limited pursuant to an Option Agreement dated the 7th day of August, 1957, and extended by Agreement dated the 8th day of August, 1958, and varied and exercised by Agreement dated the 8th day of February, 1960, subject to the terms and conditions of said agreements, be and the same is hereby ratified and confirmed.

It was then explained at this meeting of Directors as follows:

> Mr. Wilson then explained the variations between the new Agreement of February 8th, 1960, and the original Agreement dated August 7th, 1957. Western Development had attempted to cut the original price of $2,000,000 00 (payable over the next four years) by approximately two thirds. This was turned down and, after several meetings of negotiations, it was agreed that Inland Resources would accept $1,570,000.00 in cash and 320,000 shares of Van Tor as final. This change amounts to approximately a 6% discount on a present day basis.

As appears in the following resolution, which was also passed by the appellant company, it was resolved that the company go into voluntary liquidation after this sale was completed. This resolution read as follows:

> Be it resolved that the Company be wound up voluntarily pursuant to Part VIII of the "Companies Act" and that Frederick Field be appointed Liquidator of the estate and effects of the Company for the purpose of winding up its affairs and distributing its property.

Shortly thereafter, the Minister of National Revenue made an assessment against the appellant which was amended subsequently and which concerned the value placed by the Minister on the Van-Tor Oil and Explorations Ltd. shares.

The net result of these re-assessments by the Minister was to calculate the taxable income of this appellant for the taxation year 1960 in the sum of $1,609,191.68. The reasons for this re-assesement and the adjustments are as follows:

Previous Taxable Income	$ NIL
Add: Profit on sale of Hat Creek Coal Mine as follows:	
Sale proceeds	
Cash	$1,570,000.00
320,000 shares of Van-Tor Oil and Explorations Ltd. @ quoted market value February 9, 1960—$0 51 each	163,200.00
	$1,733,200.00

Less: Initial cost of mine at fair market value	$110,499.83	
Development and carrying expenses	13,504.49	124,004.32
Revised Taxable Income		$1,609,195.68

From this re-assessment the Minister has assessed as taxable income the difference between the cash received of $1,575,000 plus the value of the 320,000 shares of Van-Tor Oil and Explorations Ltd. which are found to be $263,200 and has substracted from that sum the sum of $110,499.83 allegedly being the initial cost of the mine at fair market value which the Minister arrived at by multiplying 1,300,000 shares of the appellant company times 8½¢, and also by deducting the sum of $13,504.49, being development and carrying expenses. The net difference the Minister assessed the appellant as its revised taxable income being in the sum of $1,609,195.68.

The 8½¢ value of the shares appears to have been determined by the Minister by using the purchase of the shares in the appellant company contained in paragraph 7 of the agreement dated January 13, 1947, Exhibit A-16, between St. Eugene Mining Corporation and Wilson Mining Corporation Ltd.

Under clause 7 of that agreement the Wilson company contracted to underwrite or arrange a firm underwriting to provide the sum of $34,000 by the purchase of 400,000 shares of the appellant company then to be incorporated to yield the price of 8½¢ per share.

Under clause 6 of the same agreement the Wilson company obtained an option to purchase 450,000 shares in the appellant company for the price of something less than 7.4¢ per share.

When the shares were actually issued by the appellant company in 1951 the appellant company showed the value of these shares on its books at $1 per share or at $1,300,000. This appears in the journal entries from the appellant's books, a copy of which was filed as Exhibit A-66 and the copies of the income tax returns of the appellant which were filed as an exhibit on this appeal.

At the same time, on the books of Wilson Mining Corporation Ltd., the value of these shares during all the

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material times appeared at their cash outlay to them, namely, $8\frac{1}{2}$¢ per share; and on the books of St. Eugene Mining Corporation Ltd. the value of these shares appearing on their books at approximately 7.4¢ per share.

It is the allegation of the appellant that it sold its capital assets and that the receipts of monies and shares received was a capital receipt on the realization of such assets and not an income receipt in view of the evidence of the record of the appellant in operating a mine and not dealing in mines.

In this connection, the only actual operation of the mine was in producing a small quantity of coal to consumers in the Village of Ashcroft, B.C.

In the alternative, the appellant submits that if it should be found that the difference between the purchase and sale price of the said mine is income within the meaning of the *Income Tax Act,* the calculation of the amount of income should not exceed $365,295.51. Its submission in this regard is that the calculation should be made as follows:

(a) Proceeds from sale of mine:		
Cash	$1,570,000.00	
320,000 shares of Van-Tor Oils and Explorations Limited at 34 cents ...	108,800.00	$1,678,800.00
(b) Initial cost of mine at fair market value	1,300,000.00	
Development and carrying expenses	13,504.49	1,313,504.49
Increase in value		$ 365,295.51

More than a hundred exhibits were put in evidence and there were called as witnesses for the appellant Mr. R. W. Wilson, son of Mr. R. R. Wilson, of the Wilson Mining Corporation Ltd., his brother Mr. Keith Wilson, who was the secretary of the Wilson company at all material times, and also Mr. Alexander Smith, an engineer who worked for Mr. R. R. Wilson, and subsequently with St. Eugene Mining Corporation Ltd.

The respondent called no evidence but did submit certain proof in documentary form which was filed as exhibits.

The evidence disclosed that St. Eugene Mining Corporation Ltd. was one of the so-called Ventures Group who were a metal mining group of companies and that these companies expended during these material years in respect of companies other than the appellant very sizeable amounts of money in the exploration and development of metal mines.

The explanation given as to why the Ventures Group handed to Wilson Mining Corporation Ltd. the Hat Creek Mine for development was that Mr. R. R. Wilson in particular and also his company, Wilson Mining Corporation Ltd., had a background of substantial knowledge in the coal mining field and that their knowledge and experience was such that the possibility of developing the Hat Creek Mine as a coal mine would be greater than if the Ventures Group themselves through the St. Eugene Mining Corporation Ltd. or any other company had embarked on this endeavour.

The evidence substantiates the fact that Mr. R. R. Wilson and the Wilson people in the company of Wilson Mining Corporation did have very considerable coal mining experience and were recognized as experts in the field in British Columbia. There was much correspondence in this connection and from which it was suggested that the inference should be drawn that the Wilson group were trying to get the Hat Creek Mine operating as a mine. In this respect the letters were written to Powell River Ltd., Pacific Mills Ltd., B. C. Cement Co. and others.

The tenor of this correspondence indicated that the intent of the appellant at all material times was to establish at the Hat Creek mine site a cement plant or a plant for the development of power or for processing pulp, for all of which uses it was necessary to have very substantial amounts of cheap heat.

The advantage of Hat Creek Mine was that there were very substantial quantities of low grade lignite coal there and that any of the users could join in with the appellant to benefit from the use of the coal, all of which uses were consistent with the intent on the part of the appellant to get the mine operating as a mine.

This effort by the appellant through the Wilson mining group was mainly directed in finding a market for the coal and not in expending money on the Hat Creek property for the purpose of ascertaining the precise limits and quantities of the field. The evidence indicated that

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the appellant was of the view that there was no point in spending money unless there was a market.

Counsel stated that section 23(1) of the *British Columbia Companies Act*, R.S.B.C. 1960, c. 67, provided that in the charter incorporating a company such as this it was necessary to include in the objects clause a power to sell the assets. This may not be a strict construction of the particular wording of this subsection of the statute but the statement of counsel for the appellant which was concurred in by counsel for the respondent was to the effect that the Registrar in the companies branch of the office of the Provincial Secretary of the Province of British Columbia insisted that such a sale provision be put in the objects clause of all such charters.

In this connection, the relevant statute at the material times was the Statutes of British Columbia, (1948)c. 58, the wording of which was carried into section 23(1) of the 1960 Revised Statutes of British Columbia.

The appellant alleges and the evidence disclosed that the Wilson Mining Corporation had for many years various mining interests and that they had never attempted at any time to sell any of their mines and that this particular case in the year 1956 was the first time that there was any suggestion made to sell the Hat Creek Mine of the appellant.

As stated, the thought of selling originated with the offer by one Sharp which came unsolicited, and it was a royalties transaction which involved bringing the property into production but this transaction was not entered into because the share interest in the appellant company represented by the St. Eugene Mining Corporation Ltd. objected to entering into this agreement, saying in effect that the price was too low and that Sharp really did not intend to develop the property, but wished to make a profit by selling to some third party.

The evidence was that in 1956 the B. C. Electric Co. would not join with the appellant in any joint effort to develop the mine but would agree only to a sale and purchase because it was a public utility. This is set out in a letter from Mr. Keith Wilson dated October 22, 1956, filed as Exhibit A-114 in this appeal and the reply of refusal by the British Columbia Electric Co. Ltd. which is filed as Exhibit A-115 in this appeal.

As a result negotiations in 1957 resulted in the option agreement being entered into (Exhibit 85), the option being extended (Exhibit A-140) and the option being finally exercised in February, 1960 (Exhibit A-143).

The appellant alleges that during the period of 1947 to 1960 it exerted a continuous effort to develop the Hat Creek Coal Mine property as a mine and to bring it into production; that the letters, Exhibits A-55, A-56 and A-57, written by Mr. R. R. Wilson during the period of February 28 to October 9, 1948, in which he offered to sell the property, were firstly, not authorized and secondly, in any event, were not part of the long range program of bringing the mine into production; instead all the action taken by the appellant company was consistent with bringing the plant into production until economic circumstances in 1956 changed the situation which resulted in the subsequent sale of this property to the subsidiary of B. C. Electric Co. Ltd., namely, Western Development and Power Ltd.

These economic circumstances, the appellant alleged, in evidence, were the advent of oil and gas in British Columbia, the establishment of Lafarge Cement Co. Ltd. in the Fraser River in Vancouver, which put back ten years the possibility of establishing another cement plant in British Columbia and the fact that the Morden Dam on the Fraser River was not proceeded with which alone the appellant alleges would have provided sufficient market to have warranted a cement plant at the Hat Creek Mine.

The appellant also argues that although there were no large expenditures on the property, the explanation given by Dr. Alexander Smith and Mr. R. W. Wilson and Mr. Keith Wilson was that it was primarily necessary to find a market for the coal and that the existence of the resources were sufficiently well known, and as a consequence it was good business not to foolishly or unwisely spend such money on development and exploration of the property at that time; in addition, there was no evidence that there was any lack of financial help in putting the mine into production. On the contrary, the Ventures Group, at least, had spent substantial monies on other properties and were in a position to spend it on the Hat Creek property; and the evidence of Mr. Keith Wilson was that

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public financing was available if the market warranted bringing this mine into production at any time.

The appellant also argued that going into liquidation after the sale of this asset to Western Development and Power Ltd. was a logical step because the appellant had no other physical assets.

The appellant also argued that the valuation put on it by the parties in 1947, namely, $1,300,000 pursuant to that agreement of January 13, 1947, and carried through by the implementation of the agreement dated September 17, 1951, Exhibit A-69, whereby the shares were issued for a value on the books of the appellant company of $1,300,000 was a realistic value in view of the selling price in 1960 to the B. C. Electric Co. by way of its subsidiary Western Development and Power Co. Ltd.

The appellant also argues that the real estate cases have no application because of a certain peculiar aspect of them which has no relevance to a mine property, *viz.*, a real estate parcel can be broken up and sold in parcels whereas a mine has no market other than as an entity.

Counsel for the appellant submitted that it was not dealing in a mine (*Sutton Lumber v. M.N.R.*[1], *Warnford Court (Canada) Limited v. M.N.R.*[2]); or alternatively, if the receipt from the sale to Western Development and Power Co. Ltd. was income then the fair market value of the mine asset when acquired by the appellant in 1951 (or also in 1947) was $1,300,000.

Counsel for the respondent submitted that there were two questions to be decided, *viz.*, firstly, whether an adventure or concern in the nature of trade existed in the matter of the disposal of the Hat Creek Mine, or secondly, if an adventure or concern in the nature of trade did exist, then what was the correct valuation in law of the coal deposits at the time of the acquisition of them by the appellant.

In support of his submission that this transaction constituted an adventure or concern in the nature of trade, counsel for the respondent referred to Exhibit A-10 which was an article by Mr. Campbell, an officer and engineer of Wilson Mining Corporation Ltd. which sets out that there was knowledge of ore body in the Hat Creek Mine before

[1] [1953] 2 S.C.R. 77.
[2] [1964] Ex. C.R. 944; 30 Tax A.B.C. 417; 63 D.T.C. at 83.

1900; submitted that the appellant and its officers and directors knew of the restricted market for coal, especially lignite coal, at all material times; submitted that the argument of appellant that it was frustrated in its efforts to develop the mine was without substance and that on the evidence there was no such original intention, but instead the original intention which continued was to sell the mine; submitted that the fact that the Ventures Group spent no money in developing this mine but handed the problem over to the Wilson group who also spent no money on developing it, but instead devoted their efforts to the disposal of it, rebutted any suggestion that this mine should be categorized as a capital asset of the appellant.

On this evidence the Court must determine whether the assessment made by the Minister, Exhibit 1, is correct in law.

The question for consideration, therefore, is whether on the facts as disclosed by the evidence at this trial the profits realized from the sale of Hat Creek mine property by the appellant to Western Development and Power Ltd., which it acquired in 1951 and which it sold in 1960, are profits from a business or property within the meaning of sections 3 and 4 of the *Income Tax Act*, and the extended meaning of "business" as defined in section 139(1)(*e*) or as submitted by the respondent whether this Hat Creek property was acquired by the appellant for the purpose of developing it as a mine and that it was only because this purpose was frustrated by economic factors in 1956 more particularly set out above in the resume of the evidence that the Hat Creek Mine was sold realizing therefrom a fortuitous profit by way of capital gain.

In this case as in all these cases, the test of whether there is an adventure or concern in the nature of trade is objective and the intention or motive of the taxpayer although relevant cannot alone determine what the acts amounted to and in some cases may be given very little weight.

Whether the alternative taken by the taxpayer in the event that his preferred intention becomes for some reason unrealizeable, is taxable or not depends on whether the evidence discloses that this chosen alternative is or is not the operation of a trade.

This situation arises in all cases where assets such as this are purchased for the alleged purpose of using the same to

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create an investment and there is a secondary alternative intention which by proper evidence can be inferred.

The evidence in a case such as this must of necessity detail all the surrounding circumstances including the knowledge of the taxpayer, the skill of the taxpayer or any other fact or circumstances sufficient to indicate whether or not the purchasing of the assets was a speculation looking to resale which must have been in contemplation in the event that the preferred intention could not be carried out.

In *Regal Heights Limited v. M.N.R.*[1], Mr. Justice Judson stated at page 905:

> There is no doubt that the primary aim of the partners in the acquisition of these properties, and the learned trial judge so found, was the establishment of a shopping centre but he also found that their intention was to sell at a profit if they were unable to carry out their primary aim.

In this particular case, in my opinion, there is no doubt that the Wilsons, especially Mr. R. R. Wilson, who was an expert in the coal mining field along with other employees of the Wilson Mining Corporation Ltd., did know in fact that in 1947 and 1951 it would be most difficult to market successfully lignite coal from the Hat Creek Coal Mine.

It must be concluded that they were fully aware of the fact that the oil and gas industry was developing in Alberta and in British Columbia and would be competing and that the market for coal was dwindling. Indeed, the Wilson Mining Corporation Ltd. was the operator of a coal mine at that time, and its market was declining and it has since ceased operation. During the material times, it was undoubtedly within their knowledge that the market for coal in general was most restricted and in this particular case the market for this low grade lignite coal was even more restricted. The appellant's knowledge and intentions at the material times (which I find was the knowledge of its directors, namely, the Wilsons and Dr. Alexander Smith, who was also a director of the Ventures Group) following the judgment of Judson J. in *Regal Heights Ltd. v. M.N.R. (supra)* where it was held that the knowledge and intention of the appellant were throughout its existence identical with those of its promoters (who later became its directors) was that this Hat Creek Coal Mine was known to be a vast resource from before 1900 that any possible market

[1] [1960] S.C.R. 902.

at that time was very uncertain, and therefore the probability of it being developed as a mine by them was remote.

When it was acquired in 1944 by the Ventures Group through St. Eugene Mining Corporation Ltd. and subsequently made the subject of the agreement, Exhibit A-16, in 1947, between St. Eugene Mining Corporation Ltd. and Wilson Mining Corporation Ltd., it was known to the parties that this resource might not be converted into profit by development because of lack of market.

The Ventures Group, through St. Eugene Mining Corporation Ltd., although spending large sums of money on other mines, spent nothing on the Hat Creek Mine. Instead, they handed it over to the Wilson group who were expert in the coal mining field but they declined to spend any sums on it for development as a mine but instead sought to search out a market.

It is probably true, according to the evidence, and many exhibits that were filed to substantiate it that the intention of the appellant may have been incidentally to develop this as a mine but the main intent which I find on the evidence was to sell the asset either outright or on some royalty basis or by some other contractual arrangement of substantially the same category of transaction.

This, in my view, was an adventure or concern in the nature of trade within the meaning of the *Income Tax Act* and the profit therefrom is income within the meaning of the Act.

Having so found, it becomes necessary to ascertain what is the taxable income of the appellant for the taxation year 1960.

To ascertain this, it is necessary to determine what was the fair market value within the meaning of the Act either in 1947 or 1951 when this asset was acquired by the appellant.

The fair market value is conceded as the amount arrived at in an arm's length transaction between a vendor willing to sell and a purchaser willing to buy. The relevant statute was the 1951 *Income Tax Act*.

The problem of determining fair market value in this particular transaction is one of considerable difficulty in view of the evidence adduced.

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While recognizing that the onus is on the appellant to prove on the balance of probabilities that the assessment is wrong, I am of opinion in this case that it has done so.

The evidence is very slight but of necessity it must be so in a case such as this.

Certainly in the year 1947 when (Exhibit A-16) the agreement was entered into, what was the fair market value of the shares was a difficult thing to determine. The St. Eugene Mining Corporation Ltd. had purchased the Hat Creek Mine in 1944 for $38,000. It did agree to sell the mine to the company which subsequently became the appellant. Pursuant to the agreement dated January 13, 1947, Exhibit A-16, for the mine it did get 900,000 shares of the par value of $1 from the appellant company; and Wilson Mining Corporation Ltd. did by that agreement of January 13, 1947, agree to buy 400,000 such shares in the appellant company, at 8½¢ per share; and there was an option agreement entered into between St. Eugene Mining Corporation Ltd. and Wilson Mining Corporation Ltd. in that same agreement whereby the latter obtained an option to buy one-half the shares to be issued to St. Eugene Mining Corporation Ltd. for a price which worked out to approximately 4.1¢ per share.

However, none of the these facts, in my opinion, determine what was the fair market value in 1947.

In 1947, St. Eugene Mining Corporation Ltd. and the appellant were not at arm's length when this agreement was made; but St. Eugene Mining Corporation Ltd. and Wilson Mining Corporation Ltd. were dealing at arm's length within the meaning of the Act. On these facts the problem still is what was the fair market value of the Hat Creek Mine at that time.

In the determination what was the fair market value in 1951, when the shares were issued to St. Eugene Mining Corporation Ltd. or its nominees and to Wilson Mining Corporation Ltd. pursuant to clause 2 of the said agreement dated September 17, 1951, Exhibit A-69, probably the most cogent evidence that is available was the actual price paid for this asset by Western Development and Power Ltd., a subsidiary of B. C. Electric Co. Ltd., pursuant to its option agreement entered into on August 7, 1957, which it subsequently exercised in 1960.

It is to be noted that in 1957, when the option agreement was entered into between the appellant and Western Development and Power Ltd. the knowledge of the extent of the reserves was that obtained from the appellant and Wilson Mining Corporation Ltd. which was to the effect that the reserves were something under 100,000,000 tons of ore. That was the known state of the facts on which the price was fixed. The price, it turned out, was $1,570,000 plus 320,000 shares of Van-Tor Oils and Exploration Ltd. (These shares the Minister subsequently found to have a value of $108,800.) The total market price determined, therefore by that agreement was $1,678,800.

Subsequent to this, as a result of the exploratory work done by Western Development and Power Ltd. during the option period and the extensions to the option period, the extent of the mine deposit was found to be 700,000,000 tons.

In view of this, considering all the other evidence, I am of the opinion that the fair market value for these shares at the material time, *viz.*, 1951, was $1,300,000, which was the value placed on this mine by the directors of the appellant at the material time. And during the period 1951 and 1960 the value of this mine asset did not increase.

For this reason, I am of the opinion that the income of the appellant for the taxation year which was subject to tax is the difference between the proceeds of the sale of the mine to Western Development and Power Ltd. which appears to be $1,570,000 plus $108,800 being the value of the 320,000 shares of Van-Tor Oils & Exploration Ltd., making a total of $1,678,000 less the initial fair market value, so found, of the property acquired by the appellant in 1951 in the sum of $1,300,000 plus the development and carrying costs of $13,504.49 or a total of $1,313,504.49 which results in a difference of $365,295.51.

The appeal, therefore, is allowed in part and the matter submitted back to the Minister for re-assessment not inconsistent with these reasons.

The appellant shall be entitled to its costs of this appeal.

Judgment accordingly.

1964
Oct. 20
Oct. 21

BETWEEN:

JOSEPH EMILE POULIOT .... SUPPLIANT;

AND

MINISTER OF TRANSPORT .... RESPONDENT.

Practice—Certiorari—Writ of certiorari—Jurisdiction of Exchequer Court —Meaning of "officer of the Crown" as used in s. 29(c) of the Exchequer Court Act—Exchequer Court Act, R.S.C. 1952, c. 98, s. 29(c).

This is an application for a writ of certiorari addressed to the Minister of Transport.

Held: That this Court is a statutory Court and has no jurisdiction to grant an order for a writ of certiorari unless such jurisdiction has been conferred upon it by statute.

2. That a Minister of the Crown is not an officer of the Crown within the meaning of s. 29(*c*) of the *Exchequer Court Act.*

3. That the application is dismissed.

APPLICATION for a writ of certiorari.

The application was heard on October 20, 1964 by the Honourable Mr. Justice Jackett, President of the Court, at Ottawa and was dismissed with costs.

G. S. Dery for suppliant.

R. Bedard, Q.C. for respondent.

JACKETT P. the next day (October 21, 1964) delivered the following reasons for dismissing the application:

An application was made to this Court by Joseph Emile Pouliot on Tuesday, October 20, for a writ of certiorari addressed to the Minister of Transport.

As this Court is a statutory Court, it has no jurisdiction to grant an order for such a writ unless such jurisdiction has been conferred upon it by statute. The only statutory provision suggested by counsel as being a possible foundation for jurisdiction for the order requested was section 29 of the *Exchequer Court Act,* R.S.C. 1952, chapter 98, which reads in part as follows:

29. The Exchequer Court has and possesses concurrent original jurisdiction in Canada

* * *

(*c*) in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer;

* * *

In *Belleau v. Minister of National Health and Welfare*[1], per Angers J. at pages 303 *et seq.*, it was decided that a Minister of the Crown is not an "officer of the Crown" within the meaning of paragraph (*c*) of section 29. Even if I had doubt as to the correctness of this decision, I should feel constrained to follow it because it is a carefully considered decision and should, in my view, be followed until such time, if any, as it is overruled by the Supreme Court of Canada. Any doubt that I might have had as to the correctness of this decision is removed by reference to the French version of section 29(*c*) where the expression employed is "un functionnaire de la Couronne". Clearly, this phrase does not include one of Her Majesty's ministers but, as I understand it, refers to the class of officer or servant normally referred to in English as "civil servant". I might also add that I have a very clear recollection of an unreported order made by Thorson P. by which, in an exercise of the inherent jurisdiction of the Court, he struck out a statement of claim against the Secretary of State seeking to obtain an order in the nature of Mandamus. My recollection is that President Thorson, in that case, accepted the submission that the Secretary of State was not an "officer of the Crown" within the meaning of those words in Section 29(*c*) of the *Exchequer Court Act*.

For the above reasons, when this matter came before me yesterday, I dismissed the application with costs.

1964
Mar. 9, 23
Oct. 21

BETWEEN:

OTTAWA PRE-MIXED CONCRETE LIMITED .... SUPPLIANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Crown—Petition of Right—Action for damages—Negligence—Apportionment of negligence—Assessment of damages—Crown Liability Act, S. of C. 1952-53, c. 30, s. 3(1)(a).

The suppliant claims compensation for damages suffered by it when one of its cement mixer trucks was damaged because of the collapse of a wooden ramp up which the truck was being driven during delivery of a load of cement to the "Garden of the Provinces", a public work being built by the National Capital Commission on Wellington

[1] [1948] Ex.C.R. 288.

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Street in the City of Ottawa. The National Capital Commission was at all material times an agent of Her Majesty the Queen in right of Canada.

Held: That since the ramp was not meant or built for the use of cement mixer trucks, it became the duty of the respondent's employees to prevent such use.

2. That the driver of suppliant's truck assumed the risk of driving his truck up the ramp without first inspecting it and despite the fact that he did not trust the ramp.

3. That the respondent is responsible for two-thirds of the damages and the suppliant for one-third.

PETITION OF RIGHT for compensation for damages caused through the alleged negligence of a servant of the Crown.

The action was tried by the Honourable Mr. Justice Dumoulin at Ottawa.

K. E. Eaton and *A. B. Doran* for suppliant.

D. H. Aylen and *Peter Sorokan* for respondent.

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

DUMOULIN J. now (October 21, 1964) delivered the following judgment:

The suppliant, a company incorporated under the laws of the Province of Ontario, carries on a pre-mixed concrete business from its premises on Russell Road in the City of Ottawa.

It is alleged that, on August 9, 1962, at approximately 9:45 in the forenoon, one of the suppliant's cement mixer trucks "was damaged when a ramp onto which it had been backed on instructions of a servant of the Crown, acting in the scope of his employment, collapsed causing the said truck to roll over and come to rest on its side" (cf. exhibits 1, 2 and 3, photos).

Paragraph 4 of the Petition of Right states that "said ramp was located on property owned and occupied by the Crown known as the 'Garden of the Provinces' on Wellington Street in the City of Ottawa, and had been constructed by servants of the Crown with the authority of the Crown to enable trucks to back over some steps when making deliveries of concrete being used for construction purposes on the said property."

The petitioner represents that the Crown should be liable, under s. 3(1)(*a*) of the *Crown Liability Act*, 1-2 Elizabeth II, c. 30, for the damages suffered by suppliant resulting from the negligence of servants of the Crown acting in the scope of their employment, particulars of which negligence consist in:

(*a*) constructing a defective ramp unsafe for the purposes intended;

(*b*) directing the driver of the truck to back on to the ramp when the respondent's servant so acting knew or ought to have known that the ramp could not withstand the weight of a cement loaded truck.

It is further alleged that those servants of the Crown referred to in the petition of right "were all employed under the administration of the National Capital Commission, which, at all material times, was for all purposes an agent of the Crown by virtue of section 4 of the *National Capital Act.*"

The damages claimed included the repairs to the truck and its cement mixing mechanism, the major portion of that particular item applying to the water tank shell, the charging hopper and the drum assembly, a total, labour included, of $7,766.81. In addition, a sum of $2,000 is sought for loss of use of the cement mixer while undergoing repairs, plus $39 for concrete spoiled in the accident.

The Statement of Defence admits the occurrence of the aforesaid accident on the day, time and at the spot mentioned in the petition and also agrees "that the National Capital Commission was at all material times an agent of Her Majesty the Queen in right of Canada", but denies the other allegations.

The Reply to the petition of right assigns the entire blame for the mishap to negligence on the part of suppliant's driver in that:

(*a*) he drove the truck on to the ramp without first ascertaining that it was safe to do so;

(b) ...

(c) he drove the truck to the point where the accident occurred without permission from any person authorized to give permission on behalf of the respondent;

(d) . . . when he knew or ought to have known that the weight of the truck and its load would be likely to cause the collapse of the ramp;

. . .

Additionally, it is said "that the suppliant was not invited to enter this part of the property owned by Her

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Majesty, nor was the suppliant or its servants permitted to enter this part of the property...".

A counter-claim in a sum of $863.35 concludes the Statement of Defence for damages caused to a flight of granite steps forming part of the Garden of the Provinces, the property of Her Majesty. At the opening of trial, Mr. Aylen, counsel for respondent, withdrew this counter-claim, with costs up to March 4, 1964, going to suppliant.

The material facts are uncontradicted. Ottawa Pre-Mixed Concrete Ltd., in July and the early part of August, 1962, pursuant to requests from the respondent's servant, delivered several loads of concrete required for the building of a public work, called the Garden of the Provinces, in the City of Ottawa.

A full load of concrete stored in the truck consists of six cubic yards weighing 2 tons a yard, and the truck itself weighs 12 tons, in all, 48,000 pounds.

Mr. Winston Askwith, senior construction engineer for the National Capital Commission, hereinafter abbreviated to NCC, described at some length this ramp, in an Examination on Discovery held October 16, 1963. No special design was prepared and it had been constructed by "a small gang allocated to that particular work" (p. 5) "it had an intermediate crib support for it half-way up the ramp. It was continuous except for that" (p. 6). On the crib work the planking was applied and some long board stringers added "to put the planking on in a transverse manner" (p. 7). The timber utilized consisted in planks 10 inches wide and 3 inches thick, with a maximum length of 15 feet. "There were 3 or 4 stringers going up" upon which the planks were laid. The witness sums up the design of the ramp as follows: "In the transverse length it would be supported in three places but across the width we had at least three stringers, possibly four stringers going across". Necessarily, those stringers had the same measurements as the boards, a length of 10 to 15 feet and a width of 10 inches.

Next, Mr. Askwith, questioned about the breaking point of this wooden gradient, replies "approximately half way up the ramp". The timber had been obtained from a dismantled bridge erected "in the early 1900's" but maintained in good condition up to 1962. When asked whether any test was applied to find out if these timbers would support the weight of a truck, Askwith answers: "No, it was not intended for the weight of a truck so no test was carried out" and explains that this ramp was destined "primarily to support material by the use of a wheelbarrow".

Several witnesses were called upon to relate the circumstances of the mishap. As might be expected in a case of this kind, the evidence adduced is somewhat contradictory.

Arvin Firobin, 27 years old, drove the truck on the day of the accident. Firobin has, since, left the suppliant's employ to take up a similar job with Saco Fuel Oil Co. He started truck driving for Ottawa Pre-Mixed Concrete Ltd. some two months before the accident of August 9. This man's story is that a month or so before the ill-fated August day, he delivered some loads of cement at the Garden of the Provinces. On the morning of August 9, Firobin brought his truck at the foot of the ramp where an unidentified watchman of NCC would have directed him to back his load up to the ramp to its upper extremity, and dump the concrete at a point indicated on ex. 1 by a wheelbarrow. This first delivery comprised only one-half load of cement, the other half being previously unloaded at the west end of the Garden of the Provinces. Half an hour later, at 9:45 or thereabouts, Firobin returned with a full charge of six cubic yards, a total weight, as already mentioned, of 48,000 pounds. The witness persists in his former statement that, on this second instance also, an NCC handyman directed the backing up of his truck. Unfortunately, as the crushing weight reached half way up, the ramp broke; the timbers becoming completely dislocated, the cement mixer turned upside down at the right of the slope. (cf. exhibits 1, 2, 3).

The driver's cross examination brought out certain facts which are not in complete agreement with the preceding statements. Firobin acknowledged that his employers warned him to use caution. He also says that he never left his truck to inspect the ramp because he figured his employers had examined it; neither did he enquire from the NCC people if it was fit to support so great a weight.

This witness does not recall whether or not one Séguin, an NCC employee, told him to unload close to the foot of the ramp at the time of his first delivery, August 9. As to the second load, the same day, Firobin testifies that "presumably, an NCC employee waved me up the ramp so as to

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keep the truck in line". It is also possible, continues the witness, that he said to some NCC journeyman on his first August 9 trip "of having been there all summer", meaning that the ramp's solidity was assured.

The next witness, Roger Allaire, during July and August 1962, drove cement mixer trucks for Ottawa Pre-Mixed Concrete Ltd. Allaire, so he says, unloaded cement, in July and August, 1962, at the Wellington Street ramp and once or twice "backed his truck all the way up, somebody directing my movements". This unknown person, according to the witness, worked for NCC.

Apparently, Allaire displayed more prudence than his fellow driver, Firobin, and "looked at the planking before backing up. It seemed safe to me. If it had not I would not have backed up. The man directing my movements wore a brown shirt on which the initials P.W. appeared". After each delivery, Allaire obtained a signature on his receipt slips.

The evidence of Roland Maisonneuve, presently truck driver for Ottawa Transportation Commission, and similarly employed by the suppliant in the summer of 1962, is to the same effect. Maisonneuve, who possessed seven years' experience as conductor, made one delivery late in June, 1962, moving back his vehicle up to four feet from the top extremity of the gradient to discharge the cement in wheelbarrows. He examined the ramp but derived a sense of security from the impression that others had used it for identical purposes. The deponent concludes with this assertion: "There was a guy there who directed us the whole way up to where we had to stop and handed us the delivery receipt slips". Maisonneuve's use of the ramp probably occurred a week or four days before the incident.

Next, in the witness box, came Brian Martin Lock, a construction engineer domiciled in Ottawa. Mr. Lock, who obtained his engineering degree in England, possesses a long experience of construction jobs. He is asked how he would have attended to these deliveries of concrete had he been entrusted with the task in 1962. The witness eliminates as too expensive for a small job the method of hoisting cement with a crane and recommends facilitating the access to the point of unloading by means of a wooden slope. A proper construction would consist of guide boards on either side, to center the wheels of trucks over the supporting beams and prevent them from rearing to one side. "This ramp", pursues Mr. Lock, "should be designed by somebody with an engineering background". The trucks should, when going up the ramp, be brought as close as possible to the ultimate point of delivery. A stopping plank at the rear end of the gradient was necessary to prevent backing beyond the rear end. The inference, here, must be that Mr. Lock disapproved of the ramp due to the irrefutable fact that it broke.

This much, then, for the suppliant's proof regarding the material circumstances of the mishap.

The recital of facts was completed by evidence adduced on respondent's behalf.

Emile Victor, in the summer of 1962, was the foreman entrusted by the National Capital Commission with the supervision of the work in course of execution on Wellington Street. Victor explains that concrete was ordered by him from Ottawa Pre-Mixed and also obtained elsewhere from a contractor, whose name he ignores and over whom he exercised no control. On account of what follows, it seems strange that this employee felt he could waive all responsibility for the use of the ramp by concrete mixer trucks other than those of the petitioner. It is admitted that the ramp served for the needs of the independent contractor before August 9. Yet, Emile Victor had been warned by the engineer in charge, Mr. Brooks, "not to use the ramp, because it was not made for my purposes". As this interdiction appeared too absolute, Victor suggested a compromise, or, in his own words: "I made arrangements with my boss I would tell Séguin (a subforeman) not to allow backing up on the ramp more than three feet."

On the morning of August 9, Emile Victor called for two loads of cement, the first was brought at the west end of the "Garden", the other and ill-fated one, where the trouble occurred. Victor did not observe the concrete mixer entering the wooden slope; a sound of cracking timbers made him turn around and he saw the truck slip sidewise and overturn.

This witness, the chief foreman, knew of the unsuitability of this slope for cement deliveries; his superior, Engineer Brooks, had told him so. Still, he maintained complete

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aloofness save for suppliant's vehicles, not realizing this occasional indifference might soon fritter away the prohibition in all cases, or be interpreted as a tacit invitation.

Lucien Séguin, for 11 years in the employ of NCC, an assistant to the preceding witness, offers another instance of a quickly changing mind, one who forbids and then allows. His testimony being the most revealing of all, since he stood at the foot of the ramp, I will quote its essential passages as they appear in my notes. Séguin says that "two loads of concrete were delivered on August 9, the first at the western extremity of the 'Garden', where half was dumped out, and the remainder brought over to the ramp. I had orders to forbid the use of that ramp to cement delivery trucks." Séguin swears he imparted these instructions to Firobin, suppliant's driver, but ineffectually, the witness adding: "That driver, far from heeding my orders, started backing up the ramp; seeing that, I yelled to Macraw, a labourer, to guide the truck's movements." One might expect Séguin to have more energetically striven to prevent this brazen defiance. However, it could happen that he simply did not have time to do anything else. Such an excuse could not be invoked when, a few minutes later, Firobin returned with his truck, this time bearing a full 6 cubic yard load. Lucien Séguin then had ample opportunity to block access to the wooden plank, and obtain due compliance with his instructions. Instead, he proved fully acquiescent, offered no opposition, and cooperated to the extent of ordering Albert Macraw to guide the mixer's backing movements.

This change of conduct, at the crucial moment, seems a positive authorization on Séguin's part to use a ramp he knew "was not intended for those purposes" and to which he was ordered to refuse admittance.

A last witness called by the respondent imparted to the Court some significant information. Bernard Gagnon, a young R.C.M.P. constable, reached the scene of the accident shortly after its occurrence and saw the disordered planking and capsized mixer. This Police officer requested the driver's explanation of the matter. Firobin told constable Gagnon the load his truck carried when the ramp broke was heavier than a preceding one delivered the same morning, adding "he did not trust that ramp too much but had to use it due to the rush of cement deliveries elsewhere that day."

Suppliant's objection to this statement on the ground of hearsay is manifestly unwarranted.

The Court, having carefully reviewed the evidence, believes that each party should bear its share of responsibility. Both are at fault. Since there can be no doubt that this ramp was not meant nor built for the use of cement mixer trucks, engineer Brooks' cautioning directions to Victor, the chief foreman, prove it, then it became the duty of respondent's employees, Emile Victor and Lucien Séguin, to carry out these orders by taking the necessary steps. This obligation was not discharged properly, as we have seen.

On the other hand, a person entrusted with the care and control of a cement mixer truck weighing, when loaded, 48,000 pounds, cannot reasonably ignore the risks inherent to such a tremendous charge. Before engaging his vehicle on the ramp, especially after Séguin's warning, Firobin, at the very least, should have attentively inspected it and realized it was unsafe. Furthermore, Firobin told the R.C.M.P. constable "he did not trust the ramp too much", but assumed the risk in order to meet the daily pressure of jobs. Nevertheless, the fact remains that the intervening period between the two deliveries, on the forenoon of August 9, afforded Lucien Séguin ample time to devise the ways and means of preventing any further disregard of his instructions. Instead, suppliant's truck was complacently waved up the ramp.

I would hold the respondent responsible for two thirds of the damages to be assessed and the suppliant for the one third remaining.

The apportionment of those amounts also requires attentive consideration.

The damaged concrete mixer was shipped to Montreal for repairs on August 10, 1962, at the shops of Mount Royal Paving and Supply Ltd., the suppliant's parent company, and returned to Ottawa 25 days later, on September 6.

Mr. Frederick C. Dalton, vice president and manager of Mount Royal Paving and Supply Co., testified that the concrete mixer was purchased in 1954 at a price of $6,000, and the truck chassis in 1956 for $10,145; a total of $16,145. According to this witness, the cost of a mixer and truck

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chassis in 1964 would amount approximately to $30,000. In 1962, the value of the truck chassis, subsequent to the mishap, would have shrunk to $5,075 and that of the damaged mixer to $2,000 in all, $7,075. Mr. Dalton specifies that these depreciated entries in the company's books bear no relation to the real worth of a cement mixer truck in proper condition. We are also told that the duration or life of a concrete mixer, with proper maintenance, could extend to 15 or even 20 years.

Mr. James MacDonald, general superintendent of equipment for Mount Royal Paving and Supply, declares he inspected the truck upon its arrival in Montreal, August 10, and files exhibit 4 as a detailed list of the material and labour required for the repairs. This exhibit shows a sum of $8,099.69 for parts, tax included, and $416 for labour, totalizing $8,515.69. Mr. MacDonald singles out three components of the mechanical assembly as having sustained the major injuries, namely, as listed on exhibit 5, the drum assembly priced at $5,016, the water tank shell $756.80, and the charging hopper $528.53. The three renewal parts were taken out of a 1956 concrete mixer which had previously undergone a complete renovation so that replacement could be considered as brand new material. Frederick Dalton and MacDonald felt a certain amount of depreciation on those major parts, put in the damaged truck, existed and would have attributed a reduction of 25% for this reason. However, no trace of this appears in exhibits 4, 5 or 8. Possibly it had already been deducted from the price mentioned on those exhibits.

A competitor, Mussens Canada Limited, was asked to quote prices for material and labour required to restore the unit to pre-accident operating conditions. Their figures, in exhibit 7, are: $7,641.22 for material and $557.50 for labour; in all $8,198.72. The preceding estimate was prepared by Mussens' Montreal buyer, Michael Finnerty, who previously obtained the cost prices from the Milwaukee firm of Rex Chainbell Co. Mr. Finnerty notes that the prices given on exhibit 7 are selling prices, those charged to clients.

The respondent heard two witnesses on the question of damages. The first, Mr. Roy Booth, of Toronto, President of Collision Appraisal Services Ltd., a firm incorporated in 1958, testifies he deals with damages to cement mixers and their supporting trucks three or four times each month. Mr. Booth values a 1962 mixer, in good condition, after 8 years' usage at $1,500 plus expenses recently incurred for its careful maintenance. In 1954 or 1955, the mixing apparatus cost some $6,100 or $6,300 and the truck itself about $14,000. Mr. Booth personally received from manufacturers the information contained in exhibit C, wherein brand new water tank, charging hopper and drum assembly are respectively priced at $319.58, $528.53 and $3,927; in all $4,775.11, as against $6,301.33, a difference of $1,526.22.

Mr. Michael Herman Bruce of Ottawa is manager of Moto-Mix Concrete Co., engaged in ready made concrete for building purposes. He corroborates Booth, agreeing that the price of a 4½ yard mixer in 1950 was in the order of $6,000, and $6,400 for a 6-cubic yard. The value of an 8-year-old mechanism of this description, in 1962, would range between $1,200 and $1,600 having undergone a yearly depreciation of 20%.

I need not attach much importance to the value, in 1962, of the suppliant's injured property but I am mostly concerned with finding the true and fair cost of the material and labour necessitated for the repair job. A stretch of $1,526.22 separates the estimates submitted by each party. The suppliant resorted to material already used and, according to its own expression, "cannibalized" from another unit of its trucking fleet, 50 to 55 in number, whilst the parts priced on exhibit C are brand new. It seems justified to deduct $1,000 from the amount of $7,766.81 claimed in para. 8 of the petition as the total expenditure incurred to repair the damage, which should therefore be assessed at $6,766.81.

The remaining item for which compensation is sought bears on the loss of use of a cement mixer. In his evidence, Mr. Dalton valued this loss at $8 an hour for a 10-hour day, or a total of $2,000 for 25 days. In truth, the question cannot be solved so easily because Dalton failed to bring out the margin of net profit. In order to have an acceptable notion of this, we must revert to L. W. Fransechini's examination on discovery held October 16, 1963. This gentleman is the General Manager of the suppliant company. On pages 5 and 6 of his transcribed evidence, Fransechini gives some explanation of the items making

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up the rental price of cement mixing trucks. A closer indication is found on pages 7 and 8 from which I quote a few questions and answers:

By Mr. Aylen:

32. And then there is an indication that if the truck like the truck in question were rented the rental would be $12.00 an hour.

A That would include the operator's time and the fuel and oil and supplies.

33. That would include all the operating expenses?

A. Yes, plus a profit on the rental.

34. How much of the $12.00 would be operating expense?

A. $2 00 an hour for the driver's wages.

To this would be added $0.50 or so for gas and oil, says the witness, plus $1.50 an hour for profit. No other proof on this point was adduced to establish the loss of use, which, consequently, I must apportion at $15 a day for a period of 25 days, a total of $375.

The damages suffered will be:

For material and labour	$6,766.81
For loss of use	375 00
One load of concrete	39 00
	$7,180.81

of which two thirds (2/3), or $4,787.21, are granted.

For the reasons above, this Court doth order and adjudge that the suppliant is entitled to recover from Her Majesty the Queen the sum of $4,787.21 being part of the relief sought by his petition of right, and costs to be taxed.

Judgment accordingly.

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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—

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

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N. R. WHITTALL v. MINISTER OF NATIONAL REVENUE

Gibson J.

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:

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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 $4\frac{1}{2}$% 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, 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 7½¢ 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.

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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Sept. 16, 17
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BETWEEN:

H. RICHARD 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 position of company director—Profits from a business—Income Tax Act, R.S.C. 1952, c. 148, s. 3.

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

At all material times the appellant was vice-president and a director of Norman R. Whittall Ltd, an investment dealer, stockbroker and underwriter carrying on business in Vancouver, British Columbia.

The development of the appellant's interests in the companies in question and his acquisition of shares therein is more particularly set out in the reasons for judgment in *Norman R. Whittall v. Minister of National Revenue, ante, p. 342.*

Held: That for the reasons given in *Norman R. Whittall v. Minister of National Revenue, ante,* p 342, the transactions under review are trading operations as part of the business of the appellant.

2. That because of the particular fiduciary relationships of the appellant with certain of the companies in question and their shareholders, in his capacity of director thereof, the transactions under review did not constitute ordinary investments and the profits realized from the sales of the securities were profits from a business within the meaning of s. 3 of the *Income Tax Act.*

3. That the appeal is dismissed.

APPEAL under the *Income Tax Act.*

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

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

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H. J. Grey 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-assessments by the Minister of National Revenue in respect of the income of the appellant for the taxation years 1952, 1953 and 1954, whereby the taxable income was assessed respectively at $71,823.35, $17,820.94 and $45,763.69.

At all material times, the appellant was the vice-president and a director of Norman R. Whittall Ltd., a company incorporated under the laws of British Columbia and carrying on the business of brokers, investment dealers and underwriters at 424 Burrard St., in the City of Vancouver, B.C.; and prior to 1952, the appellant was engaged as a full-time executive of Ross Whittall Ltd.

The appellant had a $12\frac{1}{2}\%$ interest in the firm of Ross Whittall Ltd. since 1947 and later acquired a 20% interest at a cost of $25,000 to $30,000.

The explanations given by the respondent for these re-assessments for the relevant years were as follows:

For 1952:

Taxable Income previous assessed			$16,995.85
Add:			
Proceeds re sale of St. John's Trust Syndicate		$19,400.00	
Less:			
Cost of Interest in four Wilson Syndicate Units		1,250.00	18,150.00
Profit on sale of shares of Yankee Princess Oils Ltd. acquired during promotion and re-organization of Yankee Princess Oils Ltd.:			
Sales Feb. 1, 1951 to June 12, 1952—43,500 shares		$39,990.00	
Cost—10,000 shares @ 8 ¢	$ 800 00		
33,500 shares @ $7\frac{1}{2}$¢	2,512.50		36,677.50
Adjusted Taxable Income Assessed			$71,823.35

For 1953:

Taxable Income previously assessed	$ 7,417.12

Add:		
Proceeds from sale of shares of Inland Natural Gas Co. Ltd., which were received from St. John's Trust Syndicate in 1952	$10,343.82	
Less: Cost of same at $1.00 per share	4,000.00	$ 6,343.82
Proceeds from sale of shares of Canadian Collieries (Dunsmuir) Ltd., which were acquired through participation with Ross Whittall Ltd. on purchase from Sunray Oils: 1500 shares	$ 9,310 00	
Less: Cost at $3 50 per share	5,250.00	4,060 00
Adjusted Taxable Income Assessed		$17,820.94
For 1954:		
Taxable Income previously assessed		$22,866 93
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 Ltd. shares which were underwritten by Ross Whittall Ltd.	$28,210.93	
Less: Cost of same at $1.00 per share	11,000 00	17,210 93
Proceeds from sale of shares of Can. Collieries (Dunsmuir) Ltd. which were acquired through participation with Ross Whittall Ltd. in Purchase from Sunray Oils: 1000 shares	$ 9,185 83	
Less: Cost at $3 50 per share	3,500.00	5,685.83
Adjusted Taxable Income assessed		$45,763.69

As will be noted from the above, during the year 1952 the appellant was assessed for further taxable income on the net proceeds of the sale of St. John's Trust Syndicate units and on the sale of Yankee Princess Oils Ltd. shares; and for the year 1953, he was assessed in respect of the proceeds of the sale of shares of Inland Natural Gas Co. Ltd., and of Canadian Collieries (Dunsmuir) Ltd.; in respect of the year 1954, he was assessed in respect of further sales of the shares of Inland Natural Gas Co. Ltd., and of Canadian Collieries (Dunsmuir) Ltd.

The development of these interests and their acquisition are more particularly set out in the reasons for judgment in the case of *Norman R. Whittall v. Minister of National Revenue ante*, p. 342 and need not be repeated here.

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There is one substantial difference in the instant case, however, namely, in the fiduciary capacities in which the appellant was in relation to the various companies and their shareholders at the material times.

The appellant was a director and officer only of the St. John Oil & Gas Co. Ltd., of Yankee Princess Ltd. and of Ross Whittall Limited. Ross Whittall Limited was the fiscal agent of Yankee Princess Ltd. and did the underwriting for it and also for Inland Natural Gas Co. Ltd. and St. John Oil & Gas Co. Ltd. (In respect of the latter company, the evidence was that it was really an exchange of shares and an accommodation granted by Ross Whittall Limited in the hope that there would be underwriting in the future given it by St. John Oil & Gas Co. Ltd.)

For the reasons given in the case of *Norman R. Whittall v. The Minister of National Revenue* (*supra*) the general finding that these transactions were trading operations as part of the business is applicable in this case, and also because of the particular fiduciary relationships of the appellant with certain of these companies and their shareholders in his capacity as director thereof, I find that these transactions in these securities did not constitute "ordinary" investments, and therefore, I am of opinion that the profits realized from the sales of the securities more particularly set out in the re-assessment notices for 1952, 1953 and 1954 were profits from a business within the meaning of section 3 of the *Income Tax Act*, and that the Minister was right in including it in the assessment.

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

Judgment accordingly.

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Oct. 23

BETWEEN:

PREFORMED LINE PRODUCTS COMPANY, N. SLATER COMPANY LIMITED and SLATER STEEL INDUSTRIES LIMITED ... PLAINTIFFS;

AND

PAYER ELECTRICAL FITTINGS COMPANY LIMITED, and R. LEO PAYER .... DEFENDANTS.

Practice—Application for issue of Writ of Attachment—Application to commit—Breach of injunction—Contempt of order of Court—Injunction binding only on defendants in action—Validity of patents open to attack by persons not parties to action despite judgment—Degree of proof required on contempt application.

This is an application for an order giving leave to issue a Writ of Attachment against Raymond Payer or, in the alternative, to commit the said Raymond Payer, on the grounds that he is in breach of an injunction granted by this Court or, in the alternative, that he has acted in contempt of an order thereof. The injunction in question was part of a consent judgment delivered in a patent infringement action in which the applicant was one of the plaintiffs but to which the said Raymond Payer was not a party.

The applicant contended that R. Leo Payer, one of the defendants in the patent infringement action, committed a breach of the injunction and that the respondent, Raymond Payer, aided and abetted him therein and is therefore in contempt of Court or, in the alternative, that the respondent, Raymond Payer, is in contempt of Court in that he assisted or aided in carrying on activities which would have been an infringement of the invention had they been carried on by the said defendant, R. Leo Payer.

Held: That, notwithstanding the form of the injunction it is clear that it is binding only on the defendants in the action.

2. That, having regard to the nature of the applicant's contentions, the defendant in the infringement action, R. Leo Payer, should have been advised of the substance of the contentions and have been given an opportunity of being heard.

3. That the validity of the patents referred to in the judgment in this case is, notwithstanding that judgment, open to attack by any person other than the parties bound by that judgment, and the respondent, Raymond Payer, is therefore entitled to make such an attack.

4. That even if it had been established that R. Leo Payer had aided the respondent, Raymond Payer, in carrying on the manufacture and sale of products embodying the patented inventions mentioned in the judgment, it does not follow that Raymond Payer would have been guilty of contempt.

5. That the application is dismissed.

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APPLICATION for leave to issue a Writ of Attachment or, in the alternative, to commit for contempt a person not a party to the action.

The application was heard on October 23, 1964 by the Honourable Mr. Justice Jackett, President of the Court, at Ottawa and was dismissed with costs.

D. G. Finlayson for plaintiff Preformed Line Products Company.

D. J. Wright for plaintiff N. Slater Company Limited.

Redmond Quain, Q.C. and *B. Pollack* for Raymond Payer.

JACKETT P. delivered the following reasons for dismissing the application:

This is an application for an order giving leave to the plaintiff to issue a Writ of Attachment against Raymond Payer or, in the alternative, to commit the said Raymond Payer, or for such other order as seems just on the grounds that the said Raymond Payer is in breach of an order dated March 11, 1963, or in the alternative, that he has acted in contempt of an order of this Honourable Court.

On March 11, 1963, consent judgment was delivered in a patent infringement action in which Preformed Line Products Co. and the Slater Co. Ltd. and Slater Steel Industries Ltd. were plaintiffs and Payer Electrical Fittings Co. Ltd. and R. Leo Payer were the defendants. Among other things that judgment provided that the defendants, their representatives, servants, agents and workmen be enjoined from further infringing Canadian Patents Nos. 495,848, 484,432 and 589,353 or the rights conferred by the said patents during the continuance of the said Letters Patent.

Notwithstanding the form of this injunction, it is clear in my view that it is only binding on the defendants in the action. See *Marengo v. Daily Sketch and Sunday Graphic, Ltd.*[1] where Lord Uthwatt, at page 407, said:

> The reference to servants, workmen, and agents in the common form is nothing other than a warning against wrongdoing to those persons who may by reason of their situation be thought easily to fall into the error of implicating themselves in a breach of the injunction by the defendant There its operation, in my opinion, ends.

[1] [1948] 1 All E R 406

While this application is in terms an application for a Writ of Attachment for breach of the Order of this Court or, alternatively, on the ground that Raymond Payer is in contempt, counsel for the applicant indicated upon opening that he was limiting the application to committal for the contempt branch of the application.

Although it does not appear too clearly from the application, the applicant based his application on two alternative contentions: first, the contention that the individual defendant, R. Leo Payer, committed a breach of the injunction and that the respondent here aided and abetted him in that breach and is therefore in contempt of Court; and second, in the alternative, on the contention that the respondent here is in contempt of Court in that he assisted or aided in carrying on activities which would have been an infringement of the invention had they been carried on by the defendant R. Leo Payer.

Having regard to the nature of these contentions, it is unfortunate in my view that the defendant, R. Leo Payer, is not present on this application. I am informed by counsel for the applicant that the defendant, R. Leo Payer, was represented and was prepared to appear but did not do so because his counsel was informed by counsel for the applicant that no relief was being claimed against R. Leo Payer. Before adjudicating on the matter in favour of the applicant, I should be inclined to require that R. Leo Payer be advised of the substance of the contentions and be given an opportunity of being heard.

Clearly, the validity of the patents referred to in the judgment in this case is, notwithstanding that judgment, open to attack by any person other than the parties bound by that judgment. I should myself have thought that, not being such a party, the respondent to this application, Raymond Payer, is therefore entitled to make such an attack. Nevertheless, counsel for the applicant indicated that this application is brought in the hope of avoiding expensive infringement proceedings against Raymond Payer.

The submission of counsel for the applicants as to the actual facts established by his material (which material consists of an affidavit of William Frederick Corkran, an

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affidavit of one Walker and an affidavit of one Grant) is, as I understand it, in substance as follows:

(1) R. Leo Payer at one time was employed by one of the plaintiffs as an engineer and, upon leaving that employment, took with him specifications of a product manufactured and sold by that plaintiff, which product embodied a patented invention or inventions;

(2) after leaving that plaintiff's employment, R. Leo Payer and the defendant company manufactured and sold products embodying the same patented invention or inventions. R. Leo Payer was president and a director of the defendant company, Raymond Payer, the respondent here, was secretary-treasurer of that company, and their father, Leo Payer, was a director;

(3) on March 11, 1963, by a consent judgment in these proceedings, the defendant company and R. Leo Payer were enjoined from infringing the patents in question;

(4) following that judgment, a company brought into existence by one of the plaintiffs acquired most of the assets of the defendant company and Raymond Payer and R. Leo Payer were associated with that company for periods of two and three months respectively;

(5) shortly after that relationship ceased, Raymond Payer and certain other members of the Payer family brought into existence another company, which proceeded to manufacture and sell products that also embodied the patented inventions that were referred to in the judgment; this company used a catalogue that was, in substance, identical to that that had been employed by the defendant company;

(6) while there is no evidence that R. Leo Payer had participated in the activities of this new company and particularly that he was associated in any way with the production or sale of products embodying the patent inventions referred to in the judgment of March 11, 1963, it is established

(a) that the specifications that R. Leo Payer took when he left the employment of the plaintiff have never been returned, and

(b) that R. Leo Payer is the only Payer referred to in the evidence that has the competence, ability and experience to carry out the production of the products in question.

Counsel for the applicants argues that certain inferences be drawn from these established facts, namely, that R. Leo Payer has supplied the new company with the old specifications that he took from the plaintiff and further that R. Leo Payer is helping the new company in the production of the articles embodying the patented invention.

The next step that counsel invites the Court to take is to conclude that it follows from such inferences

(a) that R. Leo Payer has been using the patented inventions contrary to the injunction and that Raymond Payer has aided and abetted him and is therefore guilty of contempt or

(b) alternatively, that Raymond Payer has accepted from R. Leo Payer aid in doing what would have been a breach of the injunction if it had been done by R. Leo Payer and that this was a contempt of Court by Raymond Payer.

I reject the application because I am not able to draw these inferences from the alleged facts even if such facts have been established. At most, if the facts are as submitted by the applicants, there is a suspicion that R. Leo Payer may have participated in the activities of the new company. In my view, it cannot be said that these facts establish that R. Leo Payer was in any way directly or indirectly a party to the operations of the new company even if I apply only the test applicable in civil proceedings of "balance of probability" and not the test applicable in criminal cases which I should have thought is applicable before finding that a person should be punished for contempt.

I should say that if I were able to draw the proposed inferences from the basic facts, I should then have had to cope with a number of questions concerning the adequacy of the proof of the basic facts. I am far from satisfied that many of the facts have been established by satisfactory evidence, if at all.

I should also say that, even if I had been persuaded that R. Leo Payer had aided (by advice or supplying of specifications) Raymond Payer in carrying on the manufacture and sale of products embodying the patented inventions mentioned in the judgment, I am far from satisfied that

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Raymond Payer would have been guilty of contempt. Had R. Leo Payer been cited for contempt for manufacture in defiance of the injunction that was directed to him and had Raymond Payer been cited for knowingly assisting R. Leo Payer in a breach of that injunction, the situation would be quite different. That is not the situation here.

I must refer also to the fact that, prior to R. Leo Payer withdrawing from the case on the assurance from the plaintiff that no relief was being sought against him, he filed an affidavit stating his compliance with the injunction and his abstention from participation in the activities of the new company. Counsel for the applicants drew my attention to this affidavit in some detail and also to a second affidavit of Mr. Corkran in reply to it. Subsequently, counsel for the applicant indicated that he was not relying on either of these two affidavits. (He of course referred to them only in an attempt to throw doubt on the accuracy of the statements in the affidavit of R. Leo Payer.) I am not at all satisfied that this material is not part of the material that I should take into consideration in view of the reference made to it by counsel for the applicant. However, in view of the conclusions that I have reached on the other material, I do not have to decide that question. There is no doubt in my mind that looking at the two additional affidavits would only tend to support the conclusion that I have already reached.

The application is dismissed with costs.

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Oct. 8

Oct. 29

BETWEEN:

TALON EXPLORATION LTD. .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ... RESPONDENT.

Revenue—Income—Income tax—Acquisition and sale of carried interest in oil lands—Sale of potential income producing assets—Adventure or concern in the nature of trade—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 income of the appellant for the taxation year 1957 wherein the respondent included therein a sum representing the appellant's profit resulting from its acquisition and sale of certain petroleum interests in Western Canada.

The appellant was incorporated in July 1954 under the Alberta *Companies Act* and had as its objects to prospect, explore, drill, produce and accumulate petroleum, natural gas and related hydrocarbons and to open, drill, develop, improve, maintain and manage petroleum and natural gas wells and natural gas property generally. All the issued shares of the company were held by one Harris Cox and his wife and son, Harris Cox being its president and major shareholder. Before incorporating the appellant company Cox was employed for many years in seismographic work in connection with the discovery of oil, in Canada and other countries. The appellant entered into three agreements, each with a different oil company, and one agreement with the Province of Saskatchewan, the appellant agreeing in each case to drill for oil on the lands described in the agreements at its own expense, in return for which it was given an interest in the said lands. In each case the appellant arranged for other companies or individuals, including one Ross H. Chamberlain, with respect to all four drilling agreements, to finance the full cost of drilling in return for which the appellant's interest in the properties was transferred to them subject to a carried interest, usually of 15% being reserved to the appellant.

When Humber Oils Ltd. offered to buy Chamberlain's interests in the lands in question, the offer included the carried interests held by the appellant. The appellant's carried interests were sold to Humber Oils Ltd. along with Chamberlain's interests in the said lands.

The issue to be decided is whether the purchase or acquisition in 1954 of the carried interests of the appellant from Chamberlain and their sale in conjunction with the interests of Chamberlain in 1957, was an adventure or concern in the nature of trade so that the profit therefrom constituted taxable income, or whether what was done was the realization at an enhanced price of capital assets or investments and as a consequence did not constitute an adventure or concern in the nature of trade.

Held: That it is a fair inference from the evidence to conclude that Chamberlain wished to sell his interests to Humber Oils Ltd. and that while there may not have been too great reluctance on the part of the appellant to sell its carried interests, nevertheless, because of the history of the assistance given to the appellant by Chamberlain it would have been impractical and unrealistic for the appellant not to have concurred in the decision made by Chamberlain to sell.

2. That what Humber Oils Ltd. acquired was in effect a business as a going concern, and it acquired it by way of purchasing the investment interests of Chamberlain and the appellant in the properties affected by the first two drilling agreements executed by the appellant.
3. That the carried interests in question were acquired by the appellant as potential income-producing assets.
4. That the acquisition and sale of the carried interests of the appellant were transactions in capital assets and were not adventures or concerns in the nature of trade within the meaning of s. 139(1)(*e*) of the *Income Tax Act*.
5. That the appeal is allowed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Gibson at Calgary.

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R. A. MacKimmie, Q.C. for appellant.

H. J. MacDonald, Q.C. and *T. E. Jackson* for respondent.

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

GIBSON J. now (October 29, 1964) delivered the following judgment:

This is an appeal from the judgment of the Tax Appeal Board which dismissed the appellant's appeal from a re-assessment made by the Minister for the 1957 taxation year wherein the Minister included in the appellant's income, *inter alia,* the sum of $58,685.69, which the Minister assessed as being profit constituting income arising out of the acquisition and sale by the appellant of certain petroleum interests in Western Canada.

The appellant company was incorporated in July, 1954. Under letters patent issued pursuant to provisions of *The Alberta Companies Act,* it had as its objects to prospect, explore, drill, produce and accumulate petroleum, natural gas and related hydrocarbons and to open, drill, develop, improve, maintain and manage petroleum and natural gas wells and natural gas property generally.

All the issued shares of this company belonged at all material times to Mr. Harris Cox, his wife and son. The issued capital stock originally had a value only of $4 and any money this company received initially to carry on its activities was supplied to it by way of loans from its president and major shareholder, Mr. Harris Cox.

Mr. Harris Cox said he caused this company to be incorporated with the intent to build up an independent oil company; and to do so it was necessary for him after this incorporation to acquire properties which had a probability of containing oil, and to cause these properties to be drilled for oil and to get the wells as drilled into production.

In order to accomplish this, he made various deals in respect to which he gave evidence.

According to the evidence the deals were made in the manner described because the oil industry in its discovery and development stages requires huge risks to be taken and requires huge amounts of capital to be expended to develop producing wells, and at the same time there are relatively small quantities of land available for such development. These facts caused oil companies, big and small, to spread risks with other persons and/or companies so that in the business practically all oil wells are developed by more than one person or company, under contractual arrangements among themselves, which are varied, sometimes complicated and almost never uniform.

This is sometimes true in the case of proven lands but always true in the case of unproven lands.

In connection with the latter, the acquisition and drilling of unproven lands is sometimes referred to in the oil industry as "wild-catting".

According to the evidence the activities of certain individuals in obtaining leases in unproven lands has caused them to be called in the industry, in some cases, "lease hounds". Such persons, if they carried on this kind of activity in real estate transactions, would be looking for what are sometimes called "finder's fees".

It was stated that so-called "lease-hounds" do not participate in any way in the development of the property after obtaining leases, as for example in the way of drilling and otherwise developing the properties, but instead they receive only a fee for their services. The evidence also is that such persons seldom, if ever, receive any shares of any interests in the properties for their services, but instead, as stated, receive money for their services.

In making these deals concerning properties which potentially may contain oil or gas, it appears that the first thing that has to be provided for is a royalty to the land owner who is usually a farmer or the Crown. It is usually $12\frac{1}{2}\%$ and is payable from the gross revenues obtained from the property whether or not the proceeds from the property result in a profit from operations or not.

Then, sometimes, in respect to a given property there is an interest called a "carried interest". In such a case the party owning the "carried interest" puts up no money for drilling costs or other expenses for the development of the mine. If such well or mine becomes profitable after it gets into production, then the costs that the other participating interests incurred for drilling and other charges are recouped first out of the revenues, and then after that the "carried interest" shares with the participating interests in the net profit according to the respective proportions of their ownership.

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At this stage the "carried interest" becomes a "working interest" and its owner becomes liable for the expenses subsequently incurred in the development and operation of the mine, but also, of course, entitles the owner of it to participate in the management proportionate to its relative share interest in the mine. In this way, the carried interest then becomes subject to what is called the "working agreement" which is the main agreement spelling out all the details of how the development and operation of the mine is to be done and what costs may be incurred and so forth.

Then there is sometimes what is called a "working interest" which is a full participating interest, which bears at all times its proportionate share of the expenses of development and operation of the mine.

There is also another interest which is carried and it is units in a royalty agreement. Royalty units usually belong to the owner of the minerals who is usually the farmer or the Crown.

The evidence indicated that any of the interests in mining properties outlined above may be earned in many ways, other than by putting up cash; and the largest of oil companies try to avoid putting up money or incurring drilling costs in unproven lands and often obtain interests in such lands without the expenditure of monies by them.

The result of all the activity by the appellant (which is detailed below) was that it did obtain some interests in unproven lands and that in the acquisition of these interests the appellant neither put up nor paid any money but instead earned them by providing certain technical services and "know-how".

The four transactions which resulted in the appellant obtaining petroleum interests were prescribed in certain agreements and documents which are filed in this appeal and are Exhibits 2 to 16.

The evidence of the president of the appellant, Mr. Harris Cox, however, was that the preparation and execution of each of these documents followed the actual events and that in certain respects these documents do not tell exactly what took place. However, the end result was that they show that the appellant did receive interests in oil and gas properties out of these four transactions and the precise nature of these interests which it obtained is accurately described in these documents.

The situation was that prior to July, 1954, when Mr. Harris Cox caused the appellant company to be incorporated, he was employed in certain other endeavours. From 1931 until 1954, save and except for war service, he was employed by a company known as Geophysical Services Inc., of Dallas, Texas, which employment lasted until the war years, and after that he was employed by Western Geophysical Company. With the former company, he did seismograph work, which is a service rendered to oil companies who are interested in finding oil. This service is rendered complimentary to the services rendered by geologists; and as a result of putting together the information obtained from the rendering of such services, a recommendation is made to oil well clients advising them of the probable best places to drill for oil.

Mr. Cox performed his services with these two companies in the United States, in South America, the Indian Netherlands, and in Canada.

In 1954 Mr. Cox was employed by Western Geophysical Company in Canada, and at that time decided to leave that company to set up his own oil company, the appellant herein.

The first transaction that the appellant company entered into was with Canadian Superior Oil of California Ltd., and this took place in July of 1954. For the appellant, Mr. Harris Cox made a verbal agreement with that company to drill a minimum of ten wells on property which the latter held on lease, and in return the appellant received a 50% interest subject to the royalty in favor of the owner of the land. This verbal agreement was consumated after he had visited the properties with representatives of Canadian Superior Oil of California Ltd.

Mr. Cox then arranged with Dome Exploration Ltd. to put up 50% of the drilling costs, with Ross H. Chamberlain to put up 25% of these costs and with Welton Becket to

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put up 25% of these costs. In other words, he arranged with these three persons to take over and put up all the cash obligations in the drilling contract he had made with Canadian Superior Oil of California Ltd.

In the result, therefore, subject to a 12½% royalty to be paid to the owner of the land, there resulted the following percentage interests in this farm-out property from Superior Oil of California Ltd.:

50 % to Canadian Superior Oil of California Ltd.,
25 % to Dome Exploration Ltd.,
12½% to Ross H. Chamberlain, and
12½% to Welton Becket.

However, from the interests sold to Ross H. Chamberlain and Welton Becket, the appellant retained a 12½% "carried interest".

In the net result then the appellant ended up with a 3⅛% interest in the property which was a "carried interest". These arrangements are supported in evidence by Exhibits 2, 3, 4, 5, 6, 7 and 8 filed in this appeal.

The second transaction the appellant entered into was with Imperial Oil Ltd. in 1954 and it concerned the Midale field in Southern Alberta, and consisted of a quarter section or 160 acres.

Imperial Oil Ltd. held the lease from the farmer-owner in this unproven property and it was subject to a 12½% royalty to the owner.

Originally, Imperial Oil Ltd. in the negotiations with the appellant wanted a straight 10% royalty, which in the opinion of the appellant would have been most uneconomic for it and as a result there were further negotiations which ended in different arrangements being made.

The final arrangement made with Imperial Oil Ltd. required the appellant to drill the property and there was reserved to Imperial Oil Ltd. a 2½% royalty. This resulted in a 15% royalty payable, being 12½% to the farmer-owner and 2½% to Imperial Oil Ltd.

The appellant at the same time also obtained an option to drill on some Canadian Superior of California Ltd. property nearby, which in the event that the option was exercised by the appellant would give Canadian Superior Oil of California Ltd. a 2½% royalty.

The appellant then arranged with Dome Exploration Ltd. and the said Ross H. Chamberlain and Welton Becket to assume these costs of the drilling of these properties and also reserved to itself a 15% carried interest out of the interests sold to Chamberlain and Becket.

This resulted in the interests in these properties being as follows, namely, 50% to Dome Exploration Ltd., 25% to Ross H. Chamberlain, 25% to Welton Becket; and out of each of the interests of Chamberlain and Becket there was reserved to the appellant a 15% carried interest; so that in this transaction the appellant obtained a 7½% interest in the whole which was a carried interest.

The third transaction concerned property in the Province of Saskatchewan and was made in the fall of 1956 and was a reservation of land obtained by way of bid from the Province of Saskatchewan. This bid was made on a net royalty basis and in this bid the appellant joined with West Canadian Petroleum Ltd. and Westburne Oil Development Ltd. so that in the result each obtained a one-third interest in this reservation of land.

In this case the bid was such that an 87½% interest was to belong to the Crown once the property became a working property. In other words the Crown in this arrangement was to receive a 12½% gross royalty immediately on production, and then if and when the property became profitable, the Crown would receive 87½% of the net income.

The appellant in respect to this third transaction again went to Dome Exploration Ltd. and to Welton Becket who were not interested in buying into this one-third interest of the appellant, but Ross H. Chamberlain was interested and did assume the whole of the cash obligation of this one-third interest and reserved to the appellant a 25% carried interest therein.

The fourth transaction took place in December, 1956, and concerned property near the Virden Airport on which BA Oil Company Ltd. had a lease and in respect to which lands it was reluctant to develop by way of drilling because of danger to the airport facilities and adverse publicity if anything untoward should happen, and the appellant made a deal with it to drill which agreement was subject to a 50% carried interest in favor of BA Oil

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Company Ltd. In other words, the appellant assumed 100% of the drilling costs in this arrangement.

Then the appellant arranged with Ross H. Chamberlain to put up all the funds for this 100% of the drilling costs but reserved to the appellant a 25% carried interest.

The result was that this whole transaction was subject to a 50% carried interest in favour of BA Oil Company Ltd. and a 25% carried interest in favour of the appellant; and Ross Chamberlain had the other 25% which was the only full participating interest.

The evidence was that Mr. Cox for the appellant acquired all these interests in the four transactions and made deals with the other parties involved, namely, Dome Exploration Ltd., Ross H. Chamberlain and Welton Becket; that in these transactions Mr. Cox as president of the appellant company worked with Dome Exploration Ltd. which latter company was the operator company, in getting these properties drilled (and some of them into production as mentioned hereafter) and also successfully negotiated contributions from other persons or corporations who had leases in the various adjoining areas where such drilling was done, obtaining from them what is known as "dry hole money", being a contribution towards the drilling costs.

In all these efforts in working with Dome Exploration Ltd., thirty-three wells were drilled and fourteen of these were dry holes and nineteen were producers.

The appellant through its president Mr. Harris Cox was involved in the full program which caused these wells to be producers. In some cases the wells had his name joined in them, as, e.g., Harris Cox-Dome Well No. so-and-so.

The evidence was that the drilling costs for the cheapest well ran from $15,000 to $20,000 to a high for the most expensive of $75,000.

Subsequently, the interests in the transactions which were reservation lands from the Province of Saskatchewan the appellant disposed of in circumstances which are not relevant on this appeal, but in respect to the profit on the realization of which the appellant paid income tax.

The appellant subsequently did also sell the "carried interests" which he had received from Ross H. Chamberlain and the issue on this appeal is how the profit realized on this sale should be categorized with reference to the provisions of the *Income Tax Act*.

The appellant still owns the carried interests which it obtained from Welton Becket.

The circumstances under which the carried interests which the appellant obtained from Ross H. Chamberlain were sold are briefly as follows: The brokerage and underwriting firm of Dougherty, Roadhouse & Co. of Toronto incorporated a company known as Humber Oils Ltd. and were anxious to acquire proven oil and gas properties for Humber Oils Ltd. in order to make it a producing company. It was necessary before the shares of this company could be listed on the Toronto Stock Exchange for it to own interests in proven properties. Mr. Darcy Dougherty approached Mr. Harris Cox to find out whether the Chamberlain interests were for sale and Mr. Cox referred him to Mr. Ross H. Chamberlain who at that time resided in San Francisco and was a broker and underwriter, and there subsequently was a meeting in San Francisco of all interested parties.

(Ross H. Chamberlain, as is patent from the summary of the evidence recorded above, had been a sort of financial "angel" of the appellant and had taken up and assumed, at all material times, a substantial part of the drilling cost obligations of the appellant in respect to all the transactions which are above recited. The appellant was dependent to a large extent on him for these costs; and had received for what it contributed to these transactions the carried interests above referred to.)

As a result, Humber Oils Ltd. (after the conference in San Francisco at which were present representatives of Dougherty, Roadhouse & Co. certain officers of the Humber Oils Ltd., Ross H. Chamberlain and certain of his associates, and officers of the appellant) purchased the Chamberlain interests in the first two transactions recited above, and also the carried interests of the appellant which the latter had received from the Chamberlain interests.

The purchase price was determined by negotiation after an appraisal had been made for Humber Oils Ltd. of the market value of these interests; and the offer made and accepted was substantially less than that suggested as the proper price in the so-called Sproule Valuation Report, which Chamberlain had obtained valuing these properties.

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The evidence was that the Sproule report did not separate on a valuation basis the interests of the appellant from the Chamberlain interests and the whole negotiations were carried on by Chamberlain on the basis that the carried interests of the appellant would be included in the sale.

It is a fair inference from the evidence to conclude that Ross H. Chamberlain wished to sell to Humber Oils Ltd. at this material time and he unquestionably was the dominant figure in the proposal and the arrangements to sell to Humber Oils Ltd.; and that while there may not have been too great reluctance on the part of the appellant to sell its carried interests, nevertheless, because of the history of the assistance given to the appellant by Chamberlain it would have been impractical and unrealistic for the appellant not to have concurred in the decision made by Chamberlain to sell.

It is relevant to observe also that what was sold were properties which were proven which is what Humber Oils Ltd. needed so that its underwriters could list its shares on the Toronto Stock Exchange and sell them to the public. Humber Oils Ltd. was not interested in buying nor did it buy unproven properties. In other words, what the Humber Oils Ltd. did acquire was in effect a business as a going concern; and it acquired it by way of purchasing the investment interests of Chamberlain and the appellant in the two properties referred to in the first two transactions recited above.

This conclusion is arrived at by considering the whole of the evidence given by Mr. Louis Diehl, secretary-treasurer of Hitchcock and Chamberlain Ltd. (of which Ross H. Chamberlain was the major owner), and who was familiar with the sales transaction with Humber Oils Ltd., Dr. E. D. Alcock who acted as a geologist advisor and who had very considerable experience in the oil industry and who appraised for Humber Oils Ltd. the interests of Chamberlain and the appellant in these producing wells and who also gave evidence that Humber Oils Ltd. tried to buy the Becket interest in these properties but was unsuccessful, and also the evidence of the appellant.

Counsel for the appellant submitted that these transactions resulted in a capital gain and the transactions should not be considered solely from the intention of the party but their characterization should also be determined from what the appellant actually did; and in this particular case what the appellant actually did was more important.

Counsel submitted that Cox, president of the appellant, was a trained engineer in the oil industry; that he left his employment and formed a small company, the appellant, whose objects are set out in the memorandum of association filed as Exhibit 1, referred to above; that the appellant showed what it did in acquiring these interests and demonstrated that it obtained these carried interests for the purpose of obtaining future income from producing wells, which corresponded with its declared intention and that in this business, the high cost of drilling was so important that even though the appellant did not have money to drill the evidence was that this was not a great criteria, because oil companies, big or small, always tried to get someone else to incur the drilling costs in "wild-cat" drilling in unproven areas; that the appellant made these deals with Canadian Superior Oils Co. of California and Imperial Oil Ltd. and the subsequent deals with Dome Exploration Ltd. and Chamberlain and Becket, and from the two latter he got these small carried interests; that Chamberlain was the financial "angel" of the appellant during this period; and that what the appellant got was nothing like a "finder's fee" but instead were interests in future income and these interests became valuable because the appellant worked to get the mines into operation; that when Mr. Dougherty of Dougherty, Roadhouse & Co. contacted the president of the appellant, he immediately referred him to Ross H. Chamberlain, and although Mr. Cox attended the negotiating meetings in San Francisco "the situation was delicate" (as Mr. Cox put it) and that Mr. Cox thought that Chamberlain wanted to sell, and the appellant really had no practical alternative but to sell.

From this evidence the appellant submits that it was reasonable for it to sell when Chamberlain saw the opportunity and wished to sell because the appellant did not want to frustrate Chamberlain's effort especially in view of his history as a financial backer, and as a consequence the appellant did sell its interests, but this did not make the appellant a trader in securities. Up to that time it had been a developer of these properties, working closely with Dome Exploration Ltd., the operator, and that this transaction in which the appellant concurred in Chamberlain's resolution

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to sell, under the circumstances, did not change the appellant from being a small operator of mines doing reasonably well into a trader in security interests in such mines.

In this latter connection, Mr. Cox for the appellant stated that the appellant is currently receiving a small income of about $300 a month from the "carried interests" obtained through the Becket interests in these properties.

Counsel for the appellant also stated that in effect the appellant exchanged one form of investment for another in this transaction, that is, it exchanged the carried interests for shares in Humber Oils Ltd. and some cash, and on the evidence, its intent and conduct go together to substantiate that it was not a trader of securities.

Counsel for the respondent to the contrary argued that the profit from the transactions was income within the meaning of section 3 of the *Income Tax Act;* that the property was not being taxed, but it was the taxpayer who was being taxed; that in a given case the receipt of an asset exchanged can be capital in one company and income in the other company with whom the former dealt; that there was only one business that Talon was engaged in and that was to make money; that the only time the appellant made any money was when it sold assets it had acquired; that the only thing the appellant had to offer at any material time was the knowledge, experience and the contribution that its president could make; that what it did was put several deals together as a promoter and therefore a dealer; that this was the business of the company, namely, putting transactions together; that with respect to the contract which is the subject of this appeal, the appellant negotiated with Canadian Superior Oils of California and with Imperial Oils Ltd. and then went to Dome Exploration Ltd. and Chamberlain and Becket and that it did not matter whether the interest received by the appellant came only from Becket or Chamberlain, the important thing was that it received an asset in the production of these properties; that what the appellant got for its services and contributions was an interest in the production of the wells and it was that interest that the appellant sold and converted into cash; that any company in order to make a profit must receive cash; and the only way that the appellant could get cash was to sell what it had acquired and it did not matter what method was followed if that was the business of the company, as was the case here.

On these facts and submissions I am of the opinion following:

In the consideration of this matter, the applicable sections of the *Income Tax Act*, R. S. C. 1952, c. 148, in the determination of this appeal are sections 3, 4 and 139(1) (*e*) which read as follows:

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.

139.(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;

The issue to be decided here is whether the purchase or acquisition in 1954 of the carried interests of the appellant from Ross H. Chamberlain and their sales in conjunction with the interests of Ross H. Chamberlain, in 1957, was an adventure or concern in the nature of trade so that the profit therefrom constituted taxable income, or whether what was done was the realization at an enhanced price of capital assets or investments and as a consequence did not constitute an adventure or concern in the nature of trade.

The respondent in his Reply to the notice of appeal sets out the issue in this way (pleading that in re-assessing he acted on the following assumptions) paragraph 15:

15. In re-assessing the Appellant for its 1957 taxation year, notice of which was posted on the 15th day of April, 1959, wherein he included in the Appellant's income, inter alia, the sum of $58,685 69, the Respondent acted on the following assumptions, inter alia:

(a) that in the course of its business the Appellant acquired interests in certain petroleum and natural gas properties in Canada, or in the proceeds of production therefrom;

(b) that the acquisition of interests in petroleum or natural gas properties or in the proceeds of production therefrom and the turning to account thereof at a profit constituted a business of the Appellant;

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(c) that in the course of the Appellant's business, the Appellant, in the taxation year 1957, disposed of the following interests at a profit of $58,685 69:

(i) 15% of the 25% interest acquired by one Ross H. Chamberlain in a farmout agreement dated July 2nd, 1954, made between Superior Oil of California Ltd. and Dome Exploration (Western) Limited;

(ii) 15% of the interest acquired by the said Ross H. Chamberlain in a farmout agreement dated October 21st, 1954, made between Imperial Oil Limited and Dome Exploration Limited;

(iii) 15% of the interest acquired by the said Ross H. Chamberlain in a farmout agreement dated November 1st, 1954, made between Canadian Superior Oil of California Ltd. and Dome Exploration (Western) Limited;

(iv) a 25% interest in the share of the said Ross H. Chamberlain in the gross proceeds of the production from certain properties in which the Appellant had had, together with West Canadian Petroleums Ltd. and Westburne Oil Development Ltd., a beneficial interest, which interest the Appellant had assigned to the said Ross H. Chamberlain by agreement dated July 1st, 1956;

(v) a 12½% interest in the petroleum substances produced from wells drilled on certain leased property in which the Appellant had assigned its interest to the said Ross H. Chamberlain by agreement dated September 14th, 1956.

(d) that the said profit constituted income from the Appellant's business for the 1957 taxation year.

In respect to this pleading, as Cattanach J. said in *Minister of National Revenue v. Pillsbury*[1].

The respondent could have met the Minister's pleadings that, in assessing the . . . (appellant), he assumed the facts set out in paragraph . . . (15) . . . of the Notice of Appeal by:

(*a*) challenging the Minister's allegation that he did assume those facts,

(*b*) assuming the onus of showing that one or more of the assumptions was wrong, or

(c) contending that, even if the assumptions were justified, they do not of themselves support the assessment.

The appellant on this appeal adopted the course outlined in (b) above.

As a result from the evidence adduced the question to be decided might be put in several ways, as for example: Was the appellant in the business of trading in securities when it acquired and disposed of these carried interests? Did these transactions constitute dealing in mining securities? Is the proper inference to be drawn from these

[1] (64. D T C. 5184)

transactions that the appellant was not a developer but instead a trader?

As a guide in matters such as this, certain tests were laid down by the learned former President of this Court in the case of *Minister of National Revenue v. Taylor*[1]. At page 214 of the Canadian Tax Cases Report, Thorson P., after prescribing these certain guides, stated:

> . . . that the question whether a particular transaction is an adventure in the nature of trade depends on its character and surrounding circumstances and no single criterion can be formulated.

And in *Edwards v. Bairstow*[2], Lord Radcliffe stated at page 38:

> Dealing is, I think, essentially a trading adventure, and the respondents' operations were nothing but a deal or deals in plant or machinery.

In this case in brief, therefore, was this then a deal or deals in purchasing mining securities?

Or was the transaction simply this—Was the acquisition of these carried interests by the appellant at the material times made for the purpose of obtaining revenue and therefore in the nature of capital investment within the meaning of the *Irrigation Industries Ltd. v. Minister of National Revenue*[3] and *Montreal Trust Company v. Minister of National Revenue*[4] cases and was the gain or profit on the realization of such capital assets or investments capital?

The evidence adduced by the appellant in my opinion proves that in substance the assumptions of the Minister contained in paragraph 15 of the Reply in the pleadings are wrong.

The evidence established that these carried interests were acquired by the appellant as potential income producing assets; that the appellant with Dome Exploration Ltd. had developed the properties, in which there were these carried interests, so that nineteen wells were brought into production; that Humber Oils Ltd., the purchaser of these carried interests was only interested at the material time in buying proven properties, i.e., income producing properties; and that Chamberlain was the dominant person who made the effective decision to sell to Humber Oils Ltd.; and that in the circumstances it would have been

[1] [1956] C.T.C. 189. [2] [1956] A.C. 14.
[3] [1962] S.C.R. 346. [4] [1962] S.C.R. 570.

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impractical and unrealistic for the appellant not to have gone along with or concurred in Chamberlain's decision to sell.

In my opinion, therefore, the evidence proves that the acquisitions and sales of these carried interests of the appellant were transactions in capital assets, and neither were an adventure or concern in the nature of trade within the meaning of section 139(1)(*e*) of the *Income Tax Act* and therefore any profit or gain is not income within the meaning of section 3 of the Act.

The appeal is therefore allowed with costs.

Judgment accordingly.

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Oct. 29

BETWEEN:

JEAN MILLAR HENDRY and JOHN HENDRY .... SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ....RESPONDENT,

AND

NORMAN C. BROWN and W. G. PERREMENT .... THIRD PARTIES.

Crown—Petition of Right—Claim against the Crown for damages for personal injuries—Crown as occupier of premises—Licensees claiming against Crown as occupier—Notice required by s. 4(4) of Crown Liability Act—Failure of suppliants to give notice of claim to Crown—Negligence of licensee—Members of Her Majesty's forces acting in personal capacity—Occupancy and control of Sergeants' Mess—Duty of occupier to licensee at common law—Danger concealed or obvious—Proper lookout—The National Defence Act, R.S.C. 1952, c. 184, s. 39—The Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3(1)(a) and (b), 4(2), (4) and (5)—Exchequer Court Act, R.S.C. 1952, c. 98, s. 50—General Rules and Orders of the Exchequer Court, Rule 138.

The suppliants are husband wife and on February 17, 1962, were attending a social function at the Sergeants' Mess, No. 10 Repair Depot of the R.C.A.F. at Calgary, Alberta as guests of an associate member of the Mess. On the completion of a bingo game the suppliants and the other guests partook of a buffet supper which was laid out on a billiard table in the bililard room in the Mess. When the female suppliant approached the table for a second time to obtain coffee and a roll for her husband and herself she fell and broke her right hip. She was wearing high-heeled shoes with metal clips on the toes and heels at the time she fell.

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The evidence established that there was a small amount of cole slaw or cabbage salad on the floor near the billiard table at the place where the suppliant fell.

Held: That the failure to give the notice required by s. 4(4) of the *Crown Liability Act,* or its insufficiency, is not a bar to the proceedings because the respondent in its defence was not prejudiced by such want or insufficiency of notice and to bar the proceedings would be an injustice.

2. That there was no tort committed as envisaged by s. 3(1)(*a*) of the *Crown Liability Act,* by the members of Her Majesty's forces who were present at the material time because they ran this function in their personal capacities and not in their capacities *qua* members of the said forces.
3. That the respondent had occupancy and control of the premises in question at the material time and the Sergeants' Mess, i.e., the third party, were mere licensees of the respondent in respect to these premises and not tenants of the respondent.
4. That the suppliants were licensees at common law on the premises in question and the only duty at common law owed to them by the respondent was to warn them of any concealed danger actually known to the respondent and which was not known to the suppliants or which was not obvious to them.
5. That the fall of the female suppliant was caused by a small amount of cole slaw or cabbage salad on the floor of the billiard room and the steel clips on the high-heeled shoes worn by her, together with inadequate or no lookout by her when she turned from the billiard table.
6. That the presence of the small amount of cole slaw or cabbage salad on the floor by the billiard table was not a concealed danger, nor was it a danger that was not obvious or to be expected by the female suppliant under the circumstances.
7. That the damages complained of by the suppliants were the result of the female suppliant's failure to keep a proper lookout while walking in the billiard room and her failure to take reasonable care for her own safety, especially when she was wearing the shoes as already described.
8. That the suppliants' petition of right is dismissed and the action by the respondent against the third party is also dismissed.

PETITION OF RIGHT for damages for injuries sustained on a public work.

The action was tried by the Honourable Mr. Justice Gibson at Calgary.

A. M. Lutz for suppliants.

H. J. MacDonald, Q.C. and *N. A. Chalmers* for respondent.

W. R. Brennan for third parties.

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

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GIBSON J. now (October 29, 1964) delivered the following judgment:

This is a claim for damages for injuries sustained by the suppliant, Jean Millar Hendry, while on premises alleged to be occupied by the respondent and for damages due to loss of services and consortium of his wife allegedly sustained by the suppliant, John Hendry; and in the third party issue the respondent claims indemnity against the third party in respect of any amounts which the suppliants may be entitled to receive from the respondent or in the alternative judgment in favor of the respondent against the third parties for contribution in respect of any amounts which the suppliants may be entitled to receive from the respondent.

At all material times the respondent owned the premises known as No. 10 Repair Depot in the City of Calgary, Alberta, part of which comprised the Sergeants' Mess of the Royal Canadian Air Force, in the area known as McCall Field.

The Sergeants' Mess is one of the Non-Public Funds Institutes of the R.C.A.F. Station in Calgary and the property of which Non-Public Funds Institutes vested in the third party, Group Captain N. C. Brown, and the management of which Non-Public Funds Institute vested in both third parties by virtue of *The National Defence Act*, R.S.C. 1952, c. 184, and in particular section 39 thereof, and the Queen's Orders and Regulations, and General Orders and Station Orders made pursuant to the said statute.

During the evening of February 17, 1962, the suppliant, Jean Millar Hendry, was a guest of an associate member of this Mess, a Mr. Earl Wilfred Cook, and at or about the hour of 11:30 p.m., she fell on the floor on a part of the premises known as the billiard room where a buffet supper was being served, and she was injured, causing her damages. The allegation is that her fall was caused by a slippery condition of the floor caused by the wax which had been applied to it or by certain cole slaw or salad material which had fallen on the floor, or from a combination of both.

The social evening on this night took the form of a bingo followed by a dance and then a buffet supper, all of which were put on by the expenditure of Non-Public Funds by the Sergeant's Mess at McCall Field.

The premises on which the Sergeants' Mess was located and in which this social evening took place are more particularly shown on the sketch which was filed as Exhibit R-1. It consists of a so-called H hut on the east side of which was a bar and two rooms which were connected by a hall to a large room on the west side which was used on this night for playing bingo and for dancing, and off this large room to the northwest corner of the building was a billiard room in which there was a billiard table, upon which at the material time was set out a buffet supper.

The suppliant with her husband, John Hendry, at the invitation of the said associate member of the Mess, Earl Wilfred Cook, arrived at this Mess shortly after 9:00 p.m. on the evening of February 17, 1962, and each of them paid $1.50 for tickets to defray the costs of the expenses of the evening and they commenced to play bingo at a table in the large room in the west part of the building until about 10:45 p.m. after which they danced until shortly before 11:30 p.m. when the buffet supper commenced to be served.

At that time the door leading to this billiard room was opened and those present lined up to get their food.

The arrangement was that a Mess steward, one Corporal Richard MacRae, served the hot food at a little table south of the billard table and after being served by him those present proceeded in an anti-clockwise fashion around the billiard table serving themselves the rest of the food, which consisted of vegetables and salads, rolls, dessert and coffee.

The suppliant, Jean Millar Hendry, had been in this queue of people and had obtained two platefuls of food, one for herself and the other for her husband, and had returned to the table where prior to this time, bingo had been played by them and others, and this table was located at the southwest corner of this large room. She then returned to the billiard room to obtain a roll and coffee for herself and her husband. By that time the lineup or queue had diminished and there were only a relatively few people still in the process of being served and serving themselves while going around this table. She entered into the billiard room and proceeded in a clockwise fashion around the billiard table and got to the north side of the table. She apparently did not see what she wished in the way of food and turned to the west intending to return to go around the westerly end of the table when she slipped and her feet

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came from under her and she fell on her hip and then lay down on her back, all of which resulted in the injuries which are hereinafter described.

Her husband was called and he came and put his suit jacket under her head; a nurse, Mrs. Irene Helen Smith, came and attended her; and Mr. Arthur Charles Hall, who was a member of the Sergeants' Mess Committee, informed the President of the Mess, and went with the President to call an ambulance and eventually this suppliant was removed to a hospital where she was treated for a broken right hip, and had a plate and pin put in the neck of the right femur bone of her hip.

As part of the evidence there was filed this suppliant's shoes, Exhibit S-3. These are high-heeled shoes and have a metal clip on each of the heels and also a small metal attachment on the sole at the toes of them.

This suppliant, in cross-examination, said she had been at this Mess ten or fifteen times before, was very familiar with the rooms, had been in the billiard room many times, and in the bingo room and other rooms where the crowd gathered. She felt that her status there was the same as in a person's home; she said that the Mess was kept clean and run in an orderly fashion and that at these various functions which she attended there were Mess people looking after the running of the functions; that as far as she knew, no one had any trouble with the dance floor and that she never noticed anything wrong with the floor either in the billiard room or the dance room; that she knew that she had to be more careful as the food was served on paper plates, as every guest would know; that when she went around to the other side of the billiard table at the material time she was about a foot or two from the table when she fell; that she had no trouble seeing her way in the room and she could see any impediment in her way, if there was any, if she had been watching, and she could have seen any food on the floor if it was spilled if she had been looking, and that anyone who watched as one went around the table could see anything which might be on the floor; that no one complained about the condition of the floor that night; that she did not know what made her fall and as far as she was concerned the fall could have been caused by a number of things.

This suppliant was on crutches for nine months and for two or three months after she had to use a cane. She still has pain when arising from a chair causing her to limp for the first few steps and this condition also obtains the first thing in the morning.

It was agreed that the hospital expenses, namely, $36.50, medical expenses $332 and miscellaneous expenses of $15, making a total of $383.50 were incurred.

The suppliant, Mrs. Hendry, also asked $360 for housekeeping services which she said her sister, one Mrs. Petitt, rendered to her during her period of incapacity. She didn't tell her solicitor of this sum which she alleged she paid until a few days before the trial and at the trial her claim was amended to claim for this item. She computed from memory this amount just two days before the trial and she said that the sum was paid by her in cash to her sister.

The suppliant, Mrs. Hendry, also claimed loss of wages in the sum of $4,084.29 gross, being a sum computed by multiplying the sum of $129.66 per month (which she was earning for janitorial services performed for a school board at Calgary) by the number of months since her accident to date. She admitted she went to the school board about a year and half ago to inquire about being re-employed but there was no job available there, but she did not go back to inquire again because of back trouble; and she did not otherwise apply for a job anywhere or apply for unemployment insurance, and was in fact out of the labor market since her accident.

The suppliant, John Hendry, the next day after the accident tried to inquire at the Sergeants' Mess if there was coverage that would help him with the expected expenses of his wife arising out of this accident but got no information; and then he went again the following Monday and with a similar result; and on the following Sunday he received the information that the place to direct his inquiries was Lincoln Park which was the headquarters for the R.C.A.F. for the Calgary area. As a result, he went to his solicitor who wrote a letter addressed to S/L H. C. Hourigan, R.C.A.F. Station, Lincoln Park, Calgary, Alberta, which is dated February 28, 1962, and which is Exhibit R-1. The solicitor, however, did not send any

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notice to the Attorney General of Canada by registered mail as is required by the statute.

There was no evidence tendered by the respondent against the third party in the third party issue.

Counsel for the suppliant argued firstly that although the notice required by section 4(4) of *The Crown Liability Act,* S. of C. 1952-1953, c. 30, was not given, that failure to give or the insufficiency of the notice was not a bar to these proceedings because the Crown in its defence was not prejudiced by such and to bar these proceedings for this reason would be an injustice; that the respondent, Her Majesty the Queen, was the actual occupier of the premises where the suppliant was injured and the Sergeants' Mess was a mere licensee of Her Majesty the Queen; that the duty owed to the suppliant was that duty owed to an invitee or in the alternative was the duty that was owed to a licensee, or in the further alternative, that it did not matter whether the suppliant was an invitee or a licensee because this distinction is only material in regard to static conditions of premises and this was a current operation situation within the meaning of the dictum of the Lord Justice Denning in *Dunster v. Abbott*[1] and there was negligence on the part of the occupier; and that the cole slaw or salad on the floor and/or the wax condition in the billiard room was an unusual danger or trap in law.

Counsel for the respondent submitted the basis of liability in the first instance in this matter is set out in section 3(1)(*a*) of *The Crown Liability Act* which provides that the Crown is liable in tort for damages which, if it were a private person of full age and capacity, it would be liable "in respect of a tort committed by a servant of the Crown"; and in the second instance, under section 3(1)(*b*) of the Act, "in respect of a breach of duty attaching to the ownership, occupation, possession or control of property"; but that by reason of section 4(2) of that Act that no proceedings lie against the Crown in respect of this liability in tort in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or his personal representative.

Counsel then submitted that any members of Her Majesty's forces at this Sergeants' Mess who are servants

[1] [1953] 2 All E.R. 1572 at 1574.

of the Crown within the meaning of section 50 of the *Exchequer Court Act* were not acting in their capacity *qua* servant of the Crown on the night of this incident but rather in their personal capacity and, therefore, that no liability could arise giving a cause of action to the suppliant by reason of section 3(1)(*a*) of *The Crown Liability Act*.

Counsel for the respondent then submitted that no liability could arise under section 3(1)(*b*) of the Act because the only duty owed to the suppliants in the circumstances disclosed by the evidence was the duty owed by the occupier of these premises and the respondent was not the occupier but instead the third party was the occupier in law.

Counsel for the third party submitted that there was no evidence adduced in the third party issue and so no finding could be made against the third party that in any event the third party was not sued by the suppliant and could not be liable in the main action; and in any event if the respondent was liable in the main action then there was no claim over for indemnity or for contribution against the third parties because the third parties were not occupiers in law of the premises where the injury occurred to the suppliant but instead were merely licensees from the respondent and the respondent was at all material times in law the occupier of the premises.

In this case, therefore, the first question for decision is whether or not failure to give or the insufficiency of the notice barred the proceedings brought by the suppliants by reason of section 4(4) of *The Crown Liability Act*, S. of C. 1952-1953, c. 30, or whether the saving provisions of section 4(5) of that Act apply.

It is my opinion that the failure to give or the insufficiency of the notice in this matter is not a bar to the proceedings because the respondent in its defence was not prejudiced by such want or insufficiency of notice and to bar the proceedings would be an injustice. At the material time the president of the Sergeants' Mess, R.C.A.F. McCall Field, was present at the time this accident occurred and in fact called the ambulance for the suppliant, Mrs. Hendry. He was the person appointed by the Officer Commanding the R.C.A.F. area in Calgary as President of the Mess and was responsible to the Officer Commanding, and any information was immediately available to the respondent

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through its responsible officers and servants so that no prejudice did occur.

The next question for decision is whether this was a tort committed by a servant of the Crown within the meaning of section 3(1)(a) of *The Crown Liability Act.*

In this respect, I am of opinion that there was no such tort committed as envisaged by section 3(1)(*a*) of *The Crown Liability Act,* by the members of Her Majesty's forces who were present at the material time because they ran this function in their personal capacities and not in their capacities *qua* members of the said forces.

The next question for decision is whether the Crown is liable in tort for damages by reason of section 3(1)(*b*) of *The Crown Liability Act* in "respect of a breach of duty attaching to the ownership, occupation, possession or control of property".

The only liability that can arise in this case must be by reason of the legal occupation of these premises by the respondent which on the facts of this case also imports control of the premises.

On the facts of this case, I am of the opinion that the respondent had occupancy and control of these premises at the material time and that the Sergeants' Mess were mere licensees of the respondent in respect to these premises and not tenants of the respondent. The evidence supporting this finding that the relationship between the respondent and the third parties was that of licensor and licensee appears in several places, but one such instance will suffice. Question and answer 114 of the examination for discovery of Frank Karwandy, which was read in by counsel for the suppliant pursuant to Exchequer Court Rule 138, sets this out very clearly:

114 Q. Could you tell me what agreement there is between Her Majesty the Queen and these third parties?

A. There was not to my knowledge an express agreement between Her Majesty and the sergeants mess in question. However, there is an implied agreement or understanding that when a sergeants mess occupies a building and operates it as a sergeants mess that it does so in accordance with regulations, and also that it carries public liability insurance.

The next question for decision, therefore, is what was the duty owed by the respondent through the third parties to the suppliants and whether there was any breach of it which would give rise to liability for damages for injuries sustained by the suppliants.

The right therefore of the suppliants to recover against the respondent the damages they suffered depends on the circumstances under which each of the suppliants, Jean Millar Hendry and her husband, came on these premises; that is whether they were licensees or invitees on those premises at the time and place of the accident.

It is clear from the evidence that such status is the same for both suppliants, and so reference hereunder on this point will be made only to the suppliant, Mrs. Hendry.

On the evidence I find it established that she came on these premises as a guest of an associate member of the Sergeants' Mess. She did not enter on business which concerned the occupier, the respondent, or the Sergeants' Mess represented by the third parties (who used these premises under licence from the respondent). She was only there for social reasons with the permission of the occupier, the respondent, given through the respondent's licensee, the Sergeants' Mess.

The suppliant, therefore, in my opinion, at the material time, was a licensee at common law on these premises.

It follows therefore that the only duty at common law, owed to the suppliant by the respondent, was to warn her of any concealed danger actually known to the respondent and which was not known to the suppliant or which was not obvious to her.

As a licensee the suppliant had to take these premises as she found them.

The combination of a small amount of cole slaw or cabbage salad on the floor of the billiard room and the contact with the floor of the steel clips on the high heel shoes of this suppliant, together with no or inadequate lookout by the suppliant when she turned from the billiard table and walked at the material time, caused her fall, which resulted in her injuries; and the presence of this small amount of cole slaw on the floor in front of the buffet, which had been patronized by a large number of guests who served themselves, all within fifteen (15) minutes before this suppliant fell, was not a danger that was concealed, or not obvious or to be expected by this suppliant under the circumstances; or as it is sometimes

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put shortly, it was not a trap laid by the respondent for this suppliant, or was not exposing her to a danger not obvious nor to be expected at that material time. On the contrary, the danger was obvious and was one that should have been expected and the suppliant in law was obliged to take her own precautions and in this case I find that the suppliant suffered these damages by reason of the fact that she failed to keep a proper lookout while walking in the billiard room of these premises at this material time and did not take reasonable care for her own safety, especially when she was wearing the shoes as described.

As stated, the status of the suppliant, John Hendry, was the same as the suppliant, Jean Millar Hendry, and these findings *qua* liability also apply to his claim.

In the result, the petitions of the suppliants against the respondent are dismissed; and the action by the respondent against the third party is also dismissed.

Notwithstanding the result, I assess the damages as follows. The special damages I find and assess are:

(1) Medical accounts at	*$ 337.00*
(2) Hospital expenses at	*36.50*
(3) Miscellaneous at	*15.00*
(4) Loss of earnings at	*1,535.00*

The first three items were agreed to by the parties.

As to the claim for loss of earnings, the suppliant, Jean Millar Hendry, said that about a year and a half ago she went to her former employer the School Board but there was no opening for her, but she never tried again to obtain employment from them nor did she otherwise apply for employment. On the evidence I, therefore, find her loss of earnings to be for a period of 12 months at $129.66 gross, or $1,535.92.

I disallow the claim for housekeeping services allegedly paid to her sister, Mrs. Petitt, in the sum of $360 as not proven.

I accept the evidence of Dr. W. L. Crooks, who stated that the fracture Mrs. Hendry suffered through the neck of the right femur was healed with minimal disability after an uneventful period of convalescence, and who stated that there was now no deformity of her hip, but that it lacked 10% full flexibility and had a little more arthritic change than the uninvolved hip; and that it was difficult to state what increasing disability she would have in the future, and therefore he declined to say.

On the evidence, I assess this suppliant's general damages at $3,500.

As to the claim of the suppliant, John Hendry, for loss of consortium and servitum, the only evidence adduced was to the effect that he did a little more of the housework after his wife's accident than he did before. I find his claim not proven, and it is therefore dismissed.

The respondent may have costs against the suppliant if demanded; and the third parties shall be entitled to costs in the third party action against the respondent.

Judgment accordingly.

THE ONTARIO ADMIRALTY DISTRICT

1963
Mar. 29, April 1, 2
1964
Nov. 2

BETWEEN:

THE BRITISH AMERICAN TRANSPORTATION COMPANY LTD. .. PLAINTIFF;

AND

THE SHIP *EXTAVIA* ....DEFENDANT.

Shipping—Collision in Welland Ship Canal—Stern of ship drifting across channel while ship being moored—Faulty mooring procedure—Failure to warn Canal authorities of approaching ships of mooring difficulties—Negligence of ship's Master and officers.

This action arises out of a collision which occurred in the Welland Ship Canal at about or slightly after midnight on the night of June 15-16, 1962, when the ship, *B. A. Peerless,* owned by the plaintiff, while proceeding up-bound in a southerly direction in the canal, collided with the defendant ship which had been proceeding down-bound and was then in the process of tying up to a wharf on the east side of the canal.

The evidence disclosed that at the point of collision the canal was about 215 feet wide and that the length of the defendant ship was 420 feet and its maximum width was 60 feet. It was also established that the defendant ship was moored by the bow and that before the stern could be moored it swung out into the canal under the influence of the current in the canal and the propeller action used in stopping the defendant ship. The Captain of the defendant ship, when directed to tie up, was told that a large and deep tanker was coming up-bound and would pass him. It was disclosed by the evidence that the Captain of the defendant ship took no steps to warn anybody connected with the operation of the canal of the plight he was in, nor did he signal by whistle or in any other way that he was in difficulty.

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Held: That it could be fairly said that the situation in which the stern of the defendant ship drifted across the canal was caused by attempting to tie up the defendant ship bow first with the current coming from astern and in the presence of the effect of the propeller action and that this fact was one of which both the Master and the pilot of the defendant ship must have been aware.

2. That the radio officer of the defendant ship was guilty of irresponsible conduct which was shared by some of his fellow officers, when in face of the fact that the defendant ship was tying up to let a large ship pass and a query was received by radio as to whether they were in trouble, he took no steps to find out who was calling or to communicate with the Master or one of the mates of his ship.
3. That once those on the *B. A. Peerless* became aware of the danger of collision, their actions were the best possible ones that could have been taken in the circumstances considering the width of their ship and the sea room available.
4. That the Master of the *B. A. Peerless* was alert to the situation and when he realized the danger, which the defendant ship should have advised him of earlier, he did his best to prevent the collision which followed, using all the means which, practically speaking, were open to him.
5. That the Master of the defendant ship did nothing to cope with the effect of the propeller action he took to stop his ship and of the current in the canal which would tend to throw his stern out, which, when combined with the lack of enough men ashore to take the stern lines, led directly to the drifting of the stern of the defendant ship across the canal and made the collision inevitable.
6. That the plaintiff's action for damages succeeds and defendant's counterclaim is dismissed.

ACTION for damages to a ship in the Welland Canal resulting from collision.

The action was tried by the Honourable Mr. Justice Wells, District Judge in Admiralty for the Ontario Admiralty District.

Peter Wright, Q.C. and *Arthur Stone, Q.C.* for plaintiff.

F. O. Gerity, Q.C. and *S. G. Fisher* for defendant.

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

WELLS, D. J. A. now (November 2, 1964) delivered the following judgment:

This action arises out of a collision which took place in the southern area of the Welland Canal on or about June 16, 1962.

The defendant ship *Extavia* was down bound from Lake Erie to Lake Ontario and was proceeding northerly. The actual collision took place in the vicinity of what is known as McGees Dock, which is situated in the area known as

Rameys Bend. To the south of McGees Dock the canal proceeds slightly east of north and then makes a turn almost immediately after McGees Dock, going north it proceeds for a considerable distance slightly west of north.

The *Extavia*, as I have said, was coming down the canal in a northerly direction and the plaintiff ship *B. A. Peerless* was coming up the canal towards Lake Erie. Generally speaking, there is a steady drop from Lake Erie to Lake Ontario and according to the chart, the average water level at Port Colborne in the month of June would be somewhere about half way between 572 and 573 feet above sea level; whereas the average level at Port Dalhousie on Lake Ontario and I presume the levels would be roughly the same at Port Weller, the present northerly entrance to the canal from Lake Ontario, is just short of an average level of 247 feet. The rate of flow in the area was variously estimated from 1 to 1½ or 2 knots.

The ship *Extavia* is said to have been 420 feet long with a width at widest of about 60 feet.

At McGees Wharf the canal is apparently about 215 feet wide.

On the *Extavia* there was a pilot aboard, Captain Fred Hudson.

Apparently at about 23:00 hours on June 15 the *Extavia* entered the canal at the Lake Erie end and went through the first lock, which is known as Lock 8. At that time the *Extavia* received orders to tie up on the starboard side at McGees Wharf, which was on the eastern side of the canal. This order was transmitted to the Master of the *Extavia* by Captain Hudson the pilot and was either given him by radio telephone or by the lock Master at No. 8 Lock. Captain McKenna, who was the Master of the *Extavia* said Captain Hudson told him this. It was explained that a large and deep tanker was expected upbound. The purpose of the tie up was to let the tanker by.

Captain McKenna's examination for discovery was referred to in cross examination and it becomes clear from it and from his evidence before me that they do not vary in any substantial way. He described coming down from Lock 8 and passing another ship going in the opposite direction which created some suction on the *Extavia*. He then described what action he took to counteract this effect,

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Wells, D.J.A.

which was apparently to use considerable rudder and put the engine, which had been going at "slow" and "dead slow" speed at "half ahead". Captain McKenna said this was necessary in order to make the ship steer properly. In turn this put too much headway on the ship for ease in handling and to counteract this it became necessary to back the engine for a short time at "half astern".

At Question 153 in the examination for discovery Captain McKenna recalled having told the pilot that the ship had too much headway and he said the pilot agreed with him. At Question 154 he gave the following description of what happened:—

> We went to half astern for a very short time, just enough to check most of the headway. By then we were at the wall, by the time this backing action of the propeller had taken effect, as we got the bow in close enough to land two seamen by our swinging boom. Everything was fine forward but the action of the backing propeller turning left-handed, which normally tends to throw the stern to port—this motion of the stern to port was accelerated by the current coming out of that weir.

It is to be observed that only two seamen were landed to take the bow line ashore and no effort was apparently made to land others who might have been able to take stern lines or to carry them astern. The effect of the current of course, once the boat was secured, was to force the stern outward and to the knowledge of the Captain that was also the effect of the action of the propeller when he took steps to check the ship's forward progress. He had been told at the time he was directed to tie up to land that a large and deep tanker was coming up bound and would pass him. What actually happened from the action he had taken was that the stern swung slowly out into the middle of the canal, while the bow was still alongside the wall in the vicinity of McGees Wharf.

Admittedly the captain of the *Extavia* took no steps to warn anybody connected with the operation of the canal of the plight he was in, nor did he signal by whistle or any other way that he was in difficulty. His stern was slowly drifting westward across the canal to the west. One would have thought that it would have been an act of caution to put more men ashore and in any case try to prevent the vessel's stern from drifting out into the canal. I think it could be fairly said that this situation was caused by attempting to tie up the ship bow first with the current coming from astern and from the action of the propeller. This was a fact of which both Master and pilot must have been aware. Having only two men on the dock to handle heaving lines and mooring lines was not enough. It would have seemed the better part of wisdom to have had at least one or two more men ashore. It is significant when it was found that the *Extavia* obviously occupied more than half the width of the canal no report was sent to the Guard Lock so that shipping could be warned.

Owing to the bend in the canal from east to west of north the *B.A. Peerless* was eventually sighted only when it was reasonably close and no warning, such as blasts and whistles or any warning by telephone was attempted to be given, in fact the contrary was the case.

Mr. J. W. MacIntyre, the second mate of the *B.A. Peerless* was examined on commission in Halifax in March of 1963. He deposed that there had been communication by radio telephone with the *Extavia* within a couple of minutes after she was sighted by the *B.A. Peerless*. He said he was directed by the Master to make the call and that when he made it he identified his ship by name. He asked the person who answered on the *Extavia* if they were having any trouble and his answer was, "No—we are just getting lines out". He was asked again about this on cross examination. At page 10 of the Commissions' evidence the following questions and answers were put and replied to:—

Q. 76 Could you tell me what—as best as you can recall, what your query was?

A. Well, I asked him if he was having any trouble.

Q. 77 What made you ask that question?

A. From where we were watching with binoculars and by sight—and he appeared to be, say a little bit across the canal from what we could see at that angle.

Q. 78 And as best as you can recall, what was the answer to that query?

A. No, no trouble—just putting lines out.

Q. 79 Would the words: we are not exactly sure—end of quote—in answer to your query, would they be something like that, the words that were given?

A. No, no!, it was definitely—no trouble, we are putting lines out or getting lines out.

The radio officer of the *Extavia* also testified. His evidence was given on Commission in New York and his name is Edwin E. Whidden. He was apparently the only radio officer on the ship and he described two radio telephones both in the wheelhouse and he stated that his duties were to stand by the telephones in case anyone called so that he could

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answer and then he would call the captain or pilot. His attention was directed to the time the *Extavia* was attempting to tie up a McGees Wharf and he said that the message to tie up had not come over the telephone and at Line 11, Page 4 of his evidence he was asked—"Did you receive any message over your radio telephone?"—His evidence proceeds as follows:—

A. Someone called, *Extavia* are you having trouble?
Q. And can you tell me the approximate time of that call?
A. No sir, I can't.
Q. Was any entry made of this call in your log book?
A. No, sir, there couldn't, because I didn't know who it came from.
Q. And the query was—
A. *Extavia* are you having trouble?
Q. And did you answer that call?
A. I said the captain had orders to tie up at the wall; I don't know if he has the lines out yet.
Q. Did you say anything else at that time?
A. That was all.
Q. Was there any further query?
A. No sir.

He was later asked if he received any other messages over the telephones prior to the collision and he replied "No". He did not hear any other signals, horns or whistles.

Photostat copies of the radio log of the *Extavia* were produced, being copies of pages 53 and 54. These photostat copies became Exhibit 8 at the trial. None of the entries appear to throw any light on this conversation. At page 9 of his evidence he was examined by counsel for the plaintiff as follows:—

Q. Then subsequently you stated that a message was received over the radio-telephone, *Extavia* are you having trouble?
A. Yes, sir.
Q. Who was in the wheelhouse at this time?
A. I don't know.
Q. Do you recall anybody?
A. The man at the wheel.
Q. What was his name?
A. I don't know. He was a sailor.
Q. Did you see anybody else there?
A. No sir, or if I did, I didn't notice.
Q. What set was this received over, the FM?
A. The AM.
Q. How far from the telegraph is the AM set located?
A. The ship's telegraph?

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Q. Yes.
A. I don't know. I would have to guess. Six or seven feet.
Q. If there had been anybody standing at the telegraph, would you have noticed him?
A. Not necessarily, no.
Q. Did you mention the message to the captain or pilot?
A. At that time, no.
Q. You didn't at that time?
A. No, sir.
Q. Did anybody come to you and ask you what the message was?
A. No, sir.
Q. Would you be able to tell me how long before the collision this message was received?
A. Not definitely. Just a few minutes. That's the best I could say.
Q. You couldn't tell me the number of minutes?
A. No, sir.
Q. Did the captain and the pilot remain in the wheelhouse throughout the mooring?
A. No; they work from the wing of the bridge.
Q. Outside the wheelhouse?
A. Yes.
Q. Who stands by the telegraph?
A. The mate on watch.
Q. Third mate?
A. Well, sometimes it's the junior third mate; whatever mate is on watch.
Q. I see. When did you tell the captain of the receipt of this message?
A. As soon as he finished tying up.
Q. After the tie-up?
A. Yes, sir: after the tie-up, while he was still on the bridge.
Q. And neither the pilot nor the captain knew before then?
A. No, sir.

Apparently nothing was done about recording the message and he apparently did not do it. He had heard the captain talking and saying that some large ships were coming by, so that he knew the purpose of the tie up at McGees Wharf.

This evidence was also taken on Commission and I have not seen either of these witnesses. It is in some conflict but in my opinion I should accept the evidence of MacIntyre in preference to that of Whidden. The fact that they were tying the *Extavia* up to let a large ship pass and that even on this version a query was made as to whether they were in trouble, should have alerted him to finding out who was calling and promptly communicating

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with the Master or one of the Mates. Whidden's conduct seems to have been one of irresponsibility which in my view was shared by some of his fellow officers. MacIntyre was not shaken on cross examination and in my opinion his is the much more probable version of what took place. It also seems to have been much more related to what the actual surrounding facts were.

Owing to the bend in the canal it was not possible for the *B.A. Peerless* to get an accurate view of the *Extavia* until they were very close. The *B.A. Peerless* first saw the lights of the *Extavia,* but not the whole ship. Speed was reduced and then reduced again. At Question 101 of his cross examination Mr. MacIntyre estimates the *Extavia* was about one mile away when she was first seen. His description of what occurred is I think worth setting out. It occurs at Page 13, Line 101 of his evidence:—

Q. Now when you first saw the *Extavia* you were about a mile away. What was your position in the Canal with regard to the west and east bank?

A. We were in the centre of the Canal or close to the centre.

Q. And up to the point where you were 1,000 feet away from the *Extavia,* at which point you went to the bow, did you change your position in the Canal at all?

A. Yes, we had changed it by then, yes.

Q. Where had you gone?

A. We had gone to starboard towards the west bank.

Q. When did you make that maneuver?

A. This was shortly before the time I left the bridge, about the time I was leaving, the Master was bringing the course to starboard.

Q. And you would be what, about 1,500 feet from the *Extavia?*

A. In approximate figures about 1,500 feet.

Q. And during that period from the time you first sighted the *Extavia,* which was about a mile away, to that 1,500 to 1,000 feet away from the *Extavia,* what was her position, what changes in her position took place in that period?

A. Well, the first sight I guess the Master figured there was sufficient room to pass between his stern and the west wall, and the closer we got to him, well, it was noticed that he was drifting down the Canal and closing up the open water. I think the Canal was about 250 feet wide from this point, around 250.

Q. Where was the—what was the position of the *Extavia* when you first sighted her?

A. As near as I can say, he was close to the east bank at this Magee's Wharf.

Q. Bow and stern?

A. Appeared to be bow and stern. From a mile away and at an angle it would be hard to tell. It was hard, I couldn't tell you then whether he was over across the wall or whether he was crossways.

Q. And when you made your radio communication, she appeared to be having difficulty?

A. He appeared to be having difficulty, yes.

Q. You indicated that the *Extavia* appeared to be coming toward you. Do you mean the entire vessel appeared to be coming toward you or some part of the vessel?

A. I would say the stern of the vessel.

Q. Did the bow change its position at all, best as you can recall?

A. As I can recall, the bow did not appear to be.

Q. Did you notice whether any lines were out?

A. Shortly before I did not notice if any lines were out, but shortly before the collision, or the impact, I had heard someone on the *Extavia* say to: Slack the lines off. Slack your lines off. Or something to that effect. Then, this was then, this was pretty damn close to the time I hit him. Pardon me, strike that out. It was very close.

Q. When you were one thousand feet from the *Extavia,* what was the position of the *Extavia* at that point with regard to the west and east bank?

A. Well, he was done, I would say he was taking up more than half of the Canal by this time, well over half of the Canal.

Q. And prior to that, how far prior to that had he been taking up over half of the Canal?

A. Well, I couldn't give you an answer on that.

Q. Well, you indicated earlier about 1,500 feet.

A. Yes.

Q. He appeared to be.

A. He appeared to be then, there was about half the room of the Canal, I guess.

Q. Was his position changing constantly?

A. As we were going towards him, he was drifting this way—down.

Q. The stern appeared to be coming out to port, is that correct?

A. Well you can put it that way, yes.

Q. You indicated that it was the Captain's intention to pass, is that correct?

A. Um'hm. It was his intention to pass.

Q. When did it become obvious to you that you were not going to be able to—your ship was not going to be able to pass?

A. I guess it was just about the time that I was directed to go to the bow, that is when the room was getting pretty short.

Q. You were about a thousand feet away at that point?

A. I would say approximately 1,000 feet when I got on the bow of the ship. How far we went from the time I left the bridge until I got to the bow wouldn't be too far because I was moving fairly fast.

Q. Well, would you say it would be 300 feet in that period?

A. I would imagine it could go 300 feet, yes.

Q. So that at about—when your vessel was about 1,300 feet from the *Extavia* it was obvious to you that you were not going to have room to pass?

A. Yes that's correct.

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From a fair reading of the evidence it would appear that the *B.A. Peerless* proceeded down the Canal at a reduced speed and under good control. At a distance of about one mile on first sight there seemed nothing to cause any alarm, but as she came closer it became evident that the *Extavia* was drifting out into the canal. The radio inquiry was then made and as Mr. MacIntyre has said it was entirely reassuring and undoubtedly postponed further preventative measures at a time when seconds were of great importance. It is clear I think that once those on the *B.A. Peerless* were aware of the danger, their actions were the best possible ones that could be taken in the circumstances considering the width of the boat and the sea room available.

As my assessor has pointed out to me:—

> The possibility of a screw propelled vessel to stop in a certain distance is primarily a function of the displacement. In other words, with two vessels of the same size, power and shape at different draughts, the more deeply laden one will take a greater distance in which to stop. It is estimated that from a speed of six knots the crash full stop distance for the B.A. Peerless would lie between the limits of 1,000 and 1,500 feet, which is two to three ship lengths. No witness on either ship thought the speed of the *B.A. Peerless* to be excessive.

Under all these circumstances, in my opinion, the Master of the *B.A. Peerless* did his utmost to ascertain what was happening to the *Extavia,* although at the time of the radio phone call he was lulled into a false sense of security by the reply of the radio officer of the *Extavia* to the call from his ship. It appears to me that he was alert to the situation and when he realized the danger, which the *Extavia* should have advised him of earlier, he did his best to prevent the collision which followed using all the means which practically speaking were open to him. On the other hand what should have been a commonplace operation of tying up to the east wall at McGees Wharf was handled in so casual a manner as in my view to amount to negligence. The fact that they had been told that a large and deep tanker was coming up the canal should have led them to act with promptness and take every precaution, so that the stern would not drift out as it did. The Master of the *Extavia* was well aware of the effect of the propeller action he took to stop his ship and he was also aware of the current in the canal which would tend to throw his stern out.

In my opinion he did nothing to cope with either of these conditions, which in their combined effect, together with the lack of enough men ashore to take the stern lines in my opinion led directly to the drifting west of the stern of the *Extavia* which made the collision inevitable.

In these circumstances there should be Judgment for the plaintiff and the Counterclaim of the defendant dismissed. If the parties cannot agree there will be a reference to the Registrar of this court to assess the damages by the *B.A. Peerless* as a result of this collision. The plaintiff should have its costs to this action and the counterclaim is dismissed with costs. The costs of the reference are to be in the discretion of the Registrar.

Judgment accordingly.

1964
Mar. 17,
Apr. 3
Nov. 5

BETWEEN:

BEN LECHTER .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Expropriation and sale of real property—Real property acquired for long-term investment or as an adventure or concern in nature of trade—Meaning of "taxation year"—Date of creation of obligation to pay in relation to date of payment—Re-assessment within six years of original assessment—Income Tax Act, R.S.C. 1952, c. 148, ss. 46(1) and (4)(a) and (b), 139(1)(e) and 1139(2)(b)—Expropriation Act, R.S.C. 1952, c. 106, s. 9.

The appellant is a Montreal wholesale jeweller who has invested considerable sums in real estate partnerships and as a leading shareholder of Benaby Realties Co. and in his own private name and capacity. In 1952 he purchased lot 507 in the Parish of St. Laurent, district of Montreal. On April 13, 1953 he sold a parcel comprising about ten per cent of lot 507 to Canadian Aviation Electronics Limited. Later a portion of the part of lot 507 still owned by the appellant was expropriated by the Crown in right of Canada, the expropriation being effective from January 7, 1954, and a few months later the appellant was notified that additional parts of lot 507 would be required by the Canadian Government. As a consequence the appellant sold to the Crown in right of Canada those parts of lot 507 required by it, after which sale the appellant retained about twenty-five per cent of the said lot. This remaining part of lot 507 owned by the appellant was disposed of by him in 1956.

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The evidence disclosed that the sale by the appellant to the Canadian Government of the already expropriated part of lot 507, together with the additional part of the lot required by the Government was effected no later than July 1954.

The appellant received a notice of assessment dated March 15, 1962 which declared that certain sums of money were land profits arising out of lot 507.

Held: That the acquisition of lot 507 by the appellant, the initial sale to Canadian Aviation Electronics Limited and the 1954 expropriation by the Crown and the subsequent disposal of the remainder of lot 507 is really more germane than alien to the oft stated assessable pursuit included in s. 139(1)(*e*) of the *Income Tax Act*, "an adventure or concern in the nature of trade".

2. That the appellant may have entered upon the transactions in question on his own, without any company affiliation or partnership connections, and, nonetheless, have pursued a profit making scheme which the law renders liable to income taxation.

3. That the relevant taxation year must coincide with that during which a debt or an obligation to pay, legally enforceable, originated between the Crown and the appellant.

4. That the Treasury Board's authorization of payment of the sum agreed upon between the Crown and the appellant for the lands sold to the Crown did not create a debt but merely authorized payment of a pre-existing one.

5. That the respondent's notification of reassessment to the appellant, dated March 15, 1962, alleging no misrepresentation or fraud falls well beyond the prohibitory limit of six years and is illegal.

6. That the appeal is allowed.

APPEAL under the *Income Tax Act*.

The appeal was heard by the Honourable Mr. Justice Dumoulin at Montreal and Ottawa.

N. N. Genser, Q.C., P. F. Vineberg, Q.C. and *Sydney Phillips* for appellant.

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

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

DUMOULIN J. now (November 5, 1964) delivered the following judgment:

The appellant, Mr. Ben Lechter, a successful Montreal wholesale jeweller, appeals from the decision of the Minister of National Revenue, dated October 16, 1962, in respect of the income tax re-assessment for the taxation year ended December 31, 1956.

Apart from his thriving jewellery trade, the appellant has invested considerable sums in real estate partnerships or as a leading shareholder of Benaby Realties Co. and, as presently, in his own private name and capacity.

On March 5, 1952, Ben Lechter purchased land in the Parish of St. Laurent, district of Montreal, known and designated as lot 507 on the official plan and book of references of the aforesaid Parish. The total area thus bought was approximately 2,800,000 sq. ft. and the price thereof $125,000 (cf. exhibit 1).

This property was allegedly acquired "for the express purpose of long range investment through extensive development". Conformably to these intentions, Mr. Lechter approached Canadian Aviation Electronics Limited (hereinafter abbreviated to CAE), a progressive manufacturing concern, with an offer to erect and rent a building suitable to all the company's requirements (see exhibits 7, 8, 9). The proposed agreement also extended to CAE an "option to purchase", subsequently accepted as stated in exhibit 9, a letter from K. R. Patrick, President of CAE, dated October 5, 1953. Lechter submitted several tentative plans but, for some undisclosed reason, the rental proposal was dropped and an outright purchase substituted. On April 13, 1953, appellant sold to CAE 270,000 sq. ft. out of lot 507, as appears on plan exhibit 12.

This sale, according to paragraph 6 of the Notice of Appeal, was expected "to bring greater prestige to the balance of appellant's holdings and further his plans for extensive building thereon".

On January 15, 1954, Mr. Lechter received a letter from the Department of Transport, advising him that a portion of lot 507 had been expropriated under authority of the *Expropriation Act* (1952, R.S.C., c. 106, s. 9), and, accordingly, that title thereto vested in the Crown from January 7, 1954. (cf. Notice of Appeal, para. 11, and exhibit 13).

A few months later, the Department of Transport realized its previous expropriation of part of lot 507 was insufficient and, by the intermediary of the District Land Agent, Mr. Mr. Jean Paul Adam, duly authorized in virtue of a power of attorney from Mr. George C. Marler, then Minister of Transport for Canada, (exhibit 18), informed Lechter that additional ground would be taken by the government. As a

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matter of convenience to both parties and to avoid a second expropriation, Mr. Lechter agreed to sell outright.

Exhibit 15, a registered letter dated at Montreal July 13, 1954, signed J. P. Adam and addressed to Mr. Ben Lechter, declares that:

> Pursuant to the expropriation of January 7th, 1954 affecting part of lot 507 in the Parish of St. Laurent, we are now authorized to make you a formal offer of settlement in the amount of $318,776 in full compensation for the area expropriated, that part of lot 507 severed by reason of the expropriation, and all damages arising from the said expropriation. The foregoing is all without prejudice to the rights of the Crown.
>
> Would you kindly advise us as soon as possible of your decision with respect to this offer.

This tender was accepted in lightning-quick time as evidenced in exhibit 16, a registered communication of July 14, 1954, addressed by Ben H. Lechter to the attention of Mr. J. P. Adam and worded thus:

> In reply to your letter of the 13th instant, I wish to notify you that I accept your formal offer of settlement in the amount of three hundred and eighteen thousand seven hundred and seventy-six dollars ($318,776) in full compensation for all damages arising out of the expropriation of January 7th, 1954 affecting part of my property bearing lot No. 507 Parish of St. Laurent.
>
> In view of the expropriation having been filed six months ago, I would appreciate payment within the next sixty days.

This parcel of land sold to Her Majesty consisted of 32.25 arpents.

Two notarial deeds of sale, respectively filed as exhibits 17 and 18, executed the same day, May 13, 1955, drawn up by Emile Massicotte, notary public for the Province of Quebec, relate to the expropriation of January 7, 1954, and the direct purchase, the exact date of which, though unspecified, must necessarily be set no later than the first days of July.

It should be noted, now, that the outright sale attained its legal validity the moment it was definitely agreed upon by the interested parties, in keeping with art. 1472 of the *Civil Code* enacting that sale "is perfected by the consent alone of the parties, although the things sold be not then delivered..."

The compensation amount paid for expropriation was $140,783 and for the voluntary sale $177,993, a total of $318,776.

In consequence of the above transactions, a plan, exhibit 12, drawn by Mr. Pierre Lapointe, Quebec Land Surveyor in the employ of the Department of Transport, shows that, as of September 1, 1954, only 728,600 sq. ft. out of a former holding of 2,800,000 sq. ft. were still owned by Ben Lechter.

The appellant further states that "in the taxation year 1956, [he] also was forced to dispose of other parcels of land which were no longer suitable for the purpose of investment for which they were acquired".

Reverting now to the expropriation and ensuing deals of 1954, the appellant "under date of March 15, 1962, received a notice of assessment which in part declares that an amount of $109,406.55 and a further amount of $125,100.36 were land profits arising out of the said lot 507".

The first ground of appeal relied upon by Mr. Lechter is that the profits derived from the expropriation and the several sales previously mentioned were enhancements of capital investments. With this, the Court can hardly agree since the over-all picture of the case, i.e., the acquisition of lot 507 on March 5, 1952, the initial sale to CAE in December of that year, then, omitting for the time being the expropriation, the 1954 sale to the respondent and subsequent disposals to private parties, is really more germane than alien to the oft stated assessable pursuit included in s. 139(1)(*e*) of our Act "an adventure or concern in the nature of trade".

Mr. Lechter may, so he testified, have entered upon this deal on his own, without any company affiliation or partnership connections, and, nonetheless, have pursued a profit making scheme which the law renders liable to income taxation.

It would seem purposeless to quote any specific precedent because most would, I believe, support this opinion, and all of these might also offer some factual differences. The jurisprudence in the matter unanimously suggests that each problem be viewed in the light of its own specific incidents. Consequently, I probably would have considered the appellant as engaged in a profit-making scheme or venture in the nature of trade if this question were the only one raised in the instant suit.

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That other point, a decisive one herein, consists in the applicability of the prescriptible immunity to re-assessment, obtained by taxpayers at the expiry of the statutory period declared by s. 46 (4) (*a*) (*b*) of 1954 the pertinent year, as will be hereafter shown. This provision enacts that:

> 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 6 years from the day of an original assessment in any other case,
>
> re-assess or make additional assessments.

Section 46 (1), albeit first in numbering, is really complementary to 46 (4); it reads:

> 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. (emphasis not in text).

Obviously, the issue before the Court calls for a determination of the period constituting the true "taxation year", particularly so because respondent nowhere alleges "misrepresentation or fraud", vitiating factors which, if pleaded and proved, relieve the Minister from all limitations as to time.

Paragraph 22 of the Notice of Appeal invokes this defence in law, when it argues that:

> 22. Further, the assessment with respect to the taxation year 1956 was made in March, 1962, a delay which is completely contrary to the provisions of Section 46 (1), (*supra*) of the Income Tax Act, and such assessment is illegal and should be dismissed on such grounds alone.

A statutory definition is in order, as also a restatement of certain dates and facts, before I attempt to solve this objection.

To start with, "taxation year" in the language of s. 139 (2) (*b*) is defined in these terms:

> 139. (2) For the purpose of this Act, a "taxation year" is
>
> (*a*) . . .
>
> (*b*) in the case of an individual, a calendar year,
>
> and when a taxation year is referred to by reference to a calendar year *the reference is to the taxation year or years coinciding with, or ending in, that year.* (italics are mine).

Should I add a superfluous reminder that "calendar year" comprises "the period from January 1 to December 31 inclusive". (Black's Law Dictionary, 4th ed.)

The approach to the problem resorted to by the respondent in para. 13 of the Reply argues that:

13. . . . in assessing the appellant for the taxation year 1956, he (respondent) relied on the assumption that:

(a) the Appellant was a dealer in real estate;

(b) the land purchased formed part of the taxpayer's real estate inventory or stock-in-trade;

(c) the profit realized on sale was income from a business within the meaning of sections 3, 4 and 139 (1) (e) of the Income Tax Act.

As already said, no allegation whatsoever of misrepresentation or fraud is found in respondent's pleadings, nor was anything of the kind hinted at during the trial, which would, indeed, have seemed a belated and illegal proceeding. Misrepresentation or fraud must be both alleged and proved. In this respect, Mr. Justice Cameron's pronouncement in *Minister of National Revenue v. Maurice Taylor*[1] will afford ample justification.

Next come the essential dates:

(a) that of the Notice of Expropriation filed in the office of the Montreal Registrar of Deeds on January 7, 1954; exhibit 13.

(b) the "formal offer of settlement in the amount of $318,776" in full compensation for the area expropriated and that bought in a free sale, tendered by the duly authorized agent of the Minister of Transport; exhibit 15.

(c) the acceptance of the above offer by Ben H. Lechter on July 14, 1954; exhibit 16.

(d) the two notarial conveyances of May 13, 1955, exhibits 17 and 18, describing topographically the parts of lot 507 expropriated or directly sold and the price paid therefor but nowise constitutive of the obligation previously incurred by the Government of Canada.

(e) an extract from the minutes of the Treasury Board held at Ottawa on February 11, 1955, authorizing payment of $318,776 "to Ben H. Lechter in full and final settlement of all claims other than claims of the Bell Telephone Company of Canada, arising out of the expropriation of approximately 703,915 square feet of land, and as compensation for the purchase of approximately 1,186,620 square feet severed by the expropriation, all located in Lot 507, Parish of St. Laurent, Quebec"; exhibit F.

The text of this document incontrovertibly establishes that it does not purport to create a debt but merely acquits one "arising out of the expropriation . . . and as compensation for the purchase . . . " of land.

[1] [1961] Ex.C.R. 318 at 319, 320, 322, 327.

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In the notes submitted by the respondent, the latter's view of the case is expressed in these lines:

> As appears from the balance sheet attached to the Appellant's Return for the year 1956, the Appellant's fiscal period ends on January 31st. It follows that any income received or receivable by the Appellant between February 1st 1955 and January 31st 1956 is properly assessable in the taxation year 1956.

And, again, in the ensuing paragraph on page 3:

> Respondent submits that the approval of the Treasury Board was a prerequisite to the existence of a binding agreement between the Crown and the Appellant and that prior to such authority being granted on February the 11th 1955, there was no legal obligation binding on the Crown to pay the amount in question . . .

The relevant taxation year must coincide with that during which a debt or an obligation to pay, legally enforceable, originated between respondent and appellant.

No doubt can exist regarding the expropriation since s. 9 of the *Expropriation Act* expressly vests in Her Majesty the Queen all land expropriated from the day a plan and description are deposited of record in the Registration office, and this formality was duly effected on January 7, 1954. It is equally assured that the appropriation by private sale of the second part of lot 507 must have occurred during the intervening period up to July 13 and 14, when the departmental offer of payment was made to the appellant and immediately accepted (cf. exhibits 15 and 16).

The voluntary sale of 1954 required no other essential element than the mutual consent of the parties; the transmission of property due to expropriation intervened by the sole authority of the law.

The respondent appears to confuse two completely different components of all transactions: the creation of a debt receivable and a payment ultimately received.

In Simon's *Income Tax*, 2nd ed., vol. II, 153, the distinction is made quite clear, I quote:

> Normally an item becomes a trade receipt on the day when it is receivable even though the date of receipt is postponed. Equally, an item becomes an admissible deduction for tax purposes on the date on which it becomes a debt due from the business, irrespective of the date of its actual payment.
>
> Accordingly, when a sale is made, the sale price has to be brought into account at that date, and it will form part of the total of the sales in the profit and loss account for the then current periods; and that will be so even if the sum is not paid to the trader until after the end of the current accounting period. The fact that the consideration for a sale

is other than money, or is an asset not immediately realisable, is no reason for excluding it. It should be included at the relevant accounting date as its then value.

I would also cite Mr. Justice Cameron's interpretation of s. 85 (*b*) of the *Income Tax Act,* in *Wilson and Wilson Ltd. v. Minister of National Revenue*[1]:

> The proviso in the paragraph quoted is not here applicable. The all important word "receivable" is not defined in the Act but after a most careful consideration of the paragraph, I have come to the conclusion that in both places where that word is used, it bears the ordinary meaning "to be received". It would appear, therefore, that in enacting this subsection, Parliament has extended somewhat the ordinary concept of "income" in relation to a business in which property is sold or services rendered and that from and including the 1953 taxation year, every amount to be received 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 to be received until a subsequent year, subject, of course, to the proviso and to the provisions of para. (*d*) thereof relating to the deduction of a reasonable amount as a reserve in some cases. The paragraph is drawn in very wide terms so as to include every amount so receivable and such amounts are to be brought into the computation of income for the year in which the property was sold or the services rendered.

For these reasons, I hardly hesitate to conclude that the proper taxation year of these transactions could be none other than 1954, the calendar year of their inception. Payment may have been delayed until a later period but remained an enforceable obligation from the moment the expropriation and sale occurred. The Treasury Board's authorization for payment did not create a debt but merely paid a pre-existing one.

For income tax purposes, Ben Lechter was admittedly under the accrual system, his fiscal year ending on January 31, and respondent vainly strove to derive some advantage from this. The Minister mistakenly transposed in taxation year 1956 a gain accruing in 1954, which I will regard as the start of the six years' delay extended to re-assessment operations. My understanding of the expression "taxation year" obtaining in s. 139 (2), leads me to hold that the revisionary period ended on December 31, 1960; however, should the respondent's contention prevail, which would then extend the bar to January 31, 1955, the situation would continue unchanged, with the limitation only put off until February 1, 1961. Therefore, the department's notification

[1] [1960] Ex.C.R. 205 at 213.

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to appellant, dated February 15, 1962, falls well beyond the prohibitory limit of six years, and is illegal.

CONSEQUENTLY, the appeal is allowed and respondent's re-assessment of February 15, 1962, annulled and set aside. The appellant will be entitled to recover its costs after taxation.

Judgment accordingly.

1964 — Sept. 21, 22 — Nov. 6 —

BETWEEN:

WEST COAST PARTS CO. LTD. ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Adventure or concern in the nature of trade—Meaning of "trade" and "adventure in the nature of trade"—Usual badges of trade—Lump sum payment or premium as interest or profit from property—Fixed amount included in repayment of loan in addition to principal and interest—Loan as an investment—Bonus or discount as a profit from a trade or adventure in the nature of trade—Effect of circumstances surrounding loan transaction—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6 and 139(1)(e).

This appeal is from an assessment of the appellant for its 1958 taxation year under which the sum of $56,000 received by the appellant as a bonus upon a loan was assessed as income.

The appellant, a company incorporated under the laws of the Province of British Columbia, is one of a group of seven very closely related companies, basically all the shares of six of them being owned by the seventh, Transport Finance Ltd., the shares of which were owned by members of the Ferguson family. All the companies shared a common office, a common accounting staff and a common board of directors, the members of which were members of the Ferguson family. The funds of all companies except Transport Finance Ltd. were deposited in a common bank account in the name of one of the companies, although each company kept its own book of accounts. All the companies except Transport Finance Ltd., which dealt in commercial paper and one other which was dormant, were engaged in the sale and distribution of, the repair and maintenance of, or the supply of parts for Kenworth motor trucks. At the material time, the appellant was in the process of gradually liquidating its assets, having sold its inventory of parts to a subsidiary of the manufacturer of the Kenworth trucks, which had undertaken the distribution of its own parts. One of the assets of the appellant was the amount of its funds on deposit in the common bank account.

By agreement dated February 22, 1957 the appellant agreed to lend $125,000 to a group of companies, known as the Lions Equipment group, to enable them to purchase the equipment required to fulfil a contract for testing a gas pipeline for leaks for West Coast Transmission Ltd. The agreement provided that the loan was to be repaid by payment to the appellant of $115,000 on November 1, 1957 on account of principal, and the principal balance of $10,000 on November 1, 1958, with a premium of $56,000, together with interest at 10 per cent per annum on the monies advanced from the date of the advances to date of repayment. The loan was made and subsequently repaid in 1958 with the premium and interest as set out in the agreement.

Held: That "trade" is not the same thing as "an adventure in the nature of trade" and a single transaction may well be the latter without being the former, provided it is essentially commercial.

2. That the absence of one or all of the usual badges of trade does not negative the existence of an adventure in the nature of trade.
3. That when a person enters into a contract whereby he advances money to another person on terms that it is to be repaid at a fixed time together with an additional amount, if that additional amount is described as interest there is no problem, for interest is income from property within s. 3 of the *Income Tax Act,* but when such a contract requires repayment with such an additional amount, but does not describe it as interest, it becomes a question of fact as to whether the additional payment is or is not interest or, in any event, a profit from property in the sense of revenue derived from the money advanced, but if the additional payment is the sole consideration for the use of the money, there would appear to be a very strong probability that it is interest or a payment in lieu of interest.
4. That the lump sum payment, as provided for by the agreement under consideration, not being payment merely for the use of the money, is, in the absence of very special circumstances, a profit from an adventure in the nature of trade.
5. That a money lender who advances money in the course of an established business on terms whereby he charges interest as such plus a fixed amount determined by reference to the special risk involved would count as profits from his "trade" not only the interest but the additional amount, and it follows that when a person who is not a money lender enters into such a contract and thus embarks on an adventure in the nature of the money lender's trade and earns a similar profit, he acquires a profit from an adventure in the nature of trade.
6. That it would be unrealistic to consider a transaction such as that undertaken by the appellant an investment of a prudent investor looking to a fair and safe return by way of interest.
7. That the question whether the additional amount is a payment in respect of what is referred to as "capital risk involved" is immaterial to the question whether it is profit from a money lender's trade or from an adventure in the nature of such trade. Even if such a payment can be classified as a bonus or discount rather than interest, such classification does not negative its character as a profit from a trade or adventure, even though it might negative its character as interest on money lent. Once it is established that it is not a simple case of investment, such as a purchase of a debenture at a discount, but is an adventure in the nature of trade, such distinction becomes irrelevant.
8. That the transaction entered into by the appellant, by reason of the cumulative effect of the surrounding circumstances, was an adventure

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in the nature of trade within the meaning of s. 139(1)(*e*) of the *Income Tax Act*.

9. That the appeal is dismissed.

APPEAL under the *Income Tax Act*.

The appeal was heard by the Honourable Mr. Justice Cattanach at Victoria.

D. T. Braidwood, Q.C. for appellant.

C. C. Locke, Q.C. and *W. M. Carlyle,* for respondent.

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

CATTANACH J. now (November 6, 1964) delivered the following judgment:

This is an appeal from an assessment under the *Income Tax Act,* R.S.C. 1952, c. 148 of West Coast Parts Co. Ltd. for its 1958 taxation year.

The appellant is a company incorporated pursuant to the laws of the Province of British Columbia with its head office at 2015 Main Street in the City of Vancouver in that Province. It was, prior to 1955, engaged in the business of trading in parts for motor vehicles and more particularly parts for Kenworth motor trucks, which were sold through sub-dealers and to users. The annual sales averaged about $700,000, of which ninety percent were in the Province of British Columbia. The appellant maintained an inventory between $150,000 and $200,000.

In the year 1955, the manufacturer of Kenworth motor trucks undertook the distribution of its own parts through a subsidiary company known as Canadian Kenworth Limited. This Company purchased all Kenworth parts owned by the appellant, whereupon the appellant began a gradual liquidation of its remaining assets.

The appellant's banking arrangements were somewhat unusual. They were described by William John Ferguson, Jr., who was the only witness at the trial.

Mr. Ferguson is presently the president and general manager of Canadian Kenworth Ltd., but at the time material to this appeal, he was the vice-president of the appellant.

The appellant was one of seven very closely related companies, (1) Transport Finance Ltd., which as the name implies, was a company dealing in commercial paper, (2) Ferguson Truck & Equipment Co. Ltd., the distributor of Kenworth motor trucks, (3) Ferguson Automotive Parts Ltd., which repaired and maintained the motor trucks, (4) Ferguson Trucks Ltd., the distributor of Kenworth motor trucks on Vancouver Island, (5) Midwest Kenworth Sales Ltd., the distributor for Alberta, (6) Seymour Securities, Ltd., which was dormant, and (7) the appellant which, as previously intimated, engaged in the sale of truck parts.

Basically all shares in the other six companies, were owned by Transport Finance Ltd. and the shares of Transport Finance Ltd. were owned by the members of the Ferguson family. All companies shared a common office, a common accounting staff and a common board of directors. The Board consisted of W. J. Ferguson, Jr., his father W. J. Ferguson, Sr., a brother and, in some instances, his mother and sister. All major corporate decisions of each of the seven companies were made by W. J. Ferguson, Jr., his father and brother.

The funds of all the companies, except Transport Finance, Ltd., were deposited in a bank account in the name of Ferguson Truck & Equipment Co. Ltd. although each company kept a separate book of accounts. Thus the funds of all companies were intermingled, the reason given being that there was no necessity for segregation and this constituted a simpler method of doing business. Furthermore, when a bank loan was required by any one of the six companies, it was negotiated in the name of Ferguson Truck & Equipment Co. Ltd. Clearly, the affairs of the companies were closely interwoven.

On the asset side of the appellant's balance sheets for the fiscal years ending November 1956, 1957 and 1958 under the heading "Current Assets" the following item appears, "Advance receivable—Ferguson Truck & Equipment Co. Ltd." in the respective amounts of $128,680.36, $114,805.29 and $187,170.57, which represent the appellant's funds deposited in the bank account of Ferguson Truck & Equipment Co. Ltd. No interest was paid to the appellant on these deposits.

In the latter months of 1956, a group of companies consisting of Lions Equipment Limited, C. & R. Welding

Ltd., Craig & Ralston Testing Co., Ltd., Vancouver Ditching Co., Ltd., and Craig & Ralston Construction Co., Ltd., (hereinafter referred to as "the Lions Equipment group" or "the borrowers") were engaged in negotiating a contract with Canadian Bechtel Ltd., as agents for West Coast Transmission Ltd., to test a West Coast natural gas pipeline for leaks. Such work would be carried out over a period of 150 days and required highly specialized and expensive equipment, which would be of no further use after the completion of the work. This was to be a single specialized venture which had prospects of being very profitable.

The shareholders and directors of the Lions Equipment group were J. D. Craig and W. C. Ralston. Ralston was a professional engineer possessed of skill and knowledge in the particular type of work required by the proposed contract.

The amount required to be borrowed to purchase the specialized equipment needed to undertake this work was $125,000. Craig and Ralston had tried unsuccessfully over a period of time to arrange for a loan in the required amount.

A mutual friend of J. D. Craig and W. J. Ferguson, Jr. suggested that Ferguson might have funds available whereupon Craig telephoned Ferguson explaining the proposed contract between the Lions Equipment group and West Coast Transmission Ltd., the need for money to purchase the specialized equipment to perform the contract and suggesting if a loan were forthcoming, the payment of interest at the going rate for loans of this nature plus a substantial bonus. This telephone call was not made to Ferguson in his capacity as vice-president of the appellant, but as an individual, who might be in a position to make a loan, the source of the funds to do so being unknown and immaterial to Craig.

Thereupon there followed a series of conferences between the Lions Equipment group and the Fergusons and a series of meetings of the Ferguson directors and their legal and accountancy advisors as a consequence of which it was decided to make the loan, the terms and conditions of which were embodied in an agreement dated February 22, 1957, between the Lion Equipment group, as borrowers, the appellant, as lender, and Craig and Ralston, as guarantors.

Basically this agreement provides for the loan of $125,000 by the appellant to the Lion Equipment group to be advanced in two stages, $40,000 upon execution of the agreement and $85,000 upon the execution of the contract between the borrower and West Coast Transmission Ltd., such contract to be executed no later than June 1, 1957. The loan was to be repayable, as follows, $115,000 on November 1, 1957 in reduction of principal, the balance of $10,000 on November 1, 1958, plus a premium of $56,000, together with interest at 10 percent per annum on the monies advanced from the date of such advancement to date of repayment.

The amount of $40,000 was in fact advanced to the borrowers on February 28, 1957. The agreement included a provision that, if the contract between the Lions Equipment group and West Coast Transmission Ltd. were not executed by June 1, 1957, the $40,000 advanced would be forthwith repayable to the appellant with interest at 10 percent plus a premium of 45 percent. For any significance that it may have, I observe that a premium of $56,000 on $125,000 is a premium of approximately 45 percent.

However, the contract between the borrowers and West Coast Transmission Ltd. was executed and the further amount of $85,000 of the loan was advanced to the borrowers by the appellant on April 30, 1957.

The agreement between the appellant and the borrowers and guarantors also provided for collateral security being (1) a mortgage on all equipment owned or acquired (2) the hypothecation of term life insurance on the lives of Craig and Ralston, (3) the hypothecation of all of the shares in the borrowing companies and (4) an assignment of all book accounts of the borrowers subject to a prior assignment.

However, the security, above outlined, was not sufficient to discharge the loan if it became necessary to realize upon the security. In making the loan the appellant was relying on the ability of the individuals, Craig and Ralston, to perform the contract which was to be obtained.

The repayment of $115,000 on acount of principal became due on November 1, 1957. By letter dated October 22, 1957 W. J. Ferguson, Jr., wrote the borrowers advising them of the approaching due date. Payment was not made until November 29, 1957, some 28 days beyond the due date.

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The borrowers apparently encountered difficulty in performing the conditions of their contract with West Coast Transmission Ltd. and had fallen behind in the time schedule. The borrowers were in need of additional funds and accordingly approached W. J. Ferguson, Jr. for the advance of a further amount. Mr. Ferguson and his fellow directors had become alarmed at the state of the performance of the borrowers' contract and funds were not so readily available to them as on the previous occasion. They therefore declined to make a further loan.

The borrowers' need for further funds was urgent and it became necessary for them to obtain a release of the collateral security given to the appellant in order to pledge such assets as security for a loan from other sources. Therefore, the borrowers paid off the outstanding balance of the principal of their loan to the appellant, being $10,000, plus interest to the date of payment and the stipulated bonus of $56,000 on April 22, 1958, being six months prior to the maturity date of November 1, 1958.

The payment was in the total amount of $73,872.61 made up as follows:

Repayment of loan	....	$ 10,000.00
Interest:	$40,000-245 days @ 10% ..	2,684.93
	$85,000-203 days @ 10% ..	4,727.40
	$10,000-153 days @ 10% ..	419.18
	April 3 April 18	41.10
Bonus	....	56,000.00

As previously recited, the agreement between the appellant and the borrowers dated February 22, 1957 accurately represents the ultimate terms agreed upon among the parties thereto arrived at following a series of conferences between the parties and among the directors of the Ferguson group of companies. The rate of interest payable was the subject of negotiation and a rate of 10 percent was fixed as the normal rate for a loan of this nature. The term of the loan and times and amounts of the advances and repayment were also the subject of negotiation. However, Mr. Ferguson, Jr. was adamant in his testimony that the bonus of $56,000 was proffered in the initial approach by telephone by Craig on behalf of the prospective borrowers and that such amount remained comparatively constant throughout the negotiations antecedent to the loan being made although he conceded that it was a matter of limited discussion and negotiation.

The decision of the directors of the Ferguson companies to make the loan in the name of the appellant was predicated upon the fact that the appellant was no longer actively engaged in the business of selling truck parts, but was merely liquidating its inventory on hand and receiving outstanding accounts and primarily because there was an adequate amount on hand with the appellant to make the loan, that amount being the account receivable from Ferguson Truck & Equipment Co. Ltd.

The issue for determination is whether the sum of $56,000 received by the appellant in 1958 as a bonus upon its loan, was a profit arising from an adventure or concern in the nature of trade and is, therefore, income from a business within the meaning of ss. 3, 4 and 139(1) (*e*) of the *Income Tax Act*.

By s. 3 of the *Income Tax Act* the income of a taxpayer for a taxation year for the purposes of Part I of the Act is declared to be his income from all sources and includes income for the year, *inter alia,* from all businesses. By s. 4, income from a business is declared to be, subject to the other provisions of Part I, the profit therefrom for the year and by s. 139(1) (*e*) business is defined as including a profession, calling, trade, manufacture, or undertaking of any kind whatsoever and as including an adventure or concern in the nature of trade.

The determination of the above issue must depend on the totality of the facts and surrounding circumstances of the case because no single criterion has been laid down upon which to decide whether a transaction is an investment or an adventure in the nature of trade.

It was contended by counsel for the appellant that the sum of $56,000 received by it was a bonus compensation for risk of capital on a loan receivable and was, therefore, a capital receipt and not income subject to income tax.

It is conceded by the Minister, both in argument and in his pleadings, that to be taxable, the bonus must be a profit arising from a business, within the extended definition thereof including an adventure or concern in the nature of trade. Therefore, as stated before, the issue

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resolves itself into whether the transaction entered into by the appellant as described above, constitutes an adventure or concern in the nature of trade and not an investment.

Counsel for the appellant, after an exhaustive review of the authorities and by reference to definitions in standard dictionaries, submitted that the word "trade" has reference to a commercial or mercantile occupation of a continuing or habitual character with particular emphasis on dealing in goods or commodities. He submitted that the usual badges of trade were lacking in the transaction under review in that (1) there was no organization set up for the purpose, (2) there was no multiplicity of transactions, (3) the appellant had no prior association with the business and (4) there was no scheme, system, business or operation.

However, "trade" is not the same thing as "an adventure in the nature of trade". A single transaction may well be the latter without being the former, provided it is essentially commercial. The absence of one or all of the usual badges of trade does not negative the existence of an adventure in the nature of trade.

In *M.N.R. v. Taylor*[1] the former President of this Court points out that while the words, "adventure or concern in the nature of trade" first appeared in a Canadian *Income Tax Act* in the 1948 Act, they have been in the United Kingdom *Income Tax Acts* since 1842. He then proceeds to a careful examination of the leading cases dealing with the meaning of the expression and arrives inductively at certain general propositions to guide the Court in dealing with a particular case. He first advances some negative propositions concerned with excluding a number of erroneous tests.

On the negative side he had this to say:

(i) The singleness or isolation of a transaction cannot be a test of whether it was an adventure in the nature of trade . . . it is the nature of the transaction, not its singleness or isolation that is to be determined.

(ii) It is not "essential to a transaction being an adventure in the nature of trade that an organization be set up to carry it into effect".

(iii) ". . . the fact that a transaction is totally different in nature from any of the other activities of the taxpayer and that he has never entered upon a transaction of that kind before or since does not, of itself, take it out of the category of being an adventure in the nature of trade."

[1] [1956] C.T.C. 189; 56 D.T.C. 1125.

(iv) "The intention to sell the purchased property at a profit is not of 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."

On the positive side the former President outlines some specific guides:

(i) ". . . if a person deals with the commodity purchased by him in the same way as a dealer in it would ordinarily do such a dealing is a trading adventure."

(ii) The nature and quantity of the subject matter of the transaction "may exclude the possibility that its sale was the realization of an investment or otherwise of a capital nature or that it could have been disposed of otherwise than as a trade transaction."

While formulating these guides as helpful, he recognizes that the question whether a particular transaction is an adventure in the nature of trade depends on its character and surrounding circumstances and no single criterion can be formulated.

When a person enters into a contract whereby he advances money to another person on terms that it is to be repaid at a fixed time together with an additional amount, if that additional amount is described as interest, there is no problem. Interest is income from property within s. 3 of the *Income Tax Act* and it is specifically required to be included in computing income by s. 6. When such a contract requires repayment with such an additional amount, but does not describe it as interest, it becomes a question of fact as to whether the additional payment is or is not in fact interest or, in any event, a profit from property in the sense of revenue derived from the money advanced. If the additional payment is the sole consideration for use of the money, there would appear to be a very strong probability that it is interest or payment in lieu of interest. The problem is more complicated where, as here, the contract provides for repayment with interest as such plus an additional fixed amount. Usually the promise of such an amount is not regarded as being a payment for the use of the money, but as an inducement to the lender to incur the risk of not getting his money back in speculative circumstances. I cannot escape the conclusion that, in such event, the lump sum payment, not being payment

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merely for the use of the money, is, in the absence of very special circumstances, a profit from an adventure in the nature of trade.

There can be no doubt that a money lender who advances money in the course of an established business on terms whereby he charges interest as such plus a fixed amount determined by reference to the special risk involved, would count as profits from his "trade" not only the interest collected as such, but the additional amounts charged by reason of special risks. If it be true that such an amount is a profit from a money lender's trade, it follows, in my view, that, when a person who is not a money lender enters into such a contract and thus embarks on an adventure in the nature of the money lender's trade and earns a similar profit, he acquired a profit from an adventure in the nature of trade.

In the present instance the borrowers did not approach the appellant to obtain the loan, but rather Mr. W. J. Ferguson, Jr. in his personal capacity, who in turn discussed the proposition with his fellow directors who, as I have indicated, were directors of all seven companies in the Ferguson group. The decision to grant the loan was not entered into lightly. The advantages and disadvantages were carefully weighed and the lenders obtained as much collateral security as possible, but the security so obtained was not sufficient to cover the loan in event of default. The prime factor which influenced the grant of the loan was the reliance placed on the prospect of the borrowers making a substantial profit from the pipeline testing contract, which was virtually assured. After a very careful appraisal of the risks involved the directors of the Ferguson group decided to make the loan.

The word "adventure" is defined in the Shorter Oxford Dictionary as a "pecuniary venture" and "a speculation". The word, "venture" is in turn defined as meaning "a commercial enterprise in which there is a considerable risk of loss as well as a chance of gain". There is no doubt that the risk of loss was a paramount consideration present in the minds of the directors of the Ferguson companies and it is equally clear that the chance of substantial gain, namely, a bonus of $56,000 or in terms of percentage 45 percent on the principal sum, offset the risk of loss and was the determining factor in the decision to make the loan. To me it would be unrealistic to consider a transaction such as this as an investment of a prudent investor looking to a fair and safe return by way of interest. There is no doubt that the prospect of a very substantial premium within a very short period of time was the dominant consideration.

The directors of the appellant were not unfamiliar with the finance and loan business. Transport Finance Ltd., of which they were also directors, was engaged in the business of financing motor vehicles sold by the other related companies and a loan with a substantial bonus was made by Ferguson Automotive Parts Ltd. to oblige a customer of the Ferguson interests, prior to the present loan.

In my view, what the appellant did here is precisely what an ordinary money lender would do.

I should also say that, in my view, the question whether the additional amount is a payment in respect of what is referred to as "capital risk involved" is immaterial to the question whether it is profit from a money lender's trade or from an adventure in the natue of such trade. Even if such a payment can be classified as a bonus or discount rather than interest (cf *Lomax v. Peter Dixon & Son Ltd.*)[1], such classification does not negative its character as a profit from the trade or adventure, even though it might negative its character as interest on money loaned. Once it is established that this is not a simple case of investment, such as the purchase of a debenture at a discount, but is an adventure in the nature of trade, such distinction becomes irrelevant.

I am, therefore, of the opinion that this transaction entered into by the appellant, by reason of the cumulative effect of the surrounding circumstances, was an adventure in the nature of trade within the meaning of s. 139(1)(*e*) of the *Income Tax Act*, that the profit from it was a profit from a business within the meaning of s. 3 of the Act and that the Minister was, therefore, right in including the premium of $56,000 in the appellant's assessment for its 1958 taxation year.

The appeal is, therefore, dismissed with costs.

Judgment accordingly.

[1] 25 T.C. 353.

1964 June 25 Nov. 12

BETWEEN:

J. & R. WEIR LIMITED .... APPELLANT;

AND

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

Revenue—Income—Income tax—Profit-making scheme—Purchase and resale of Government of Canada bonds—Ownership of bonds—Intent of taxpayer—Investment of surplus capital—Income Tax Act, R.S.C. 1952, c. 148, ss. 6(1)(b) and 139(1)(e).

This is an appeal from the reassessment of the appellant's income for the taxation years 1956, 1957, 1958 and 1959, under which the respondent added to the appellant's income the amount received by the appellant in addition to interest on certain short term transactions in which the appellant claims it invested its surplus capital in the purchase and subsequent resale of Government of Canada bonds.

The evidence established that although the usual contract between the appellant and its broker purported to provide for the purchase by the appellant from the broker of short term Government of Canada bonds, and for the resale of the said bonds to the broker, effective thirty days after the purchase, the appellant, as purchaser, acquired no right to cut off the interest coupons during the thirty-day period it held the bonds, such right being an essential characteristic of ownership.

Held: That the buying and reselling of the bonds are simultaneous to such a degree that, in fact and in law, none of the contracts ever took place, and the transactions under review were merely a thinly disguised form of short term loan between the appellant and the broker

2. That the investing intent, in its customary connotation, is lacking in the transactions in question, which exhibit all the ear-marks pertaining to pursuits of profit-making schemes within the scope of s 139(1)(*e*) of the *Income Tax Act*.

3. That the appeal is dismissed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Dumoulin at Quebec.

René Amyot for appellant.

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

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

DUMOULIN J. now (November 12, 1964) delivered the following judgment:

J. & R. Weir Limited, an important Montreal concern, dealing in marine and industrial works, appeals from the

Tax Appeal Board's decision, dated April 29, 1963[1], which affirmed re-assessments by the Minister of National Revenue of appellant's taxable income for taxation years 1956, 1957, 1958 and 1959.

The supplementary dues levied in connection with the four years' period amount to $5,207.62 and were imposed, so the respondent contends in para. 10 of his Reply, on the assumption that "the appellant's dealings in government bonds were a venture in the nature of trade within the meaning of section 139(1)(*e*) of the *Income Tax Act*."

Previously, in the Notice of Appeal, the Company had summed up its viewpoint in three concise paragraphs, 5, 6 and 7, hereunder reproduced:

> 5. The Appellant was a manufacturing company which, over the years 1956 to 1959, carried on a program of investing whatever surplus capital it had, from time to time, in short term Government bonds.
>
> 6. On these bonds, the Appellant received interest, which was, of course, duly returned as income and made also a small gain which it contended was a capital gain.
>
> 7. The Appellant bought these short term Government of Canada bonds from investment dealers, and on the same day and in the same contract, resold the bonds to him (sic) for delivery thirty (30) days later at an agreed price.

Fifteen such transactions annually in Government of Canada bonds were made by the appellant and a few more by its subsidiary associate, Welding Engineers Limited, also of Montreal, whose similar appeal, number A-1615 of this Court's 1963 records, proceeded jointly with the instant one.

It may seem a commonplace to say the issue consists in unravelling the nature of these dealings within the purview of the oft recurring section 139 (1) (*e*) of the *Income Tax Act*.

In the record of the case an explanatory brief, labelled "Schedule", is filed and signed by Mr. John W. Robinson, Vice-President and Secretary of J. & R. Weir Ltd., as also of Welding Engineers Ltd.

This executive officer outlines in the document aforesaid his company's explanation of these moot ventures. The undergoing excerpts are taken from pages 2 and 3:

Page 2:

> Ever since the inception of the money market in Canada some six years ago, it has been considered acceptable practice for members of the Investment Dealers' Association of Canada to offer their clients the

[1] (1963) 32 Tax A.B.C. 33.

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advantages contained in the Canada Money Market. This has been achieved by the purchase by various corporations of Government of Canada Securities (and or Government of Canada guaranteed issues) and their resale at a later date.

. . . To implement this investment, dealers offered to various corporate clients who have temporary unemployed funds, short term government and government guaranteed securities.

There has also come into existence a type of transaction which would involve *lending* (italics added throughout) of certain amounts of money to the investment dealer, who, in turn, would pay a certain rate of interest on the funds so *borrowed*. To secure the *loan*, the dealer would lodge Government of Canada Securities with the client, *and in some instances obligate himself to have this loan outstanding for a given period of time* (usually 30, 60, or 90 days). In other instances, a so-called *loan would be entered into between the client and the dealer* . . .

Bonds were sold to various corporate clients who had excess funds, at the current market, flat coupon interest, with a day to day money market interest rate allowed on the amount of money involved. This rate of interest so allowed since funds might be required on anything from 1, 30 or 60 days, the bonds being then sold at the current market, thus involving gain or loss by the holder of the bonds.

Page 3:

Bonds *as placed with our Company with respect to loans* remain the property of our Company throughout the period of the arrangement . . .

Especially noticeable are the frequent recurrences of the expressions "loan", "borrowed", and that of "arrangement".

The opening in Canada, a matter of common knowledge, of a so-called money market, naturally intensified this simple enough trading of excess funds against short term Government securities, on a monthly basis, and deriving therefrom a dual source of profit, day to day interest and the par value appreciation as the term of maturity drew nearer. A six to ten cents "natural increment" (cf. Notice of Appeal, para. 8), on a one hundred dollar bond is meaningless, but if multiplied, as in this case, 250,000 times, it brings in $150, bolstering up by so much the current interest *"agreed upon"* as we shall see. (cf. ex. A-2). At all events, it affords a better yield than would accrue, here, from the snail like pace of bank interest, were any allowed. In brokerage parlance this practice is called "buy-backs".

In his testimony before the Tax Appeal Board, Mr. John W. Robinson indicated the motivating incentive that prompted the appellants to initiate these deals. Some quotations, out of the transcript filed, are in order; the witness is examined by the companies' counsel:

At page 7:

Q. How did you happen to start making investments in Government of Canada short term securities?

A. As I said previously, *we first went to the bank and we found no satisfactory situation there,* so we went to the brokers, *and from discussions with the brokers it was presented to us to engage in this sort of business.*

From this point on, there arises more than a strong suspicion that the objective sought had little in common with a real investment of surplus funds, for which banks are unfrequent agents, and bears a striking resemblance to a quest for the highest interest yield.

Nothing in the following excerpts tends to modify this opinion.

At page 12:

Q. You knew at the beginning that the value of the bonds would increase day by day approaching their maturity.

A. Yes, that's right.

Mr. Robinson now is cross-examined. At page 18:

Q. These bonds were the property of your company as soon as they were acquired for the period stated in the contract?

A. For the period of thirty (30) days.

Q. How come, if you were the owners of these bonds, your company was not to receive the full amount of the interest (3%) stated on the bonds?

A. Because we were only getting them for thirty (30) days.

Q. But the bonds were paying three per cent interest, and your company received only one and a quarter per cent?

A. The reason for that is that the bond was three per cent, and that's three per cent per annum; but we held the bonds for only thirty (30) days.

From page 21:

Q. *When you sold back your bonds, were you always selling them to the same dealers who sold them to you,* Mr. Robinson?

A. *Yes.*

The witness admits these particular operations were not transacted on the open market but through private contracts.

About these contracts, Mr. Harry W. Andrews, who, in 1956, negotiated them with J. & R. Weir Ltd., and for Welding Engineeers, in his then capacity of senior sales representative for Royal Securities, vouchsafes some additional information to Mr. Chagnon, counsel for respondent, who proceeds to cross-examine him.

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On pages 38 and 39:

Q. Mr. Andrews, I show the contracts by which the bonds were acquired by Weir and I ask you to explain to the Court what is meant by the word "flat"?

A. It means that there is no accrued interest on the transaction because the contractual agreement is not that the coupon belongs to the purchaser as such.

Q. They belong to whom?

A. They belonged to the Royal Securities in this instance because the agreement is for thirty days that they can have the bonds. They actually owned the bonds, *but it's our agreement that they will return them to us at the expiration of that time, so the coupon belongs to Royal Securities in these instances.*

Q. So the bonds were always acquired by the taxpayer or the appellant without any coupons?

A. Oh, no, the coupons would be on the bond, *but they had no right to cut them off.*

Q. *And the right to cut them off would be to your company* (i.e. Royal Securities Ltd.)?

A. *Yes.*

It certainly would require an astounding stretch of the imagination to perceive in such "arrangements" the customary traits of a true and outright purchase. In this occurrence, buying and reselling are simultaneous to such a degree that, in fact and law, none of those contracts ever took place, but merely a thinly disguised form of short term loan between the appellant and Royal Securities. An essential characteristic of ownership resides in the entitlement to all accruing benefits, in this instance the interest coupons, which, as seen above, the so-called purchaser "had no right to cut".

Exhibits A-2 and A-3, *inter alia,* each composed of statements of sale slips to J. & R. Weir Ltd., and statements of purchase from the latter by Royal Securities Corporation, same dates in both cases, and, in each instance again, two letters identically dated, one referring to the would-be sale to J. & R. Weir, the other to the supposed repurchase from it, leave no room for doubt as to the true nature of these transactions.

The appellant company and the investment dealers concerned never had the intention of entering into a valid sale nor a genuine investment.

To all appearances, the appellant pursued the thrifty purpose of putting its abundant spare cash to the best use possible, in other words, the highest rate of interest, and

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insofar its endeavours are encompassed by s. 6 (1) (*b*) of the Act:

6. (1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year

* * *

(*b*) amounts received in the year or receivable in the year . . . as interest or on account or in lieu of payment of, or in satisfaction of interest.

Out of duty, I reviewed the taxpayer's entire plea when, truly, the legal fallacy in para. 8 of the Appeal might have warranted a shorter shrift.

Apart from a split interest return, the residue retained by Royal Securities, it is alleged that J. & R. Weir (and also Welding Engineers Ltd.) "has considered that the natural increment in price of a bond over that period (exactly 30 days) was from six (.06) to ten (.10) cents or more per month, as the bond was coming closer to maturity, and this normal increment was considered as a capital gain by the appellant . . .", (cf. Notice of Appeal, para. 8).

So far, so good, but, then, whose bonds attracted that "natural increment"? Surely not the taxpayer's since oral and literal evidence, for instance, exhibits A-2, A-3 and R-2, repetitiously assert resales of the bonds to Royal Securities the very moment they purported to have been bought by the appellant. Indeed, both transactions are so inextricably interwoven that resale seems to precede purchase. It does not come as a surprise, therefore, that the real owners of those bonds, Royal Securities Corporation, were alone empowered to cut off the interest coupons (H. W. Andrews *dixit*). Consequently, capital appreciation benefited the investment dealers who, by anticipation, apparently added this "increment" to the pre-determined interest.

At all events, the investing intent, in its customary connotation, is lacking. Irrespective of any other description, these deals exhibit all the ear-marks pertaining to pursuits of profit-making schemes, within the scope of s. 139 (1) (*e*) of the Statute.

This was a smart attempt to escape the long reach of the tax-gatherer, and insomuch no blame attaches, . . . income tax only.

For the above reasons, the decision of the Tax Appeal Board is affirmed and the appeal dismissed. The respondent will be entitled to recover his costs after taxation.

Judgment accordingly.

1964 June 8, 9, 10, 11, 12, 15, 16 — Dec. 9

BETWEEN:

GEORGE LAHAM ....SUPPLIANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Crown—Petition of Right—Motor vehicle collision—Negligence—Apportionment of liability—Excessive speed—Failure to keep proper lookout—Motor vehicle on left side of highway center line—Removal of stop sign shortly before date of collision—Assessment of damages—Compensation for expense of operating suppliant's business during his incapacity—Damages for pain and suffering, inconvenience and loss of enjoyment of life—Damages for permanent incapacity—Apportionment of costs—Quebec Highway Code, S. of Q. 1959-60, c. 67, s. 41(1).

This action arises out of a collision between a motor vehicle owned and operated by the suppliant and one owned by the respondent and operated by one Robert Monier, a constable of the R C.M.P. The collision occurred at about 8:00 p.m. on June 4, 1961 in the Province of Quebec at the intersection of Highway 11, running north and south between Hull and Masham Village and a section of Highway 11 leading to Wakefield, Quebec. The suppliant, who had been proceeding south-westerly on the Wakefield spur of Highway 11, had entered its intersection with the main section of Highway 11 without coming to a stop and had just turned to his left to proceed in a southerly direction toward Hull when his motor vehicle collided head-on with that of the respondent which had been proceeding northerly on the said main section of Highway 11 on its left side of the double white line marking the center line of the said Highway.

The evidence established that immediately prior to the collision both motor vehicles were travelling at about forty miles per hour, that there had been a stop sign so situated as to require vehicles approaching the main section Highway 11 along the Wakefield spur thereof to come to a stop before entering the intersection, that the operator of the respondent's motor vehicle had seen the sign many times before and had seen it in position on May 28 or 29, 1961, and that the sign was not there at the time of the collision but was replaced two or three weeks later.

In addition to claiming damages for the loss of his motor vehicle, the suppliant also claimed damages for personal injury, loss of personal effects, medical and hospital expenses and loss of income during his period of disability and expense incurred in paying his brother to manage and operate his restaurant business during his disability.

The respondent counterclaimed for damages for loss of her motor vehicle.

Held: That the suppliant was negligent in not looking to his left before entering the intersection and in not reducing his speed before doing so.

2. That the operator of the respondent's motor vehicle was negligent in driving his motor vehicle on the left side of the double white center line of the highway and for continuing to do so even after noticing the suppliant's omission to slow down on approaching the intersection.

3. That the responsibility for the collision is assessed as two-thirds against the respondent and one-third against the suppliant.

4. That the remuneration of $175 per week claimed to have been paid by the suppliant to his brother for managing the suppliant's restaurant during his period of disability is excessive and an amount of $100 per week for the period of twenty-three weeks will be allowed.

5. That compensation for pain and suffering, inconvenience and loss of enjoyment of life during the period of total incapacity and convalescence is assessed at $1,500.
6. That damages for permanent incapacity, although it is doubtful whether such was established, are assessed at $1,000.
7. That the costs, after taxation, are two-thirds recoverable by the suppliant on the petition of right and the cross demand, and one-third by the respondent in connection with both proceedings.

PETITION OF RIGHT to recover damages resulting from a collision.

The action was heard by the Honourable Mr. Justice Dumoulin at Ottawa.

L. Assaly, Q.C. for suppliant.

Paul Coderre and *Raymond Roger* for respondent.

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

DUMOULIN J. now (December 9, 1964) delivered the following judgment:

In his amended petition of right, filed June 2, 1964, one George Laham of the City of Ottawa, formerly a restaurant owner, claims from Her Majesty the Queen, in the right of Canada, consequently to an automobile collision between his motor car, a Ford Thunderbird, and a 1960 Pontiac vehicle owned and operated by the respondent, special damages in the sum of $9,216.55 and general damages amounting to $27,500, in all $36,716.55.

This accident occurred on or about June 4, 1961, at approximately 8:00 p.m., the suppliant then driving his vehicle in a southwesterly direction along the Wakefield road, towards the main section of highway 11, running south-north from the City of Hull to Masham Village, Province of Quebec.

The respondent's car was, at the material time, operated by Constable Robert Monier, a member of the Royal Canadian Mounted Police, then acting within the scope of his duties in respondent's employ. Constable Monier, heading towards Masham, was approaching a point on highway number 11, where it divides into a double section; one, leading in a northerly direction to the above mentioned village, the other swerving to the north-east in the direction of Wakefield.

The petition alleges that "as the two motor vehicles were about to pass each other, the said Robert Monier

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drove his motor vehicle over the central line of the said highway and collided with the motor vehicle being operated by this suppliant" (petition, para. 2). George Laham ascribes the cause of this smashup to the negligence of the R.C.M.P. constable in that, among other shortcomings, he was going at an excessive rate of speed; failed to afford to the other vehicle at his right half of the roadway or the right of way to which it was entitled and, having the last clear chance to avoid the collision, could have done so by the exercise of reasonable care. To this, respondent replies partly by directing similar allegations of fault against the suppliant who, allegedly, would also have driven at an excessive rate of speed under the prevailing circumstances, without paying proper attention to the traffic in general, and, more particularly, to Robert Monier's car.

Apart from the total loss of his automobile, the suppliant suffered severe personal injuries as did three passengers seated in his car: Miss Elaine Nesrallah, since become Mrs. George Laham, her sister Sandra Nesrallah, then aged 19, and a brother, George Nesrallah, 26 years old.

A cross-demand, joined to the statement of defence, claims from George Laham, for the preceding reasons, damages in the sum of $3,000, subsequently reduced to $1,378.03.

The petitioner's attorneys moved for and obtained an order that the trial of this action should proceed jointly with that of another petition bearing number A-714 of the records of this Court, instituted against Her Majesty the Queen by George Nesrallah, Elaine Nesrallah and Sandra Nesrallah, all of the city of Ottawa, the latter claimant duly represented by Philip Nesrallah, named curator to her property by a judgment of the Superior Court of the District of Hull, Province of Quebec, dated June 2, 1962, pursuant to art. 348 of the Civil Code.

The evidence relative to the crash will then obtain in both petitions, the compensation for physical injuries constituting the sole difference.

The bare facts of the accident itself, reported by oral evidence, remain practically uncontradicted. It is admitted, for instance, that the civilian car had a speed of approximately 40 miles an hour when it swerved to its left in order to align itself on the section of highway number 11 leading south towards Hull. Constable Monier similarly appraises the speed of his vehicle, saying that at a distance of some

1,600 or 1,500 feet from the intersection of the two roads, he noticed an opening in the white center line beyond which he proceeded straight ahead on the Hull to Masham road.

This witness, whose testimony impressed the Court by its complete reliability, readily agrees that George Laham's automobile was travelling on its right side of the road whilst his own kept to the left of the double white center line. He adds that Laham did not appear to be driving in any erratic fashion.

His explanation of this unfortunate incident is that no later than the 28th or 29th of May previous, while on the Wakefield road, he had noticed a stop sign some 25 feet or so before the intersection point, and expected it still would be there, obliging Laham to make a full stop. Strange to say, this stop signal, as Monier found out shortly after the collision, had disappeared, but was replaced within the two or three weeks following. I must say that the suppression of so necessary an indication at a particularly dangerous spot on a highly travelled road remains unaccountable.

> "When I first saw the Laham car", continues Monier, "I was approximately 400 feet south of the intersection and 30 feet south of the break in the double white center line. At the same time, Laham's car seemed approximately at 100 feet or less from the junction, very close to the spot where the stop sign stood until then."

This fact, however fantastic it may seem, was certified by the local Wakefield constable, Henri Gervais, whose statement I noted. "On the 26th of May, 1961," testified this road policeman, "I served a ticket on a truck driver in the employ of the Quebec Department of Roads, attached to the Aylmer section. He had failed to make a stop opposite the signpost after I had delivered that infraction notice, the stop sign disappeared." Objection was taken and allowed to conversation between the witness and a third party, but Gervais went on to say that some time afterwards the post was put back.

So strange an occurrence goes a long way to excuse, if not legally justify, Constable Monier whose veracity remained unimpeachable throughout, in assuming this cautioning post stood where he had many times noticed it before.

Constable Monier, on his section of road, had no stop sign to defer to, only an indication of an intersection 500 feet ahead.

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The witness marks, on exhibit R-3(f), with an "L" the position of Laham's car when first detected and by an "M" the situation of his own car.

The evidence reveals that the conductor of the civilian car was interested in watching the traffic only to his right, observing a row of automobiles going south on the Masham to Hull road where a stop placard is posted. He completely omitted looking to his left, an imperative precaution under the circumstances, as he intended making a right angle turn to the left from where he should have expected a heavy oncoming traffic. Moreover, quite aware of the dangerous conditions of those roads, over which he had frequently travelled, George Laham, in my opinion, should have reduced the speed of his car before engaging it in the convergence of those two highways. A glance at left surely would not have transcended the dictates of elementary prudence, as prescribed by s. 41 (1) of the *Quebec Highway Code* (Statutes of Quebec, 1959-60, 8-9 Elizabeth II, c. 67), next cited:

> 41. 1. Any speed or imprudent action which might endanger safety, life or property is prohibited on all the roads of the province.

The impact occurred about 25 feet from the beginning of the double white line pointing north towards Masham, marked by the letter "A" on photo exhibit R-3(d). Visibility was clear, some rain had fallen in the afternoon and a heavy downpour started around 8:30 p.m.

Exhibit S-2, a diagram precisely depicting the locality of the accident and positions of the cars, drawn by R.C.M.P. Sergeant Reginald K. Hayman, who reached the spot soon after the collision, reveals that the rear of Laham's damaged Thunderbird stood at 4 feet 5 inches to its right of the dividing line and situates the front of respondent's vehicle at a distance of 3 feet 8 inches and its rear at 3 feet 6 inches to the left of the separation line.

On that very day, June 4, a provincial highway patrolman, Maurice Lepage, had investigated, jointly with Constable Monier, no less than ten accidents along the Hull-Maniwaki road.

A Wakefield garage owner, Mr. Thomas Broom, who towed Laham's automobile to his repair shop, expressed some surprise at noticing the disappearance of a stop post close to the intersection line. Asked whether a speed of 35 to 40 miles per hour at this particular intersecting point was prudent or not, he replied thus: "I would say that it would be a little fast. I usually take it at about 20 miles an hour. I am rather cautious and would expect what is coming out to my right." I am inclined to think that the expression "a little fast" is an understatement under the circumstances.

On the other hand, the driver of the respondent's car was undeniably following the wrong side of the speed lanes, proceeding, as Monier readily admitted, at his left. His understandable yet unfortunate assumption that the stop signal had not been removed impelled him to go straight on, even after noticing the civilian car's omission of slowing down, which constituted a second error on his part.

Both drivers are at fault for the reasons above. Their respective responsibility, however, differs in its quantum and the Court would assess two-thirds against the respondent, and one-third against George Laham.

Suppliant's claim for his motor vehicle amounts to $2,627.60, a sum undisputed by respondent; 2/3 of this, $1,751.73, are granted.

The Crown's vehicle also became a complete wreck entailing a loss of $1,378.03, of which 1/3, $459.34, is allowed pursuant to the cross-demand.

This, of course, disposes of only one aspect of the case as the suppliant suffered serious bodily injuries minutely detailed in para. 7 of the petition. The principal hurts inflicted were to the chest, the right wrist and right knee, as diagnosed at the Ottawa Civic Hospital, where Laham was brought late in the evening of June 4.

Dr. Ross Craig, an Ottawa surgeon, found at the X-ray examination, an injury to the right leg with a fracture of the knee cap or patella. On June 5, a plaster cast was applied to the wounded limb but, on June 21, the patella had to be excised.

Considerable pain developed in Laham's chest due to pressure at the time of the accident. Massive doses of penicillin were administered, inducing severe skin rash (allergy) for a period of ten days. General anaesthesia was necessary for the removal of the patella, an operation lasting 1½ hours. Sedatives relieved the pain in the chest. After the operation a full cast, from groin to ankle, was applied during a fortnight, then physiotherapy was resorted to. For two months following his release from hospital, July 13, Laham could not move without the help of crutches.

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He was totally disabled until September 13 and partly up to March 29, 1962. Laham resumed work on November 11, 1961, still suffering from a 5° lack of extensibility in his right knee and 3/4 of an inch shrinkage of the left thigh. Physiotherapy cured this defect, but a minimal shrinkage of the left thigh persists. Dr. Craig is of opinion that the leg will never resume normality and the absence of the knee cap would, for instance, possibly prevent this man from working 14 hours a day as previously. This physician expects Laham might have to change his mode of livelihood. The injury to the big muscles of the left leg does not hinder Laham's normal walk.

Exhibit S-5 purports to list the out-of-pocket expenses, or special damages, sought by George Laham, of which the most expensive item is a bill for hospitalization at the Ottawa Civic Hospital from June 4 to July 13, $889.20.

The other claims on Exhibit S-5 include a bill for $5 from Dr. David Conrad Geggie who first saw Laham, in a state of shock, immediately after the accident, when all the victims were brought for emergency treatment at the Gatineau Memorial Hospital in Wakefield; other bills for professional services are those of Dr. Craig, $275; of Dr. James Leach, $107; of Dr. W. A. Blair, $40; of Mrs. H. Brottman, for physiotherapy, $100; and those of Drs. Howard A. Barends, $25, and Abelson, a skin specialist, $200.

Three additional claims, one for ambulance transport, $20, a second for drugs, $22.50, a third from Parkway Taxi for transportation to the physiotherapist's offices, $54.75, and one for loss of personal effects, $182.80, complete the list on Exhibit S-5, with the exception of $5,175 sought for loss of income, business and salary.

Before apportionment of this claim, I would say that one of the dermatologists, Dr. James Leach, testified he periodically saw Laham every sixth week since the accident, the last visit on April 30, 1964, when signs of skin irritability were still present. The claimant himself insists on a decided persistence of this inconvenience, stating that "after my daily shower I itch terribly and this extends to the rectum". Dr. Leach recommended discontinuing the daily showers. Finally, Laham describes his actual condition in the following words: "I am capable of working hard but my persisting state of nervousness and irritability prevents me from accomplishing things", whatever meaning that may convey.

The medical bills reach a total of $752, of which $501.33 are allowed; hospitalization costs at the Ottawa Civic, from June 4 to July 13, $889.20, of which $592.80 are granted. Three other items, Parkway Taxi, Gauvreau Ambulance and drugs, amount to $97.25 of which $64.83 are allowed. A claim for $182.80, loss of personal effects, went undisputed, entitling the suppliant to $121.87.

The final demand, under the heading of special damages, is for $5,175, comprising a weekly salary of $175, for 23 weeks, to a brother, Fred Laham, who replaced the petitioner during invalidity, and $1,150, the total supplementary wages paid for overtime to two waitresses.

In 1963, Laham became a sales representative, gaining an income of $1,600 only in the year he undertook this new occupation. He testifies that for the years 1961 and 1962, his annual earnings were no less than $12,000. At all events, in 1962 the restaurant enterprise went into bankruptcy due allegedly to an attempt of considerably enlarging the business by the purchase of the "goodwill and key" of a neighbouring store. The cross-examination of the claimant produced the information that the operating expenses connected with the restaurant absorbed 60 to 65% of the gross receipts, leaving a net profit of 35 to 40%. This does not quite tally with a preceding statement that the monthly gross income ran close to $4,000, 35% of which leaves a net monthly profit of some $1,400 and an overall annual net revenue of $16,800, considerably beyond Laham's assertion of a $12,000 income.

The supposed remuneration to Fred Laham of $175 a week is inadmissible and I cannot bring myself to believe that so excessive a rate of pay ever obtained. If it did, a fact I more than doubt, it might explain why the restaurant business failed a few months later. A weekly salary of $100 is fully sufficient, or $2,300 for 23 weeks, which are granted plus $1,150 for the two servant girls, a total of $3,450 of which $\frac{2}{3}$, or $2,300, will be allowed.

We now reach the matter of general damages in a total of $27,500 made up as follows:

(a)	for pain and suffering	$7,500.00
(b)	for inconvenience and loss of enjoyment of life during total incapacity and convalescence	10,000.00

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(c) for permanent incapacity 10,000.00

The injuries sustained induced acute pain and suffering over a period of possibly eight weeks. A decreasing degree of inconvenience and the alleged persistence of itching to this day also seem reasonably proved. To the above claim, I would join that for inconvenience and loss of enjoyment of life during total incapacity and convalescence, as it is more or less a repetition of pain and suffering. An allotment of $1,500 appears equitable of which $\frac{2}{3}$, or $1,000, are allowed.

Lastly, it is doubtful whether any permanent incapacity was established. Laham's walk is normal, his left leg causes no pain nor does it labour under any disability. He has long since resumed a regular working schedule, and the only lingering discomfort would be the bouts of itchiness. However, to eliminate, in the largest measure possible, all doubts on this score, I would allow an additional amount of $1,000, $\frac{2}{3}$ of which are $667.

The overall recapitulation of the compensation extended to the petitioner, on a ratio of $\frac{2}{3}$ of the separate indemnities accorded, adds up to a total of $6,999.56, from which a sum of $459.34, allowed to the respondent on her cross-demand, must be deducted, reducing the damages due the suppliant to the total of $6,540.22.

The same ratio must apply in the matter of costs after taxation, $\frac{2}{3}$ recoverable by suppliant on the petition of right and the cross-demand; $\frac{1}{3}$ by respondent in connection with both proceedings.

Judgment accordingly.

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BETWEEN:

GEORGE NESRALLAH, ELAINE NESRALLAH AND SANDRA NESRALLAH .... SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ....RESPONDENT;

AND

GEORGE LAHAM ....THIRD PARTY.

Crown—Petition of Right—Motor vehicle collision—Negligence—Apportionment of liability—Injury to passengers in motor vehicle—Assessment of damages—Compensation for pain and suffering, inconvenience *and loss of enjoyment of life, permanent incapacity, future medical expenses and disfigurement and scars—Claim over by respondent against third party—Apportionment of costs.*

The claims by the suppliants arise out of the collision of a motor vehicle owned and operated by the third party with one owned by the respondent. The circumstances surrounding the collision are described in detail in the reasons for judgment in *George Laham v. Her Majesty the Queen, ante,* p. ..... In that case the suppliant, who is the third party herein, was found to be one-third responsible for the collision and Her Majesty the Queen, the respondent in both cases, was held to be two-thirds responsible.

The suppliants' claims all arise out of personal injuries received by them while riding as passengers in the motor vehicle owned and operated by the third party herein at the time of the collision.

Held: That the suppliant, George Nesrallah, is entitled to, in addition to his special damages as proved, the sum of $1,000 for pain and suffering and inconvenience and loss of enjoyment of life during total incapacity and convalescence, the sum of $1,000 for possible permanent partial incapacity or continuing inconvenience and $500 for future medical expenses.

2 That the suppliant, Elaine Nesrallah, is entitled to special damages as proved, and to $3,000 for inconvenience and loss of enjoyment of life during total incapacity and convalescence, $1,200 for disfigurement and scars and for loss of or damage to teeth, and $1,000 for possible permanent partial incapacity.

3. That the suppliant, Sandra Nesrallah, is entitled to special damages as proved, and to the sum of $2,500 for pain and suffering, inconvenience and loss of enjoyment of life during total incapacity and convalescence and $1,000 for possible permanent partial incapacity.

4. That the third party will indemnify the respondent to the extent of one-third of the pecuniary damages accorded to the three suppliants.

5. That the suppliants are entitled to recover their costs after taxation from the respondent and the respondent will be allowed one-third of the costs after taxation as against the third party.

PETITION OF RIGHT to recover damages resulting from a collision.

The action was heard by the Honourable Mr. Justice Dumoulin at Ottawa.

C. B. Major, Q.C. and *Joseph Konst* for suppliants.

Paul Coderre and *Raymond Roger* for respondent.

L. Assaly, Q.C. for third party.

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

DUMOULIN J. now (December 9, 1964) delivered the following judgment:

On June 4, 1961, the three above suppliants were passengers in George Laham's automobile, at the latter's invitation, and were proceeding along the spur of road

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linking Wakefield with the other section of highway no. 11, leading from the city of Hull to Masham and Maniwaki in the Province of Quebec. A collision occurred about 8:00 p.m., between George Laham's vehicle and a car driven by R.C.M.P. Constable Robert Monier, then in the performance of his duties as a Police officer.

Bodily injuries to the claimants resulted, thence their joint petition of right.

It was agreed at trial that each and every fact adduced in evidence concerning the several incidents and circumstances leading up to the accident itself, as revealed at the hearing of George Laham's petition of right, *ante* p. 440 would form an integral part of the instant suit. The judgment rendered in the former petition of right found the respondent responsible in a proportion of two thirds and the suppliant for one third of the collision. This common fault, in the light of art. 1106 of the *Civil Code,* quoted hereunder, is joint and several between both tortfeasors:

1106. The obligation arising from the common offence or quasi-offence of two or more persons is joint and several.

Consequently, damages eventually allotted will be payable by the respondent who, having instituted third party proceedings against George Laham, held responsible for one third, will have the right to recover from the latter a corresponding proportion of all damages assessed.

GEORGE NESRALLAH:

This man suffered multiple injuries to the skull, body and limbs, from the head-on collision, and was rushed to the Gatineau Memorial Hospital the night of June 4, 1961, where Dr. David Conrad Geggie attended him. Nesrallah, according to the Doctor's evidence, was in a state of considerable distress, conscious but suffering from shock. A bone of his left hand was broken, bruises appeared about the head and neck and a contusion to the right temple extending over the right eye. He bled from the left ear, a result of the trauma of collision. X-rays immediately taken revealed an injury to the seventh cervical bone. A plastic cast was applied to the left arm and head. Transfer to Ottawa Civic Hospital ensued the same evening.

Dr. William H. Caven took charge of the case at Ottawa Civic and, in turn, diagnosed severe bruises to head, neck, chest, abdomen and also a broken finger. George Nesrallah remained in hospital for a week, the bruises and pains gradually diminishing and allowing his subsequent release.

Dr. Caven is of opinion that two complaints are still present: headaches in right temporal side of the forehead and soreness in the neck. This, explains Dr. Caven, may cause a "referred headache" of considerable severity as also neckaches, especially when the muscles and ligaments become tired. The doctor thinks those troubles result from the automobile accident of June 4, 1961. He also believes the painful spells may continue for several years and then decrease. He examined Nesrallah last on June 2, 1964, and had seen him frequently over the past three years.

Dr. Huston Kellam, an orthopedic surgeon, sounds more optimistic. He checked Nesrallah's condition and studied X-rays of forehead and neck taken in May, 1964. This specialist can assign no clinical cause to the headaches as no head injury exists. Difficulty in moving the neck from side to side was observed and the X-rays reveal signs of "wear and tear" in the fourth and fifth neck vertebrae, with no traces whatsoever of ruptured muscles or ligaments. The soreness, testifies Dr. Kellam, may, within a year or two, settle down or disappear, especially if physiotherapy treatments are resorted to, which would considerably improve matters.

Nesrallah consulted also Dr. Courtney Evans, an Ottawa physician specializing in internal medicine, on October 25, 1963. The result of this check-up indicated headaches and a thickening of tissues consistent with a blow. There was a tender spot at base of skull on the right side, immediately remedied by an infiltration of cortisone bringing complete relief within two days. The headaches became less frequent and more tolerable after that. Unfortunately, continues Dr. Evans, a relapse occurred in January, 1964, with a return of the headaches and soreness in the neck. X-rays showed a flattening of the neck curve with too close a contact of vertebrae C-4 and C-5. Physiotherapy proved disappointing, the headaches and neck pains recurring to this day.

George Nesrallah, after describing the sufferings endured immediately and shortly after the accident, testifies he remained nine days in bed and that abdominal pain troubled him for a couple of months. He resumed work steadily after his release from hospital on or about June 13, 1961, but the headaches would come on every two to three weeks. The daily exercises recommended by Dr. Evans proved successful although the witness has spells of migraine two or three times a week.

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The special damages sought by George Nesrallah, less $400 to be dealt with later on, are as follows:

Dr. Caven	$250.00
Ottawa Civic Hospital	211.20
Dr. Courtney Evans	100.00
Gatineau Memorial Hospital	11.50
Dr. Charette	70.00
Drs. Geggie & Thompson	30.00
Mrs. H. Brottman	36.00
	$708.70

This suppliant is a cook in his own restaurant. His working hours are 6:00 a.m. to 9:00 p.m. and he also attends at the counter and serves tables. Although a contradiction would appear in that Nesrallah says he spent no more than nine days in hospital and resumed his job at once, he further states that he was away from work for a month and a half. I believe he required this length of time to regain his usual condition. His absence from the restaurant entailed a loss of some $400 for which he will be indemnified as also for $708.70 expended on medical and hospital treatments.

The heading: general damages includes compensation of $4,000 for pain and suffering and $3,000 for inconvenience and loss of enjoyment of life during total incapacity and convalescence. I intend to link together these two claims, for which I would allow $1,000.

Next, comes a demand of $15,000 for permanent incapacity, of which absolutely no trace was proved beyond a recurrence of headaches and to a certain degree of soreness in the neck, that do not prevent Nesrallah from working "15 hours a day". Such inconveniences are bothersome and even painful, but cannot create a state of permanent incapacity, and an amount of $1,000 is a fair and sufficient indemnity.

For future medical expenses, I would not go beyond the amount of $500.

Consequently, the total indemnity granted to George Nesrallah adds up to $3,608.70.

ELAINE NESRALLAH:

This petitioner has become, at an unspecified date since June 4, 1961, the wife of George Laham, the suppliant in the cognate petition *ante* p. 440. She will be described, throughout, under the name assumed in this action, her maiden one of Elaine Nesrallah.

The evidence adduced by Drs. David Conrad Geggie, William H. Caven, Lorne Burdett, and in Dr. Frederick Miles Woolhouse's affidavit, undeniably attests that Miss Elaine Nesrallah, as she then was, suffered severe facial lacerations.

Dr. Geggie, who attended her at the scene of the accident and at the Gatineau Memorial Hospital, noted lacerations, some of superficial extent, others very deep. Minor arteries were severed and a condition of shock existed. There also were jagged cuts in the patient's face with glass in them. Some teeth appeared loosened. Miss Nesrallah had bled profusely and the next morning a 10-gram blood transfusion was had. A facial operation, lasting 90 minutes, under local anaesthetics, became necessary. Six under-skin sutures were made to blood vessels and fifty sutures applied to the skin, each of these requiring two perforations of the jagged derm. The upper gum had to be sewed and also the inner tissue of the nose. The injured girl was removed to the Ottawa Civil Hospital, where she spent five days, under the professional care of Dr. William H. Caven and Dr. Lorne Burdett.

"After some time", says Dr. Caven, "the pain diminished but my patient remained considerably disfigured and I referred her to the plastic surgeon. These sequels were uncomfortable rather than excruciatingly painful."

One month after the accident, Dr. Lorne Burdett, an Ottawa plastic surgeon, examined Miss Nesrallah and could still find rather severe cuts, the major one extending on the left cheek. Stitch marks were apparent and severe disfigurement. Surgical treatment followed to excise the scars and close the wounds with eight inches of excising of $\frac{1}{4}$ inch in depth. Subsequent to healing, and to facilitate the planing down action of the skin, smoothing treatments were given. Freezing was applied to allay the pain. A scab developed lasting over a couple of weeks.

Dr. Burdett saw this patient on June 12, 1964, during the trial, and noticed a residual scar on the left cheek. He concludes with this remark: "The results are very satisfactory."

Dr. Frederick Miles Woolhouse, director of the traumatic and reparative unit at Montreal General Hospital, filed an affidavit, of record in the case, detailing at length the condition of Miss Nesrallah in the course of her several visits to his office and the treatment he applied from October 18, 1962 to September 12, 1963. In para. 6 of this affidavit, the results of Dr. Woolhouse's first examination, on October 18, 1962, are carefully mentioned. Para. 13 reads thus: "As a result of the surgery above described, I am of the opinion that the scarring of Mrs. Laham's face has been reduced and that the overall cosmetic result is better."

Petitioner's counsel requested me, as his client stood in the witness box, to attentively scan her face. I must say that I could not then detect any perceptible signs of former hurts. Miss Nesrallah had responded successfully to plastic surgery of great skill since the taking of two photographs, exhibits S-4(1) and S-4(2), on July 17, 1961.

Special damages, to which I join Dr. Woolhouse's account for $600, reach a total of $1,905.25 and are allowed.

There is a duplication of claim for loss of income in the special and general damages columns, totalizing in all $800. It remained undisputed that Miss Elaine Nesrallah, and understandably so, did not resume her occupation as waitress until eight months after her injury. Her salary was $30 a week. In the absence of evidence that her marriage to George Laham intervened during the period extending from June 4, 1961, to the probable resumption of her tasks early in February, 1962, I must grant her claim of $800 for loss of income.

Next comes the chapter of general damages for which an aggregate total of $50,500 is sought: $17,500 for pain and suffering, for inconvenience and loss of enjoyment of life during incapacity and convalescence; $32,000 for disfigurement and scars, for loss and damage to teeth; $1,000 for permanent incapacity.

It may be appropriate to repeat a truism so often forgotten: an accident such as that suffered by the claimant, so long as common sense holds some sway in human affairs, is and will remain, objectively considered, an unfortunate hazard of the road and not a windfall. Doubtless, these misfortunes result from somebody's fault, and it is the Court's endeavour to impose upon the tortfeasor the legal redress of the prejudice resulting from his wantonness. But, beyond this tangible ground, caution is imperative in order to avoid changing a mishap into a roseate boon of Fortune.

For pain and suffering, for inconvenience and loss of enjoyment of life during total incapacity and convalescence, I would allow $3,000 owing to the protracted duration of surgical treatment.

For disfigurement and scars, hardly observable now, and for loss of and damage to teeth, $1,200 seems to me an ample indemnity.

Regarding the sixth listing "Permanent incapacity", no similar sequel was conclusively proved, save perhaps the difficulty in closing the right eyelid. For this, and to eliminate doubt, however remote, I will grant the entire amount of $1,000.

The total indemnity extended to this claimant amounts to $7,905.25.

SANDRA NESRALLAH:

The third petitioner is Miss Sandra Nesrallah, seriously hurt in the crash. Her case is outlined in Dr. D. C. Geggie's testimony, who states that: "The injured person appeared in great pain and distress immediately after the accident, suffering from a broken leg between knee and hip, with an obvious shortening and twisting of this limb. Hypodermic injections relieved the pain and a metal splint was applied. A fracture of this sort, that of the largest bone in the body, results only from a major trauma consequent to a violent impact. The left femur was fractured and, after insertion of the metal or 'Thomas' splint to straighten the fractured bone, limb traction was had. This inflicts great pain to a patient. The injured leg was twisted in $\frac{1}{4}$ deviation from its normal position." Later, on the night of June 4, 1961, Sandra was hospitalized in the Ottawa Civic.

Dr. Ross Craig operated on Miss Nesrallah, inserting a 15″ steel nail in the bone. The surgical intervention lasted $1\frac{1}{2}$ hours, and a second operation of an hour's duration was required to extract the steel prop. Sandra Nesrallah was confined to bed for ten weeks and subjected to daily physiotherapy. She endured suffering for at least two weeks, and her release from the hospital did not occur until August 17, 1961. She moved about on crutches until November, 1961, and could not rely on her injured leg until January of the next year. The petitioner now walks freely and suffers no limp.

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Exhibit S-3 details the special damages prayed for: $2,596.90 for medical and hospital bills. I will grant the total of $2,596.90.

This young woman, at the time of her injury, was doing secretarial work in a local office, at a monthly salary of $245, paid for June 1961, but, on account of her disability, unpaid during the period July 1 to January 1, a loss of $1,470, now allowed for compensation.

On the topic of general damages, I would grant $2,500 for pain and suffering, inconvenience and loss of enjoyment of life during total incapacity and convalescence, keeping in mind that the excision of the steel nail, by means of another operation, intervened a year later.

Fortunately, no facial lacerations occurred in her case and, for obvious reasons, the scars, if any, on leg and thigh are not discreetly noticeable. Dr. Craig singled out a shortening of $\frac{1}{4}''$ of the injured leg explaining that this was not necessarily a sequel of the accident, but could be.

Due to this admissible conjecture, an indemnity of $1,000 is included.

The total compensation extended to Sandra Nesrallah amounts to $7,566.90.

To recapitulate the preceding allocations of damages:

George Nesrallah will receive	$ 3,608.70
Elaine Nesrallah-Laham	7,905.25
Sandra Nesrallah	7,566.90
a grand total of	$ 19,080.85

The petitioners are entitled to recover their costs after taxation.

Her Majesty the Queen, respondent, as previously indicated, annexed to her defence a statement of claim against third party, in this instance George Laham, the suppliant in petition of right *ante* p. 440, who was held responsible of the automobile accident on June 4, 1961, in the proportion of one third. A similar conclusion follows in the matter of the third party proceedings and the Court, therefore, enacts that George Laham will indemnify Her Majesty the Queen to the extent of one third of the pecuniary damages accorded to the three claimants in petition of right no. A-714.

The respondent will be allowed one third of the costs after taxation.

Judgment accordingly.

BETWEEN:

1962
Nov. 12-16, 20-23, 28-30
Dec. 3-7
1963
Apr. 16-19, 22, 23
1964
Apr. 17

OMARK INDUSTRIES (1960) LTD. ....PLAINTIFF;

AND

GOUGER SAW CHAIN CO., and TEVIR PRODUCTS LIMITED, sole proprietor of SABRE SAW CHAIN COMPANY and JIMDEB COMPANY LIMITED, HELCHA COMPANY LIMITED, LARGOLD COMPANY LIMITED and NEEROD COMPANY LIMITED, a partnership trading under the name SABRE SAW CHAIN COMPANY and said SABRE SAW CHAIN COMPANY ....DEFENDANTS.

Patents—Infringement—Validity—Significance of commercial success of patented invention with respect to validity—Range of approximation afforded a patentee—Definition of monopoly in claims of patent—Duty imposed on patentee by s. 36(2) is heavy one—Theory of substance or pith and marrow—Determining meaning of claims—Construing the claims of a patent—Comparison of allegedly infringing article to be with the claims of the patent not with plaintiff's product—Verification of plaintiff's product as embodying the claims of the patent—Prior art to be compared with claims of the patent, not with plaintiff's product—Novelty—Anticipation—Obviousness—Lack of invention—Variation from strict wording of claims—Interpretation of meaning of specific words in claims—Object invented may be considered at time subsequent to its manufacture in certain cases—Presumption of validity—Prior use or knowledge available to public—Prior invention genuinely given to public—Prima facie validity of patent does not extend beyond application date—Burden of proving earlier date of invention—Certified copy of prior application for U.S. patent as evidence of earlier date of invention—Documents as evidence of anticipation—Prior use as evidence of anticipation—Experimental use as prior use—Nature of prior use required to defeat patent enjoying great commercial success—Interpretation of claims of combination patent—Combination patent—Textual infringement—Infringement where variations in offending article do not affect substance of the patent—Mechanical or chemical equivalency—Doctrine of taking the substance of a patent—Immaterial whether offending device better or worse than patented invention—Liability of director of company for its infringing acts.

This is an action brought by the plaintiff as owner by assignment of Canadian patent No. 468,826 issued on October 17, 1950 for infringement thereof by the defendants, all of the defendants save Gouger Saw Chain Co. having been added as parties defendant by order under Rule 228 of the Rules of this Court. The defendants claim no infringement and that the patent in suit is invalid because it has been anticipated, lacks inventiveness and the claims are so worded that they describe an inoperable device. The invention relates to the shape or configuration of the tooth of a saw chain particularly adapted for cutting wood.

The evidence established that the plaintiff's saw chain, referred to as the "chipper chain", is superior to any saw chain previously available and

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that because of its cutting effectiveness and ease of maintenance in the field it has practically swept the other types of saw chain off the market and has attained tremendous commercial success in Canada as well as in the United States.

Held: That it now appears to be accepted in patent matters that a director of a company can be held liable in some cases with and for the company for its infringing acts.

2. That the commercial success of a patented invention has significance with respect to the validity of the patent only if it is shown that the success is due to the invention and not to extraneous matters.
3. That the law affords a patentee a certain range of approximation providing the language of the claims of the patent and the use to which the invention is adapted so permit.
4. That the claim or claims in a patent alone define the monopoly where the patentee has a statutory duty and an obligation to state what is the invention he desires to protect.
5. That although the duty placed on the patentee by s. 36(2) of the *Patent Act,* to claim clearly, distinctly and explicitly that which he claims is his exclusive property, is a heavy one to discharge and should not be allowed to be obscured by the theory of substance or pith and marrow, it must be tempered by adding that the approach of the Court must be to look at what the inventor did and what his invention achieved.
6. That although the claims define the monopoly, in determining what these claims mean, the specifications at large must be considered and the whole document read.
7. That when construing the claims of the patent one must divorce one's mind from the prior art and look at what the claims mean by their words and to determine whether there is infringement or not one must compare the defendant's allegedly infringing article not with the disclosure nor with what the plaintiff is doing in the market place but with the claims of the patent. It is an illegitimate approach to compare the defendant's article with the plaintiff's article, unless the latter has been verified as embodying the claims of the patent.
8. That when considering validity, either from the standpoint of novelty, which is anticipation, or obviousness, which is lack of invention, it is necessary to construe the claims to see what invention, if any, they define, and then the prior art put forward should be considered, but when looking at the prior art one should not compare it with the plaintiff's structure as made and sold in the market place but with the claims of the patent unless the plaintiff's structure has been verified as being in accordance with the claims of the patent.
9. That the words "substantially at right angles" as used in claim I of the patent in suit must be read in the light of the disclosure and the drawings as they appear in the patent and if that is done it becomes apparent that they cannot mean precisely at right angles, and the evidence that variation in this respect would have no effect on the operation of the saw chain confirms that a relatively wide interpretation should be given to the word "substantially".
10. That applying the ordinary rules of interpretation as to the meaning of the word "balance" as used in claim I and looking at it from the viewpoint of the competent skilled workman in the art at the date of the patent and the meaning ascribed to that word in the prior art it

can be seen that it is a relative term which means that the tooth is so constructed that it gives stability and smoothness as well as all those things which enable the tooth during the whole of its working life to give a satisfactory performance.

11. That the proposition that the object invented should be considered in its condition at the time of manufacture and not at some later time after it has been used has no application in this case because the saw tooth in question was conceived and described bearing in mind that it was to have a working life during which constant and repeated sharpening would be required, and because of this the condition in which this tooth becomes after use is a very important consideration of the invention. The character of the device at the time of manufacture must be considered in this case, having regard to the object and the use of the invention during its existence.
12. That the saw teeth produced by the plaintiff and sold in the market embody the invention as claimed in the patent in suit, so that the saw tooth manufactured by the defendants may now be compared with what the plaintiff has been selling in the market.
13. That the defendants not only have the burden of setting aside the presumption of validity of the plaintiff's patent as set out in s. 48 of the *Patent Act* and which covers all the requirements of a patent such as novelty, utility and inventiveness, but also, when they allege prior use or knowledge under s. 28(1)(*a*) of the Act, they must not only establish this prior use or knowledge but also that it was made available to the public as required by s. 63(1)(*a*) of the Act.
14. That it is not sufficient for one to invoke s. 63(1)(*a*) of the *Patent Act* to defeat a Canadian patent by alleging prior invention. He must establish that such invention was genuinely given to the public before the application for the patent in suit was filed.
15. That if the patentee seeks to bring his date of invention earlier than the date which appears on the face of his patent and to which he is entitled by the words of the Patent Office he has the burden of so doing and the *prima facie* validity of his patent does not go beyond the application date unless an earlier date is proven by cogent evidence.
16. That when the plaintiff seeks to establish a date of invention earlier than the date of application for the patent in suit, it is sufficient for this purpose for him to introduce in evidence a certified copy of a prior application for a United States patent where such application identifies the inventor by name and address as the same person as the inventor in the Canadian application and both applications deal with the same invention. If the certified copy of the prior U.S. application is not contradicted by evidence, the plaintiff will have succeeded in establishing the date of the U.S. application as the date of first invention.
17. That when documents are brought forward as anticipations, they must be read singly and must in no way be combined together to form a mosaic of extracts.
18. That with respect to evidence of prior use as anticipation, the test should be even stricter than in the case of written publications because in the latter case there is something concrete to go on, a document or a writing, but when dealing with prior use, one is concerned with memory.
19. That fortuitous or experimental use which does not lead to the invention going to the public cannot be accepted as prior use.

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20 That in the case of an invention which has realized great commercial success, the evidence of prior use must be of such a character as to leave no doubt in the mind of the Court that it was the invention as invented that was used and no other, and any difference, even of a minor nature, would not be a prior use sufficient to defeat a valuable patent.

21 That in the case of a combination patent the claims should be given a reasonably restrictive interpretation allowing them to encompass a reasonable manifestation of the invention, so that it may be possible to find that the invention has not been anticipated without having to limit the substantiality of the invention in protecting it against infringers.

22 That in a combination patent it is not permissible to characterize the invention as a series of parts because the invention lies in the fact that they were put together and in the present case, the invention may well reside in the very idea of arranging a saw tooth so that its configuration will allow not only ease of filing and maintenance but also will give excellent cutting.

23. That the apparently trifling change from the prior art which led to the solution of the problems of filing the saw teeth in the field while permitting the saw chain to cut satisfactorily and the considerable commercial success resulting therefrom confirms that the invention in suit was a forward step of great importance in the trade and definitely stamps it as being an invention of great importance.

24. That the claims must be looked at by the competent skilled workman at the date of the patent with "a mind willing to understand, not by a mind desirous of misunderstanding".

25. That the matter of infringement can be considered from two standpoints. The claims having been properly construed according to the canons of construction, is the offending device within the text of the claims. If so, this is called textural infringement and this is the end of the matter. However, if the device is not within the precise wording of the claims, it may nevertheless still be an infringement if the substance or pith and marrow of the invention has been taken on the basis that the property in a patent is not to be taken away by someone making variations which do not affect the substance.

26. That the doctrine of mechanical or chemical equivalency is only one facet of the larger doctrine of taking the substance of an invention and it therefore appears that the substance may be taken when the infringer, using small variations of dimensional details only to distinguish his device from that of the plaintiff, produces a device which performs exactly the same function.

27. That it is immaterial whether a device is better or worse than the invention of the plaintiff, but if there is nothing functionally different, it is an infringement.

28. That the defendant's device will infringe the plaintiff's patent where they both work satisfactorily, there is no difference in the main elements of the structures, none in the operation and both perform the same function in the same way.

29. That the defendants have infringed the plaintiff's rights under the claims in suit.

Practice—Rule 228 of Rules of Court—Joinder of parties defendant—Multiplicity of proceedings—Rule 22A of Rules of Court—Earliest date of *invention relied on by plaintiff includes all dates earlier than application date on which plaintiff to rely—Practice of this Court regarding evidence of tests and experiments conducted pendente lite or ex parte.*

Held: That it is in the interests of justice that multiplicity of proceedings be avoided particularly when the subject matter is a wasting asset such as a patent.

2. That the purpose of Rule 22A of the Rules of this Court is to allow the opposite party to know not only the earliest date of invention upon which his opponent intends to rely, but also all the dates upon which he intends to rely, together with "the nature of the acts upon which he intends to rely for the purpose of establishing the same", and this is so in order that he may be fully informed so as to be able to decide whether or not he should contest the proceeding and also to insure that he will not be taken by surprise.

3. That the practice in this Court seems to have been that evidence of tests and experiments conducted *pendente lite* without notice to the other side and an opportunity being given to attend should not be considered, and this is a salutary rule. In any event, tests and experiments conducted even before trial in the presence of the other party are much more probative than if conducted *ex parte.*

ACTION for infringement of a patent.

The action was tried by the Honourable Mr. Justice Noël at Ottawa.

Gordon F. Henderson, Q.C., David Watson and *Jean Richard* for plaintiff.

Harold G. Fox, Q.C., Donald Sim, Q.C. and *Jacques Bonneau* for defendants.

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

NOËL J. now (April 17, 1964) delivered the following judgment:

This is an action for infringement of patent No. 468,826 issued on October 17, 1950, to Joseph B. Cox the inventor, assigned to Oregon Saw Chain Manufacturing Corporation and now owned by plaintiff Omark Industries (1960) Ltd. to which it was assigned on the 2nd day of March, 1962, by a document bearing that date including the right to continue any suits for infringement of the said Canadian patent brought by the assignee under the name of Omark Industries (1959) Ltd. and to all claims for damages or other recovery by reason of the infringement of the said Canadian patent No. 468,826 occurring prior to the effective date of such assignment. The plaintiff Omark Industries (1960)

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Ltd. is a body politic and corporate having its head office and principal place of business at the City of Guelph, in the Province of Ontario. The defendant, Gouger Saw Chain Co. is a sole proprietorship owned and operated by Galt Die and Stamping Company Limited and carried on business at 519 Parkdale Avenue North, in the City of Hamilton, in the Province of Ontario, until sometime in July 1961 when it moved to other premises located at 618 Parkdale, in the same city. The defendant, Sabre Saw Chain Company was a sole proprietorship owned and operated by Tevir Products Limited from February 1, 1961, to October 10, 1961, and then owned and operated by Jimdeb Company Limited, Helcha Company Limited, Largold Company Limited and Neerod Company Limited, all of the City of Hamilton, in the Province of Ontario, from October 10, 1961 to date.

The defendants other than Gouger Saw Chain Co. were all joined as parties defendant to the present action by a verbal judgment delivered by me on November 28, 1962, following a motion made by counsel for the plaintiff on November 23, 1962, requesting that they be so joined, launched pursuant to Rule 228 of the Rules of this Court which allows the adding of parties to an action by the Court even *ex parte* where by reason "of any event occurring after the commencement of an action and causing a change or transmission of interest or liability . . . or for any other cause it becomes necessary or desirable that any person not already a party to the action should be made a party thereto."

My decision to so join the above defendants was based on a number of facts disclosed in an examination for discovery of one John Salvisburg, a former manager of plaintiff's Canadian operations, who had an interest in Gouger, as well as in the other defendants, and was one of their main executive officers. I had authorized this examination to be conducted upon the request of counsel for the plaintiff for the purpose of assessing the situation and determining whether these new defendants should be joined or not.

The facts thus revealed by Mr. Salvisburg, in some cases reluctantly after a lengthy, arduous and at times trying discovery, were of such a nature that I felt the interests of justice would be better served if these parties were joined as defendants.

Indeed, after the taking of the present action against the first defendant Gouger Saw Chain Company, on April 1, 1959, and before the above facts, of which I shall say more later, were revealed, the plaintiff on October 11, 1962, took another action for infringement of the same patent against Sabre Saw Chain Company and the four partner companies, Jimdeb Company Limited, Helcha Company Limited, Largold Company Limited and Neerod Company Limited under No. A-872 of this Court with identical issues and therefore dealing with the same subject matter, the only possible difference, and this would not be of any substance from what I observed, being the consideration of one additional chain "the Sabre" whose structure may not be exactly the same as that made by the defendant, Gouger, in the same manner, however, as the structure of the Gouger tooth may not be exactly identical to that of the plaintiff.

Had the plaintiff, at the time of the taking of the above action No. A-872, known the following facts disclosed by Mr. Salvisburg's discoveries, there is no question in my mind that the plaintiff would have requested they be joined in the present action and the second action would not have been taken.

Indeed, as soon as Gouger, as a sole proprietorship of Galt Die and Stamping Co. Ltd., stopped manufacturing on January 31, 1961, Sabre Saw Chain Company, as a sole proprietorship of Tevir Products Ltd., with Gouger's equipment and staff, carried on its operations in the same premises as Gouger, at 519 Parkdale Avenue North, Hamilton, until July, 1961, when the operations were removed to 618 of the same street in that city, where operations were continued until October 10, 1961, when Sabre Saw Chain became the sole proprietorship of Jimdeb Co. Ltd., Helcha Co. Ltd., Largold Co. Ltd., Neerod Co. Ltd., a partnership trading under the above name and continued the manufacturing of the Sabre tooth with some of Gouger's equipment and all of its staff. The drawings used by Sabre Saw Chain Company, whether as a proprietorship of Tevir or of the four above mentioned corporations were Gouger's drawings and the same people, James Moses, Lawrence Goldblatt and John Salvisburg, were all officers and interested in all the defendants, Salvisburg further admitting that notwithstanding the change of ownership there was a continuity of operations, in that some of the same equipment was used,

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the same trade mark utilized, and the employees of Gouger remained throughout those of the other defendants. He also admitted that Sabre Saw Chain Company was contributing financial assistance to the defence of the present action and that he personally was actively participating therein.

It therefore occurred to me that because of those facts and the similarity of the subject matter, there ought not to be here a multiplicity of proceedings and these new defendants should be joined. By so doing, I felt that dealing as we are here with a patent which is a wasting asset, the decision in the present action of the Sabre issue, as well as that of Gouger, at an early date, would be in the interest of justice and in the event the plaintiff was successful, his costs could be recovered from all of the defendants.

It was on this basis that I allowed these defendants to be joined as such in these proceedings.

I have gone into this matter in some detail because counsel for the plaintiff submitted in his argument that the joining of these defendants went much further than that. Indeed, he urged that I had found in the oral judgment rendered on his motion to join, that Sabre was a successor to Gouger, that for a period of time, from February 1961 to October 10, 1961, Sabre made the chains for Gouger, that Sabre was financing this lawsuit and that there was in general a joint relationship of the parties and that, therefore, Sabre was responsible for the actions of Gouger by reason of the above relationship.

Now there is some authority to the effect that a director of a company can be held liable with the latter for infringement when he personally directs the company's infringing activities.

This rule was applied in the High Court of Justice, Chancery Division in *Reitzman and Another v. Grahame-Chapman and Derustit, Ltd.*[1]

This decision is supported by *Halsbury's Laws of England*, 2nd edition, vol. 24, No. 1226, at p. 652, when dealing with the responsibility in some cases of directors of a company for the torts committed by the latter:

> Normally the directors of a company are not personally liable for the company's torts, even if they are managing directors or the sole directors and shareholders. In order to make them responsible it must be proved either (1) that they have formed the company for a tortious purpose; or (2) that they have directly ordered or authorised the acts complained of; or (3) that they have so authorised or ordered by implication.

[1] (1950) 67 R.P.C. 178.

This whole matter was well stated by Lord Atkin in *Performing Right Society v. Civil Theatrical Syndicate*[1], citing Lord Buckmaster in *Rainham Chemical Works v. Belvedere Guano Co.*[2]:

Prime facie a managing director is not liable for tortious acts done by servants of the company unless he himself is privy to the acts, that is to say unless he ordered or procured the acts to be done. That is authoritatively stated in *Rainham Chemical Works v. Belvedere Guano Co.*, where it was sought to make a company liable for an explosion upon their works in the course of manufacturing high explosives. The company were held liable on the principle of *Rylands v. Fletcher.* It was also sought to charge two directors with liability. They were eventually held responsible because they were in fact occupiers of the works. It was contended that they were liable on the ground that they were managing directors of the company, that the company was under their sole control as governing directors, and that they were responsible for the work done by their servants. Lord Buckmaster said: "I cannot accept either of these views. If the company was really trading independently on its own account, the fact that it was directed by Messrs. Feldman and Partridge would not render them responsible for its tortious acts unless, indeed, they were acts expressly directed by them. If a company is formed for the express purpose of doing a wrongful act or if, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences, but there is no evidence in the present case to establish liability under either of these heads.

Although, as we have just seen, it now appears to be accepted in patent matters that a director of a company can be held liable in some cases with the latter and for the latter, the liability of one corporation for the infringement of another, as suggested here by counsel for the plaintiff is, in my opinion, another matter which appears to be fraught with considerable difficulty.

Now, before going any further in this matter, I might pause to say that if the joined defendants could be held responsible for the acts of Gouger as successors to the latter and as formed for the express purpose of doing a wrongful act assuming, of course, that the defendants have all infringed a valid patent, this responsibility in any event cannot go beyond the date upon which I must assume the new defendants came into existence which, as we have seen, would be February 1, 1961, for Tevir and October 10, 1961, for the four company partnership, i.e., at a time when Gouger was no longer operating.

I might have, under the circumstances disclosed in the discovery and under the above authority, been prepared to

[1] [1924] 1 K.B. 1 at 14. [2] [1921] 2 A.C. 465.

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hold the individuals jointly responsible with Gouger for any of the acts committed by the defendants joined herein had they been made a party to these proceedings on the basis that they had expressly directed the tortious acts complained of, which, of course, is why they would be so held liable but to hold Tevir and the four limited corporations which traded under the name Sabre Saw Chain Company, liable for the infringement committed by Gouger, even under the circumstances revealed, including the close association with the first defendant, would not, for the above reasons, seem possible.

It therefore appears that my purpose in adding these new defendants to this action was to determine the rights of all in one proceeding in view of the similarity of the subject matter and also in the event the validity of the patent is upheld and infringement is proven, to allow recovery of plaintiff's costs from the defendants. However, with respect to the matter of damages, the latter will have to be allotted on the basis of the individual responsibility of each defendant.

I now turn to the action proper herein and particularly to the statement of defence and the particulars of objection where, although a large number of matters were raised, they can broadly be narrowed to the following. The defendants have not infringed the patent, and even if they have, the patent is invalid because it has been anticipated, and/or it lacks inventiveness and, finally, the claims are so worded that they describe an inoperable device.

The invention, according to the plaintiff, defined by the claims in suit relates to the tooth of a saw chain particularly adapted for cutting wood although the title of the patent appears as "Power Saw Chains" and the disclosure deals with "saw chains".

The invention dates on which the plaintiff relies go back to May 21, 1947, May 30, 1947, and July 29, 1947, and although I intend to deal with this matter at greater length later in this judgment, it will suffice for the time being to say that the invention date is in dispute on the basis that when the defendant, under Exchequer Court Rule 22A, required the plaintiff to state the date on which he proposed to rely, the latter stated he was going to rely on a date of invention of May 21, 1947, on which date a drawing of the invention was made without mentioning the other two dates subsequent thereto on which he later, at the trial, stated he relied also; the defendants also contest the evidence adduced to support the above dates.

The invention covered by the patent in suit relates to a particularly conformed tooth on a saw chain. The particular object of the invention is to provide a saw chain that would make wood cutting in the field easier and more productive by providing teeth that could be easily, rapidly and effectively sharpened and maintained in the field on the saw bar even by a non-professional filer by means of a simple operation and with a single round file held in one filing position and not on a vice as most of the saw chains had to be sharpened prior thereto. A saw chain that would provide easy maintenance and sharpening without sacrificing good cutting qualities presented a substantial problem to those engaged in the art. Another object, as stated in the disclosure, was to provide a saw chain in which the cutting edge of each tooth extends for substantially equal distances on opposite sides of the plane of the base plate so that the load during cutting operations of the tooth is substantially balanced upon the opposite sides of the central plane of the tooth plate and by so balancing the tooth load eliminate thereby alternate lateral outward gouging and inward tearing or jerkiness in operation.

A more specific object was to provide a new and improved saw chain in which each cutting tooth is of such configuration and the cutting edge so formed thereon that the load during cutting operation is substantially balanced on the opposite sides of the median plane of the base of the tooth.

This tooth has a particular configuration or shape, with an outwardly curved portion called a shank, a flat toe which extends over the edge of that plate portion and in front of this tooth there is a depth gauge which rides in the bottom of the part of the wood that is cut out by the tooth and which is called the kerf. This shank portion is cylindrical, with the upper end of the plate and extends outwardly, then it is reversely curved and doubled back over itself merging with the flat toe portion; the latter extends from the upper end of the curved shank portion and also across the upper end of the plate on which the tooth is formed and is substantially at right angles to the plate, the forward end of both the shank and the toe portions being provided with a bevel, and the bevel surface which defines the for-

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ward end of the toe and shank portion conforms to a cylindrical surface and the axis of this cylindrical surface extends in a horizontal plane substantially parallel to the plane of the toe portion. Furthermore, each tooth has a top and lateral clearance angle which allows it to operate smoothly in the kerf. There are teeth of this description on each side of the plate left and right and the saw chain can be more fully described as follows: There is a right cutter with a depth gauge and tooth, the tie strap is on the left and the cutter link is on the other side and the drive link with the root portion in between. Then come the two tie straps and the opposite structure with a left cutter, a tie strap on the right and root portion and a number of these left and right cutters are assembled in a chain which fits into a bar by means called the root portion of the drive link. This chain then moves around on a stationary saw bar propelled by a motor.

The depth gauge as we have seen is at the front of each cutter and gauges the depth of the cut. There is a distance between the depth gauge and the tooth and this is of some importance here because there must be sufficient space to allow a file to be inserted to sharpen the teeth. This sharpening of the tooth dealt with in the patent in suit is done by means of a round file and it can be seen that because of this the configuration of the tooth is cylindrical so as to allow the file to nestle in this cylindrical part thereby insuring that there will be no error in filing. The particular configuration of this tooth with a flat toe over the edge of the plate makes it possible to have this cylindrical inner cutting surface and at the same time assists in delimiting the proper insertion of the round file, thereby allowing even the inexperienced filer to properly sharpen the teeth.

In other words, this cutter tooth provides its own guide for filing because there are dimensions which enable one to fit round files into the concave portion. Indeed, the whole bevel conforms with the cylindrical surface of the file so one has a mating of these two units. The flat top gives a guide and prevents the file going upwards or downwards so we have here a mating in different directions by reason of the bevel's lateral movement and by reason of the flat top.

The plaintiff claims that the manner in which the shank portion and the toe portion is cut does not only facilitate sharpening or maintenance but it also, at the same time, improves the cutting.

The tie straps merely tie the unit together in an articulated way to complete the pivotal chain structure, so that it may move around the chain saw which incidentally is the whole assembly, the motor, the sprocket, the bar and the saw chain as opposed to the latter which, as we have just seen, is the chain proper only.

The cutting links are spaced apart and this gives a sawdust and chip clearing area whereby both can be eliminated. The patent in suit is called a chipper saw because it actually chips out the wood.

According to the plaintiff it is the combination of the shank portion and the toe portion and the cylindrical surface which gives the advantages which flow from this invention. The better filing is what enables it to be maintained efficiently and this is done without the sacrifice of speed or smoothness.

Evidence was given as to the state of the relevant art by a number of witnesses and exhibits. A simple band saw (Ex. 9) was first dealt with composed of a series of two outwardly disposed slitter teeth which slit the fibre of the wood as one saws. Then we come to the ordinary cross-cut saw which has both slitter and raker or router teeth. The sample before the Court, Ex. 10, has four slitter teeth alternatively left and right followed by a raker tooth down the centre. In this saw the slitter teeth slit the fibre and the raker teeth rake it.

We then come to the scratcher or the cross-cut Oregon chain (Ex. 44) which was an attempt to have slitter and raker teeth in a chain. On this chain the router teeth, which are in the centre, have the root on a link which fits into the saw bar and then there are slitter teeth on the left and on the right, and so on. The sequence of the teeth are as follows: left slitter tooth, centre router, right slitter, left router, left slitter, right router, right slitter, centre router.

There is then the Hassler chain which is sometimes called the Atkins-Hassler chain with a root portion on one drive link that fits into the saw bar and on which link there are slitter teeth to the right and left and a depth gauge on the same tooth. We then have the tie straps and right and left routers or rakers. On the next link there are two slitters

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oppositely disposed to those on the first link. The first ones are right and left and the second ones are left and right. As for the routers, when the first are right and left, the second are left and right.

The next chain saw is the chisel (Ex. 43) which has a chisel tooth. The latter here is at a right angle, the shank portion being straight as well as the toe. There is a clearance angle but the shank portion is straight and at right angles to the toe. It is not outwardly curved.

The next chain is called a number of names such as the half-circle, Merz, demi-lune and the Low-R and the High-R. This chain does not have a flat toe but a half-circle and the depth gauge here is not on the same link as the tooth.

With respect to the scratcher chain, Mr. Carlton, one of the plaintiff's witnesses, explained that in this saw chain the slitter teeth come in contact with the wood first providing the little grooves or the slitting operation of the cross-grain. They are then followed by the router teeth each one taking out its particular section of the kerf requiring three of them to complete the operation of taking out the bottom kerf of the wood. This witness stated that the plaintiff still makes and sells a limited number of scratcher chains because there is only a very limited demand for this saw chain as it is such a difficult chain to maintain. He also added that a flat mill file was ordinarily used to sharpen a scratcher chain. Generally, the procedure in filing a scratcher chain is to file the front faces of the slitter teeth and that is accomplished by holding the file at the angle that is already on the tooth and stroking it at a straight angle. Several witnesses pointed out that although the manufacturer recommends not to touch the top, it is however necessary to file the top also because it gets equally and as quickly dull as the front faces. If one does not do that, a very thin tooth is obtained which, of course, breaks off so it is advisable to file partly from the front and partly from the top.

Now if the top of the slitter teeth is filed, its height becomes lowered and consequently the height of the raker teeth must be correspondingly lowered. In sharpening, the original contour or form must be retained. All the slitter teeth are therefore sharpened around the chain and the latter is then turned around and the other side of those teeth are sharpened and it is necessary to measure constantly while filing. After sharpening the slitter teeth, the raker teeth are sharpened at the front edge and the height of these raker teeth are then reduced to the same amount as the slitter teeth. There are at least four angles at which these various teeth must be sharpened and Carlton stated that one must be very well experienced to do this.

Although gauges have been provided for assisting in measuring the height of the various teeth, they were, according to this witness, very rough and inaccurate and merely gave an approximation.

Because of the very different elements in this saw chain and because they are filed at different angles and because of the relationship of the height of the slitters to the rakers which has to be maintained, it takes a considerable length of time to file this chain properly. If, for instance, in filing this chain the right slitters were all higher than the left slitters, the chain would "run" and tend to cut in a circle. If the right relationship of raker and slitter is not maintained, the chain will either cut very slowly or not at all because it will jam in the wood and bind up. The evidence is also to the effect that a scratcher chain to be filed properly must be placed in a holding vice because if it is not, or if the base is not level and on the same plane, then it is impossible to obtain the same length for the cutter teeth. This chain saw is almost never sharpened in the field but in a garage or filing shop located close to a city or town and it is not feasible to sharpen a scratcher chain while the chain is held in the saw bar and, therefore, it is very difficult for the average man to maintain it properly.

Mr. Carlton added, however, that in felling with the scratcher he found it did cut very smoothly, although rather slowly, as compared with the other chains. He also found that in the undercutting or notching of a tree, in trying to remove the saw bar from the cut or the kerf, the chain would hang up on the opposite end of the cut. It would indeed gouge into the side walls of the kerf and throw the whole saw out of the cut, thereby endangering the operator and this is characteristic of the scratcher chain when sharp. When it gets dull, however, it is not quite as bad.

Although the scratcher chain is available, it has now gone off the market and both Mr. Lajoie and Mr. DeRoy, experienced Quebec woodsmen, state that the only chain

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that sells in Eastern Canada and particularly in Quebec today is the chipper chain.

As for the Hassler chain, Ex. 12, Carlton states that because it comprises slitter and raker teeth, it has to be filed in two different manners. The slitter teeth are filed in the same manner as the teeth on the scratcher chain, by filing the front edge of the slitter teeth and their top edge around the chain, and their height must be maintained at the same level as the router teeth which must, however, be sharpened from three different angles, downwardly, horizontally and then inwardly. Here also, because of the relationship of the slitter teeth to the raker teeth, it is important that the saw chain be placed on a flat surface and held firmly for filing and that is why it is ordinarily filed in a shop and not in the field. This chain appears to be a hard chain to file even with the instructions supplied with it, Ex. 54, and must be done by an experienced man. A gauge was made to measure the height of the teeth when the chain was new but as soon as the chain has been filed, and the height of the teeth has been reduced, this gauge is no longer useful. If this chain is not properly sharpened, the evidence is to the effect that it is a rough operating chain and one would have difficulty cutting with it. Carlton states definitely that it is a very hard one to maintain and if it is not properly maintained it becomes unusable. As a matter of fact, it is no longer being made today.

Its size also gives rise to a problem of instability and it has a serious weakness in that it has a part that overhangs which has a tendency to break off. This is apparent in Ex. 46 where a break off is evident. Furthermore, although the chain will undercut, it will not bore.

The chisel chain (Cox's model) Ex. 13, also has a special tooth difficult to file because of a difficult critical angle and it can be filed only by a professional with a special file called a "chisel bit file" which looks like a cricket bat. Here it is important that the side wall cutting portion of the tooth or the shank portion be filed at a perpendicular angle and the top at a prescribed angle. To maintain these angles this chisel bit file was developed which, however, to be effective must be precisely stroked by the filer. If the file is tilted up or down too far, or towards the back or front, then a proper cutting edge will not be obtained. Carlton

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himself developed this special "chisel bit file" in or around 1954 because he had had so much difficulty filing a chisel chain with a mill file. However, although the new file helped, it did not solve all the problems and it still remained a chain difficult to maintain.

This critical corner particular to the chisel chain was exemplified by Carlton in that when using the flat mill file, the filer had a tendency to let the file file towards the point of least resistance which is the fine edge dropping the file into the side wall thus creating a hook. He also added that even using the chisel bit type file, as the angles are all related, if one holds the file at an improper angle to file the underside of the top plate, an improper angle will be obtained on the side plate of the chisel chain as well. Because this "chisel bit file" files both angles of the cutter at the same time, the change of one angle automatically affects the other which, however, is not true of the flat mill file and, therefore, one can get into more trouble with the chisel bit file than with the flat file. He finally concluded that whatever file was used, the average user in the woods cannot maintain the chisel type of chain and although it should be sharpened by using a vice, he admitted it can be touched up on the bar. This chain today is not sold by any company other than Omark Industries in the United States and only to a very limited extent, "to a group of people who pride themselves as being experts and who are in fact very mechanically inclined and who do a very good job of maintaining it." Furthermore, although there is no patent in Canada on this chain, it is not being sold in this country.

We now come to the R chain which, as we have seen, has been identified in various ways by the witnesses as the half-circle, the demi-lune, the Merz and the C-bit and the Low-R and the High-R.

The R chain is No. 6 as to High-R and No. 7 as to Low-R on Ex. 43 and samples of the chain were produced in Ex. 146 as to High-R and Ex. 147 as to Low-R. The semi-circular appearance of the tooth appears on Ex. 59 which is a document of instructions as to the filing of this chain issued by the manufacturer. Exhibit D-38 is the back-to-back depth gauge which was not successful and it gave way to another type of R chain, Ex. D-40 and the tooth here also has the semi-circular tooth in figs. 4 and 5. An examination of Exs. 182 and 185, which are photographs of R chains, discloses that there is no top plate or flat toe on these units.

I will deal at greater length with this saw chain later on the matter of anticipation and it will suffice for the time being to deal with what was being sold to the public as commercial units and to state that the evidence discloses that this chain also, whether the High-R or the Low-R, could not be easily sharpened as this could not be done with any assurance of correctness with a single stroke back and forth because there are no references or guide points to maintain the proper stroking. Thompson, however, a witness of the defendants, stated that he had no difficulty in sharpening such a chain saw although he did so in a manner entirely inconsistent with the instructions of the manufacturer. The instructions indeed taught one to file this tooth by rocking the file which Thompson did not do. Furthermore, this witness, in connection with Ex. D-28 (the tooth with a "V") stated at one point it was a well filed unit. However, later, he stated that whoever had filed the unit was not a very good apprentice. This would seem to indicate that this witness did not know too much about filing particularly with respect to this saw chain. The evidence discloses that the High-R is just a larger cutter than the Low-R and that the difference between the High-R and the Low-R is merely in the radius of curve. Mr. Carlton stated that the Low-R, although rougher than the High-R, was faster cutting.

Mr. Carlton dealing with the inability of the half-circle to be maintained in the field as a smooth working unit stated that it was an "infamously" rough cutting saw and that the Low-R was rougher than the High-R. This witness indeed had this to say at p. 467 of the transcript:

> A. Assuming these chains are maintained or filed by an expert or that they are from the factory and done properly, I would suggest that the scratcher chain and the chisel chain and the Hassler chain and the chipper chain are, you might say, in one category; they are smooth-operating chains and reasonably fast-cutting chains. The only one I would exclude from this category is the half-circle which is infamously rough.

This witness added, however, that if improperly filed, such as they were out in the field all these chains were rough cutting. Two of the plaintiff's witnesses, a Mr. Falleri was also of the opinion that the R chain was rough and Mr. Davison stated that it could not be filed to work smoothly. Mr. Harvey, one of the defendants' witnesses stated that it was an erratic chain, that when not properly maintained it would run, cut off to one side and bind. The cutting edge would become dull and blunted and it took time and was difficult to maintain.

Mr. Falleri stated that the Low-R was bad to file because there was no well defined plate and if one tried to file the unit in a reciprocating manner, the chain would become rougher adding that in trying to smooth out the R chain, speed was sacrificed and Mr. Carter was of the same opinion. Mr. DeRoy also testified that the half moon is not easy to file.

Mr. Davison stated that the R chain is extremely difficult to bore with and with respect to undercutting, it does not cut properly on an angle in the wood. At p. 1434 of the transcript he stated that the High-R is unpredictable and the Low-R is slow. As a matter of fact, in the test conducted in the basement of the Supreme Court Building, the latter type gave the most vibration. Furthermore, Exs. 159, 158 and 157 which are all Low-R, all had very wide kerfs in these tests.

Mr. Falleri in cross-examination, when comparing the chipper and the Low-R, stated that the chipper does actually what the name implies. The side of the cutter cuts off the end grain in cross-cutting and the plate chips the centre section out. In the Low-R, however, this witness stated that the side of the cutter cuts the end grain and top with a circular cut on the cutter but that there is no defined top plate to take the centre out as a chip. Davison, Falleri and Thompson all admit that the R chain cannot be sold today.

Mr. John Delton Gray, president of the plaintiff corporation since its inception in 1953 stated that the first manager of the Canadian operation of the predecessor of the plaintiff company was Mr. Jack Salvisburg who today is the manager of the defendant, Gouger Saw Chain Company. The Canadian plaintiff company is wholly owned by an American company founded by Mr. Joseph Cox, the inventor of the patent in suit.

Mr. Gray stated that the first manufacturing operation of Mr. Cox was in the basement of his house in Portland, Oregon, sometime in 1947. The American corporation was actually incorporated in July 1947 and it went into busi-

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ness making chains in late 1947. At the beginning, the only people engaged in the business were Mr. Cox and his wife. In March of 1948, the operations moved to a 5,000 square foot garage on North Mississipi Street, in Portland, Oregon, until the summer of 1950, when the operations were moved to another larger building on South East 17th Street also in Portland. During all this time, the company was solely engaged in making Oregon chipper chains. Mr. Gray, who had a general business background, became the sixteenth employee of the American corporation in August of 1948 and has been associated with the company continuously since that time. The principal item sold by the company from its inception has been the Oregon chipper chain and it has today approximately 600 employees.

In the year 1955, the operations were moved to a factory the company built in Portland. At the same time, a new factory was also built in Canada. The Canadian operations, which started in 1953, showed continuous progress in that from eighteen employees in that year, it grew up to 183 in 1962. In December of 1953, Mr. Cox sold the companies to Mr. Gray who has owned them ever since.

Although counsel for the defendants objected to the production of sale figures in the United States, and a decision on the objection was reserved at the time, it would appear to me that the American operations would be relevant provided, of course, the product sold in that country corresponds to a product covered by the claims in suit. It is on this basis that such information, as appears on Ex. 33, "Sale of saw chains in the United States", covering three different types, the scratcher, the chisel and the chipper, is allowed as part of the evidence of this case.

This exhibit indicates that from 50,000 scratcher, 60,000 chisel and 213,000 chipper chains in the year 1948, and through a constant gradation during the intermediate years, 3,555 scratcher, 139,026 chisel and 5,619,658 chipper chains were sold in the United States in the year 1961. The evidence (Ex. 32) also indicates that types other than the chipper are today less than 2 per cent of the market.

Exhibit 175 which indicates the footage of chipper chains manufactured in Canada by Omark Industries (1960) Ltd. shows that from 107,828 feet in 1953, and here also through a constant gradation during the intermediate years, it went to 1,656,629 in 1961 and Ex. 176 shows that the value of the chipper chain in Canadian dollars manufactured in Canada went from $218,623 in 1953 to $2,431,681 in 1962.

Mr. D. Challenger, of Vancouver, British Columbia, president and manager of Power Saw Sales and Services Limited stated that the type of chains predominating in his company's sales today is the chipper type, as it is 95 per cent of its total sales. He also added that a small percentage of chisel is still sold and that the scratcher chain has dropped right out of the picture. Furthermore, to his knowledge, the half circle chain is not in the picture at all. In this witness's opinion, the reason the chipper chain has become his company's best seller and, as he put it, "almost our entire seller, is the fact that it is an easier chain for the average individual to maintain and file and get the best returns or the best production returns from his efforts."

In the eastern part of Canada, and particularly Quebec, Mr. DeRoy, employed by the plaintiff company to instruct wood cutters in Quebec in the proper manner to maintain the plaintiff's chain saws, stated at p. 1017 of the transcript that in the eastern part of Canada the chipper chain was the only chain used today adding that it has become so popular because it is relatively easy to file more so than other types of saw chains including the Merz type or the Low-R or the High-R. At p. 1018 he stated in answer to the following question by the Court:

Q. Pourquoi est-ce plus facile que pour la demi-lune?
R. C'est parce que c'est le dessus qui nous indique, qui est un genre de guide pour envoyer notre lime, on voit le dessus de la dent, on peut tenir la lime.
Q. Cela vous permet de guider . . .
R. Cela permet de guider notre lime et c'est très important.

Mr. Clément Lajoie, of St-Urbain, P.Q., a wood cutter who earns his living cutting wood since 1947 and has used all types of saws starting from the hand saw, the Merz, the chisel and the chipper, stated that he preferred the chipper above all others because as he said at p. 1037:

R. Parce que, à mon avis, c'est une gauge qui s'adapte mieux à la lime, elle s'aiguise mieux et on obtient de meilleurs rendements.

For the witness, the filing and maintenance of the chain is very important as he is paid so much per cord of wood and the more wood he cuts the more money he makes. He also stated to the Court that he filed his saws himself mainly on the bar, in the woods and has experienced no

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difficulty in doing this. He also stated that in his part of the country, the wood cutters all use the chipper chain and that he has seen no others. He also stated that the Merz chain can be filed easily but not as easily as the chipper.

Mr. B. Falleri, of Emeka, California, a salesman since 1953 with Western Chain Saw Company, which sells Homelite chain saws and who was prior thereto a lumberjack, has travelled in this business throughout California, Nevada, Arizona and New Mexico, visiting the people who sell various types of chains. This area is what is called the big tree area, the heart of the redwoods. He has seen a lot of felling which is the act of cross-cutting at the base of the tree and bucking which is the act of cutting the tree into desired lengths once it has fallen. Falleri's experience goes back to the spring of 1948 when he first tried to use a chisel chain but which he could not use because it was found too hard to file consistently. He then turned to a chipper chain because it was a better chain. Between 1948 and 1953 he used also the chisel chain and the circle R or what was known as the Titan R chain. Of all these chains, he found the Oregon chipper chain to be superior because it easily outcuts the other chains, bored smoothly and efficiently, was fast to file and was easily maintained. According to this witness, the chain he felt was not too safe was the Titan R chain, as at times, when carrying it, the cutters would slip down and inflict injuries.

This witness is also of the opinion that the Oregon chipper chain, with its well defined plates, makes it easy on a filer to maintain a proper bevel and thereby sharpen the teeth properly.

Mr. Francis Davison, of Corgurlle, Oregon, has a business called Davison's Filing Shed which has been in existence since about 1947, and which deals with the filing of saw chains. He has also had considerable experience in the bush since the year 1929, when he started making railroad ties and felling, bucking, marking, splitting and hewing. From 1945 through 1949 he worked for large logging companies who had filing sheds at their operations where he was the company filer. This man has had considerable experience in filing scratcher, chisel, C-bit which is nearly a half circle, the half-circle, and the chipper chain. He states that the easiest chain to sharpen is the chipper due to the shape of its teeth which he explains as follows at p. 885 of the transcript:

A. First, the outside edge is the part of the chain that cuts the grain loose. The top of the chain chips it loose, so that the side of the tooth is the most important. However, the top of the tooth controls the action of that tooth, so this angle is not critical; it should be straight up and down. The bevels are not critical, but they should be around 35 thousandths—I mean 35 degrees. They can be more or less.

Q. You say that angle is not critical, it can be more or less, but it should be around 35 degrees?

A. It can be changed for different operations, different woods, Sir. Different cutters have different ways of cutting logs.

This witness demonstrated how the chipper tooth should be filed and it may be of some use to describe this from p. 886 of the transcript:

MR. HENDERSON:

Q. Now, I have given you a chipper chain, which is No. 11AC, and I have also now handed to you Exhibit 61, which is a file. I would now ask you if you would demonstrate to the Court why the shape of the tooth of the chipper chain enables it to be maintained easily as you have already set out.

A. It takes only one bevel, one operation, to maintain this chain properly. I would hold it this way (indicating).

Q. Now, this way you are showing—I'm sorry, I didn't see you.

A. I am filing against the tooth, sir, (indicating).

Q. Yes.

A. One straight stroke (indicating).

Q. When you file that way how efficiently is the tooth filed, how efficiently is it sharpened, when you sharpen it in the way in which you have demonstrated.

A. It will come out practically shaped like this cutter here.

This witness finally concluded by saying that of all the chains the chipper enjoyed a much wider use because most people can learn to maintain it in one or two short periods of instruction and in most cases it can easily be sharpened on the bar whereas the other chains should be sharpened in a vice. As for the C-Bit, which this witness finally identified as either the High or Low R, it is no longer being sold as the cutters will not use it because it does not operate to their expectations. According to this witness, an inexperienced man is not able to file a C-Bit chain and make it work smoothly because of the structure of the cutting edge which is such that it cuts an extremely rough and wide kerf, is difficult to bore with (which is shoving the round end of

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the saw into the wood) and this chain also does not slope undercut easily as it does not cut properly on an angle in the wood. He also pointed out that the chipper chain can bore easily as well as slope undercut and that, as a matter of fact, this slope undercutting started when the chipper chain came on the market and led to this type of cutting. He agreed that farmers began to use chain saws with the advent of the chipper chain, as well as homeowners with fireplaces to cut their own wood. Furthermore, it had a tremendous effect on those wood cutters by the piece or buckers who before the chipper chains came out were cutting by hand making approximately $25 to $40 a day. After the chipper chain came out, they got power chain saws and their wages ran up from $25 to $100 a day and were able to make about two and a half times more with the chipper chain than with other chains.

Mr. Thompson called by the defendants also admitted that he sells considerably more chipper chains and it predominates.

It therefore appears that the chipper chain, because of its growth, its immediate acceptance, its near total replacement of all other types of chains in the United States, as well as in Canada, its easiness of maintenance and filing in the field, with the consequential increase in use in the field, its increased productivity and its cutting effectiveness, and this was demonstrated in the tests made in the basement of the Supreme Court Building, is a chain saw superior to anything that went on before and consequently solved for the wood cutters whatever problems of maintenance and sharpening existed in that field thereby increasing the productivity of this particular trade. I do not think that it can be contested that whatever existed before was not satisfactory for the ordinary wood cutter and that the chipper chain was the solution to the maintenance and production problems that had existed prior thereto. I might also add that there is a preponderance of evidence indicating that its easiness of maintenance and filing for the purpose of keeping it sharp and smooth has been obtained without any sacrifice of any of its good operating characteristics.

Indeed, it was brought within the reach of the average user, it opened up new areas of use, it is no longer limited to the professional and it can now be used for farm and wood lots. It is a versatile saw, bores and undercuts easily and because of this it has practically swept the other types off the market and has attained tremendous commercial success in Canada as well as in the United States. Mr. Carlton, I believe, at pp. 382 *et seq.* of the transcript described this invention by saying that it combines best the characteristics that a user of a saw chain needs and wants: ease of maintenance, smoothness of cut, speed of cut, versatility in that it will fell and buck, bore, undercut and limb and can be manufactured at a reasonable price.

This commercial success, however, and this was strongly urged by counsel for the defendants to be significant, and rightly so, must be shown to be due to the invention in suit and not to extraneous means. It would appear to me from the evidence, that extraneous means, if any, had very little to do with the success of the Omark tooth. Indeed, the invention started in 1947, as we have seen, from a modest beginning in the basement of Mr. Cox's home, developed and progressed over the years, to a point where it took over practically the totality of the market against competition so that it must be taken that the popularity of this tooth grew on its own merits and not on the basis of any advertising, which, as a matter of fact, from Ex. 170, does not appear to have been excessive. Exhibit 169 also shows that in the early years of its growth, the advertising was a small portion of the budget in the United States. Now, although it appears from the evidence that the plaintiff did give better service and that it or its licencees own other patents and were able to offer to their customers a better range of parts, including sprockets and bars, which undoubtedly must have assisted somewhat in the sale of the plaintiff's devices, the success of its tooth, in my opinion, is due and attributable mainly to its features and very little else. It must also, however, be shown to be due to the precise improvement of the patent in suit and this is what I now intend to address myself to. The question is, does this tooth, which is enjoying such commercial success, embody the features of the claims in the patent and in order to answer this, it will be necessary to interpret these claims which, for convenience purposes, I intend to insert here, limiting them, however, to those the plaintiff relies on in this action, i.e., claims I, II, III, IV, V, VI, VII and IX, claim VIII being eliminated, as it deals with a special depth gauge which has nothing to do with the present contestation. These claims were broken down in their various elements in a number of charts produced by both parties and it might be helpful here to do likewise.

ELEMENTS OF CLAIM I

1-3 In a saw chain a pair of longitudinally spaced apart links including sprocket-engaging root portions, a pair of oppositely disposed side plates pivotally joining said links together, one plate of said pair of side plates having a cutting tooth formed thereon and including an intermediate portion extending outwardly in the opposite direction with respect to said links and adjacent an edge thereof.

4. The end portion of said plate extending back over said links substantially at right angles with respect to the plane of said plate.
5. The forward edge of said intermediate and end portions being provided with a chisel cutting edge.
6. The lateral extent of said chisel edge being substantially equal on opposite sides of said plate whereby the cutting load during working of said tooth is substantially balanced on the opposite sides of said one plate.

ELEMENTS OF CLAIM II

1. In a saw chain, a pair of longitudinally spaced apart links including sprocket engaging root portions,
2. A pair of oppositely disposed side plates pivotally joining said links together
3. One plate of said pair of plates having a shank portion extending laterally outwardly in the opposite direction with respect to said links and adjacent an edge thereof
4. A toe portion integral with the end of said shank portion and extending substantially at right angles with respect to the plane of said plate
5. The forward edge of the said shank portion and said toe portion being provided with a chisel cutting edge,
6. The lateral extent of said chisel edge being substantially the same on opposite sides of said plate.

ELEMENTS OF CLAIM III

1. In a saw chain having a pair of longitudinally spaced apart links including sprocket-engaging portions.
2. And a pair of oppositely disposed side plates pivotally joining said links together
3. The invention comprising a cutting tooth formed on one of said side plates, said tooth including a shank portion and a toe portion.
4. Said shank portion extending laterally outwardly from said one plate in the direction opposite said links and said toe portion extending from said shank portion back over the edge of said plate and spaced therefrom
5. The forward edge of said shank and toe portions being provided with a continuous chisel cutting edge.

6. Said shank and toe portions extending laterally substantially equal distances from opposite sides of said plate,
7. The bevelled surface defining the cutting edge on said toe portion being concave and that defining the cutting edge on said shank portion being flat in the direction transversely of said surface.

ELEMENTS OF CLAIM IV

1. In a saw chain having a pair of longitudinally spaced apart links including sprocket engaging portions,
2. And a pair of oppositely disposed side plates pivotally joining said links together,
3. The invention comprising a cutting tooth formed on one of said side plates, said tooth including a reversely curved shank portion and a toe portion integral with the end of said shank portion,
4. Said shank portion extending laterally outwardly from said one plate in the direction opposite said links and said toe portion extending from said shank portion back over the edge of said plate at substantially right angles with respect thereto and spaced therefrom,
5. The forward edge of said shank and toe portions being provided with a continuous chisel cutting edge,
6. The bevelled edge surface defining the cutting edge on said toe and shank portions conforming to a cylindrical surface with the axis of said cylindrical surface extending parallel with said toe portion.
7. Whereby said cutting edge may be re-sharpened throughout its full extent on both said shank and toe portion by a cylindrical round file reciprocated coaxially with said cylindrical surface.

ELEMENTS OF CLAIM V

1. to 5. In a saw chain having a pair of longitudinally spaced apart links including sprocket-engaging portions, and a pair of oppositely disposed side plates pivotally joining said links together, the invention comprising a cutting tooth formed on one of said side plates, said tooth including a shank portion and a toe portion, said shank portion being reversely curved and extending laterally outwardly from said one plate in the direction opposite said links and said toe portion extending from said shank portion back over the edge of said plate and spaced therefrom, the forward edge of said shank and toe portions being provided with a continuous chisel cutting edge,

6. Said shank and toe portion extending laterally substantially equal distances from opposite sides of said plate,
7. The cutting edge of said shank portion terminating substantially in a first plane normal to the longitudinal direction of the chain,
8. The cutting edge of said toe portion lying in a second plane at right angles to said first plane and extending at a substantially 45° angle with respect to the longitudinal direction of said chain, the bevelled edge surface defining the cutting edge of said toe portion being concavely curved in the transverse direction.

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ELEMENTS OF CLAIM VI

1. In a saw chain, a link plate having a cutting tooth formed thereon,
2. Said tooth including a reversely curved shank portion,
3. And a toe portion extending tangentially from said shank portion substantially at right angles with respect to said plate,
4. The forward edge of said shank and toe portions being provided with a bevelled surface forming a continuous chisel cutting edge on the forward extremity of said shank and toe portions,
5. Said bevelled surface of said shank and toe portions conforming to a cylindrical surface
6. Whereby said cutting edge may be resharpened throughout its full extent on both said shank and toe portions by a cylindrical round file reciprocated coaxially with said cylindrical surface.

ELEMENTS OF CLAIM VII

1. In a saw chain having a pair of longitudinal spaced apart links including sprocket engaging portions,
2. And a pair of oppositely disposed side plates pivotally joining said links together,
3. The invention comprising a cutting tooth formed on one of said side plates, said tooth including a reversely curved shank portion and a toe portion,
4. Said shank portion extending laterally outwardly from said one plate in the direction opposite said links and said toe portion extending tangentially from said shank portion back over the edge of said plate and spaced therefrom.
5. The forward edge of said shank and toe portions being provided with a continuous bevelled chisel cutting edge,
6. The bevel surface defining said cutting edge of said shank and toe portions conforming to a cylindrical surface,
7. The axis of curvature of said cylindrical surface extending at a substantially 45° angle with respect to the plane of said plate whereby said cutting edge may be resharpened throughout its full extent on both said shank and toe portions by a cylindrical round file reciprocated coaxially with said cylindrical surface.

ELEMENTS OF CLAIM IX

1. In a saw chain, a link plate having a cutting tooth formed thereon, said tooth including a shank portion and a toe portion,
2. Said shank portion being reversely curved and extending laterally outwardly from said one plate and said toe portion being substantially flat and extending tangentially from said shank portion back over the edge of said plate and spaced therefrom.
3. The forward edge of said shank and toe portions being provided with a bevel surface forming a continuous chisel cutting edge,
4. Said bevelled surface of said shank and toe portions conforming substantially to a cylindrical surface whereby said cutting edge may be resharpened throughout its full extent on both said shank and toe portions by a cylindrical round file,
5. The cutting edge of said shank portion terminating substantially in a plane normal to the longitudinal direction of the chain.

Before going into each of the elements of the claims however, it may be of some use here to refer to the *Novocol v. MacFarlane*[1] case where at p. 161 it was stated that:

> . . . If an important step in advance has been made by an inventor, the law, I think, affords a patentee a range of equivalents commensurable with his invention,

This principle might apply also to a meritorious invention and one might say here, also, that "the law" affords a patentee a certain range of approximation providing the language of its claims, and the use to which the invention in suit is adapted, so permit.

Before, however, dealing with the claims proper, it might also be useful to set out a few fundamental principles which have been urged by counsel for the defendants and which apply to all patent cases.

The claim or claims in a patent alone define the monopoly where the patentee has a statutory duty and has the obligation to state what is the invention he desires to protect. As put by Lord Russel of Killowen in *Electric & Musical Industries Ltd. et al. v. Lissen*[2]:

> The forbidden field must be found in the language of the claims and not elsewhere.

In the *Minerals Separation v. Noranda*[3] case Thorson P. stated:

> Section 14(1) (which is now s. 36(2)), also requires that the specification shall end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege. By his claims, the inventor puts fences around the fields of his monopoly and warns the public against trespassing on his property. His fences must be clearly placed in order to give the necessary warning, and he must not fence in any property that is not his own. The terms of a claim must be free from avoidable ambiguity or obscurity and must not be flexible. They must be clear and precise so that the public will be able to know not only where it must not trespass but also where it may safely go.

Counsel for the defendants urged strongly that the statutory duty which is placed on a patentee by s. 36(2) to claim clearly, distinctly and explicitly that which he claims is his exclusive property, is a heavy one to discharge and that it should not be allowed to be obscured by the theory of substance or pith and marrow. Now although this is true, it

[1] [1939] Ex. C.R. 151. [2] (1939) 56 R.P.C. 23
[3] [1946] Fox P.C. 175 at 176.

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must, in my opinion, however, be tempered by adding that the approach of the Court must also be to look at what the inventor did and what his invention achieved.

Furthermore, although the claims define the monopoly, in determining what these claims mean, the specifications at large must be considered and the whole document read.

In *Baldwin v. Western*[1] the Supreme Court of Canada, dealing with the manner in which a patent with respect to a meritorious invention should be interpreted or looked at by a Court stated that the entire document must be considered in order to find the pith and substance of the invention "by a mind willing to understand, not by a mind desirous of misunderstanding."

In approaching the question not only of infringement but also of validity, the first duty of the Court is to construe the claims and Blanco White in his book *Patents for Inventions,* at p. 48 sets down the manner in which this should be done:

> A patent specification is to be construed like any other document, due regard being paid to the special functions of the claims. As with any other document, questions of construction of a patent specification, arising in legal proceedings, are for the Court to decide as a matter of law; for this purpose the Court must first instruct itself as to the technical matters involved, so as to place itself in the position of one acquainted with the art concerned, in a position, that is, of a person to whom the specification is addressed. Given the necessary knowledge and understanding, however, the question is what the words of the document mean, not what information a man skilled in the art would in fact derive from them; and expert evidence as to their meaning is in general not admissible.

In *Molins et al. v. Industrial Machinery Company*[2] Lord Green stated:

> Now the first thing to do is, of course, to construe this claim, and it must be construed without reference to any document relied upon as an anticipation.

One must therefore divorce one's mind from the prior art and look at what the claims mean by their words and to determine whether there is infringement or not one must compare the defendants' tooth not with the disclosure nor with what the plaintiff is doing in the market place, but with the claims of the patent. It is indeed an illegitimate approach to compare the defendants' structure with the

[1] [1934] S.C.R. 94 at 106. [2] (1938) 55 R.P.C. 31 at 39.

plaintiff's structure, unless, however, the latter has been verified as embodying the claims of the patent.

Now, when considering validity, either from the standpoint of novelty, which is anticipation, or obviousness, which is lack of invention, it is also necessary to construe the claims, to see what invention, if any, they define. Once that is done the prior art put forward is then considered which in this case consists of prior documents and prior uses. Here also, when looking at the prior art, one should not look at and compare the prior art with the plaintiff's structure as made and sold in the market place, but with the claims of the patent, unless, as here again, the plaintiff's structure has been verified as being in accordance with the claims of the patent.

I will now proceed to the construction of the claims in suit dwelling, however, for some length on those elements only which I might say could be contentious or which require clarification. My purpose in so doing is to ascertain what the invention defined by the claims is and I shall do this in the light of the common knowledge which persons skilled in this art are assumed to have had at the date of the patent and which is acquired with the aid of the expert evidence on such matters as to the state of the art at the date of the patent, the meaning of technical terms and the working of the invention.

As I have already set out in great detail the claims in issue and their respective elements, it is not my intention to repeat them all again here. I will indeed restrict myself, as I said before, to those elements which might give rise to some problems of interpretation.

The first point of contention with respect to claim I is element 4 of claim I which deals with: "The end portion of said plate extending back over said links substantially at right angles with respect to the plane of said plate,".

The defendants submit that "substantially at right angles" here means to all intents and purposes, a right angle and that on the plain, ordinary meaning of the word "substantially" a deviation of one degree either way is sufficient to make something "not substantially". Such a restrictive interpretation cannot, in my opinion, be accepted here.

The above words "substantially at right angles" must be read in the light of the disclosure and the drawings as they

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appear in the patent in suit, and if that is done, they cannot mean precisely at right angles. Indeed, if one examines figs. 6 and 7 of the drawings of the patent in suit, it can be readily seen that there is an angle there, the purpose of which is explained in the disclosure. On the shank side, it is down, and on the leading edge side, it is up and because of the filing angle, this then will make the two points at the filing angle horizontal or in a plane at right angles with respect to the plane of the plate. By looking at the above figs. 6 and 7 it can be seen that what is intended by the words "substantially at right angles" is that the angle 41 in fig. 7 is such as to have a horizontal cutting edge. I might add that the evidence which discloses that variations in this respect would have no effect on the operation of the saw chains confirms that a relatively wide interpretation should be given to the word "substantially" here.

The defendants also submit that the word "substantially" in element 6 of claim I, i.e., "the lateral extent of said chisel edge being substantially equal on opposite sides of said plate whereby the cutting load during working of said tooth is substantially balanced on the opposite sides of said one plate" cannot be interpreted as meaning a very wide difference of equality.

Here again, however, the words in element 6 must be read as the competent workman would read them, i.e., in relation to the disclosure bearing in mind that the tooth is intended to perform in the field during the whole extent of its life because this tooth will be working not only in its initial stage but also during the whole course of its existence and use. In other words, as the claim deals with a working tooth, it will be working throughout its life. At the initial stage, the patentee's tooth may have deviations from being exactly equal as it is a working article, the configuration of which in the course of use and sharpening will be reduced and altered.

Now, applying the ordinary rules of interpretation as to the meaning of the word "balance" and again looking at it from the viewpoint of the competent skilled workman in the art at the date of the patent and the meaning ascribed to that word in the prior art, such as the Hassler patent for instance, it can be seen that it is a relative term which means that the tooth is so constructed that it gives stability and smoothness as well as all those things which enable the tooth

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during the whole of its working life to give a satisfactory performance. This was confirmed by Mr. Carlton at p. 938 of the transcript when, in cross-examination, he explained this in a very clear manner:

WITNESS: We say that the chipper type cutter is balanced on equal sides of the plate and we say that it is balanced when it gives stability to the cutting tooth, and by this we mean that part of the plate is under the chip causing the bottom of the plate to be captured between the bar and the wood. For instance, the depth gauge of the tooth is against the wood and the bottom of the tooth is against the bar so that it is solidly in there. It is stable in the cut. And we say that the plate being extended equal distance on the side of the plate adds to the stability of this cutter.

MR. SIM: Q. I see. If the tooth is formed so that it extends equal lateral distances on opposite sides of the plate that will add to the balance that you spoke of, is that correct, it will contribute to the balance?

A. It will contribute to the balance, yes.

Q. But it is not the determining feature?

A. I couldn't give the amount of importance a particular thing has.

And later this witness admitted that the words stability or smoothness and balance all mean many things coming together to make this chain perform satisfactorily and then stated that it would tend to go out of balance if the lateral extent of the cutting edge is substantially different on opposite sides of the plate.

It would therefore appear from all this that the claims deal with a tooth which is made so that it will be substantially balanced during its working life and that this substantial equality of the lateral extent is one means only of obtaining such balance. This requirement must also be read together with the specifications where the lateral clearance is also explained. In fig. 5 of the patent this clearance angle appears at No. 38 and it is such as to insure also that the working of the tooth throughout its life will be substantially balanced. It is therefore in this context that the meaning of these words must be determined and because of this, it does appear to me that any minor deviations in this regard would not prevent the lateral extent of the chisel edge of the teeth from being substantially equal nor the cutting load during working of said teeth from being substantially balanced.

It might be of some interest here to deal with a proposition advanced by counsel for the defendants and based on *Roger v. Cochrane*[1] that the object invented should be considered in its condition at the time of manufacture and not

[1] (1908) 25 R.P.C. 762.

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in the condition in which it was found some time later after being used. It does not appear to me that this decision can have any bearing on this particular aspect of the case because, as I had occasion to say before, this tooth was conceived and described bearing in mind that it was to have a working life during which constant and repeated sharpening would be required and because of this, the condition in which this tooth becomes after use is a very important consideration of the invention. Indeed, the character of the device at the time of manufacture must be considered here having regard to the object and the use of the invention during its existence. This is not an accidental change such as took place in the above referred case but a thought out and deliberate change.

As element 4 in Claim II, element 4 in claim IV, element 3 in claim VI is the same as element 4 in claim I and as element 6 in claim II and element 6 in claim III, element 6 in claim V are the same as element 6 in claim I and element 5 in claim IX is the same as element 7 in claim V with all of which I have already dealt, it is not necessary to repeat here what has already been said in connection with claim I. However, before going to element 6 in claim VI, it must be pointed out that element 4 in claim IV, although equated to element 4 in claim I, as we have just seen, contains however a further limitation in that the toe portion must extend from the shank portion back over the edge of the plate. Although this difference must here be pointed out, this element 4 in claim IV would seem to create no problem of interpretation.

Now, element 6 of claim IV reads as follows:

> The bevelled edge surface defining the cutting edge on said toe and shank portions conforming to a cylindrical surface with the axis of said cylindrical surface extending parallel with said toe portion.

The defendants urge that here it is not possible from the claims to say where exactly the axis of the cylindrical surface is, nor is it possible to tell from the drawings where this axis is.

It would, however, appear to me that if the toe is horizontal and the axis of the cylindrical surface is to be parallel to the toe, and fig. 5 is examined and particularly the round file 44, it can be seen that in order for the file to nest into the tooth, it must be held in a horizontal position. If it nests in a horizontal position, then the axis is parallel to the toe as called for in the claim.

We now go to element 8 of claim V which reads as follows:

> The cutting edge of said toe portion lying in a second plane at right angles to said first plane and extending at a substantially 45° angle with respect to the longitudinal direction of said chain, the bevelled edge surface defining the cutting edge of said toe portion being concavely curved in the transverse direction.

The term to be determined here is "a substantially 45° angle" and counsel for the defendants submits that none of those angles that vary from a minimum of 31° to a maximum of 40° is substantially 45°.

The question of the essentiality of this feature of the tooth is a matter of course which will depend on the evidence adduced and looking at the words of the claim one can only infer that the word substantially means 45° within certain tolerances although this is a matter with which I intend to deal in more detail on the matter of infringement. I might here merely point out, however, that on Ex. 69, which is the Gouger filing instructions, the defendants themselves have classified this element as non essential by stating in paragraph 3 of these instructions:

> 3. Maintain proper angle on front of cutter. Have same angle on every cutter. Do not have less than 25° or more than 45°.

On this basis alone, it would appear that a proper interpretation of the "substantially 45° angle" of this element of the claim should also receive a wide interpretation.

Claims I, II, III, IV, V, VI, VII and IX of the patent in suit therefore define an invention of a tooth on a saw chain of a particular configuration or shape which has an outwardly curved portion called a shank, a flat toe which extends over the edge of that plate portion. The shank portion is cylindrical with the upper end of the plate and extends outwardly forming a chisel edge, the lateral extent of which is substantially equal on opposite sides of the plate whereby the cutting load during the working of the tooth is substantially balanced on the opposite sides of the plate and this substantial equality and substantial balance is to be taken to encompass certain variations from precise equality or balance bearing in mind that we are dealing here with a tooth that will be, during its working life, subject to wear and tear. The shank then is reversely curved

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and doubled back over itself and then merges with the flat toe portion; the latter extends from the upper end of the curved shank portion and also across the upper end of the plate on which the tooth is formed and is substantially at right angles to the plate (and this does not mean precisely at right angles), the forward end of both the shank and the toe portions being provided with a bevel, the surface of which defines the forward end of the toe and shank portion and which conforms to a cylindrical surface, the axis of which extends in a horizontal plane substantially parallel to the plane of the toe portion which cylindrical surface together with the flat toe allows a round file to nestle therein and to be guided thereby in performing a simple operation of filing without affecting in any way the efficiency of its cutting properties.

Having thus construed the claims and upon a close examination of the teeth produced by the plaintiff as exhibits and referred to in Ex. 85, which were used to compare with the teeth produced by the defendants, I may now say here without any hesitation that these teeth produced by the plaintiff and sold in the market, embody the invention as claimed in the patent in suit. Having done this, defendants' objection to the production of Ex. 85 (which was reserved at the trial) on the basis that it is illegal to compare what the plaintiff was selling in the market to what the defendants were producing now falls and this document now becomes a very useful one.

I might now address myself to the attacks made by the defendants on the patent based on prior use or prior knowledge and it would be useful, I believe, to point out here that the defendants have the burden of setting aside not only the presumption of validity of the patent which exists under s. 48 of the Act and which covers all the requirements of a patent such as novelty, utility and inventiveness, but they also, when alleging prior knowledge or use under s. 28(1)(*a*) of the Act, must establish not only this prior use or knowledge but also that it was made available to the public as required by s. 63(1)(*a*) of the Act.

Section 48 of the *Patent Act* has been interpreted in many cases, however in *McPhar Engineering v. Sharpe Instruments*[1] the Court (Thorson P.) construed it as imposing an onus (that is not an easy one to discharge) on the

[1] 21 Fox P.C. 1.

defendant in showing that there is either no novelty or no utility or no inventive step in the subject matter before the Court or that it may be otherwise invalid.

Section 28(1)(*a*) of the Act which deals with the matter of novelty reads as follows:

> 28. (1) Subject to the subsequent provisions of this section, any inventor or legal representative of an inventor of an invention that was
>
> (*a*) not known or used by any other person before he invented it,
>
> . . .
>
> may, on presentation to the Commissioner of a petition setting forth the facts . . ., obtain a patent granting to him an exclusive property in such invention.

The law, however, is not as simple as s. 28 appears, as it is not sufficient for a defendant to invoke it, he must also, as we have just seen, conform to the requirements or conditions laid down in s. 63(1)(*a*) which provides that "no patent or claim in a patent shall be declared invalid or void on the ground that, before the invention therein defined was made by the inventor by whom the patent was applied for, it had already been known or used by some other person, unless it is established either that,

(*a*) before the date of the application for the patent such other person had disclosed or used the invention in such manner that it had become *available* to the public."

In the present instance, the date of the application for the patent in suit is December 4, 1948, and it is therefore incumbent upon the defendants to both plead and prove that before that date some other person had disclosed or used the invention in such a manner that it had become available to the public.

This requirement of the law sets out clearly that no one has the right to defeat a Canadian patent unless he has genuinely given the invention to the public before the application was filed. The fact he may have invented it before is not sufficient.

Under s. 28(1)(*b*) which provides that a patent may be granted if the invention was "not described in any patent or in any publication printed in Canada or in any other country more than two years before presentation of the petition" the material date here would be December 4, 1946, i.e., two years before the filing of the application so before the defendants can seek to attack the validity of this patent on

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the basis of novelty under this section, the first thing they must do is to produce a patent or printed publication printed in any country before December 4, 1946.

With respect to s. 28(1)(c) there is an additional limitation which is that the Court is only concerned with the prior use or sale in Canada which to be effective under this section must have occurred more than two years before the filing of the application or the material date of December 4, 1946.

Now under our Canadian patent law, the date of invention is important and if the patentee seeks to bring his date of invention earlier than the date which appears on the face of his patent and to which he is entitled by the records of the Patent Office he has the burden of so doing.

In the present instance, the patent in suit was applied for on December 4, 1948, which would ordinarily be the date of the invention, unless of course the invention was made earlier than that date and here the inventor or his assignee has the burden or onus of proof to establish an earlier date of invention than his date of application. Indeed, the *prima facie* validity of a patent does not go beyond the application date and if he desires to go beyond this date, he must prove it by cogent evidence.

Furthermore, there is also, as I mentioned at the beginning of this judgment, Rule 22A of the Exchequer Court Rules which permits a defendant in a patent infringement action, by notice, to require the plaintiff to state the date upon which he proposes to rely if he intends to rely upon a date earlier than the date of application and if he does so intend to rely as set down in the above Rule:

> . . . he shall furnish to the opposite party, within thirty days after service upon him of such demand, particulars of the date which he proposes to assert and the nature of the acts upon which he intends to rely for the purpose of establishing the same.

As already mentioned, the plaintiff in the present case, in its reply to the demand under Rule 22A stated it was going to rely on a date of invention of May 21, 1947, on which date a drawing of the invention was made. It did not, however, intimate or inform the defendants that it intended to rely on other dates, until at the trial when it proposed to produce, by means of Mr. Gray (p. 178 of the transcript) another drawing dated May 30, 1947, and a U.S. application for the invention dated July 29, 1947. An objection was immediately made by counsel for the defendants to the acceptance of these two documents, i.e., the drawing of May 30, 1947, and the U.S. application of July 29, 1947, on the basis that they had not been mentioned nor had the acts upon which they were based been stated as required by the above mentioned Rule, which acts we may take it comprise prior uses, disclosure to other persons, written descriptions, drawings and sales.

In answer to this objection, counsel for the plaintiff asserted that Rule 22A does not request a plaintiff or a party to submit all his dates of invention but merely requests to give the earliest date beyond which the plaintiff will not go. He added that having given the May 21, 1947, date as the earliest date the plaintiff could not go beyond that without leave of the Court but that it could go to a date subsequent even if it had not mentioned it. At the trial, the two documents subsequent to the date of May 21, 1947, were allowed to be entered under reserve of defendants objection and I now intend to deal with this matter.

I am afraid that I cannot agree with the plaintiff in this regard. Indeed, as I had occasion to point out at the trial, the purpose of Rule 22A is to allow the other party in a contestation not only to know the earliest date upon which his opponent intends to rely, but all the dates upon which he intends to rely together with "the nature of the acts (which as we have seen must be widely interpreted) upon which he intends to rely for the purpose of establishing the same" and this, I believe, is so in order that he be fully informed, so as to either be able to decide whether he should or not contest the proceeding and also to insure that he be not taken by surprise.

It would indeed be too easy for a patentee who would want to take an unwarranted advantage over his opponent to give any first date and then rely on the element of surprise of some other date. Furthermore, the burden of a patentee in establishing a date earlier than that which appears on his patent, as we have seen, is a very serious and heavy one indeed, and in my opinion, he would not be discharging it properly if he did not state in response to the above rule all the dates on which he intended to rely together with the evidence necessary to support them and in my opinion this is what the plaintiff should have done.

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This, however, does not dispose of the matter because at the trial counsel for the plaintiff asked for leave to amend the response made by him to the demand made under Rule 22A for the purpose of bringing in also the drawing of May 30, 1947, as well as the U.S. application of July 29, 1947. At that time I entertained the amendment and invited the defendants to state whether because of the reception of these documents at this late date, they had sustained any prejudice in their defence and added that in such a case I was quite prepared to grant them a reasonable delay; the defendants, however, declined to request any such delay and this is not too surprising as in the particulars of the affidavit on production in this case, a certified copy of the file history of the abandoned Cox application, serial No. 764,392, was specifically set out and the defendants, therefore, had access to and were notified of this document long before the trial of this case.

The three documents, the May 21 and 30, 1947, drawings and the U.S. application of July 29, 1947, must therefore be considered and examined for the purpose of determining the date of first invention herein.

They were all subjected to a strong attack by counsel for the defendants. Indeed, with respect to the May 21, 1947, drawing of which Mr. Gray put in a copy, the latter identified Mr. Cox's signature on it and stated that in August 1948, when he joined the company, he found this document among its records. This same witness produced also the drawing of May 30, 1947, where he also identified Mr. Cox's signature. To support the production of these two documents, plaintiff then attempted to produce the company's records of sales of chains dated November 1947, allegedly produced in accordance with the above drawings to which, however, an objection was made by the defendants on the basis that this was hearsay evidence. At p. 736 of the transcript, it does indeed appear from an answer given by Mr. Carlton that these were records that someone told him covered the chains in question, and this being clearly hearsay evidence could not be accepted and consequently, at the time, I ruled it as inadmissible.

The plaintiff also submitted that these dates were supported by Ex. D-4 introduced by the defendants and which is a catalogue showing certain filing instructions. This exhibit indicates that the plaintiff's first saw chain was made in the inventor's house in the year 1947. As it does not, however, specify what day and month in the year 1947, it can hardly be of any assistance in determining the probative value of the drawings of May 21 and May 30.

Now, although it would not have been necessary, as suggested by counsel for the defendants, that Mr. Cox, the inventor, appear and testify with regard to the drawings (although such evidence would no doubt have been conclusive) because it is not always possible for the assignee of an invention to get the inventor into the witness box, and in some cases he may of course be outside of the jurisdiction, it would seem that more cogent evidence is necessary to establish a date of first invention than what the plaintiff offered here. Indeed, the mere finding of such drawings in 1948, when the witness entered the service of the company, as he stated, and his recognition of Mr. Cox's signature, does not, in my opinion, satisfy the burden the plaintiff has in this regard to satisfy the Court that his earliest invention date is either May 21 or 30 of 1947 because it does not establish conclusively the date upon which the invention was made nor does it satisfactorily establish that it is Mr. Cox's work and I may add that the surrounding circumstances are not, in my opinion, sufficient to give those dates sufficient credence. These two dates, therefore, in my opinion, must fail.

I now come to the July 29, 1947, date upon which a U.S. application was filed and a certified copy of same was filed in this case as Ex. 36. This document was introduced by virtue of s. 14 of the Act which authorizes the production in any action or proceeding respecting a Canadian patent of invention, of a copy of any patent granted in any other country or any official document connected therewith purporting to be certified under the hand of the proper officer of the government of the country in which such patent has been obtained and the copy of such patent or document purporting to be so certified may be received in evidence without production of the original and without proof of the signature or of the official character of the person appearing to have signed the same.

The defendants admit that the seal of the United States Patent Office on this document is proof of the fact that on July 29, 1947, it was filed but submit that there is no proof, however, that this is Cox's work. All that the document

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indicates is that it purports to be an invention made by Joseph B. Cox.

I do not agree with this submission, indeed s. 14 of the Act states that such document may be received in evidence and if it is not contradicted by evidence, it does establish that it is the work of Mr. Joseph B. Cox and it establishes the date as of July 29, 1947. The only matter which might be doubtful is whether the Joseph B. Cox therein mentioned is the same one that invented the patent in suit and a simple comparison of the U.S. application with the Canadian patent in suit clearly indicates that we are dealing here with one and the same person; indeed, the names are identical in both documents, the address at 1707 S.E. 33rd Ave., Portland 15, Oregon is the same and it deals with the same invention. The date of July 29, 1947, therefore succeeds and this is the earliest date to which the plaintiff may refer in the present instance.

I may now deal with the attack made on the patent in suit on the basis of the prior art. Indeed, if the invention in the present instance was known or used by any other person before Mr. Cox invented it, i.e., as we have just seen, before July 29, 1947, in such a way that it had become available to the public, then the patent in suit may be invalidated.

The defendants submitted a number of American and Canadian patents as well as some publications in an attempt to establish that the invention was known and/or used prior to the invention date.

The first submitted was U.S. patent No. 591,039 Harris, October 5, 1897, produced as Ex. D-34. This deals with a circular saw and fig. 2 shows a number of teeth one of which the defendants suggest, the bottom one, shows a curved tooth and a toe portion extending over the blade and it would therefore appear that the general configuration of a tooth with a shank and a toe was known as early as 1897. Although to some extent this may be so, this tooth, however, certainly has not a toe portion on the tooth which extends at right angles, nor has it a cutting edge and the shank portion is in no way similar to that of the patent in suit.

The next one is U.S. patent No. 615,005 (Ex. D-35), F. W. Walquist, November 29, 1898, and this one also is for a circular saw and not for a saw chain, and although at

p. 1, column 2, line 53, it is stated that "The saw is advantageously sharpened by a circular milling tool adopted to be held at an inclination to the plane of the saw and rotated by hand, so that the front of each tooth is formed as a segmental recess", here again, the toe portion of the tooth does not extend at right angles, nor has it a cutting edge and the shank portion in no way resembles that of the patent in suit. It does, however, indicate that in 1898 it was realized that a tooth could be sharpened with a circular milling tool, which is a circular file.

As Ex. D-36, which is U.S. Patent 1,745,090, W. Geithle, July 19, 1927, relates to a ditch digger, which, of course, is an art entirely different from that of the patent in suit, I am disregarding it completely.

With respect to Ex. D-37 which is the J. E. Hassler chain, U.S. Patent 2,326,854, April 1, 1940, there is evidence that this chain went into use and some samples were produced as exhibits (Ex. 46). The tooth, however, here is on the drive link and not on the side plate and it is doubtful that the external extent of the chisel edge is substantially the same on opposite sides of the plate. Furthermore, as pointed out by counsel for the plaintiff, if they were substantially the same on each side of the plate, they would be the same width as the kerf and would bind therein. As a matter of fact, a close examination of Ex. 46 confirms this.

We now come to the square chisel chain and the same commentaries may be made here as for the Hassler tooth; indeed, the tooth here also is on the drive link and not on the side plate and the lateral extent of the chisel edge cannot be substantially the same on opposite sides of the plate as in the patent in suit. There is no patent here and this prior art is based on the evidence of Mr. Harvey that the square chisel chain was manufactured at Mill and Mine at the beginning of November 1945 and was sold for about two years. This chain is a centre link cutter but it is an advance over Hassler in that this is the first chain that has alternate left and right teeth which both cut and rout. Now, although there is some evidence (Mr. Falleri at p. 824 and Mr. Davison at p. 995 of the transcript) that this square chisel tooth can be filed with a round file, there is some doubt as to how easily this can be done, as it would be necessary to form a cylindrical surface on the cutting edge, and, of course, all the guiding elements of the tooth of the patent in

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suit are not on the chisel tooth which would, of course, make it a more difficult tooth to sharpen.

Exhibit D-42, which is Canadian patent No. 515,019, Max Merz, December 19, 1946, is called the High-R Merz. This document, according to the defendants, indicates that this chain saw has side-link cutters, which are semi-circular with an integral depth gauge, however, it does not have the flat right angled to extending beyond the plate nor equal lateral extent on opposite sides. Furthermore, it has no concave surface. The High-R is exemplified in this case also in Ex. D-11 and D-12, two drawings.

Exhibit D-11, dated December 5, 1946, is a drawing of the High-R router tooth with a back-to-back depth gauge construction of which a sample was produced as Ex. D-26 and then a later form of the High-R was produced as Ex. D-28. An attempt was made by the defendants to equate these High-R teeth to Ex. D-11 and Ex. D-13 and Mr. Harvey and Mr. Thompson, two of the defendants' witnesses, stated that the filing method of these teeth remained unchanged for the various forms of High-R and for the Low-R which followed. Indeed, these gentlemen both stated that the filing method was to use a circular file held 45° to the angle of direction of the chain and tilt it down at an angle of 15°. The instructions of Mill and Mine Supply Inc. however, for whom both of them worked, do not coincide with what both of them were doing nor with what they were teaching the users to do, which in itself strikes me as being, to say the least, peculiar. Indeed, these instructions clearly state that the filed cutting edge of the cutter tooth must not be less than 45° and there is no mention at all of tilting it 15° which, of course, means that the axis of the cylindrical surface is down 15° and would not, therefore, conform to that of the patent in suit which extends paralled with the toe portion.

However, on the other hand, if the filing instructions of Ex. 59 were followed, the 45° filing angle would have to be respected and, of course, then the round or circular file could not (unless tilted) fit right in the concavity as demonstrated by Mr. J. Thompson. I might, in passing, indicate here that this contradiction weakens considerably both Thompson's and Harvey's evidence in this respect.

Furthermore, the High-R does not show equilateral extent of the cutting edge on the shank and the toe nor does it have a toe portion at right angles to the plate and a resulting concavity on the toe and flat on the shank.

We now come to what counsel for the defendants called the Low-R story. He suggests that if one has a semi-circular or half-circle tooth such as the High-R (Ex. D-28) and brings the profile down or reduces the radius of curvature, one is left with an excess of metal at the end which, in his submission, must form and does form a flat toe portion. Mr. Harvey, one of the defendants' witnesses, at p. 2076 seemed to suggest this in re-examination when he said:

> A. D-15 is a cutter tooth from the Low R chain. The High R chain, if I may use my hand as an illustration, was a curved chain and if it was beaten and pounded down it would lower it and bring the toe farther out, away from the plate of the tooth, and this was the work that I observed.

According to this same witness, these hand made teeth were then made into a chain and given to salesmen to demonstrate in May of 1947 and one of these hand made samples used for the purpose of demonstration was the subject of the "Dear Bill" letter of May 14, 1947, produced as Ex. D-44 and which purported to be a corroboration of Harvey's evidence.

Indeed, Mr. Harvey stated that this letter was addressed to him, that he was the "Bill" mentioned therein, although later in cross-examination, he had to finally admit that he had stated some few years earlier in other proceedings that the "Bill" mentioned might have been Robert Gillespie's son Bill.

He also testified that the teeth in these hand made samples were made substantially in accordance with the drawing, Ex. 15. Temporary tooling was produced and according to Mr. Harvey and Mr. Thompson, teeth were made not later than June 15, 1947, and one of these temporary tooled teeth went to the Harbour Plywood Company and another, according to Mr. Thompson, went to Alaska in June of 1947 and the manufacture and sale of Low-R chains continued at least until 1951.

With respect to D-15 and the Low-R tooth, the defendants are not here seeking to bring themselves within s. 28(1)(*b*) or (*c*) and relying on this as a proper prior publication, but they are rather attempting to show what was known or used by Mill and Mine before the invention

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of the patent in suit and what had been made available to the public before the invention date.

On that basis, the defendants claim that the Low-R in Ex. D-15, or Ex. D-15 itself, or the physical sample dating back to June 1947 taken in conjunction with the evidence, is a complete anticipation of a number of the claims of the patent.

I might say here that I have gone over with great care the evidence of defendants' witnesses Iverson, Thompson and Harvey, particularly with regard to the Low-R, Ex. D-15, and in my opinion, there are several reasons for rejecting Ex. D-15 and whatever teeth or chains these witnesses mentioned as being in accordance with Ex. D-15. Indeed, this drawing, although bearing the date of July 28, 1947, admittedly was revised on July 31, 1947, and therefore is subsequent to the prior date of invention of July 29, 1947. This in itself would be sufficient to set it aside. However, there is more. The three above mentioned witnesses, but particularly Thompson and Harvey, in view of a number of contradictions in their evidence, and bearing in mind the manner in which their memories were refreshed after sixteen years, by the production of drawings such as D-7, D-8, D-9, D-10, D-11, D-12, D-13, D-14 and D-15, without which I am sure they could not have testified, have not succeeded in convincing me that they can, with sufficient certainty, give evidence on these matters.

There is also the absence of any invoice to show when the alleged units were on the market. Furthermore, Thompson and Harvey's evidence with regard to the hand tooled units that went to Alaska and the Harbour Plywood Company, together with the uncertainty of the "Dear Bill" letter, is not of sufficient conclusiveness in my opinion to establish that any unit in accordance with Ex. D-15 became thereby available to the public which the defendants, under s. 63(1)(*a*) had to establish.

Finally, Ex. D-15, whatever manifestation of the Low-R it may have been or whatever extended toe it might depict never, according to the evidence, found its way on the market. Indeed, none of the defendants' witnesses ever said the Low-R had a flat toe with the possible exception of Mr.

Harvey who spoke of some experimental work that went on at Mill and Mine at p. 2076 of the transcript:

> A. D-15 is a cutter tooth from the Low R chain. The High-R chain, if I may use my hand as an illustration, was a curved chain and if it was beaten and pounded down it would lower it and bring the toe farther out, away from the plate of the tooth, and this was the work that I observed.

There is, on the other hand, considerable evidence that the Low-R does not have a flat toe. Both Thompson and Harvey stated that the tooth they were talking about which was in accordance with Ex. D-15 was No. 7 of Ex. 43 which, if observed, shows there is no flat toe. This, it seems, is the only tooth in any manifestation of Ex. D-15 which went onto the market. Furthermore, by looking at the High-R and the Low-R, it can be seen that the cutting edge of both does not extend substantially at equal distance on each side as required by some of the claims but is substantially all on one side.

In my opinion, all these drawings produced by the defendants from Ex. D-7 to Ex. D-15, which all bore corrections and amendments, and particularly Ex. D-10 which showed a little projection of the tooth which might have led to the invention and which was lopped off because it gave bad characteristics, were nothing more than experiments which did not before the date of invention of the patent in suit give way to any commercial tooth on the market. They were for the most part abandoned experiments and in the case of Ex. D-10, as we have just seen, instead of leading to the invention, led away from it.

Having now reviewed the prior art, I may say that the defence of anticipation in this case must fail. Indeed, the requirements for anticipation are well known and were set out clearly by Thorson P. in *The King v. Uhlemann Optical Company*[1]:

> . . . The information as to the alleged invention given by the prior publication must, for the purposes of practical utility, be equal to that given by the subsequent patent. Whatever is essential to the invention or necessary or material for its practical working and real utility must be found substantially in the prior publication. It is not enough to prove that an apparatus described in it could have been used to produce a particular result. There must be clear directions so to use it. Nor is it sufficient to show that it contained suggestions which, taken with other suggestions, might be shown to foreshadow the invention or important steps in it.

[1] [1950] Ex. C.R. 142 at 157.

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There must be more than the nucleus of an idea which, in the light of subsequent experience, could be looked on as being the beginning of a new development. The whole invention must be shown to have been published with all the directions necessary to instruct the public how to put it into practice. It must be so presented to the public that no subsequent person could claim it as his own.

And of course Lord Dunedin in *Pope Appliance Corporation v. Spanish River Pulp and Paper Mills Ltd.*[1] described the method to find out whether there was anticipation or not as follows:

> . . . Would a man who was grappling with the problem solved by the Patent attacked, and having no knowledge of that Patent, if he had the alleged anticipation in his hand, have said "That gives me what I wish?"

And at p. 56:

> Does the man attacking the problem find what he wants as a solution in the prior so-called anticipations?

Furthermore, as set down in the same case, when documents are brought forward as anticipations, they must be read singly and must in no way be combined together to form a mosaic of extracts.

These requirements are difficult to meet and, as I said above, have not been met in the present case.

Now, with respect to the evidence of prior use, the test in my opinion should be even more strict because in a written publication we have at least something concrete to go on, a document or a writing, but when dealing with prior use, we are dealing with memory which someone has defined as a faculty that forgets. This, I believe, explains why the requirements here are more severe.

In *Unipak Cartons v. Crown Zellerback Canada Limited*[2] it was stated that:

> In view of counsel's statement that the two prior uses of the invention referred to by him were not prior uses of exactly the invention described and illustrated in the patent in suit it follows of necessity that the attack based on lack of novelty by reason of prior use fails.

And at p. 42:

> Moreover the cases indicate the evidence purporting to show that the invention was anticipated by a prior use of it, "should be subjected to the closest scrutiny"

[1] (1929) 46 R.P.C. 23 at 52.

[2] (1960) 33 C.P.R. 1 at 41.

In *Christiani v. Rice*[1] Rinfret J., as he then was, said:

> . . . Evidence of this character should be subjected to the closest scrutiny. Anyone claiming anticipation on that basis assumes a weighty burden which cannot be satisfied by mere proof of conception—if, indeed, it can be said that conception alone constitutes an anticipating invention.

I might also point out that fortuitous or experimental use which did not lead to the invention going to the public cannot be accepted. cf. *Cluett, Peabody and Co. Inc. v. Dominion Textile Co. Ltd.*[2] Maclean J. at p. 72.

Finally, in a case such as this, where, as already determined, we are dealing with a product of great commercial success, the evidence of prior use must be of such a character as to leave no doubt in the mind of the Court that it was the invention as invented that was used and no other. Indeed, any difference, even of a minor nature, would not be a prior use sufficient to defeat a valuable patent.

In *Lyon v. Goddard*[3] it was stated that:

> When a patent, especially one of simple character, has proved a commercial success, evidence of alleged prior user requires and ought to require very careful scrutiny, and evidence of something that was nearly, but not quite, a prior user is not relevant as such to an allegation of want of subject matter in a subsequent patent.

For the reasons already given in dealing with the drawing D-15, I have no hesitation in saying that the prior use here and the evidence in respect thereto is not of a nature such as to have anticipated the patent in suit and therefore the attack made upon the patent on this basis must also fail.

As the defence of anticipation was brought forward as an alternative to the defendants' defence of non infringement, it depended on how the claims would be construed. Indeed, in order to escape the possibility of the application of the doctrine of substantiality to the defendants' teeth, the latter had to submit that the claims should be construed very narrowly so that the invention defined in them be limited to a tooth strictly adhering to the angles or specifications mentioned without extending in any way the meaning of the word, "substantially". If the claims were so construed, then, however, the invention was not and could not be anticipated by any of the prior art cited because the devices disclosed by it were different from the invention defined in the claims if limited as submitted.

[1] [1930] S.C.R 443 at 452. [2] [1938] Ex. C.R. 47.
[3] (1894) 11 R.P.C. 113.

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It then, however, followed that if the invention was so limited, since the construction of the defendants' teeth was not precisely the same as those described in the patent in suit, the doctrine of substantiality could not apply to them and the defendants would be free from the charge of infringement. On the other hand, if the claims were not so limited, but were given a wide interpretation, then they were anticipated by the prior art and the defendants would escape liability in either case.

This contention, although impressive at first sight, is, in my opinion, fallacious because it does not assume, as we should here, that we are dealing with a combination patent which permits the claims herein to be given a reasonably restrictive interpretation allowing them to encompass a reasonable manifestation of the invention as I believe I have done when I dealt with the interpretation to be given to the claims of the patent in suit and yet find that the invention has not been anticipated without, however, limiting the substantiality of such a useful invention in protecting it against infringers.

Indeed, we are dealing here with a combination patent and while several of the elements in the combination defined by the claims in suit were old, the combination itself was new. This invention is not a simple aggregation of elements but a combination that was new and useful and produced a new and useful unitary result, namely a simple tooth of a conformation such that it is easy to file without the cutting edge losing any of its cutting properties. Consequently, in order to succeed in their attack, the defendants would have had to show that the combination of the invention in suit with the unitary result referred to above had been disclosed in its prior art, which, as I have already said, they have failed to do.

This now brings me to deal with defendants' attack on the patent in suit on the basis of lack of invention. Counsel for the defendants stated that he did not need Low-R to establish invalidity of the claims of the patent in suit by means of lack of invention. Indeed, he presented a chart on the other prior art in which he made a composite, showing that the elements are present in some and not in others, as the ordinary skilled workman is entitled to do, and that these charts indicate that whatever differences there are between the patent in suit and that of the prior art are not inventive differences and cannot form the subject of a valid patent.

Here again, I might point out, the defendants are not dealing with the invention of the patent in suit in a realistic manner by dissecting the invention as they have done in the prior art charts. Indeed, as I have already held, we are dealing here with an invention that lies in the combination. The combination here is in relation to a number of elements, the shank portion and the toe portion, and the bevel area or cylindrical surface which enables the unit to achieve ease of maintenance. Now, although it is permissible to mosaic in the matter of inventiveness, great caution should be used in dealing with a combination. In *Albert Wood & Amcolite Ltd. v. Gowshall Ltd.*[1] Lord Justice Green stated:

> . . . The dissection of a combination into its constituent elements and the examination of each element in order to see whether its use was obvious or not is, in our view, a method which ought to be applied with great caution since it tends to obscure the fact that the invention claimed is the combination. Moreover, this method also tends to obscure the facts that the conception of the combination is what normally governs and precedes the selection of the elements of which it is composed and that the obviousness or otherwise of each act of selection must in general be examined in the light of this consideration. The real and ultimate question is: Is the combination obvious or not?

It, therefore, is not permissible to characterize the invention as a series of parts because the invention lies in the fact that they were put together and I might even add here that the invention may well reside here in the very idea itself of arranging a tooth such as that of the patent in suit in a manner where its configuration will allow not only easiness of filing and maintenance, but will also give excellent cutting.

In *Hickton's Patent Syndicate*[2] referred to in *The King v. Uhlemann Optical* (*supra*) invention in the idea alone was found sufficient to validate a patent.

In my opinion the mere fact here of flattening the toe and giving it a dimension such as to provide guide posts for filing, would in itself be sufficient to add the attribute of inventiveness.

Now, if we consider that the chain produced in accordance with the patent in suit combines all features of a chain

[1] (1936) 54 R.P.C. 37 at 40. [2] (1909) 26 R.P.C. 339 at 347.

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saw to the best possible advantage (counsel for the defendants admitted that the chipper chain is a better one than any other chain on the market today, although he claims it is not better because of anything mentioned in the claims with which, however, I disagree,) and has, as we have seen, because of this virtually eliminated other types of chains from the market, one must necessarily conclude that the invention of the patent in suit is not only inventive but a very meritorious invention indeed.

I may add here that it might well be that the invention here lies in a combination of the flat toe and the filing angle at 45° with no tip down file at 15° or 20° such as in the D-15 teeth, and that this might be considered as a trifling change from the prior art, but in my opinion this supposedly trifling advance was sufficient to solve a problem of filing in the field and yet allow it to perform satisfactorily from a cutting point of view and, in my opinion, the considerable commercial success of the chipper chain confirms that the invention in suit was a forward step of great importance in the trade and definitely stamps it as being an invention of great importance.

Under these circumstances, it appears to me impossible not to find here the attribute of inventiveness and defendants' attack in this respect must, therefore, also fail.

I now turn to defendants' third attack on the patent in that all the claims therein are for inoperative devices as they all omit mention of a depth gauge and that without it it would not work. They also submit that all the claims in suit read on a saw chain in which all the teeth are on the one side, in which every tooth is a left-hand cutter, or a right-hand cutter and as the evidence shows that the success of this device depends on its operation on an alternative right and left cutter, cutting out a groove to allow the body of the saw chain to go through this also would show an inoperable device.

The defendants then point out that a bad claim cannot be saved by stating that no competent manufacturer would ever make a saw chain with all the teeth left-handed or right-handed and that on the basis of *Eyers v. Grundy*[1] the fact that these things have been shown in the specifications does not excuse the patentee from including every essential element in his claim.

[1] (1939) 56 R.P.C. 253 at 260.

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Counsel for the defendants even suggested a proper drafting of the claims which he produced and which would read as follows:

ELEMENTS OF CLAIMS

In a saw chain, a pair of longitudinally spaced apart links including sprocket-engaging root portions, a pair of oppositely disposed side plates pivotally joining said links together, one plate of *each* said pair of side plates having a cutting tooth formed thereon and including an intermediate portion extending outwardly in the opposite direction with respect to said links and adjacent an edge thereof, the end portion of said plate extending back over said links substantially at right angles with respect to the plane of said plate,

alternate teeth being of right and left configuration

the forward edge of said intermediate and end portions being provided with a chisel cutting edge, the lateral extent of said chisel edge being substantially equal on opposite sides of said plate whereby the cutting load during working of said tooth is substantially balanced on the opposite sides of said one plate,

and a depth gauge positioned forwardly of the cutter tooth to limit the depth of the cut made by the cutter tooth.

With respect to the absence of a depth gauge, I believe that the fact, as disclosed by the claims, that the invention here resides in a cutting tooth and not in a saw chain and that the depth gauge is merely an associated element in the chain which is in the disclosure and the drawings is a complete answer to that attack. Indeed, it appears from the specifications at column 7, lines 26, 60, 41, that a depth gauge is contemplated and it says there that its location is immaterial. The depth gauge is disclosed in fig. 14 of the drawings of the patent as not being on the cutter tooth and in fig. 1 at 22 as being on the cutter tooth. Mr. DeRoy stated at p. 1296 of the transcript: "Well if the depth gauge is not on the tooth, I have seen them on the market. In fact, the McCulloch Company had one on the market. The first tooth that I saw of this nature didn't have the depth gauge on the tooth." Mr. Carlton at pp. 1069 to 1070 stated that the chain would work no matter where the depth gauge was located. The depth gauge in fact is not an element of the invention and it is described in the specifications as one of these items that would, in the normal course, be used by anyone skilled in the art for the purpose of making the saw chain and it is not excluded in the claims as was the case in *Leggatt v. Hood*[1] where a back board for a dart game in

[1] (1951) 58 R.P.C. 3.

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a patent was clearly excluded and found wanting in this respect.

In the present case the patent contemplates that the ordinary operable parts of the saw chain, including the depth gauge, as disclosed in the disclosure and drawings will be used in whatever different location desired.

In *Rodi v. Metalliflex*[1] which dealt with bracelets, the question was whether or not an expanding watch bracelet would remain in use on the wrist without falling apart after use without some means of keeping the parts together and the Supreme Court of Canada, Taschereau J., as he was at the time, held at p. 122 that the holding means were necessary but they were disclosed in the specification and they were external to the invention.

> The claims, of course, must be construed with reference to the entire specifications, and the latter may therefore be considered in order to assist in apprehending and construing a claim, but the patentee may not be allowed to expand his monopoly specifically expressed in the claims "by borrowing this or that gloss from other parts of the specifications".
>
> But here, the respondent does not seek to enlarge or expand his monopoly by reference to the specifications, but refers to them to explain the obvious. The monopoly applied for is the combination of three elements, and the particular means by which the parts are to be held together is immaterial. The appellant does not claim a holding means.

The same applies, in my opinion, to the criticism levelled at the claims on the basis that the patentee describes but one tooth on one side or one tooth on the other side. The claims must be looked at by the competent skilled workman at the date of the patent with "a mind willing to understand, not by a mind desirous of misunderstanding." As pointed out by counsel for the plaintiff, a similar criticism can be directed at counsel for the defendants proposed draft. Indeed, his claim has only two teeth or only two links and where is his chain going to reside as he has not mentioned a saw bar.

Indeed, such a precision of language as the defendants' claim cannot be entertained when dealing with a patent, the claims of which are sufficiently well drafted to conform to the requirements of s. 36 of the *Patent Act*, which were well defined in *Watson v. Pott*[2]:

> But in my opinion, my Lords, the principle of the matter can be expressed thus: A patentee must not use language so vague as to enable him to secure a monopoly for more than his real invention and so to

[1] [1961] S.C.R. 117. [2] (1908) 25 R.P.C. 337.

invade the rights of free rivals. But, on the other hand, it is permissible to state the real invention in language of such generality as is essential to preserve it and to prevent those rivals from invading the rights of the patentee.

There is no question, in my mind, that the defendants here were not deceptively misled by the language of the claims and when one reads them with " a mind willing to understand" it is clear that the invention is in relation to a cutting tooth to be placed alternatively on both sides of a chain and the invention has, therefore, in my opinion, been properly defined in the claims.

Furthermore, as stated by Lord Shaw in *British Thomson-Houston Co. Ltd. v. Corona Lamp Works, Ltd.*[1]

> . . . it is expected that those operating the manufacture will be honestly looking, not for failure, but for success in the range in which the principle is applied.

It, therefore, follows that the attack on the patent on the basis of inoperability must also fail.

Now before leaving the matter of validity, I would like to deal briefly with the matter of utility and following upon the matter of inoperability this would be a good place to do so. I do believe that here the utility of the invention in the patent in suit is manifest. It is indeed clear from the evidence that we are dealing with a most useful device, one that not only has practically displaced all other saw chains but which also has by its ease of maintenance permitted a larger number of people to use saw chains in the field and to obtain from such use accrued monetary benefits.

I find, therefore, that all attacks on the validity of the claims in suit fail and it follows that as between the parties the claims in suit are valid.

The only matter now remaining for determination is whether the defendants have infringed the plaintiff's rights under the said claims.

This involves a consideration of the following exhibits, Ex. 7, the Gouger chain, Ex. 71, the G-58, Ex. 75, the late G-58, Ex. 78, the Citadel and Ex. 50 the Sabre and, I might point out here, that counsel for the defendants admitted at the trial that the Citadel and the Sabre teeth were one and the same thing.

[1] (1922) 39 R.P.C. 49 at 92.

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Exhibit 3 contains samples of those chains but in respect of Ex. 66, Ex. 70 and Ex. 77, we have the actual chains themselves.

Now, the matter of infringement can be considered from two standpoints. The first one is, the claims having been properly construed according to the canons of construction, as we have already done, is the offending device or devices within the text of the claims. If so, this is what is called textual infringement and this is the end of the matter. However, if the device is not within the precise wording of the claims, it may nevertheless, still be an infringement if the substance or pith and marrow of the invention has been taken on the basis that the property in a patent is not to be taken away by someone making variations which do not affect the substance.

And as pointed out by Thorson P. in *Lovell v. Beatty*[1] at p. 71 of his reasons for judgment:

> . . . It is only in such a case the question of the applicability of the doctrine of mechanical equivalency can arise for the doctrine is only a particular application of the general principle that a person who has unlawfully taken the substance of an invention is an infringer.

Now mechanical or chemical equivalency is only one facet of this larger doctrine of taking the substance and it, therefore, appears that the substance may be taken when the infringer using small variations of dimensional details only to distinguish his device from that of the plaintiff produces a device which performs exactly the same function and this in my opinion is what we have here.

However, that this has happened here is not too surprising in view of the inference I must draw from the fact that up to the second last day of the trial, although the defendants had repeatedly been requested before the trial and during the latter to produce a 7/16 or a .404 pitch drawing for their teeth, they failed to do so and produced one of a different pitch i.e. a 0.5 inch pitch instead. This, in my opinion, would indicate that the defendants probably copied the plaintiff's device and would appear from Ex. 85 which is a dimensional comparison of the plaintiff's teeth with that of the defendants. This exhibit which comprises a number of drawings shows that the defendants' devices are substantially the same as the plaintiff's device. They have

[1] (1964) 41 C.P.R. 18.

indeed used the same integers with minor dimensional variations in them and they are, therefore, obtaining the same result by similar means. Furthermore, there is no evidence that these variations were smaller or greater or different because they had to be so which would seem to indicate that they are unintentional differences.

In *McPhar Engineering v. Sharpe Instruments*[1] Thorson P. stated:

> It has long been established that if a person takes the substance of an invention he is guilty of infringement even if his act does not in every respect fall within the express terms of the claim defining it.

The authorities in this matter, I believe, are clear, it is immaterial whether it is a better or worse device, but if there is nothing functionally different, it is an infringement.

In the present instance, the only differences between the plaintiff's teeth and those of the defendants' are the dimensions, because the form and the shape of the teeth are the same and the question now remaining is as to whether these differences of dimension are of such a magnitude as to take them out of the ambit of the claims of the patent in suit. It is on this basis only that the defendants can escape infringement.

In *Electrolier Manufacturing v. Dominion Manufacturers*[2] the Supreme Court of Canada stated:

> We also agree with the learned President that infringement has been established.
>
> Infringement is a matter depending on the construction of the claims, for there it is that the inventor is required to state "the things or combinations . . . in which he claims an exclusive property and privilege".

Rinfret J. at p. 443:

> What the appellant did—and in that his infringement truly consists—was to take the idea which formed the real subject matter of the invention. It does not matter whether he also adopted the substitution of the two holes for the bar in the pivoting means. The precise form of these means was immaterial. In the language of the patent they could be changed "without departing from the spirit of the invention".

And Rinfret J. at p. 444:

> At best, the appellant has borrowed the essence of the patented structure with a small variation in its unimportant features or its non essential elements.

[1] (1961) 35 C.P.R. 105 at 156. [2] [1934] S.C.R. 436.

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Mr. Carlton used both the plaintiff's device and the defendants' devices and observed that they all worked satisfactorily, there is no difference in the main elements of the structures, none in the operation and all perform the same function in the same way. This alone would be sufficient to find infringement.

However, there is more. Indeed, Mr. Carlton testified in connection with a number of drawings produced as exhibits 94 to 97 and 97 to 104 to the effect that there is no practical difference between the patented device and the Gouger chains. (Exs. 67, 71, 75 and 78) and Ex. 85 shows how close they come to the plaintiff's device.

There is also, in my opinion, further evidence of infringement in the Gouger filing instructions which for the lack of drawings can be used to obtain some indication of Gouger's intent in this regard.

These instructions sought to keep the leading edge of the shank portion normal to the longitudinal direction of the chain; they have a filing angle which embraces 45° and the file is kept horizontal and as pointed out already by mentioning a range of from 25° to 45°, the defendants recognized that this angle is not essential. They say "make sure front of top plate and side cutting face are hollow ground" which, of course, will give the bevel or cylindrical surface provided in some of the claims of the patented device and also to keep file horizontal. The same terminology is found in Ex. 73. In Ex. 76, which is also defendants' filing instructions, the angle to be kept is between 25° and 35° and the angle for the leading edge must be kept at 90° and they also show how to file to obtain the hollow ground and Ex. 79, which is also filing instructions, appears to be similar to Ex. 76.

Now in order to evaluate the differences between the plaintiff's device and those of the defendants, two documents were submitted by the plaintiff, Ex. 85, with which we have already dealt and E. R. Hilborn's measurements of November 26, 1962, produced as Ex. 141. Exhibit 85 is a number of drawings of Gouger, Sabre and Citadel saw chains compared with Omark saw chains.

I have already rejected defendants' objection to the production of this exhibit on the basis that it is perfectly legitimate to compare the plaintiff's device with the defendants' devices once it is found, as I have, that the plaintiff's device is clearly the structure found in the drawings and claims and therefore the results obtained from such a comparison can and should be used to evaluate the importance of whatever differences are revealed.

A strong objection was also made by the defendants to the evidence of Eric Ronald Hilborn, a professional engineer employed by the plaintiff, who by means of a Kodak optical comparator which magnifies twenty times, measured the cutting edge angle as effected from the front of the toe portion with respect to the base plate, i.e. the relationship of the toe portion to the base plate on a number of right and left Gouger, G-58, late G-58, Citadel and Sabre teeth, and produced Ex. 141 which lists in the upper section the results he obtained together also with a compilation of the front edge angle to cutter side plate taken from the data which appears on Ex. 85. Mr. Hilborn made a theoretical calculation of the average leading edges of these angles and these appear in the lower part of Ex. 141 under the heading "Average". Exhibit 141 is hereafter reproduced:

November 26, 1962

Measured Edge Angles to Cutter Side Plate
(from Comparator Tracings)

		R. H. Cutter		*C. H. Cutter*	
	Chain Sample	*Number*	*Angle*	*Number*	*Angle*
"Gouger"	#1	#9	87° 50′	#13	88° 00′
"G-58"	#2 #3	#2	92° 00′	#2	90° 10′
"Late G-58"	#6	#4	92° 20′	#11	91° 20′
"Citadel"	#4	#5	92° 30′	#11	92° 30′
"Sabre"	#5	#28	91° 45′	#15	90° 20′

Compilated Front Edge Angle to Cutter Side Plate
(from Exhibit 85 Data)

Chain Model	*Chain Sample*	*Average*	*Extreme High*	*Extreme Low*	*Maximum Difference*
Gouger	#1	89° 30′	97° 6′	87° 12′	3° 24′ Ground
G-58	#2 & #3	92° 18′	94° 54′	89° 18′	5° 36′ Ground
Late G-58	#6	89° 48′	92° 12′	87° 18′	4° 54′ Formed
Citadel	#4	93° 12′	94° 12′	92° 12′	2° 00′ Formed
Sabre	#5	92° 54′	94° 30′	91° 6′	3° 24′ Formed

E. R. Hilborn
November 25, 1962

By means of tracing sheets and the comparator, Mr. Hilborn traced the outline of the cutter as a shadow or a sheet when it was properly focussed along the cutting edge and

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from this obtained the measurements which appear at the top of the above document. This was done by means of a light projected through a lens and a prism system where the magnification takes place on to a screen where the shadow twenty times magnified is traced.

Defendants' objection to Mr. Hilborn's evidence and his comparison chart was that this was in the nature of a test conducted during trial and that consequently the plaintiff should have obtained permission from the Court to go through this experiment and the defendants should have been invited to attend.

There is no question that the practice in this Court seems to have been that evidence of tests and experiments conducted *pendente lite* without notice being given to the other side and an opportunity to attend should not be considered and I believe that this is a salutary rule. I might also add that in any event tests and experiments conducted even before the trial in the presence of the other party are much more probative than if conducted *ex parte*.

However, in the present instance, we are not, in my opinion, dealing with an experiment or a test but merely with shadowgraph measurements which any of the defendants' engineers could have performed in the same manner with a similar comparator and defendants' objection to Hilborn's evidence and to the production of Ex. 141 is therefore rejected.

Counsel for the defendants, for the purpose of establishing non infringement, prepared a chart, where in regard to those elements of the various claims which showed a difference or a deviation from what they alleged was required by the patent in suit, they set down a number of measurements drawn from both Ex. 85 and Ex. 141.

With respect to element 4 in claim I "The end portion of said plate extending back over said links substantially at right angles with respect to the plane of said plate," counsel for the defendants, set down the measurements taken from Ex. 85 as follows:

> For exhibit 67 the 7/16 pitch Gouger, 91°-93° for Ex. 71, the .404 Pitch G-58 96°-98° for Ex. 78 the .404 pitch Citadel, 98°-99°, for Ex. 82 the .404 Pitch Sabre 98°-99° and for Ex. 75 the Gouger late G-58, 97°-94°.

In order to obtain the above degrees, counsel for the defendants took the figures which appear on pp. 11, 12, 13, 14 and 31 of Ex. 85 for the respective teeth. For Ex. 67 for instance, as it appears from p. 11 of Ex. 85 at the lower right-hand part of the drawing in a section indicated as A-A that it is off the vertical by 3 degrees to one degree, he has set down, as we have seen, 91°-93° for that exhibit and the same applies to the other teeth.

In the second portion of element 4 he has placed those angles measured by Mr. Hilborn on his shadowgraph as follows: 87° 50′-88° for right hand and left hand cutter as they appear on Exs. 131 and 132 for Ex. 67 7/16 pitch Gouger; 90° 10′-92° as they appear on Exs. 133 and 134 for Ex. 71 a .404 pitch G-58; 92° 30′-92° 30′ as they appear on Exs. 137 and 138 for Ex. 78 a .404 pitch Citadel; 91° 45′-90° 20′ as they appear on Exs. 139 and 140 for Ex. 82 a .404 pitch Sabre and 92° 20′-91° 20′ as they appear on Exs. 135 and 136 for Ex. 75 a Gouger late G-58.

He then entered the average figures determined theoretically by Hilborn on Ex. 141 in the lower section thereof under the heading "Average" as follows:

> For Ex. 67, 89° 30′ for Ex. 71, 92° 18′ for Ex. 78, 93° 12′ for Ex. 82, 92° 54′ and for Ex. 75, 89° 48′.

These last figures are a theoretical calculation taken from the dimensions given in Ex. 85 as to what would be the minimum and the maximum dimensions from which he then obtained the above averages.

From this, defendants argue that on the basis of Ex. 141 with respect to the late Gouger G-58 as the extreme low was 87° 18′ and the extreme high was 92° 12′, we have here an actual measurement, 92° 20′, which falls 8 minutes beyond the figure theoretically calculated as being the maximum.

On the Sabre, Ex. 82, there is a figure of 90° 20′ and as on Ex. 141 Hilborn's measurements show an extreme low of 91° 6′ and an extreme high of 92° 54′, we now have here an actual measurement of a tooth which falls below what has been calculated as theoretically the lowest. As in two respects out of twelve, the measurements are outside of what is calculated as the maximum and the minimum, counsel for the defendants submits that no credence should be given to the Hilborn measurements.

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I must say that I cannot agree with this submission. Hilborn's figures in my estimation are most valuable in that they indicate that the calculated variations of the leading edges are even in the case of the defendants' devices differences which should be considered as manufacturing tolerances and the fact that in two instances out of twelve they were slightly outside of the maximum or minimum can in no way detract from their probative value in this regard.

Now the figures from Ex. 85 and those drawn from Hilborn's measurements do not deal with the same thing. In Ex. 85 we are dealing with what appears in fig. 7 of the patent whereas in Ex. 141 we are dealing with the cutting edge as shown in fig. 6 of the patent in suit and this relationship, as I have already stated in interpreting the claims, is explained in the patent.

The measurements taken from Ex. 85 with respect to element 4 of claim I represent fig. 7 of the patent where we have a section cut behind the cutting edge, and Hilborn's figures represent the cutting edge, as in fig. 6, and therefore the measurements are not like measurements so a comparison between the two cannot be made.

Now, as already held, substantially at right angles does not, in my opinion, mean precisely at right angles and what is meant appears from the drawings fig. 6 and fig. 7 where an angle is shown. Indeed, the purpose of this angle is explained in the specifications. On the shank side it is down and on the leading edge side it is up if one cuts directly across it. Now because of the filing angle, this then will make the two points at the filing angle horizontal which is what the devices of the defendants have and which is called for by the specifications.

The defendants indeed have achieved that in the same way as the patentee has achieved it, and therefore have taken what the patentee discloses so that the relationship of figs. 6 and 7 and what is intended by "substantially at right angles" in fig. 6 in that angle 41 is such as to have a horizontal top cutting edge.

By proceeding as indicated above, one obtains the cutting edge at the positions as determined by Hilborn and we therefore have clearly here an infringement of element 4 of claim I.

Indeed, by examining the meaning of element 4 of claim I in the light of the disclosure and by looking at the Gouger Sabre and Citadel devices, it appears to me that the defendants are doing exactly what the patent teaches and Carlton's evidence at p. 361 of the transcript is also to this effect.

I now turn to element 6 of Claim I which reads as follows:

> The lateral extent of said chisel edge being substantially equal on opposite sides of said plate whereby the cutting load during working of said tooth is substantially balanced on the opposite sides of said one plate.

Counsel for the defendants on this element took from Ex. 85 the lateral extent of the cutting edge for the toe and the shank on the opposite sides of the plate from Exs. 67, 71, 78, 82 and 75 as being respectively: .0505 toe, .066 shank; .045 toe, .0645 shank, .055 toe, .077 shank; .050 toe, .0765 shank; .0565 toe, .079 shank.

He then calculated the percentage of deviation from being equal between the various sides and arrived at the following result: with respect to Ex. 67 the percentage is 31% for Ex. 71, it is 43½% for Ex. 78, it is 40% for Ex. 82, it is 53% and for Ex. 75 it is 40%.

From this he argues that differences of this magnitude can in no circumstances be said to be substantially equilateral on both sides and that the above percentages indicate how much they deviate from being equal.

Now although the above deviations expressed in percentages appear to be considerable, and although admittedly we are comparing like to like, we are still talking of minute differences of 16/1000 of an inch for Ex. 67, 26/1000 of an inch for Ex. 71, 23/1000 of an inch for Ex. 78, 26/1000 of an inch for Ex. 82 and 22/1000 of an inch for Ex. 75, and, furthermore, as I had occasion to mention when interpreting the claims, we are dealing with a working tooth that will require some substantial balance and a clearance angle during the whole of its working life, and not only at the time it is manufactured.

These differences, as explained by Carlton, exist at the initial stage of the use of these teeth and at a point somewhere approximately half way, through use and sharpening their configuration will be reduced and altered somewhat and will become actually balanced and then there will be a minor difference the other way.

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This indeed is what R. Carlton said at p. 1124 of the transcript:

MR. HENDERSON:

Q. Now, as you cut back, having regard to the clearance angle will you tell the Court what happens in terms of any difference between these two measurements that were drawn to your attention?

A. Because the side plate or the side, there is side clearance on the cutter . . . as you file back, the relationship of the centre line to the outermost cutting edge of the shank to the centre line to the outermost extent of the toe changes because you cut it back.

Q. Do these distances become equal or greater, the differences that were pointed out to you, the differences in measurement?

A. Somewhere on the tooth they become approximately equal.

HIS LORDSHIP:

Q. Is that because of the taper?

A. Yes.

Q. The tapered form of the tooth?

A. Right. This dimension from the plate to the toe all along is generally the same. However, it is not true up here (indicating) of the other side of the clearance. It goes down to a lesser degree, a lesser amount.

MR. HENDERSON:

Q. Is the point intermediate to the end point?

A. It is approximately at the middle point.

Q. Approximately at the middle of the length of the tooth?

A. Yes. We thought it was more reasonable to take it as a center point because the tooth is neither right here nor there (indicating) the front or the back, so we take the centermost point.

HIS LORDSHIP:

Q. A happy medium?

A. Yes.

I might also add that the evidence is to the effect that these small differences or deviations have no practical effect whatsoever on the operation of the saw chains involved.

The clearance angle we have just spoken of can be seen in fig. 5 of the patent in suit at No. 38 and as already pointed out is made so that during the working of the tooth throughout its life it will be substantially balanced. This clearance angle is also described in column 4 at line 40 in relation to the lateral extent of the tooth. Now, looking at the various devices of the defendants, there is no question that this is exactly what the defendants have done and, therefore, element 6 of claim I is also infringed.

Claim II is infringed in exactly the same way as claim I and claim III element 6 is infringed in the same manner as element 6 in claim I.

In claim IV although element 4 is infringed in a similar manner as element 4 of claim I, there is however a further limitation in element 4 of claim IV in that the toe portion must extend from the shank portion back over the edge of the plate and this additional limitation is also found in the Gouger, Sabre and Citadel teeth, so here also there is infringement.

I now come to element 6 of claim IV which reads as follows:

> The bevelled edge surface defining the cutting edge on said toe and shank portions conforming to a cylindrical surface with the axis of said cylindrical surface extending parallel with said toe portion.

Here counsel for the defendants submits that there is no cogent evidence and that the axis therein mentioned cannot be determined.

Now although this axis cannot be determined from the drawings or even the specifications, there is evidence of a bevelled edge surface defining the cutting edge on the toe and shank portions and which conforms to a cylindrical surface and it is stated that this surface extends parallel with the toe portion. Indeed, Carlton at pp. 603 to 606 and at p. 568 of the transcript demonstrated on the defendants teeth how the file did fit in their concave portion and the file then was in a horizontal position. It follows, therefore, that if the evidence, as here, shows that the file nests in the bevelled portion, then the axis of the file is in a horizontal position to the bevel. The same applies when the file is inserted in the plaintiff's devices, there also the axis is in a horizontal position. There are, of course, also the defendants' filing instructions which instruct that "when filing chain keep the file horizontal" and in my opinion, the defendants' devices would not cease to infringe, if the filing, as suggested by Thompson and Harvey, was done a little differently. Indeed, by merely placing the round file into the position of the Gouger, Sabre or Citadel tooth, I find that these teeth all infringe and they therefore meet this element of the claim.

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I now come to element 6 in claim V which should be dealt with in the same manner as element 6 in claim I.

With respect to element 7 of claim V which deals with the 90° angle of attack of the shank portion, it will suffice to say that it can be seen from pure observation of Ex. 85, No. 11, that the angle is 90° and as one looks down at the rivets, the disposition of the tooth is apparent.

This same angle is apparent on the defendants' devices and there is therefore here also infringement of the element of claim V.

I now come to element 8 of claim V which reads as follows:

> The cutting edge of said toe-portion lying in a second plane at right angles to said first plane and extending at a substantially 45° angle with respect to the longitudinal direction of said chain, the bevelled edge surface defining the cutting edge of said toe portion being concavely curved in the transverse direction.

Here the defendants have averaged from Ex. 85 this angle in the case of each tooth and these averages are as follows: for Ex. 67, 40°; for Ex. 71, 35°; for Ex. 78, 31°; for Ex. 82, $32\frac{1}{2}$° and for Ex. 75, $32\frac{1}{2}$°; on the basis of these variations, the defendants submit that there cannot be infringement.

Now although these variations from 45° are in some cases considerable, the maintaining of this angle does not appear to me to be essential. Indeed, the defendants themselves, as I already had occasion to point out in their filing instructions, Ex. 69, state: "Maintain proper angle on front of the cutter. Have the same angle on every cutter. Do not have less than 25 or more than 45." By so doing they have, in my opinion, established that this angle is one that has tolerances and, therefore, here also the defendants are within the claim.

Element 3 of claim VI has been dealt with already in element 4 of claim I and element 7 of claim VII has also been dealt with in element 8 of claim V.

Now the various aspects to which the defendants have directed their attacks appear differently in the various claims. The matter of "substantial equal and lateral extent" is a limitation in claims I, II, III and V only. The 45° angle is only in claims V and VII and the axis of the cylindrical surface is only in claim IV. As for the other elements

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of the claims, there is no question but that they are infringed. With regard to those pointed out by the defendants as being different and which we have just examined, there is also no question in my mind but that the features of these elements of the claims are present in the offending devices of the defendants and when they have not been taken literally or textually, they have been taken substantially within the meaning of the claims, the only variation of importance being the 45° angle of element 8 of claim V and this angle, as we have just seen, is manifestly a non essential one. The defendants here really took the substance of the invention and achieved the same purpose.

I find, therefore, that the defendants have infringed the plaintiff's rights under the claims in suit.

There will, therefore, be judgment in favour of the plaintiff as against all the defendants that as between the parties the claims in suit are valid and that they have been infringed by the defendants as contended and that the plaintiff is entitled to the relief sought, except as to damages. If the parties are unable to agree on the amount of the damages or the amount of the profits, if the plaintiff elects an account of them, there will be a reference to the Registrar or a Deputy Registrar to determine the amount of such damages or profits and judgment for the amount found on such reference. The plaintiff is also entitled to recover costs from all the defendants who will all be jointly and severally responsible therefor in view of what I must (from the manner in which the defendants were set up and their interrelationship) infer were premeditated schemes to escape infringement in which however I hasten to say that both counsel for the defendants had no part whatsoever. The defendants' counterclaims must also be dismissed with costs and the latter shall be recoverable also from all the defendants and in the same manner.

Judgment accordingly.

1963 Oct. 7-11, 17, 18 — 1964 July 29

BETWEEN:

SAMUEL DUBINER, ...PLAINTIFF;

AND

CHEERIO TOYS AND GAMES LTD., ...DEFENDANT.

Trade Marks—Infringement—Registered user agreement—Permitted use terminated by breach of registered user agreement—Permitted use of trade mark by registered user deemed to be use by owner thereof—Permitted use controlled by registered owner—User agreement not to be registered if not in the public interest—Application for registered user to be refused if it would cause deception or confusion beyond that necessarily resulting from registered user provisions of Trade Marks Act—Assignment of trade mark need not include goodwill of assignor—Goodwill severable from trade mark—Use of trade mark by permitted user after breach of user agreement constitutes infringement—Loss of distinctiveness—Piracy of trade mark may result in its loss to owner—Abandonment of trade mark—Whether trade marks have become generic—Descriptiveness and distinctiveness not necessarily incompatible qualities—Assignment agreement acted upon by both parties cannot be objected to by them although improperly authorized and executed by the party objecting to it—Assignor of trade mark cannot retain equitable ownership thereof where consideration given for assignment—Ownership of trade mark not divisible into legal and equitable title between registered owner and registered user—Non-distinctive trade mark—Trade mark may be name under which business is carried on—Trade names can be transferred only with goodwill attached to them—Goodwill of trade mark identical to and inseparable from that of trade name where trade mark is part of trade name—Corporate name used as trade mark—Wares not distinguished by trade mark when trade name also used as trade mark—Trade Marks Act, S. of C. 1952-53, c. 49, ss. 2(f), (t), (u) and (v), 4, 18(b), 20, 47(1) and (2), 49 and 53(2)—Unfair Competition Act, R.S.C. 1952, c. 274, s. 2(m).

The defendant company was incorporated in 1938 and carried on the business of selling tops and bats. In 1955 the plaintiff's wife, who owned 75 per cent of the shares in the defendant company, sold her interest therein to one Albert Krangle, but just prior thereto the defendant company assigned all but one of its trade marks to the plaintiff, the remaining trade mark being assigned to the plaintiff in 1957. By the terms of the agreement under which the transfer of interest in the defendant company took place, the plaintiff granted a non-exclusive licence to the defendant company to use the trade marks, patents, industrial designs and copyrights referred to in the licence, which included all the trade marks formerly owned by the defendant company. Under the said agreement the defendant company agreed, *inter alia,* to pay to the plaintiff an annual sum equal to five per cent of the sale price of all bandalore tops sold by it.

The defendant company, together with the plaintiff, applied for registration of the defendant company as a registered user of each of the trade marks in issue and an entry was made in the register of trade marks whereby the defendant company was registered as a registered user thereof but with the proviso that it could so use the trade marks only so long as the registered owner, the plaintiff, was given free access to the defendant company's premises to inspect the finished wares and found them to be in compliance with the standards therein set out. The permitted use was without definite period.

In December 1962, at a meeting between Krangle, the president and controlling shareholder of the defendant company and the plaintiff, the defendant company, through Krangle, denied free access to the plaintiff to inspect its wares. In January 1963 the plaintiff purported to terminate the registered user agreement because of this breach of the terms thereof. This action was then instituted by the plaintiff in which he claims damages and consequential relief for infringement by the defendant company of the plaintiff's trade marks and designs.

Held: That the plaintiff was entitled to free access for inspection under the terms of the registered user agreement and this could not be restricted to one area only of the defendant company's premises.

2. That when the defendant denied the plaintiff free access for inspection it forfeited the right to any use of the trade marks subsequent to that time and therefore ceased to be a permitted user within the meaning of s. 49(2) of the *Trade Marks Act.*

3. That the terms referred to in s. 49(2) of the *Trade Marks Act* are the terms which appear in the user agreement and are not restricted to what is defined as use in s. 4(1), (2) and (3) of the *Trade Marks Act.*

4. That the rule under the present *Trade Marks Act* is still that the purpose of a trade mark is to indicate origin by distinguishing the wares of one from those of another, as it was under the *Unfair Competition Act.*

5. That the permitted use under s. 49(3) of the *Trade Marks Act* is an exception to the rule and therefore must be strictly construed and this applies not only to the substantive law but also to the procedure set down therein to give effect to this departure from the general rule.

6. That s. 49(3) is of a very general and broad nature and goes as far as to deem not only that the permitted use of a trade mark by the registered user is use by the owner thereof but also that the wares in association with which the trade mark is used by the permitted user are deemed to distinguish the wares of the owner of the trade mark and it also confers on the permitted user, *inter alia,* the right to raise the same defences in an infringement action as are available to the registered owner, including the statutory right of use of the trade mark conferred on the registered owner by s. 19 of the Act.

7. That the permitted use of a trade mark is a type of deception which Parliament has implicitly recognized as necessary in the general interest of trade but it should not go beyond what is necessary to permit the owner of a trade mark to allow some other person to use it providing the name of such person is not confusingly similar to that of the owner, or if so, no additional objectionable confusion results from the concurrent use by him of the trade mark. Any further deception would be against the public interest which is the governing consideration the Registrar of Trade Marks is faced with when he comes to approve a person as a registered user or when once he has approved the registered user he comes to vary the terms of such use, and it can become a valid reason for cancellation of the registration of a registered user.

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8. That the provisions of s. 49 are permissive and not mandatory and are for the utility of the owner of the trade mark and the registered or permitted use ceases upon the breach of the terms of the registration as endorsed in the Register of Trade Marks if the language of the terms so provides, provided such terms are limited to what is set down in the section as being necessary for the proper carrying out of its intent.
9. That it is a basic requirement on an application for a registered user that the owner of a trade mark retain control over the permitted use; that information with respect to the wares or services for which registration is requested or the restrictions proposed with respect to the characeristics of the wares, to the mode or place of permitted use or to any other matter, be supplied, as well as information as to the proposed duration of the permitted use and such further documents, information or evidence as may be required by the Registrar.
10. That the whole purpose of the conditions underlying the registered user provisions is that the quality of the goods would not be reduced if the marks were permitted to be used by persons other than the owner and the matter of origin is not of too great concern.
11. That since the governing consideration which the Registrar must adopt in permitting the use of a trade mark is the public interest and there is no limitation in the registered user section in this regard, the registration of a proposed registered user is not to be permitted if, for any reason at all, it would not be in the public interest. The Registrar would have to refuse the application if, for any reason whatsoever, approval thereof would cause deception or confusion which went beyond that necessarily resulting from the registered user provisions of the Act.
12. That not only may a trade mark be assigned apart from the goodwill of a business but the goodwill also is considered severable so that a trade mark also can be assigned together with the particular portion of the business in association with which it has been used or even with a particular part of the business being conducted in a particular restricted area.
13. That the same grounds as those enumerated under s. 49(10)(*c*) can be raised on a hearing before the Registrar under s. 49(10(*a*) or (*b*).
14. That the defendant was no longer a permitted user after breach of the user agreement and any use made by it of the plaintiff's trade marks after that time would constitute infringement.
15. That in cases where the question is whether a particular symbol has been used for the purpose of distinguishing the wares of a particular manufacturer or whether it has been used principally as a description or a name of the wares themselves, the whole course of conduct of the owner or permitted user of the trade mark must be considered in order to determine whether or not it has lost its distinctiveness.
16. That whether a word registered as a trade mark has come to mean the name of the goods or wares themselves is a question of fact to be determined from the circumstances of the particular case.
17. That a trade mark can be lost because it has come to mean the ware itself only when the owner has been careless in its use and has allowed extensive piracy of the mark by others.
18. That there can be no abandonment of the trade marks YO-YO and BO-LO by the owner because he has maintained his rights to them

by allowing the defendant to use them under controlled licence as permitted by the Act, such use being deemed under the Act to be use by the owner, and for which he has over the period of the user agreement and up to date, received royalty payments.

19. That the conduct of the plaintiff and defendant in successfully taking action on two occasions to terminate infringement of the trade marks is such as to make it apparent that the trade marks have been used principally as trade marks and consequently cannot be considered to have become generic. This conclusion is strengthened by the fact that in many cases the words YO-YO and BO-LO have been accompanied by the letter "R" in a circle, meaning registered trade mark, on the packing boxes of the wares and that in its advertising the defendant has always indicated that these were registered trade marks.

20. That the sole basis on which the trade mark BEGINNERS might be invalidated as being no longer distinctive would be its descriptiveness, even though these two qualities are not necessarily incompatible, and the question as to whether or not the trade mark actually distiguishes the wares in association with which it is used by its owner from those of others is one of fact.

21. That although it has not been shown that any other producer of tops or bats has used the trade mark BEGINNERS on the same product anywhere in Canada, it has been established on the evidence that the word BEGINNERS, when used by the plaintiff through its registered owner in association with the wares on which it has been used in the area in which the products are sold, was descriptively used for the purpose of indicating that the wares were easy of operation and for beginners as contrasted with those of better quality, and does not actually distinguish such wares from those of others within the first part of the definition of "distinctive" in the statute, and the trade mark is accordingly invalid as not being distinctive at the material time, i.e. when the counterclaim of the defendant was delivered.

22. That since, by virtue of s. 49(3) of the *Trade Marks Act*, use of a trade mark by a registered user has the same effect as use by the registered owner for all purposes of the Act, use by the registered user is deemed to be use by the owner, so that if such use is sufficient to distinguish, then it distinguishes the wares in association with which it is used by its owner (through the registered user) from the wares of others as required by s. 2(*f*) of the *Trade Marks Act*.

23. That although evidence was adduced which indicated that the agreement by which the trade marks were assigned by the defendant company to the plaintiff in 1955 was improperly authorized and executed by the defendant company, both parties have acted on the assignment, the defendant company having paid royalties thereunder for nearly ten years, and the parties revised the conditions of the assignment in 1959 and 1961, this alone being sufficient in the circumstances of this case to prevent the defendant company from now raising this objection.

24. That although the plaintiff, because of his position in the defendant company in 1955, cannot be considered an outsider and might not therefore be able to benefit from what is termed the indoor management rule, he would still be entitled to whatever rights he might have as a party in good faith to a valid document which contains the transfer of rights and mutual obligations and on which the seal of the company was affixed.

25. That although the assignment was recited to be for $1.00 and other valuable consideration, there was in fact other consideration therefor, since the transaction was part of an overall deal whereby the majority of shares of the defendant company were transferred to Krangle and the company was allowed to use the trade marks so that the transfer of the trade marks to the plaintiff cannot be said to have been gratuitous and the defendant company is not the equitable owner of the trade marks.

26. That the fiction created by s. 49(3) of the *Trade Marks Act*, which states that the permitted use of a trade mark has the same effect for all purposes of the Act as a use thereof by the registered owner, would make it impossible in the present situation to argue that there is any division and that the plaintiff has legal title but the defendant has the beneficial or equitable title.

27. That the assignment of the trade marks from the defendant company to the plaintiff and of the user rights back to the defendant company must all be read together and if this is done it appears that as a result of these two transactions there has subsisted rights in two persons to the use of confusing trade marks and the evidence disclosing that those rights have been concurrently exercised by such persons, the trade mark CHEERIO has become non-distinctive within the meaning of s. 47(2) of the *Trade Marks Act*. The confusing trade marks are not the trade mark CHEERIO as deemed to be used by the plaintiff and as in fact used by the defendant company but the trade mark CHEERIO which stands in the name of the plaintiff, on the one hand and the corporate name "Cheerio Toys and Games Limited" which stands in the name and ownership of the defendant company on the other hand, and which, under s. 2(*u*) of the Act, can be the name under which a business is carried on and at the same time a trade mark if it is used in association with wares.

28. That although s. 47(1) of the *Trade Marks Act* now permits the assignment of trade marks with or without the goodwill of the business, this section does not apply to the transfer of trade names which can only be transferred together with the goodwill attached to them, and as there was no assignment of the trade name of the defendant company in 1955, the goodwill remained with it.

29. That since the trade mark CHEERIO is part of the trade name "Cheerio Toys and Games Limited" the goodwill of one is identical to and inseparable from that of the other.

30. That the use by the defendant of its trade name in its advertisements and also on the boxes containing its wares and on the tops themselves is clearly a trade mark use.

31. That even if the defendant had no right to use its trade name as a trade mark the fact as disclosed by the evidence that the plaintiff has allowed or tolerated the defendant to use its trade name as a trade mark over a long period of time has created a situation such that the trade mark because of this can and does no longer distinguish the wares of the plaintiff from those of others, notwithstanding the fact that under s. 49(3) of the Act use by the permitted user is deemed to be use by the owner, bearing in mind here the strict interpretation to be given to the permitted user section which permits the use of a mark and not the use of an infringing mark.

32. That the plaintiff has made out a case of infringement of the trade marks PRO, YO-YO, BO-LO, 99 and TOURNAMENT. The other

trade marks in issue having been found invalid there can be no infringement of them.

ACTION for infringement of trade marks.

The action was tried before the Honourable Mr. Justice Noël at Toronto and Ottawa.

Donald F. Sim, Q.C. and *W. F. Green* for plaintiff.

J. C. Osborne, Q.C. and *R. G. McClenahan* for defendant.

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

NOËL J. now (July 29, 1964) delivered the following judgment:

This is an action for damages and consequential relief in which the plaintiff claims that the defendant has infringed the following trade marks and designs registered as follows in his name in the Trade Marks Office of Canada as applied to the wares respectively indicated:

a)	N.S. 35/9570	CHEERIO YO-YO	Toys and Games
b)	N.S. 45/12078	CHEERIO	Toys and Games (amended Nov. 9/39 by adding Boys' and Girls' Sports Wearing Apparel and again on April 15, 1944 to include Milk; Coffee, Tea; Patent Medicines, etc.
c)	N.S. 74/19279	TUFFY	Toys and Games, undergarments, blankets, woollen sweaters, children's suits, dresses and hats
d)	N.S. 83/21541	99	Toys and Games
e)	N.S. 83/21542	66	Toys and Games
f)	N.S. 83/21543	33	Toys and Games
g)	N.S. 83/21544	88	Toys and Games
h)	N.S. 83/21545	55	Toys and Games
i)	N.S. 83/21554	22	Toys and Games
j)	N.S. 83/21555	44	Toys and Games
k)	N.S. 85/22029	CHEERIO (Design)	Toys and Games
l)	N.S. 85/22066	PRO	Toys and Games
m)	N.S. 85/22096	TOURNAMENT	Tops of Bandalore Type
n)	N.S. 86/22285	BEGINNERS	Spinning tops of the Bandalore type

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o)	N.S. 86/22303	JUNIOR	Spinning tops of the Bandalore type
p)	N.S. 89/23191	CHEERIO BEGINNER (Design)	Tops
q)	N.S. 89/23192	CHEERIO TOURNAMENT (Design)	Tops
r)	N.S. 90/23301	Design Mark	Top Strings
s)	N.S. 90/23430	CHEERIO CHAMPION	Tops
t)	N.S. 94/24465	YO-YO	Toys and Games
u)	N.S. 95/24662	PRACTICE	Paddle Balls and Tops
v)	N.S. 128/32786	FRIG-EZE	Food Moulds
w)	N.S. 48/12848	BO-LO	

The defendant denies infringement and counter-claims for an order striking out the plaintiff's above registrations.

The defendant is an Ontario corporation with its principal office and place of business at the City of Toronto, in the Province of Ontario, and since 1938, the year of its incorporation, has carried on business in Canada selling mainly bandalore tops and paddle balls.

As we are mainly concerned with the trade marks CHEERIO, YO-YO and BO-LO, we will at this stage only deal with them. The evidence discloses that the trade mark CHEERIO YO-YO, registered under No. N.S. 35/9570 of the Trade Marks Office, Canada, by Kitchener Buttons, Limited on March 4, 1933, was transferred for $1 and other valuable consideration to the defendant corporation by assignment N.S. 3401, G.C. 13383, dated August 12, 1938, and registered in its name as of October 26, 1938, and the trade mark CHEERIO was applied for and obtained by the defendant corporation on January 30, 1939.

The trade mark BO-LO, registered under No. N.S. 48/12848, was acquired by the defendant corporation from an American corporation, All-Metal Bottle Cooler Corporation by assignment dated August 2, 1939, and registered on May 28, 1940.

The plaintiff caused the incorporation of the defendant corporation in 1938 and carried on the business of selling tops and bats through this company, as well as that of plastic toys and kitchen items through a corporation called Dulev Plastics Limited until the year 1955 when he decided to sell the controlling shares of the defendant corporation to a Mr. Albert Krangle, who at the time was a personal and close friend. Both of the above companies had been managed, since 1942, by a Mr. Gordon Button and a cousin of the plaintiff, a Mr. Irwing Dubiner, in the absence of the plaintiff who, at the time was away from his business, being active in assisting towards the liberation of what is now the State of Israel, and the defendant corporation had lost money during the three years preceding the year 1955. However, on March 15, 1955, a few days prior to the sale of the shares of the defendant corporation which took place on August 17, 1955, all the trade marks belonging to the defendant corporation (with the exception of BO-LO) were assigned to the plaintiff, Samuel Dubiner, upon payment of $1 and other valuable consideration, as it appears from the said assignment produced as Ex. 7. And on April 11, 1957, the trade mark BO-LO (N.S. 48/12848) was also assigned to the plaintiff as it appears from the said assignment produced as Ex. 9.

An agreement, produced as Ex. 5, was then drawn up between Mr. A. Krangle, Betty Dubiner, Samuel Dubiner's wife, the said Samuel Dubiner, Cheerio Toys and Games Ltd. and Dulev Plastics Limited, dated August 17, 1955, whereby Betty Dubiner, who owned 75 per cent of the issued common shares of the capital stock of the defendant corporation and Samuel Dubiner, who owned all of the common issued shares of Dulev Plastics Limited, sold them to A. Krangle for $1 and other valuable consideration. This document contains the following relevant sections 8 and 9 which read as follows:

> 8. Samuel Dubiner doth hereby grant to Cheerio a non-exclusive licence to use the trade marks, patents, industrial designs and copyrights hereinbefore referred to.
>
> 9. In consideration of the granting of the aforesaid non-exclusive licence and Samuel Dubiner's agreement to reveal to Cheerio the systems of marketing and his knowledge in connection therewith from time to time as requested by Cheerio, and his agreement to assist Cheerio from time to time from Israel, Cheerio doth hereby covenant and agree to pay to Dubiner in each year a sum equal to five per centum (5%) of the sales price (excluding sales tax) of all bandalore tops sold by Cheerio in such year, and Cheerio doth further covenant and agree to pay to Samuel Dubiner's mother the sum of $12.00 per week in each and every week so long as she lives.

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And an appendix attached to the above agreement carried the following:

> 2. In the event that Albert Krangle should wish to discontinue either Cheerio Toys and Games Co. Ltd. or the Dulev Plastics Co. Ltd. and shall so notify Mr. Samuel Dubiner in writing, then from the date of such notification inventory on hand as at that time may be liquidated by the company without payment of royalty on sale price of same.

It is to be noted here that the royalties mentioned above were payable to the plaintiff whether the trade marks were used or not.

The evidence further discloses that upon Krangle's acquisition of the shares of the defendant corporation some of its assets were sold and Krangle made a substantial loan to the company from which all the creditors of the corporation were paid off and a bankruptcy was avoided. Krangle, however, as the main shareholder of the corporation derived direct benefits from this transaction as a result of operating this business from 1955 to the taking of the present action.

On August 31, 1955, the defendant corporation, Cheerio Toys and Games Ltd., together with the plaintiff, applied for registration as a registered user of each of the trade marks hereunder listed with the exception of BO-LO and the following entry was made on September 14, 1955, of such registered user right in each case. As all the entries are the same, one entry only, (the important parts of which I have italicized) without mentioning any particular trade mark is reproduced hereunder:

> *September 14, 1955*—CHEERIO TOYS AND GAMES LIMITED, 35 Hanna Avenue, Toronto, Ont., is hereby registered as a Registered User of the trade mark registered under No. .... in respect of the wares in association with which the trade mark is now registered. The Registered User is the former owner of the trade mark. *The Registered User is to use the trade mark only in association with wares meeting the standards of quality and efficiency established by it while it was the owner of the trade mark, and only so long as the Registered Owner is given free access to the premises of the Registered User to inspect the finished wares and finds them in compliance with the aforesaid standards. The permitted use is without definite period.*

In the case of the trade mark BO-LO the registered user entry is similar but bears, however, the date of May 1957.

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It may be of some interest to state here that one A. C. Gallo, who had been with the plaintiff from the very beginning of the latter's activities in bandalore tops and bats, joined the defendant company in 1955, at the time of the transfer of its shares, both as an employee and as a stockholder of 25 per cent of the common shares, and to use the plaintiff's own words, also as a watch-dog for him, which duties, I must say he did perform in a manner such that some time in the spring of 1962 he was dismissed by Mr. Krangle, this, however, not being the sole reason for this separation as there had been in addition thereto continuous bickering between them during most of their association in connection with a number of claims for a participation in profits and salary which are, at the present time, pending before another jurisdiction and with which, however, we do not have to deal here. As a result of all this, both Gallo and Krangle were always threatening to part company and in 1960 Krangle even stated that he was going out of business. I might also add that there is some evidence that in 1962 Krangle may have been expecting some sort of trouble with both Dubiner and Gallo as he had registered some new trade marks for tops in his name which were not related to the trade marks assigned herein. The above facts are of some importance and, in my opinion, necessary to fully appreciate the situation which developed from Gallo's departure from the defendant company up to and including December 28, 1962, when matters came to a head and when the plaintiff alleges the defendant by Albert Krangle breached the terms of its registered user agreement by denying free access to the plaintiff to inspect its wares.

It was around this time that the plaintiff who, during the period 1955 to 1962, was living in Israel, came to Canada in December 1962 to settle the differences between Gallo and Krangle. A number of meetings had already been held between them when on December 27, 1962, a meeting was arranged by the plaintiff and Krangle over the telephone for the next day in Krangle's office located in the premises of the defendant company at 11 Church Street, Toronto. During this conversation, Gallo entered Dubiner's room and the latter interrupted his phone call to ask Gallo the time of their appointment at the television station the next

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morning, for the purpose of looking at a film which Krangle erroneously took to be one produced for the purpose of selling yo-yos and bo-los but which, in fact, had nothing to do with the company's business at all as it dealt with Israeli art. This matter is mentioned merely because the meeting which took place the next day, at the defendant's premises at 11 Church Street, Toronto, would have started off on this misunderstanding with an accusation by Krangle that both Dubiner and Gallo were planning to have a television film made dealing with yo-yo return tops in competition with his business, which, however, Dubiner hastened to deny and explain. Although Krangle claims that the matter of the film script came up at the end of the meeting only, there is no question that the discussions which took place at this meeting were carried out in an atmosphere of tension and anger largely as a result of the television scripts but also because of Gallo's claims and lasted an hour, dealing chiefly with the latter's demand for salary and a share in profits from the year 1956 on which the parties could, however, not agree on and it was at this stage when it appeared that nothing more could be said that the plaintiff, as he was walking towards the door, turned to Krangle and said: "Well Albert, now I want to go into your stock room and examine the quality of your merchandise," to which Krangle replied "Sam, I won't let you in the back, I understand you have been at the T.V. station and you have never inspected my wares before. I think there is more to this and you had better see my lawyer."

On January 8, 1963, the plaintiff wrote a letter to the defendant company and Krangle, which was produced as Ex. 14, containing the following:

> By the terms of the registered user agreement between myself and Cheerio Toys and Games Limited, dated Toronto, the 31st day of August, 1955, Cheerio Toys and Games Limited is required to give me full access to the premises of the registered user, to inspect the finished wares, to ascertain that the quality standard set by me are maintained.
>
> On Friday December 28th, 1962 I was denied access to these facilities by you.
>
> This is to advise you that without prejudice to all other rights and causes of action which I may have against you, I do hereby terminate the registered user agreement as of December 28th, 1962.

This was then followed by a letter dated January 14, 1963, written by Messrs. McCarthy & McCarthy on behalf of the plaintiff which reads as follows:

Cheerio Toys & Games Limited,
11 Church Street,
Toronto, Ontario.

Attention: A. Krangle, Esq.

Dear Sirs,

We act for Samuel Dubiner, the owner of certain trade marks upon which you have, prior to December 28th, 1962, been operating as a registered user.

This registered user agreement has been terminated by Mr. Dubiner and we now request without prejudice to the other rights which Mr. Dubiner may have against you, your written undertaking to refrain from further use of any of the marks in question in respect of the wares for which they are registered and your undertaking to deliver existing stock bearing the trade marks to Mr. Dubiner or your written assurance that the trade marks will be removed from such stock.

If this undertaking is not received by January 21st, 1963, we shall take the necessary steps to protect our client's position without further notice to you.

Yours very truly,

McCarthy & McCarthy,
per Donald F. Sim.

Now, subsequently to the meeting of December 28, 1962, although Krangle had told Dubiner to see his lawyer, he never thereafter got in touch with him to indicate who his lawyer was. On the other hand, although Dubiner tried to reach Krangle over the telephone, he never did succeed and the above correspondence, of course, closed the door to any possible inspection or to any settlement of the matters in dispute.

Proceedings were then instituted by Messrs. McCarthy & McCarthy on behalf of the plaintiff on January 14, 1963, to cancel the defendant's registered user licence by a letter to the Registrar under s. 49(10)(*a*) of the Act but the latter was not filed in the Trade Marks Office until February 19, 1963, and this application is still pending.

The present proceedings were then taken on March 13, 1963. Later, on May 31, 1963, the Registrar of Trade Marks, upon the plaintiff's request, accepted the registration of a Quebec corporation incorporated by Al Gallo and others under the name of Cheerio Yo-Yo and Bo-Lo Company Ltd.,

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as a registered user and on June 5, 1963, the defendant herein, Cheerio Toys and Games Ltd., appealed from the Registrar's decision to this Court under No. A-1406 which appeal is also before me and with which I shall deal subsequently in another judgment.

On June 10, 1963, Cheerio Toys and Games Ltd. took proceedings against Cheerio Yo-Yo and Bo-Lo Company Ltd., under No. A-1413 of this Court, for directing public attention to its wares and/or business in such a way as to cause or be likely to cause confusion in Canada between its wares and/or business and those of the plaintiff, and passing off its wares and/or business as and for those of the plaintiff and claiming consequential relief and damages in the amount of $10,000. This action is also before me and will also be dealt with subsequently in another judgment.

Now, the evidence regarding what took place at the premises of the defendant on December 28, 1962, is somewhat contradictory, Krangle contending that he did not refuse access but merely referred the plaintiff to his lawyer as he thought that there was more to the situation than a mere wish to inspect the defendant's wares for quality, that Dubiner had never inspected the wares before, and that if he had really wanted to inspect he could have done so on the above date in his office where the discussions took place and where stock comprising several samples of each item of merchandise was kept up to date.

This, however, is not entirely true as it appears from the evidence that Dubisner had carried out some sort of inspection of wares of the defendant on each of his visits to Toronto and in one case, according to a witness produced by the defendant, became quite mad with Krangle because he was not satisfied with the quality of some of the tops. Furthermore, the latter did refuse to allow Dubiner to go into the back of the premises on the relevant date and, therefore, in my opinion, did not give him free access as he was obliged to under his registered user agreement and registration. As for the display of wares in Krangle's office, some of the wares were missing and, at any event, a proper and satisfactory spot check could not be made by Dubiner from such a selection, the latter being entitled to free access for inspection which, in my opinion, could not be restricted to one area only of the defendant's premises.

Furthermore, although the letters sent by Dubiner and his solicitors, as we have seen, closed the door to any possibility of allowing Krangle to comply with the obligation to give free access, there is no evidence that the latter, through his lawyer or personally, attempted in any manner after December 28, 1962, to comply with same and I, therefore, must of necessity find that the defendant has breached its registered user agreement.

I might also add that the fact that as of January 1, 1963, Mr. Krangle was abandoning the plaintiff's trade marks and switching to his own "Big C Glitterspin" and "Big Chief" would, in my opinion, confirm his unwillingness to comply with the obligation to give free access to the plaintiff.

Having thus determined that the defendant on December 28, 1962, was in breach of its registered user agreement, the question remaining is whether such a breach terminates the rights of the permitted user under s. 49 of the Act as of that date so as to make it no longer entitled to the use of the trade marks as of such date or whether, as submitted by the defendant, it remained a permitted user and, therefore, could not be an infringer as long as its registered user entry remained as such on the Register of Trade Marks.

In my opinion, the defendant's submission cannot be entertained in view of the manner in which the parties to the user agreement as registered in the Register of Trade Marks have by the language used, set down a term to the use upon denial of free access and when the defendant denied the plaintiff free access for the purpose of inspecting the wares, it forfeited the right to any use of the trade mark subsequent to that time and, therefore, ceased to be a permitted user within the meaning of s. 49(2) and not being a "permitted user" could no longer be a person entitled to the use of the trade marks within s. 20 of the Act which reads as follows:

> 20. The right of the owner of a registered trade mark to its exclusive use shall be deemed to be infringed by a person *not entitled* to its use under this Act who sells, distributes or advertises wares or services in association with a confusing trade mark or trade name, but no registration of a trade mark prevents a person from making . . .

There is indeed no question in my mind that the "terms" mentioned in s. 49(2) "the use of a registered trade mark by a registered user thereof *in accordance with the terms* of his registration as such" which is in this

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section mentioned as the "permitted use" in the present case refer to the terms which appear on the user agreement and which state that the registered user shall use the trade marks only so long as the registered owner has free access. It therefore follows that as soon as he is denied free access, the use made of the trade marks subsequent thereto would no longer be "permitted use". I cannot, as urged by counsel for the defendant, restrict "the terms of his registration as such" in s. 49(2) of the Act to what is defined as use in s. 4(1), (2) and (3) of the Act, but must of necessity give these words an interpretation such that can be included in such terms all those conditions and restrictions necessary to give effect to the registered user provisions of the section. There is no question in my mind here that the defendant by refusing access has broken a stipulation of major importance to the contract as without access there can be no inspection and without inspection there can be no assurance of a maintenance of a standard of quality which, as we shall later see, is one of the main considerations of this registered user section.

Bearing in mind that this section is a relatively new one, and, there being no precedents to rely on, this is new ground, I have examined this matter not only with respect to the words used in s. 49 as well as in other relevant sections of the Act such as ss. 20, 2(v) and 4, but I have also considered what appears to me to be the legislative policy which underlies the whole economy of this new registered user section because, in my opinion, it will be useful not only for the determination of the present case but also in dealing with the other cases I have before me and to which I have already referred.

The conception of registered use in Canada was introduced in 1953 by s. 49 of the *Trade Marks Act,* c. 49, and was a change of considerable importance from the prior *Unfair Competition Act* of 1932. Indeed, under the latter Act s. 2(m) required that an ordinary trade mark be used "by any person in association with wares entering into trade or commerce for the purpose of indicating to dealers in and/or users of such wares that they have been manufactured, sold, leased or hired by him..." which, of course, meant that an ordinary trade mark must be used exclusively by the owner of his own wares and, therefore, indicated origin. It also indicates to a certain extent quality and we, therefore, have with respect to a trade mark two characteristics, a warranty of origin and a badge of quality.

The reason for the origin requirement was that prior to the present Act it was felt that the prospective purchaser of wares had a right to know the trade source of the wares or goods he was buying and any transfer of the trade mark which would prevent the buyer from knowing the source of the wares would invalidate or impair the trade mark. It therefore followed that a trade mark could be assigned only together with the goodwill of the whole of the business concerned in the goods in association with which the trade mark was used and it could not be licensed for use by others without thereby rendering it non-distinctive and, therefore, invalid.

It is interesting to note that the authority to licence a trade mark in the present Act was not carried out in the definition of a trade mark [s. 2(t)] but only in s. 49 of the Act which now provides in some cases for a system of controlled licensing of trade marks. Indeed, although some changes were made the new definition still retained the basic notion that a trade mark indicates origin, by stating in s. 2(t) that a trade mark "means (i) a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others". Furthermore, "distinctive" [under s. (2f)] "in relation to a trade mark means a trade mark that actually distinguishes the wares or services in association with which it is used by its owner from the wares or services of others or is adapted to so distinguish them". In principle, the characteristics of origin and distinctiveness have therefore been retained in the new act.

In order, however, to allow someone else besides the owner to use the trade mark, as it has done for the registered user, and for the purpose of reconciling this situation without conflicting with the above definitions, a legal fiction was adopted by means of s. 49(3) which reads as follows:

49. . . .

(3) The permitted use of a trade mark has the same effect for all purposes of this Act as a use thereof by the registered owner.

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From all this, three rather important considerations should be drawn: (1) the rule under our present *Trade Marks Act* is still that the purpose of a trade mark is to indicate origin by distinguishing the ware of one from those of another; (2) the permitted user under s. 49(3) is an exception to this rule and, therefore, must be strictly construed and this applies not only to the substantive law but also to the procedure set down therein to give effect to this departure from the general rule; (3) s-s. (3) of s. 49 is of a very general and broad nature; it goes as far as to deem not only that the permitted use of a trade mark by the registered user is use by the owner of the trade mark but also that the wares in association with which the trade mark is used by the permitted user are deemed (if the above subsection means what I think it does, i.e., that every effect that the use by a registered user has is exactly the same as if it had been used by the owner) to distinguish the wares of the owner of the trade mark and it also confers on the permitted user (*inter alia*) "the right to the same defences in an action for infringement as are available to the registered owner including the statutory right of use of the trade mark conferred on the registered owner by s. 19 . . ." as held by Cameron J. in *Building Products Limited* v. *B. P. Canada Limited*[1].

It then, in my opinion, follows that the above situation having thus been allowed to develop necessarily a certain amount of confusion or deception as to origin will occur resulting from the artificial and fictional use of the owner through his registered user. Indeed, it cannot be otherwise, permitted use is a certain type of deception but one which Parliament has implicitly recognized as necessary in the general interest of trade. This deception, however, should not go beyond what is necessary to permit the owner of a trade mark to allow some other person or persons to use it providing the names of such person or persons (and I here include corporations) are not confusingly similar or if so, no additional objectionable confusion results from the concurrent use by them of the trade mark. It should, indeed, be confined to what necessarily results from allowing someone else, a registered user or several of them, to produce, manufacture or sell wares by using the trade mark. Any further deception would, I believe, go against the

[1] (1962) 21 Fox P.C. 130.

public interest which, as it appears in s. 49, s-ss. (7) and (9) of the Act is the governing consideration the Registrar is faced with when he comes to approve a person as a registered user or when once he has approved the registered user he comes to vary the terms of such use. It is also when deception or confusion goes beyond what I have attempted to circumscribe above that deception or confusion can become a valid reason for cancellation of the registration of a registered user under s. 49(10)(*c*)(i) of the Act which reads as follows:

> 49. . . .
>
> (i) that the registered user has used the trade mark otherwise than by way of the permitted use, or in such a way as to cause, or to be likely to cause, deception or confusion.

Some support for such a view can be found in the *Bostitch Trade Mark Case*[1] decided under the English Act where permitted use is also provided for, cf. p. 195:

> Both parties appear to have misconceived the provisions of s. 28 (which is our s. 49) for this is not a mandatory but a permissive section and cannot fairly be construed to provide a protective cover for any trade mark use which would otherwise be deceptive or confusing.

Furthermore, these provisions being permissive and not mandatory, it follows that they are for the utility of the owner of the trade mark and the registered or permitted use ceases when the language of the terms of the registration as endorsed in the Register of Trade Marks is such that its violation terminates the user agreement, provided however that such terms are limited to what is set down in the section as being necessary for the proper carrying out of its intent.

It would also appear from s. 49(5) which sets down the material necessary to sustain an application made for a registered user that a basic requirement is that the owner of the trade mark retain a control over the permitted use, that information with respect to the wares or services for which registration is requested or the restrictions proposed with respect to the characteristics of the wares to the mode or place of permitted use or to any other matter, be supplied, as well as information as to the proposed duration of the permitted use, and such further documents, information or evidence as may be required by the Registrar.

[1] [1963] R.P.C. 183.

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This material would appear to be necessary, (although this is not stated clearly in the section but can only be inferred) in order to enable the Registrar to determine whether means have been taken to assure a certain standard of quality in the goods or wares in association with which the trade mark will be used by the registered user.

It therefore now appears that the whole purpose of the conditions underlying registered user provisions is that the quality of the goods would not be reduced if the marks were permitted to be used by other persons than the owner and that by so placing the accent on the characteristic of quality of the goods, if the public interest is protected, the matter of origin would not be of too much concern.

If the Registrar is then in accordance with s. 49(7) "satisfied that in all the circumstances the use of the trade mark in association with such wares by the proposed registered user would not be contrary to the public interest", he may then approve the registered user.

I must add, however, that before so approving a registered user, the Registrar, under s. 49(12) in the event it will affect a person adversely, must give this person an opportunity of being heard personally or by his agent. Indeed, s. 49(2) expresses this as follows:

> 49. . . .
>
> (12) The Registrar shall not exercise any discretionary power under this section adversely to a person without giving each person who will be affected by the exercise of the power an opportunity of being heard personally or by his agent.

Now we have seen that the governing consideration which the Registrar must adopt in permitting the use of a trade mark is the public interest and it may well be useful to try to establish what this means. It would seem that there being no limitation in the registered user section in this regard, it does mean that the registration of a proposed registered user is not permitted if, *for any reason at all,* it would not be in the public interest.

A likewise interpretation was given to a similar statute in Australia in *Heublein Incorporated and Another* v. *Continental Liqueurs Proprietary Limited.*[1]

Indeed, if for any reason whatsoever, taking into consideration all the circumstances of a particular case, the

[1] 103 C.L.R. 435.

approval of a registered user would cause deception or confusion which went beyond what I have already touched upon as the necessary deception or confusion resulting from the registered user provisions and which would be contrary to the public interest, the Registrar would have to refuse it.

We now have under the registered user section of the Act a permissive procedure whereby the use of trade marks may be assigned for all or any of the wares for which it is registered [s. 49(1)], provided the public interest is protected and proper safeguards of control are used to insure a guarantee of quality in the wares under the control of the Registrar of Trade Marks.

This is further confirmed by s. 47(1) of the Act from which it now appears that not only may a trade mark be assigned apart from the goodwill of the business but the goodwill also is considered severable so that a trade mark can also be assigned together with a particular portion of the business in association with which it has been used or even with a particular part of the business being conducted in a particular restricted area. Section 47(1) of the *Trade Marks Act* reads as follows:

> 47. (1) A trade mark whether registered or unregistered is transferable, and deemed always to have been transferable, either in connection with or separately from the goodwill of the business and in respect of either all or some of the wares or services in association with which it has been used.

I might also point out that s. 49(10)(*a*), (*b*) and (*c*) determines how, when and by whom the registration of a person as a registered user of a trade mark can be cancelled by stating that it "may be cancelled" (which is permissive and not imperative), (*a*) by the Registrar on the application in writing of the registered owner or the registered user of the trade mark; (*b*) by the Registrar on his own motion in respect of wares for which the trade mark is no longer required or (*c*) by the Exchequer Court upon the application of any person, of which notice is served upon the registered owner and all registered users on any of the grounds mentioned in s-s. (i), (ii), (iii) and (iv). This subsection, however, is not too clear as the grounds mentioned under 49(10)(*c*) would seem to apply to the proceedings before the Exchequer Court only. However, as the Registrar's right of cancellation is discretionary and as s.

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49(12) does not permit the Registrar to "exercise any discretionary power under this section adversely to a person without giving each person that will be affected by the exercise of the power an opportunity of being heard personally or by his agent" it would seem that the same grounds as those contained under s-s. (*c*) above could be raised at any such hearing.

The present Act also brought a rather important change in the matter of the distinctiveness of a trade mark which may require consideration here and which I would now like to touch upon.

Under the old Act it was held that a symbol that is not adapted to distinguish in the sense of being both distinctive in fact and inherently adapted to distinguish, must not only be refused registration but cannot even be regarded as a trade mark for any purpose.

It was felt that such a restrictive definition was an unrealistic approach to what actually existed in commercial practice and that there was no good reason why a symbol which had become distinctive in fact of the wares of a particular trade should be denied protection because it was not inherently adapted to distingiush and, therefore, in the definition of a trade mark in the present Act, the requirement that a trade mark must be a symbol which has become adapted to distinguish particular wares was omitted and the situation was corrected by stating in s. 2(*t*)(i) of the present *Trade Marks Act* that "trade mark" means

> 2. . . .
>
> (*t*) . . .
>
> (i) a mark that is used by a person *for the purpose of distinguishing or so as to distinguish wares or services* . . .

instead of "a symbol which has become adapted to distinguish particular wares" as contained in the *Unfair Competition Act,* 1932.

Having thus determined that as of the date upon which the breach of the user agreement occurred, i.e. December 28, 1962, the defendant was no longer a permitted user, it follows that any use it may have made of the plaintiff's trade marks thereafter would constitute infringement. However, before examining the matter of infringement proper, the counterclaim of the defendant must be considered as, should any of the plaintiff's trade marks be successfully attacked and become invalid, there could be no infringement of them.

The attacks launched on the plaintiff's trade marks can be narrowed to the following:

(1) The words YO-YO and BO-LO are used in Canada as and are the generic names used to describe a particular type of top and bat respectively and, therefore, cannot be distinctive; the same applies to the words BEGINNERS, PRO, JUNIOR, TOURNAMENT and PRACTICE which are alleged not be be distinctive.

(2) The trade marks CHEERIO, CHEERIO YO-YO, JUNIOR, BEGINNERS, BEGINNER (design), CHEERIO TOURNAMENT (design), CHEERIO CHAMPION, CHEERIO (design) FRIG-EZE and BO-LO, do not actually distinguish any wares of the plaintiff from those of others, but do distinguish the wares of the defendant from those of others.

(3) All of the trade marks mentioned in the Statement of Claim have been abandoned by the plaintiff.

(4) None of the trade marks mentioned in the Statement of Claim actually distinguishes any wares of the plaintiff from those of others.

(5) None of the registrations in the Trade Marks Office of Canada mentioned in the Statement of Claim actually expresses or defines the existing rights of the person appearing to be the registered owner of the said trade marks.

The defendant consequently claims that the said registrations be struck out.

Defendant's first attack on the plaintiff's trade marks is based on the alleged fact that the symbols YO-YO and BO-LO are no longer distinctive as they were or have become by usage descriptive of the wares themselves.

Section 18(*b*) of the Act provides that a trade mark is invalid if

> (*b*) the trade mark is not distinctive at the time proceedings bringing the validity of the registration into question are commenced;

And S.2(*f*) defines "distinctive" as follows:

> (*f*) "distinctive" in relation to a trade mark means a trade mark that actually distinguishes the wares or services in association with which it is used by its owner from the wares or services of others or is adapted so to distinguish them;

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Mr. Hastings and Mr. Goebel, the former a toy buyer for the Robert Simpson Company, in Toronto, for some odd twenty years and the latter also a toy buyer for the Woolworth Company, in Toronto, for the last sixteen years, were both handed first of all a top bearing among other things the word YO-YO and then one not bearing the trade mark YO-YO and in both cases they said this was a yo-yo. The same thing happened with bats and both of these witnesses stated that they could not distinguish these articles without using the words YO-YO or BO-LO.

Mr. Leslie Vasilaros, a law sudent in Toronto, who was born in Greece but now lives in Canada was also handed as Ex. 1 a return top with the trade mark YO-YO on it and stated that this was a yo-yo; he also stated that Ex. A, another top without the trade mark YO-YO on it, was a yo-yo. He then added that these toys would also be called YO-YO in his native country, Greece.

The same witnesses admitted, however, that it could also be called a return top although here there could be many kinds of tops and to describe the one we are dealing with the word YO-YO would have to be used, and the same would apply to the word BO-LO which might be called bat-o-ball or bolo-bat. However, both Mr. Hastings and Mr. Goebel knew that YO-YO and BO-LO were trade marks.

Counsel for the defendant produced a page of *Cassell's German and English Dictionary* as well as a page of a German dictionary called *Der Sprach Brockhaus* which shows that the word YO-YO has now become to mean the article itself in that country. On the other hand, counsel for the plaintiff referred to the word yo-yo in Webster's Dictionary, published in 1952, volume 2, at p. 2975, which says:

> Yo-yo: A trade mark applied to a spherical top attached to the finger by a cord looped around its grooved middle. Run up and down the cord by skillful jerks, the top does odd tricks, it takes diverting positions.

The *Shorter Oxford English Dictionary* contains the following under the word YO-YO—1932—A toy resembling the old Bandalore—also vb. There is however no mention of the word BO-LO in the dictionary.

Now in cases such as here where the question is whether a particular symbol has been used for the purpose of distinguishing the wares of a particular manufacturer or whether it has been used principally as a description or a name of the wares themselves, the whole course of conduct of the owner or the permitted user of the trade mark must be considered in order to find out whether it has lost its distinctiveness or not.

In *Kodak* v. *London Stereoscopic*[1] Mr. Justice Eady stated:

> Some attempt was made by the Applicant to show that members of the public frequently applied the word "Kodak" to any hand camera, although not sold by the Plaintiffs; that they spoke of their "Kodak" as meaning their hand camera of any make or pattern, and spoke of "kodaking", meaning the taking of snapshots with any pattern of hand camera. But the fact that some persons ignorantly or carelessly called some camera a "Kodak" which is not a "Kodak" (meaning thereby a hand camera supplied by the Plaintiffs, to which they have applied the word "Kodak") cannot affect the legal rights of the parties to these proceedings. No camera has ever been sold or advertised, so far as proved before me, as "Kodak" which is not supplied by the Plaintiffs, and in my opinion it would certainly be wrong and probably fraudulent to do so. The word "Kodak" has not become an ordinary English word in its application either to hand cameras or films. In each case it refers exclusively to the Plaintiffs' goods.

The question as to whether a word registered as a trade mark has become to mean the name of the goods or wares themselves therefore remains a question of fact to be determined from the circumstances of each particular case.

It would seem that a trade mark can be lost because it has become to mean the ware itself only when the owner has been careless in its use and has allowed extensive piracy of the mark by others.

Kerly on Trade Marks, 8th Edition, at p. 244, deals with the matter as follows:

> Distinctiveness may be lost through the action of the proprietor, or by reason of successful piracy.
>
> Thus, if the proprietor abandons his mark, it will almost inevitably become a common mark, unless there are other persons who have trade mark rights in it which they assert. If he uses it himself as the name of the goods he deals in, the trade will probably adopt the same course, especially if he is for a time the only dealer in the goods.

There can be no abandonment of the trade marks YO-YO and BO-LO by the owner here as, in my opinion, he has maintained his rights to them by allowing the defendant

[1] (1903) 20 R.P.C. 337 at 350.

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company to use them under controlled licence, as permitted by the Act and for which he has, over the period of the user agreement and up to date, received royalty payments.

Furthermore, the use of the said trade marks by the defendant company under its registered user agreement has, as we have seen, under s. 49(3) "the same effect for all purposes of this Act as a use thereof by the registered owner" which, as we have seen, means that use by the defendant as a permitted user is deemed to be use by the owner and this, in my opinion, clearly precludes any possibility of the registered owner having abandoned or abandoning his trade marks. The evidence further discloses that on two occasions when the said trade marks were infringed a joint successful action by letter was taken immediately by the defendant corporation and the plaintiff to cause such infringement to cease, and damages were paid. The conduct here of both the owner and user of the trade marks is such that it appears to me that there can be no doubt that the trade marks here have been used mainly or principally as trade marks and, consequently, cannot be considered as having become generic. I might add that the fact that in many cases the words YO-YO or BO-LO have always been accompanied by the letter "R" in a circle on the packing boxes of the wares which, of course, means registered trade mark, and that in its advertising the defendant has always indicated that these were registered trade marks, confirms my view and dispels any hesitancy I might have had in this regard, that the words YO-YO and BO-LO have not become generic so as to have lost their distinctiveness and defendant's attack on this basis therefore fails.

The issue regarding the attack made on the trade mark BEGINNERS, as I see it, is whether the mark BEGINNERS at the time of the filing of the counterclaim herein was distinctive and the onus of showing that it was not distinctive rests on the party attacking the registration. In the present instance, the sole basis on which it might be invalidated as being no longer distinctive would be its descriptiveness which, however, is not necessarily incompatible with distinctiveness. The question to be determined here is whether on the whole, the mark as registered was distinctive at the time the counterclaim herein was entered.

Now, as we have seen, under the present Act, s. 2(*f*), "distinctive" in relation to a trade mark means a trade mark that actually distinguishes the wares or services in association with which it is used by its owner from the wares or services of others or is adapted so to distinguish them.

The question as to whether or not a trade mark actually distinguishes wares in association with which it is used by its owner from those of others is one of fact depending upon the circumstances disclosed in the evidence of the particular case involved. Here the word BEGINNERS has been in use by the plaintiff through the defendant, its registered user, continuously since 1955 in Canada and the extent of such use as well as the advertising of it may have caused this mark to have become well known as the mark of the plaintiff or as having a common origin and as indicating that the wares here involved, when so marked, are connected with the plaintiff unless because of its innate descriptiveness it could not have been and has not, in effect, been used as a mark. Although it has not been shown that any other producer of tops or bats used this particular mark on the same products anywhere in Canada, on the whole of the evidence adduced I am of the opinion that it has been established that the word BEGINNERS when used by the plaintiff through its registered user, in association with the wares on which it has been used in the area in which the products are sold, was descriptively used for the purpose of indicating that the wares were easy of operation and for beginners as contrasted with one of a better quality and does not actually distinguish such wares from those of others, within the first part of the definition of "distinctive" in the statute. The fact that the defendant corporation has used the word BEGINNERS in connection with its cheapest priced tops and the use on the packages containing these tops of the words "For beginner's practice" would also, in my opinion, confirm the descriptive use of such a word. It therefore follows that the plaintiff's mark was not distinctive at the material time, and the said trade mark is invalid.

I was inclined, for the same reasons, to come to the conclusion that this applies also to the trade marks PRO (for professional), TOURNAMENT, JUNIOR and PRACTICE on the basis that they also have been used more as

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a description of graduated scales of proficiency than as trade marks; however, as I am not satisfied that the defendant has here successfully discharged the onus of showing that they were not distinctive, they cannot be invalidated.

I now come to the second, third and fourth attacks made by the defendant on the plaintiff's trade marks, which can be narrowed to two points, namely that (*a*) the plaintiff's trade marks do not actually distinguish any wares of the plaintiff from those of others, but do distinguish the wares of the defendant from those of others; (*b*) that the plaintiff has abandoned the trade marks mentioned in the Statement of Claim.

I can deal with these grounds of attack rapidly by saying that because of s. 49(3), which already has been referred to, and which, as we have just seen, sets down that the permitted use of a trade mark has the same effect for all purposes of this Act as a use thereof by the registered owner, the use by the registered user benefits the owner of the trade mark and is considered or deemed to be use by the owner and if such is the case, and if such use is considered sufficient to distinguish, then it does actually distinguish the wares in association with which it is used by its owner (through its registered user) from the wares of others as required by s-s. 2(*f*) of the Act which defines "distinctive" in relation to a trade mark as meaning "a trade mark that actually distinguishes the wares...in association with which it is used by its owner from the wares of others."

The same reasoning applies to the submission made by the defendant that because the plaintiff has allowed the defendant alone to use the trade marks in association with their wares since 1955, he should be held to have abandoned them. Indeed, use by the registered user as we have seen profits the registered owner and, furthermore, may I reiterate that the joint action against infringers taken by both parties to this action would preclude any idea of abandonment and, therefore, the above attacks must also fail.

I will now deal with the defendant's last attack which is that the records of registration of the trade marks mentioned in the Statement of Claim do not reflect the rights of the persons appearing to be the registered owner because (1) the assignment (which purports to have been dated March 15, 1955) of the trade marks from Cheerio Toys and Games Limited to Mr. Dubiner is a nullity and (2) that even if it was valid, all it could do was transfer the legal title and not the beneficial title to the plaintiff.

The attack on the validity of the assignment (Ex. 7) is based on the fact that although it was signed by Betty Dubiner, the plaintiff's wife, on behalf of the defendant company and purports to be dated and executed in Toronto, on March 15, 1955, the evidence definitely establishes that the signatory was in Israel on the above date and not in Toronto. Mr. Krangle testified to this and produced a photograph showing Mrs. Krangle and Mrs. Dubiner in a hospital in Israel on that date which evidence has remained uncontroverted.

There is also a further complication in that the meeting of the Board of Directors which is said to have taken place on March 15, 1955, and which Betty Dubiner is said to have attended, with Gladys Button and Florence Scott, the three being all the directors of the defendant company at the time, could not have been attended by Betty Dubiner on that date as she was in Israel at the time and the memorandum of this meeting, although signed by Betty Dubiner and Florence Scott, is not signed by Gladys Button.

Furthermore, the motion adopted at this meeting approving the assignment authorized "any two of the officers of the company to sign the agreement on behalf of the company and to affix the seal of the company" and the only two appointed officers of the company at the time as appears from a meeting held on February 21, 1955, were Gladys Button and Florence Scott and although Betty Dubiner was a director of the company she was not on the relevant date an officer thereof.

Now before dealing with this attack by the defendant on the assignment, Ex. 7, it should be mentioned that on March 7, 1956, at a time when the defendant company was owned by Mr. Albert Krangle and at a meeting when all the shareholders of the company were present, as evidenced by the signatures of Albert Krangle, Florence Scott and Al Gallo, a resolution was passed which the plaintiff claims would have corrected any irregularity in

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the approval and signing of the assignment document and which reads as follows:

> The following resolution was thereupon unanimously passed on motion by Albert Krangle, seconded by Florence Scott, resolved that all acts, contracts, by-laws, elections, appointments and payments of money by the Board of Directors or by the officers of the Company as set forth in the minutes of the Board of Directors be and the same are hereby approved, ratified and confirmed. Carried unanimously.

Counsel for the defendant, here submits that all this resolution does is approve, ratify and confirm the acts of the Board of Directors which approved the agreement to authorize it to be signed by any two officers of the company which, however, as we have seen, was never carried out, that the ratification of this authorization is one thing, but that the carrying out of it is another and this, he urges, was never done.

It appears to me that even if this argument is to be accepted, it would at least clarify part of the present situation in that (*a*) there is no question but that the company wanted to approve the assignment, Ex. 7; (*b*) that the absence of Mrs. Dubiner from the meeting would have no bearing on the validity of the meeting since it appears that there was a quorum as two other directors were present and the only matter that remains to be determined is the effect to be given to the fact that Mrs. Betty Dubiner, who was not an officer of the company, signed the said assignment alone on behalf of the company.

Now the evidence clearly establishes that it was the clear intention of the defendant company, acting through its members, directors or officers, to enter into the agreement contained in Ex. 7. Indeed, effect was given thereto by the company, by the royalty or other payments made to the plaintiff from 1955 to date, i.e., over a period of nearly ten years. Furthermore, in addition to having acted on the assignment, the parties also revised its conditions twice, once in 1959 and then in 1961, and this alone, in my opinion, should be sufficient in the circumstances of this case (bearing in mind that Albert Krangle, who owns the equity in the defendant company at the present time, was also the interested person during the whole period under review) to prevent the defendant from now raising this objection. I might add here that authority can be found in an early Privy Council case *Ho Tung* v. *Man on In-*

surance[1] that mere tacit acquiescence over a long period may even regularize the absence of a resolution and, of course, that is the situation we unquestionably have here.

Furthermore, Mrs. Betty Dubiner, who was a director of the defendant company, need not necessarily have been regularly appointed to sign the document in order to bind the company. Under s. 304 of the *Ontario Corporation Act,* and the defendant is an Ontario corporation "the acts of a director or of an officer are valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification." In the case of *Mahony* v. *East Holyford Mining Co.*[2], neither the directors nor the secretary had in fact, been properly elected to their offices, yet the company was held to be bound by their acts.

It would seem that what most of the decisions on this subject are concerned with is to prevent an agent from clothing himself with an appearance of authority which would bind the company without any complicity on its part. Such is not the situation here where the company knowingly allowed a director to hold herself out as being authorized to represent it.

As put by *Gower Modern Company Law* at p. 167: "This appears to be an example of circumstances in which the veil of incorporation is lifted so as to allow a company to be bound by the informal consent of its individual members."

I might also add that it is not an uncommon occurrence particularly in small private companies such as here whose meetings tend to be conducted informally, that transactions are carried out without the proper procedure. It appears to me to be good law that if these improperly authorized agents of the company are knowingly allowed to be held out as representing the company, the latter will be estopped from denying that they occupy the position they have assumed.

Such, in my opinion, may I reiterate, is the situation we find here and Mrs. Betty Dubiner having been held out to be the person authorized to sign the assignment, the defendant cannot now deny that she was not so authorized.

[1] [1909] A.C. 232 P.C.

[2] (1875) L.R. 7 H.L. 869.

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Now, although the plaintiff in this case, because of his position in the defendant company in 1955, cannot be considered as an outsider and might not, therefore, be able to benefit from what is termed "the indoor management rule", he would still be entitled, in my opinion, to whatever rights he might have as a party in good faith to a valid document which contains the transfer of rights and mutual obligations and on which the seal of the company was affixed.

In *Duck v. Tower*[1] it was stated:

> ... in the House of Lords, it has always been held that it is not incumbent on the holder of such a document purporting to be issued by a company to inquire whether the persons pretending to sign as directors have been duly appointed. Those cases were followed by the Court of Appeal in the *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*; so that there has been ample authority to shew that no informality will alter the rights possessed by a *bona fide* holder for value upon a document that purports to be in order. In this case the seal of the company was affixed, and the debenture purports to be signed, by two directors.

I now come to the defendant's second proposition which is that even if the legal title to the trade marks was transferred by the assignment document, Ex. 7, the beneficial or equitable title remained with the defendant and the plaintiff would then be in the position of a trustee and could only act in the interest of the beneficial or equitable owner, i.e., in the interest of the defendant company.

This proposition is based on the common law and takes place when the legal title only is passed and the beneficial title remains with someone else. In such a case the transfer of the legal title is considered as a mere formality, the passing of something in the nature of a paper title and the legal title holder must act on behalf and in the interest and as directed by the equitable or beneficial title holder.

Furthermore, with respect to gratuitous transfers, the law appears to be that the property is deemed in equity to be held as a resulting trust for the transferor unless there is some further indication of an intention at the time to benefit the transferee. cf. Halsbury, Third Edition, Vol. 38, pp. 867-868.

If this was the situation here, the defendant being the equitable owner, could authorize the plaintiff, the legal

[1] [1901] 2 K.B. 314 at 318.

title holder, to grant a licence to another or could retain exclusive use for itself.

The defendant submits that this has occurred in the present case, because the assignment to the plaintiff of the trade marks which took place in 1955 was gratuitous; that it purported to be for $1 and there is no evidence that it was even paid. The defendant adds that there is evidence to the effect that one of the main reasons for the non-exclusive licence back to the defendant company was to place it in a position in which it would be more favourably placed from the standpoint of sales tax. Furthermore, the defendant company, over a period of seven years, from March 1955 to the spring of 1962, used these trade marks exclusively. During that time infringement occurred in two instances when the defendant company conducted the proceedings which resulted in recoveries of money from the alleged infringers which the defendant retained. The defendant therefore urges that it, and not the plaintiff, protected the trade marks and was compensated for their infringement and that such a course of action is consistent with ownership.

The defendant, because of s. 53(2) of the *Trade Marks Act* which states that "a copy of any entry in the register purporting to be certified to be true by the Registrar is admissible in evidence and is *prima facie* proof of the facts set out therein", is hereby attempting to rebut this *prima facie* proof. In my opinion, it has not succeeded in doing so as, although the assignment was made for $1, there were other considerations. Indeed this transaction, as we have seen, was part of an overall deal whereby the majority of the shares of the defendant corporation were transferred to Krangle and the corporation was allowed to use the said trade marks (from which it derived some profit) by paying certain amounts regularly to the plaintiff's mother as well as the royalty payments made over a period of years, and the amounts which replaced them when the agreement was revised. Indeed, by no stretch of the imagination can it be said that this was a gratuitous transfer.

Now, although one of the reasons for the deal whereby a non-exclusive licence was given back to the defendant was to place the latter in a more favourable position from the standpoint of sales tax, this was not the sole reason, the main one being to permit the plaintiff at some time, as he stated

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in evidence, to either use the trade marks himself, if such a thing was possible, or to allow someone else to do so.

Finally, the fiction created by s. 49(3) which, as we have seen, states that "the permitted use of a trade mark has the same effect for all purposes of this Act as a use thereof by the registered owner" would make it impossible in the present situation, to argue that there is any division here and that one has the legal title and the other the beneficial title. Indeed, because of this fiction we must assume that during the whole time the defendant was using these trade marks from 1955 to December 28, 1962, the plaintiff was using these trade marks and this, in my opinion, disposes of the contention that there could have been here any division between the beneficial ownership and the legal ownership.

I now come to deal with a matter which has given me considerable trouble and which I believe requires some elaboration. In the recital of facts at the beginning of this judgment it appears that the trade mark CHEERIO did not come into existence in 1955 when Mr. Krangle acquired the shares of Cheerio Toys and Games Limited but some time prior to 1938 when the defendant company was incorporated and it was assigned to the latter on incorporation. From 1938 until 1955, a period of 17 years, it was used exclusively by the defendant company during which time, in addition to the ownership of the trade name "Cheerio Toys and Games Limited" and the trade mark CHEERIO being in the same person, i.e., the defendant company, the word CHEERIO *per se* distinguished exclusively the wares of the defendant company from those of others. It was only, as we have seen, shortly before Mr. Krangle took over the defendant company in 1955 that the trade mark CHEERIO was transferred to Mr. Dubiner after which a registered use was given back to the defendant company who, however, continued to use the said trade marks exclusively, and it is only for this latter period that the use by the permitted user is deemed to be use by the owner.

Now, when the above use commenced, the trade mark CHEERIO and the trade name "Cheerio Toys and Games Limited" were clearly established as identifying the wares and business of the defendant company. Furthermore, as Dubiner was a party to the agreement of March 17, 1955, he must be taken to have acknowledged and consented to the use of the corporate name "Cheerio Toys and Games

Limited" without any limitation, as none appear in any of the documents produced in this case including the use agreement which does not mention that the defendant will give up or renounce the use of the word CHEERIO in its trade name upon termination of this agreement.

The assignment of the trade marks from Cheerio Toys and Games Limited to Dubiner and the user rights back to the defendant company must, I believe, all be read together and if this is done it appears that as a result of the above transactions, there has subsisted rights in two persons to the use of confusing trade marks and the evidence disclosing that those rights have been concurrently exercised by such persons the trade mark CHEERIO would have, therefore, become non-distinctive within the meaning of s. 47(2) of the *Trade Marks Act* which reads as follows:

47. . . .

(2) Nothing in subsection (1) prevents a trade mark from being held not to be distinctive if as a result of a transfer thereof there subsisted rights in two or more persons to the use of a confusing trade mark and such rights were exercised by such persons.

The confusing trade marks I am dealing with here are not the trade mark CHEERIO as deemed to be used by Dubiner and as used by the defendant corporation as a permitted user but the trade mark CHEERIO which stands in the name of Dubiner on the one hand and the corporate name "Cheerio Toys and Games Limited", which stands in the name and ownership of the company on the other hand and which, under s. 2(*u*) of the Act can be the name under which a business is carried on but can also at the same time be a trade mark if it is used in association with wares, as set down in *Boston Rubber Shoe Company* v. *The Boston Rubber Company*[1] where a trade name was so used as a trade mark Fox, *Canadian Law of Trade Marks,* Second Edition, Vol. 2, at p. 812, deals with the possible hybrid nature of trade marks as follows:

The distinction between trade names and trade marks lies mainly in the fact that a trade mark is used in association with vendible commodities or services while a trade name is more properly used as applied to the goodwill of a business. But it must be remembered that trade names are often used in association with vendible commodities and services and that trade marks, just as much as trade names, are a constituent part of the goodwill of a business. There is thus a distinction between a trade mark as applied to goods and a trade name used in association with goods.

[1] (1901-02) 32 S.C.R. 315.

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This distinction was made clear in *Singer Mfg. Co. v. Loog* [(1882), 8 App. Cas. 15 at 32] where Lord Blackburn said: "There is another way in which goods not the plaintiffs" may be sold as and for the plaintiffs'. A name may be so appropriated by user as to come to mean the goods of the plaintiffs, though it is not, and never was, impressed on the goods, or on the packages in which they are contained, so as to be a trade mark, properly so called, or within the recent statutes. Where it is established that such a trade name bears that meaning, I think the use of that name, or one so nearly resembling it as to be likely to deceive, as applicable to goods not the plaintiffs', may be the means of passing off those goods as and for the plaintiffs' just as much as the use of a trade mark; and I think the law (so far as not altered by legislation) is the same. And I think it is settled by a series of cases, of which *Hall v. Barrows* [(1863), 4 De G.J. & S. 150] is, I think, the leading one, that both trade marks and trade names are in a certain sense property, and that the right to use them passes with the goodwill of the business to the successors of the firm that originally established them, even though the name of that firm be changed so that they are no longer strictly correct . . . To call a word or symbol applied to or used in association with wares a trade name is in reality a misnomer. Such a word or symbol is a trade mark. Even if it is not marked on the wares but only used, displayed or advertised in association with them such use is a trade mark use and not a trade name use.

Now although s. 47(1) now permits the assignment of trade marks with or without the goodwill of the business, this section does not apply to the transfer of trade names which can only be transferred together with the goodwill attached to them, the old common law still applying in such a case, and as there was no assignment of the trade name of the defendant company in 1955, we may take it that the goodwill remained with the defendant corporation. It also appears to me that as we are dealing with a trade mark CHEERIO, which happens also to be part of a trade name "Cheerio Toys and Games Limited", the goodwill of one is identical to and inseparable from that of the other. This may be of some importance in dealing with the third action, which is one of passing off.

Furthermore, the evidence discloses that although the trade mark CHEERIO was used by the defendant on its wares and wrappings, it also reveals that the corporate name "Cheerio Toys and Games Limited" was also sometimes unquestionably used in association with wares by the defendant company during the whole period of its existence including the period from 1955 to date, either on the packages, sometimes imprinted on the articles themselves and sometimes in its advertisements, and when so used, it was used as a trade mark.

I have gone over the evidence with some care in order to ascertain what kind of use the defendant made of its trade name in association with the wares and it appears from such examination that the defendant did not use its trade name merely on its advertisements, but also used it consistently on the boxes containing its wares and possibly also on the tops themselves if one looks at the invoice blank, the reverse side of which was used as note-paper produced as Ex. 11 and which contains the reproduction of a top with a label bearing the following writings: "Cheerio Toys and Games Limited", "Cheerio, Toronto, Ontario."

Such a use is clearly a trade mark use and it falls within what was considered as trade mark use in an American case, *in re Lyndale Farm*[1]:

> Use of a mark on a container used solely for transportation or storage with the container being discarded when the transportation or storage ends, is not a trade mark use. This is trade name use as distinguished from trade mark use. The mark must be so used that it comes to the attention of wholesale or retail purchasers as a means of identification.

There is indeed no question here but that the trade name of the defendant used as it was came to the attention of the wholesale or retail purchasers over a period of 26 years and that explains why as sworn to by Mr. Krangle at p. 509 of the transcript, the defendant corporation was "familiarly referred to as the Cheerio Company."

It therefore appears from all this that as a result of the transactions which took place in 1955, the trade mark CHEERIO was owned by Mr. Dubiner and when it was used by the defendant company as a permitted use was use attributable to Dubiner. However, the trade mark "Cheerio Toys and Games Limited" was never assigned and the use of it made by the company was not by virtue of any user agreement with the plaintiff, but was use in its own right. May I add here that even if my assumption that the defendant's trade name as a trade mark was used by right is not so (on the principle set down in the *Boston Rubber Shoe Company* v. *The Boston Rubber Company* (*supra*) "that the defendant's use of their corporate name in the manner described" [i.e. a trade mark] "was a fraudulent infringement of the plaintiff's registered trade mark") and

[1] 186 F. 2d. 723.

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that such use be considered as not a rightful one, it appears to me that the fact as disclosed by the evidence that the plaintiff has allowed or tolerated the defendant company to use its trade name as a trade mark over a long period of time has created a situation such that the trade mark because of this can and does no longer distinguish the wares of the plaintiff from those of others, notwithstanding the fact that under s. 49(3) of the Act use by the permitted user is deemed to be use by the owner bearing in mind here the strict interpretation to be given to the permitted user section which permits the use of a mark and not the use of an infringing mark.

As a result of this situation it therefore appears that whatever the word CHEERIO now appears to designate or distinguish, it certainly does not distinguish the wares of the plaintiff from those of others and, consequently, not being distinctive, is invalid. The same applies to CHEERIO YO-YO, CHEERIO DESIGN, CHEERIO BEGINNER, CHEERIO TOURNAMENT and CHEERIO CHAMPION.

Now although the company formed by Al Gallo, Cheerio Yo-Yo and Bo-Lo Company Ltd., was authorized by the owner of the trade marks YO-YO and BO-LO to use them in its trade name, I am not able to deal with them as I have dealt with CHEERIO in view of the manner in which this corporation has derived its rights to use the trade marks in their trade name from the registered owner himself and also because I am not satisfied that on the evidence the trade name has been used as a trade mark in association with its wares, or if such use has occurred, it is of such magnitude that in effect these trade marks no longer distinguish the wares of the owner from those of others.

I now come to the matter of infringement which must be considered from December 28, 1962, to the taking of the present action, March 13, 1963.

The evidence discloses, and Krangle has admitted, that the following trade marks have been used by the defendant company during the above period:

CHEERIO YO-YO, N.S. 35/9570;
CHEERIO, N.S. 45/12078;
CHEERIO DESIGN in a slanting picture, N.S. 85/22029;

BEGINNERS, N.S. 86/22285;
PRO, N.S. 85/22066;
YO-YO, N.S. 94/24465;
BO-LO, N.S. 48/12848;
99, N.S. 83/21541 and
TOURNAMENT, N.S. 85/22096.

The words PRO and 99 are reproduced all over the booklet (Ex. 44) produced by the defendant as follows: "Genuine pro 99 Yo-Yo top"; on Ex. 50, which is a Bo-Lo price list of the defendant company, "Pro Bo-Lo Bat" is used on some old boxes with the word "Tournament" inserted thereon, which the defendant company acquired at the time of the take over of the company. On Ex. 55, which are new books put out by the defendant, the word "Tournament" is used with an "R" in a circle on it. On the side of a box belonging to the defendant company, Ex. 25, there is a reference to "these tricks can be done with a Cheerio 'Pro' " and the word pro here is in quotes. On the back of the string bag, Ex. 56, on the little crest in the lower right hand corner, the figure "99" appears.

I therefore must come to the conclusion that the plaintiff has made out a case of infringement of the following trade marks: PRO, YO-YO, BO-LO, 99 and TOURNAMENT. As for CHEERIO YO-YO, CHEERIO CHAMPION, CHEERIO, CHEERIO DESIGN, BEGINNERS, in view of my finding these trade marks invalid, there can be no infringement of them.

There will therefore be judgment holding the said trade marks CHEERIO (N.S. 45/12078), CHEERIO YO-YO (N.S. 35/9570), BEGINNERS (N.S. 86/22285, as well as the CHEERIO DESIGN (N.S. 85/22029), CHEERIO BEGINNER DESIGN (N.S. 89/23191) and the CHEERIO TOURNAMENT DESIGN (N.S. 89/23192) invalid and they shall be expunged. There will also be judgment in favour of the plaintiff that the following trade marks YO-YO (N.S. 94/24465), BO-LO (N.S. 48/12848), 99 (N.S. 83/21541) and PRO (N.S. 85/22066) have been infringed by the defendant company, and for the injunction sought by him restraining the defendant company by its servants, agents or workmen or otherwise from further infringement of the above mentioned trade marks and an order for delivering up to the plaintiff all infringing articles in the

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possession or control of the defendant or that the said infringing articles be destroyed under oath unless the defendant corporation can remove the labels or other inscriptions on the infringing articles in which case the said injunction shall be stayed for one month to enable it to perform this operation. Both parties having been partly successful in this case, there shall be no costs for either of them and as for the matter of damages or profits, they will be such as the Registrar of this Court may award on a reference to him, if the plaintiff elects such reference.

Judgment accordingly.

1963 Oct. 11, 16, 17, 22 — 1964 July 29

BETWEEN:

CHEERIO TOYS AND GAMES LIMITED .... PLAINTIFF;

AND

CHEERIO YO-YO AND BO-LO COMPANY LTD. .... DEFENDANT.

Trade Marks—Trade Marks Act, S. of C. 1952-53, c. 49, ss. 7, 47(1) and 49(4) and 10(c)—Injunction—Passing off—Whether permitted use of trade mark distinguishes user's wares sufficiently to support a passing off action—Use of non-registered trade mark—Whether goodwill assigned with trade mark or trade name—Goodwill of company and of trade mark inseparable where trade name includes the trade mark—Whether distinctiveness of trade mark lost through use by affiliated or related companies—Confusion between plaintiff's business and that of defendant—Confusion where plaintiff and defendant dealing in identical wares—Use of slogans—What required to establish passing off with respect to packages, labels and get-up—Unfair competition.

The plaintiff and defendant were respectively the appellant and one of the respondents in the action *Cheerio Toys and Games Limited v. Samuel Dubiner and Cheerio Yo-Yo and Bo-Lo Company Ltd.*, reported *post*, p. 579, and the plaintiff was the defendant in the action *Samuel Dubiner v. Cheerio Toys and Games Ltd.*, reported *ante*, p. 524. In this action the plaintiff seeks an injunction to restrain the defendant, *inter alia*, from doing business under the name, Cheerio Yo-Yo and Bo-Lo Company Ltd., from using, in merchandising its products, certain trade marks, slogans, expressions and packages, and any packages, labels or get-up confusing with those of the plaintiff.

Held: That the use by the plaintiff of trade marks, to the use of which it was entitled only as a registered user, is deemed to be use by the owner and cannot assist the plaintiff in its attempt to establish that their use by the plaintiff has distinguished its wares from those of others to the point where it could avail itself of a passing off action to protect its rights.

2. That those trade marks, the permitted use of which by the plaintiff had been terminated prior to the commencement of this action, are not available to the plaintiff in the present passing off action.

3. That where the plaintiff relies on a non-registered trade mark, then, in order to sustain its action for passing off, the plaintiff must satisfy the Court that it did use the trade mark in association with its wares, that the trade mark had come to be identified by the public with its wares exclusively and that the use of the trade mark by the defendant was a violation of its common law rights.

4. That under the present *Trade Marks Act* the task of the plaintiff is somewhat lessened due to the fact that much of the common law relating to passing off has been introduced into the statute by s. 7 of the Act as compared to the situation in the United Kingdom where there is no corresponding section.

5. That under the *Trade Marks Act,* s. 47, a trade mark may be assigned with or without the goodwill of the assignor, but a trade name cannot be assigned under the Act without the goodwill attaching thereto.

6. That the goodwill of a company is attached to its trade name and when the trade name includes a trade mark, in this case CHEERIO being included in "Cheerio Toys and Games Limited", the goodwill of the company and of the trade mark are the same and inseparable.

7. That in an action for passing off the plaintiff is required to prove his title to the mark that he claims by evidence that his goods or his business have come to be known by that mark or name, which is tantamount to saying that the goodwill attached to the mark is his.

8. That the distinctiveness of a trade mark is not lost as a result of its use by two companies which are affiliated, related and connected.

9. That whether the plaintiff had a right to the use of the word CHEERIO *per se* or not, would make very little difference as far as the plaintiff's trade name is concerned as it is undeniable that it has a right to its trade name and to the goodwill attached to it or to its business, and any act which would be likely to take that away from it would be one of unfair competition and this would apply whether the trade mark CHEERIO was valid or not.

10. That the defendant, by carrying on business as it did under its trade name, adopted a means of directing public attention to the business carried on under that name as set down in s. 7(*b*) of the *Trade Marks Act* and, under the circumstances, it makes no difference whether the defendant thought that because it was a registered user of the trade mark it had a right to do so.

11. That the defendant, in using its trade name in carrying on its business and in its advertising, has directed public attention to its business in such a way as to be likely to cause confusion between its business and that of the plaintiff and the plaintiff is therefore entitled to have the use by the defendant of its trade name restrained. In addition, the defendant, by its use of the word CHEERIO, has also directed public attention to its business in such a way as to cause or be likely to cause confusion between its business and that of the plaintiff, contrary to s. 7(*b*) of the Act.

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12. That the fact that an employee of the post office in readdressing a letter addressed to the defendant, struck out its former address and substituted the plaintiff's address is a clear case of confusion, if one considers that both companies are dealing in identical wares.
13. That since the slogans in issue have been widely used by the plaintiff in all its advertising and on its boxes for many years and have by long and extensive use become two of the badges or symbols of the origin of its wares there can be no doubt that the plaintiff has acquired a reputation for those badges in the market place and that a person paying ordinary attention would be likely to be deceived by the use thereof by the defendant.
14. That the use by the defendant of a slogan used by the plaintiff which is a coined phrase and is in fact complete nonsense cannot be interpreted otherwise than as directing public attention to its wares contrary to the provisions of s. 7 of the Act.
15. That in order to establish a passing off with respect to the use of packages, labels and get-up, which latter means the physical appearance of wares or the packages, their colour, style, etc., a high degree of reputation, akin to a secondary meaning, must be shown.
16. That where instructions appearing on the defendant's containers are similar to those the plaintiff has been using for many years but it is established that they were taken by the plaintiff from a container belonging to another company, the plaintiff cannot complain, for it has no exclusive right, copyright or otherwise to the use thereof.
17. That the defendant has committed a series of acts of unfair competition and passing off, by misappropriating the trade mark CHEERIO, by using a corporate name similar to that of the plaintiff, by its magazine advertising and by copying and using the plaintiff's price list, all of which have been done in violation of the plaintiff's rights.

ACTION for an injunction to restrain defendant *inter alia* from doing business under its corporate name.

The action was tried before the Honourable Mr. Justice Noël at Toronto and Ottawa.

J. C. Osborne, Q.C. and *R. G. McClenahan* for plaintiff.

Donald F. Sim, Q.C. and *W. F. Green* for defendant.

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

NOËL J. now (July 29, 1964) delivered the following judgment:

This is an action in which the plaintiff, Cheerio Toys and Games Limited, seeks an injunction to restrain the defendant, by itself or through its officers, servants or agents or otherwise, from doing business under the name Cheerio Yo-Yo and Bo-Lo Company Ltd. from advertising, distributing or selling toys or games in association with the trade marks CHEERIO, YO-YO, BO-LO, SPIN-MASTER, with the slogans "if it isn't Cheerio, it isn't Yo-Yo", "cannot cut or burn the axle", with the expression "Uncle Al" or "Uncle Al Gallo", with any packages, labels or get-up confusing with or simulating the packaging, labels and get-up of the plaintiff; from further reproducing any part of the original lettering marks of the plaintiff comprising the instructions for the replacement of strings on tops and its wholesale price list, from advertising or otherwise indicating that ownership of the defendant's tops entitles the owners thereof to all official contests; from directing public attention to its wares and/or business in such a way as to cause or be likely to cause confusion in Canada between its wares and/or business and the wares or business of the plaintiff and from passing off its wares and/or business as and for the wares and/or business of the plaintiff. The plaintiff further seeks an order for the delivery up to it or for the destruction by the defendant under oath of all printed material and any other paraphernalia the use whereof by the defendant would contravene any injunction issued by this Court and, finally, damages in the amount of $10,000 or an accounting of the defendant's profits as the plaintiff may elect.

This is the third of a trilogy of actions the first and second of which have already been dealt with in two judgments under No. A-1190 (*ante* p. 524) and No. A-1406 (*post* p. 579) respectively of the files of this Court and in the first of which I concluded that the trade mark CHEERIO and another were invalid, but that the rest of a number of trade marks owned by one Samuel Dubiner, including YO-YO and BO-LO were valid. I also held that the plaintiff had, as of December 28, 1962, breached its registered user agreement of September 14, 1955, covering the above Dubiner trade marks.

The trade mark CHEERIO was held invalid under s. 47(2) of the *Trade Marks Act* based on the fact that as a result of a series of transactions between the plaintiff company and the said Samuel Dubiner, there subsisted rights in both parties to the use of confusing trade marks, which rights were exercised by both said parties thus causing the trade mark to lose its distinctiveness. My decision in this regard was also based on the fact that the

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owner of the trade mark CHEERIO by permitting the plaintiff to use its trade name comprising the word CHEERIO as it did, allowed his trade mark to become non-distinctive.

It therefore follows that as the trade marks YO-YO and BO-LO were upheld and that the only title to their use by the plaintiff is as a registered user, any use by the latter of same is deemed use by the owner and cannot, in any way benefit the plaintiff company or assist in establishing that their use by the latter has distinguished its wares from those of others to a point where it could avail itself of a passing off action to protect its rights. Nor can the plaintiff, at this stage, as a registered user of such trade marks under s. 49(4) of the Act avail itself of its right to institute proceedings for infringement in its own name either under the statute or under the common law, firstly because it has not followed the procedure set down in the said section and, secondly, because, as I determined in the first case, from December 28, 1962, it no longer was a permitted user and, consequently, could not, when the present action was instituted, avail itself of any recourse given to a permitted user.

There is, therefore, no doubt that no matter what use the plaintiff may have made of the trade marks YO-YO and BO-LO, they are not available to the plaintiff in the present passing off action.

This leaves us with regard to the matters raised in this action with the remainder of the trade marks, i.e., CHEERIO, SPINMASTER, the slogans "If it isn't Cheerio, it isn't yo-yo", "cannot cut or burn the axle", "Uncle Al" or "Uncle Al Gallo", the get-up packages, labels and lettering marks, the instructions for the replacement of strings on tops and the wholesale price list used by the defendant, and the only evidence to be considered is that which bears on these issues.

I will first deal with the trade mark CHEERIO which is the one that, as we have seen, through a situation created by both the plaintiff company and Samuel Dubiner has become invalid through a loss of distinctiveness.

It would be convenient to repeat here what I have already recited in great detail in a judgment rendered this day under No. A-1190 of the files of this Court (*ante* p. 524) regarding the history of the use of the mark as such an examination will assist in determining what rights the plaintiff may have, if any, in the present passing off action with regard to the word CHEERIO.

Indeed, as we are dealing with a non-registered trade mark, in order to sustain its action for passing off, the plaintiff must bring evidence to satisfy the Court that it did use the trade mark CHEERIO in association with its wares, that the said trade mark had come to be identified by the public as identifying its wares exclusively and that the use of the trade mark by the defendant was a violation of its common law rights.

I might point out here, however, that under the present Canadian Act, the task of the plaintiff is somewhat lessened due to the fact that much of the common law relating to passing off has been introduced into the statute by way of s. 7 of the Act as compared to the situation existing in the United Kingdom where there is no such corresponding section.

Before going into this section, however, it will be useful to deal with the use of CHEERIO by the plaintiff since its incorporation to date as I am not unaware of the possibility that if, as already determined, the word CHEERIO is no longer distinctive of the wares of the owner of the trade mark as a result of the concurrent use of confusing trade marks it may well be also that it is not or cannot be distinctive either of those of the plaintiff and, of course, if such is the case, this mark cannot be used in this passing off action. From 1938, date of its incorporation, until 1955, a period of seventeen years, it was used exclusively by the plaintiff during which time the ownership of the trade name "Cheerio Toys and Games Limited" and the trade mark CHEERIO being in the same person, i.e., the plaintiff company, the word CHEERIO *per se* distinguished exclusively the wares of the plaintiff from those of others. It was only shortly before a Mr. Krangle took over the plaintiff company in 1955 that the trade mark CHEERIO was transferred to Dubiner after which a registered use was given back to the plaintiff company and it is only for this latter period that use by the permitted user can be deemed to be use by the owner under s. 49 of the Act.

But even during the period starting in 1955, the evidence discloses that although the trade mark CHEERIO was

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used by the plaintiff company on its wares and wrappings, it also reveals that the corporate name "Cheerio Toys and Games Limited" was also sometimes used by the plaintiff in association with its wares, either on the packages, sometimes imprinted on the articles themselves and sometimes in its advertisements and when so used it was used as a trade mark to a point where in the first judgment already referred to, as I already have mentioned, I held the said trade mark invalid on the basis that it was no longer distinctive.

This use by the plaintiff of its trade name as a trade mark was one it had a right to and the fact the owner of the trade mark allowed such use appears to confirm this right. However, whether such use acquiesced to by the owner of the trade mark establishes the plaintiff's right to use his trade name as a trade mark or not, it does appear to me that this course of action was allowed to be taken and in fact operated to distinguish the plaintiff's wares from those of others, during this whole period i.e. from the year 1938 to date, including the period 1955 to the taking of the present proceedings and whether it used it during the latter period by permission of its owner or in its own right, the simple fact remains that during the whole of its existence, i.e., a period of 26 years, it has in fact used this trade mark exclusively in association with its wares and this mark has come to distinguish its wares from those of others.

The evidence of Mr. Hastings of Simpson-Sears, Mr. Gable of Woolworth's and of a Mr. Topp, to the effect that the word CHEERIO without any question identifies the wares and business of the plaintiff and the long extensive and exclusive use of it for 26 years to the degree of use revealed by the evidence, makes it unquestionable that because of this the public recognized the word CHEERIO as identifying a single origin, i.e., the plaintiff. There is indeed no question in my mind but that the plaintiff has used the word extensively on its products and on its advertising and this is fully substantiated by the evidence.

That the use in its own right of the trade name Cheerio Toys and Games Limited as a trade mark could have resulted in distinguishing the wares of the plaintiff from those of others, notwithstanding the permitted use of the trade mark under the registered user agreement from 1955 to the taking of the present action and the deeming of such use as use of the owner, is not surprising if one considers that when the trade mark CHEERIO was assigned to Mr. Dubiner in 1955, the trade name of the plaintiff was retained as well as the goodwill attached to that trade name, as the assignment of the trade name without the goodwill cannot be effected under our present statute, s. 47(1) permitting only a trade mark to be assigned with or without the goodwill.

Now the goodwill of a company is attached to its trade name and when the latter comprises in its trade name a similar trade mark such as we have here, ("Cheerio" and "Cheerio Toys and Games Limited") the goodwill of the corporation and of the trade mark are the same and inseparable.

The parties in the transactions which took place in 1955 created a situation where a trade mark was assigned but where the trade name comprising the trade mark was not and as the goodwill of the business, as we have seen, remained with the trade name (which as we have seen here is the same and is inseparable from the goodwill of the mark,) it therefore follows that the plaintiff has retained this goodwill and has alone benefited from it consistently and without interruption for 26 years.

As in an action for passing off the plaintiff is required to prove his title to the mark that he claims by evidence that his goods or his business have come to be known by that mark or name which I believe is tantamount to saying that the goodwill attached to the mark is his and, as we have seen, the goodwill in CHEERIO remained in the plaintiff throughout the whole period of 26 years, there can remain no doubt in my mind that regardless of the concurrent use of the trade mark as a permitted use from 1955 to December 28, 1962, the said mark CHEERIO has clearly been distinctive only of the wares of the plaintiff and, therefore, is available to it in the present action.

The fact that the designation "Cheerio Sales" was used as a division of the Dulev Plastics Company, would not, under the present circumstances, as urged by counsel for the defendant, have caused Cheerio to have lost its distinctive character as such use was made by a company, Dulev Plastics, of which "Cheerio Sales" was a division, which was affiliated, related and connected with the plaintiff and in such a case there can be no loss of distinctiveness.

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Having thus determined the plaintiff's right to the word CHEERIO and to whatever goodwill is attached to it, the next matter to be dealt with is whether, as both the plaintiff corporation and the defendant corporation in the course of their business deal in bandalore tops and ball-bats, the use of the names "Cheerio Toys and Games Limited" and "Cheerio Yo-Yo and Bo-Lo Company Ltd.", in carrying on their business is directing public attention to their wares or business in such a way as to be likely to cause confusion between that business and the business of the plaintiff contrary to s. 7 [and particularly s. 7(b)] of the *Trade Marks Act* which reads as follows:

> 7. No person shall
>
> (*a*) make a false or misleading statement tending to discredit the business, wares or services of a competitor;
>
> (*b*) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;
>
> (*c*) pass off other wares or services as and for those ordered or requested;
>
> (*d*) make use, in association with wares or services, of any description that is false in a material respect and likely to mislead the public as to
>
> (i) the character, quality, quantity or composition,
>
> (ii) the geographical origin, or
>
> (iii) the mode of the manufacture, production or performance of such wares or services; or
>
> (*e*) do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.

I might say here that whether the plaintiff had a right to the use of the word CHEERIO *per se* or not, would make very little difference as far as the plaintiff's trade name is concerned as it is undeniable that it has a right to its trade name and to the goodwill attached to it or to its business and any act which would be likely to take that away from it would be one of unfair competition and this would apply whether the trade mark CHEERIO was valid or not.

The evidence discloses that the plaintiff has carried on a considerable business extensively in Canada under its corporate name for over 26 years and it appears that the defendant corporation adopted its present name upon incorporation on March 1, 1962 (Ex. 28) for the purpose of dealing in and with "Yo-yo tops, toys, games and novelties of every kind, nature and description and all other products related or incidental thereto", with head office in Montreal, P.Q. On May 31, 1963, the Registrar of Trade Marks informed the plaintiff that effective March 12, 1963, the defendant was registered as a registered user of the Dubiner trade marks. From its office in Montreal the defendant conducted the business of selling tops and bats until August 14, 1963, when it was enjoined and restrained by an order of this Court until the issue of judgment or other final disposition of this action from directing attention to its wares and more particularly from advertising, distributing or selling bandalore tops in association with a number of trade marks and slogans.

There is no question in my mind that the defendant by carrying on the business as it did under its trade name adopted a means of directing public attention to the business carried on under that name as set down in the above s-s. 7(*b*) and may I add that whether the defendant thought that because it was a registered user of the trade marks, it had a right to do so, would, in the present circumstances, make no difference in this matter.

This, in my opinion, falls within the principle set down by Luxmoore L.J. in *Office Cleaning Services Ltd.* v. *Westminster Window and General Cleaners Ltd.*[1] "that no one is entitled to represent his business or goods as being the business or goods of another by whatever means that result may be achieved, and it makes no difference whether the representation be intentional or otherwise."

Section 7(*b*) of the Act, however, as we have seen, also requires that such "directing of public attention to the business be likely to cause confusion in Canada...between his wares...business and the wares...or business of another".

Now a number of things must be considered in order to determine whether the use of a trade name will likely cause confusion as set down by Lord Simonds on appeal in the above case[2] such as:

> . . . The nature of the words which are used in the trade name, the circumstances and peculiarities of the trade, the motives, proved or presumed, of the trader who would use the words, all these and many factors must be considered by the judge in determining whether a plaintiff can

[1] 61 R.P.C. 133. [2] 63 R.P.C. 39.

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succeed in his claim. It is a question upon which the judge who has to decide the case has to bring his own mind to bear and which he has to decide for himself.

The particular conditions of the top and bo-lo trade, the manner in which tops and bats are promoted and sold indicate to me that the trade names though somewhat different have, in the circumstances, enough similarity to each other, bearing in mind that both companies deal with toys and principally tops and ball-bats, to constitute a representation that the businesses are connected with one another either through having the same owner or through being in some way allied or connected with each other.

In *Ewing (trading as the Buttercup Dairy Company)* v. *Buttercup Margarine Company Limited*[1] Lord Cozens Hardy M.R. said at p. 237:

> . . . I can see no principle for holding that a trader may not be injured, and seriously injured in his business as a trader by a confusion which will lead people to conclude that the defendants are really connected with the plaintiffs or a branch of the plaintiff's business, or in some way mixed up with them.

In my opinion this is a perfectly clear case, that the defendant in using such a name in carrying out its business, as well as in its advertisements has directed public attention to its business in such a way as to be likely to cause confusion between its business and that of the plaintiff and the latter is therefore entitled to have the use by the defendant of its trade name restrained.

As for the word CHEERIO, from thew ares and get-up put out by the defendant and as evidenced by Ex. 65 (the 29¢ top), Ex. 5 on the examination of Al Gallo (the 39¢ top), Ex. 6 of his examination (the 49¢ top) and Ex. 64 (the 69¢ top), it also appears to me clear that by using this word as it did, it also directed public attention to its business in such a way as to cause or be likely to cause confusion between its business and that of the plaintiff, contrary to s. 7(*b*) of the Act.

Now, although actual confusion in the market place is not required in order to come to a conclusion, but likelihood only, it follows that if such likelihood is accompanied by actual cases of confusion, this would end the matter.

Such is the situation here where the evidence discloses three sources of misdirected letters, one from Office Supply

[1] (1917) 34 R.P.C. 237.

Company, one from the Husband Transport Company and the third by the Post Office Department, which latter struck out the former address of the addressee Cheerio Yo-Yo and Bo-Lo Company Ltd. and substituted the address of the plaintiff Cheerio Toys and Games Limited; now although when the defendant found out about this it did complain to the Post Office and the latter assured the defendant it would not happen again, it is significant that an employee of the Post Office connected the word CHEERIO to the plaintiff to a point where he took it upon himself to readdress a letter destined to the defendant itself. This, in my opinion, if one considers that both companies are dealing in identical wares, is a clear case of confusion.

The same applies to the invoices issued by Office Supply Company and Husband Transport Company, addressed to the Cheerio Yo-Yo and Bo-Lo Company Ltd., at its address on Wellington Street which someone collected and addressed by means of an outside invoice to Cheerio Toys and Games Limited at 13 Church Street, Toronto.

There is also an admittedly flagrant example of passing off in an advertisement of the defendant company which occurred immediately after incorporation in a toys and playthings periodical, dated March/April 1963. The evidence discloses that Mr. Gallo, on behalf of the defendant, supplied the editor or some official of the above magazine with a yo-yo of the plaintiff for the purpose of having a sketch made and it turned out to be practically identical to the plaintiff's product, and contained not only the word CHEERIO but also the same design and the same inscription at the top and at the bottom, i.e., "balanced for two-handed players" and "the kind that the champions use". The advertisement also carried in the centre a statement which can only have been understood by the public as a reference to the activities of the plaintiff who had been conducting its sales precisely in the manner thereunder listed, as this advertisement was one of the first, if not the first one, published by the defendant immediately after incorporation. This statement reads as follows:

"Pre-sold for you by

Television	Window displays
Radio	Contests
Newspapers	Prizes and contests
Magazines	Personal demonstrations by Champions"

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There is also, in my opinion, further evidence of passing off to be derived from the use by the defendant of the slogans of the plaintiff on its packing boxes, namely, "If it isn't Cheerio, it isn't a yo-yo" and with reference to the strings "cannot cut or burn the axle". The evidence establishes that these two slogans were widely used by the plaintiff in all its advertising and on its boxes prior and subsequent to 1955 and have by long and extensive use by the plaintiff become two of the badges or symbols of the origin of its product. From using these slogans constantly and over a long period of time, there can be no doubt in my mind that the plaintiff has acquired a reputation for the above badges in the market place and that "a person paying ordinary attention would be likely to be deceived" as set down in *Ogden* v. *Canadian Expansion Bolt Limited*[1] by the use by the defendant of the plaintiff's above slogans.

The slogan "cannot cut or burn the axle" is absurd as there is no string which can possibly cut or burn the axle. The fact, however, that it is complete nonsense makes it doubly difficult for the defendant to justify its use. Indeed, if it had been a proper description of the functioning of the string and had clearly and accurately described a string such as the defendant has been selling, there might have been some excuse for using it. But to take a coined phrase such as this and apply it to its wares cannot be interpreted otherwise than as directing public attention to its wares contrary to the provisions of s. 7 of the Act.

In the matter of packages, labels and get-up, which latter means the physical appearance of wares or the packages, their colour, style, etc., it is established that a high degree of reputation, akin to a secondary meaning, must be shown in order to establish a passing off.

The defendant has submitted that the packages, labels and get-up of the plaintiff, which should be compared with those of the defendant, are not those put out under the words "Cheerio", "Yo-Yo" and "Bo-Lo" but rather those put out by the plaintiff under the Big C trade mark which it had been using since the beginning of January 1963 and that, if this is done, there is nothing similar between the two.

[1] (1915) 33 O.L.R. 589.

I, however, cannot agree with this suggestion as the Big C tops were not the only ones the plaintiff was dealing in from January 1963 as the other tops under the trade marks CHEERIO, YO-YO and BO-LO remained on the market and were still being sold. As a matter of fact in the first action, already mentioned, I found that the plaintiff had infringed the trade marks BO-LO and YO-YO during the period December 1, 1962 to the taking of the action. It therefore follows that a comparison should be made between the wares, get-up and packages of the plaintiff under the CHEERIO trade mark and not under the Big C trade mark and if this is done by comparing the defendant's exhibits already referred to and those of the plaintiff, i.e., Ex. 46 (29¢ line), Ex. 64 (49¢ line) and Ex. 42, a box corresponding to the 69¢ line, the Glitterspin, it appears that outside of the word CHEERIO there is little similarity between the boxes of the defendant and those of the plaintiff. As a matter of fact, although the colours are the same, red, white and blue, they are not disposed the same way. With regard to the labels, which can be seen by opening the packages, it appears that there are no labels on the defendant's Spinmaster tops (Ex. 65) but an inscription in the plastic; although there are labels on defendant's 49¢ top (Ex. 6 on the examination of Gallo) and on its 69¢ tops (Ex. 7), they are not similar to those of the plaintiff with again, however, the exception of the use of the word or design mark CHEERIO.

It is on this latter basis only that I can hold that the packages, get-up and labels of the defendant are objectionable.

With regard to the use of SPINMASTER by the defendant on its 29¢ tops, which is an unregistered mark which the plaintiff claims as its property, I am not convinced that the use to a limited extent of the above word by the plaintiff admittedly from 1956 until 1958, is a use such that the plaintiff has acquired a reputation from it. Indeed, there was no evidence adduced that anybody had heard of SPINMASTER, that the word SPINMASTER meant to a large portion of the public the plaintiff's product, and consequently, no one could, in my opinion, be misled or confused

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It should not, therefore, be considered in the present proceedings.

As for the use by the defendant of its string bag, illustrated by Ex. 27, as compared to the plaintiff's string bag, Ex. 8, the appearance of the envelopes containing the strings are different. The instructions to replace the strings which appear on the reverse side of both envelopes are similar, but the evidence discloses that such instructions were taken from those appearing on an envelope which belonged to an American company when the plaintiff started business in 1938, so there can be no exclusive right, copyright or otherwise to the use of these instructions.

As a matter of fact, the only objectionable reasons for the continued use of the defendant's envelopes, Ex. 27, as they now exist, would be the inscription thereon of the word CHEERIO, "cannot cut or burn the axle", the trade name "Cheerio Yo-Yo and Bo-Lo Company Ltd." and the reference to CHEERIO on the reverse side underneath the instructions.

I now come to the words "Uncle Al Gallo" which are used on the defendant's boxes with a picture of Al Gallo, one of the shareholders of the defendant corporation, and its general manager. The plaintiff claims that such use is passing off or an attempt thereto on the basis that such a designation has been used by the plaintiff. The evidence here is to the effect that it was not used in writing on packages or advertising by the plaintiff prior to the defendant's activities in March 1963. The only use made of it by the plaintiff was on a placard in a television station and Krangle stated that he had introduced it into the plaintiff's television scripts. It appears to me that this appellation "Uncle Al" was introduced by the plaintiff not as a means of distinguishing the wares of the plaintiff from those of others but rather as a familiar form of identification of Mr. Gallo in the promotion and advertising of the company. Here again I do not believe that it has been a use such that the plaintiff has acquired a reputation from it and therefore cannot be used in the present action. Furthermore, the fact that the defendant here, such as on Ex. 64, uses the designation "Uncle Al Gallo" renders remote any possibility of confusion.

With regard to defendant's jewelled satellite four precious stones type of tops, which resemble plaintiff's Glitterspin, I would see no objection to the use of the label if it did not contain the word CHEERIO. As for the four precious stones, there being no high degree of public awareness and recognition of this product as that of the plaintiff, it could not, in my opinion be of use in the present action. Furthermore, Krangle himself, in an affidavit used in support of the interim injunction herein, introduced the Hiker tops which, he said, had been on sale in Canada from time to time during the period under review and this top has the four diamonds in the same location which, of course, would negate any distinctiveness it might have of plaintiff's wares.

I now come to the plaintiff's price list, (Ex. 40), which, according to the evidence, was prepared by Krangle, an officer of the plaintiff company, and which was copied by the defendant. Without attempting to determine whether such use can be considered as an infringement or not of plaintiff's copyright, if a copyright can exist in such a production, it is clear that the defendant should not have used it. It therefore becomes one additional element to be taken into consideration in the present passing off action.

The defendant, in its counterclaim, requests that an order be issued cancelling the registration of the plaintiff as a registered user of the trade marks of Samuel Dubiner identified in paragraphs (iii) and (iv) of the Statement of Defence and which contains all those trade marks dealt with in the first action on the basis that it had breached its user agreement on December 28, 1962 by not giving free access to the owner of the trade marks as it was obligated to and, therefore, was no longer entitled to remain registered as a registered user of the said trade marks. In view of my finding in the first action that because of the manner in which the parties had established a term, or an end, to the permitted use upon refusal of access, which refusal I determined took place on December 28, 1962, and that from that date the plaintiff was no longer

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Noël J.

a permitted user, the matter of cancellation of the registration under s. 49(10)(*c*) by this Court of the plaintiff's registration becomes a matter of course to which, however, I intend to give effect in the conclusion of this judgment.

It therefore appears to me from the exhaustive examination I have conducted of the activities of the defendant corporation, that there has been here a series of acts of unfair competition and passing off accomplished by misappropriation of the trade mark CHEERIO, the use of a corporate name similar to that of the plaintiff, by the advertisement in the magazine Toys and Playthings, by the use of a number of slogans belonging to the plaintiff, by the copying and use of the plaintiff's price list, all of which have been done in violation of the plaintiff's rights.

I accordingly find that the plaintiff is entitled to an injunction which will issue restraining the defendant company by its servants, agents or workmen, or otherwise, from directing public attention to its business of dealing in toys and games and from passing off its wares and/or business as and for the wares of the plaintiff, by using or trading under the name "Cheerio Yo-Yo and Bo-Lo Company Limited" in connection with the production, distribution or sale of toys and games and particularly return tops and Bat-a-ball bats or in that connection, by using or trading under any name including the word CHEERIO or by the use of or under any other name so similar to the plaintiff's name as to be likely to cause confusion between its business and that of the plaintiff's in Canada; from advertising, distributing or selling toys or games in association with the trade mark CHEERIO, with slogans "If it isn't Cheerio, it isn't yo-yo", "cannot cut or burn the axle" and from further reproducing any part of the original lettering marks of the plaintiff's wholesale price list.

There will also be an order for delivering up to the plaintiff all objectionable printed material or other paraphernalia in the possession or control of the defendant or that the said articles be destroyed by the defendant under oath unless the latter can remove the labels or inscriptions on the said articles in which case the said injunction shall be stayed for one month to enable it to perform this operation. The plaintiff shall be entitled to its costs and as for the matter of damages or profits, they will be such as the Registrar of this Court may award on a reference to him if the plaintiff elects such reference. As for the defendant's counterclaim, plaintiff's registration as a registered user of the Dubiner trade marks, dated September 14, 1955, is accordingly cancelled. This cancellation being, however, for the reasons already given something that should be performed as a matter of course, there will be no costs.

Judgment accordingly.

BETWEEN:

CHEERIO TOYS AND GAMES LIMITED .... APPELLANT;

AND

SAMUEL DUBINER AND CHEERIO YO-YO AND BO-LO COMPANY LTD. .... RESPONDENT.

1963
Oct. 21, 22
1964
July 29

Trade Marks—Trade Marks Act, S. of C. 1952-53, c. 49, ss. 49(11) and (12) and 55—Application for registered user—Appeal from decision of Registrar of Trade Marks—Who may appeal decision of Registrar of Trade Marks granting application for registered user—Whether decision of Registrar of Trade Marks adverse to appellant as required by s. 49(12) of Trade Marks Act—Whether appellant must be registered user of trade mark in question.

The appellant and the respondent, Dubiner, were respectively the defendant and plaintiff in the action *Dubiner v. Cheerio Toys and Games Ltd.* reported at p. 524 *ante*. In this action the respondents applied to the Registrar of Trade Marks for registration of the respondent company as a registered user of several trade marks of which the respondent, Dubiner, was the registered owner. The application was granted without the appellant having been given an opportunity to oppose it although it had notified the Registrar of its desire to do so.

Held: That the appellant has a right of appeal under s. 55(3) of the *Trade Marks Act,* as it allows any person entitled to a notice of a decision made by the Registrar to appeal it and the appellant was entitled to and did receive such notice.

2. That to the extent that the grounds of appeal are the same as or similar to those grounds mentioned in s. 49(10)(*c*)(i), (ii), (iii) and (iv) of the *Trade Marks Act,* the procedure outlined in that section for cancellation was the only one available to the appellant.

3. That the Registrar's decision was adverse to the appellant within the meaning of s. 49(12) of the *Trade Marks Act* in that the proposed user

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would be actively competing with the appellant and its name would be confusingly similar to that of the appellant and such a confusion or deception would go beyond what the registered user's provisions tolerate.

4. That although the appellant was no longer a registered user of the trade marks in question at the time when the events here under review occurred, it is not because of any status as a registered user that it was injuriously affected by the Registrar's decision but because the Registrar has approved a registered user under a trade name confusingly similar to that of the appellant and the registered user section of the Act cannot be construed to allow conflicting trade names to operate with the resultant confusion and deception which such a situation would create, unless the trade names were those of companies which are related, affiliated or connected as representing a group of traders in a manner such as no conflicting confusion would result from their concurrent use.
5. That the registered user section of the *Trade Marks Act* must be interpreted strictly and cannot go beyond the confusion necessary to allow one or several persons to use the same registered trade mark.
6. That the appellant clearly had a right to be heard by the Registrar under s. 49(12) of the *Trade Marks Act* and its appeal from the Registrar's decision on the ground that he had refused to hear it is properly raised under s. 55 of the Act.
7. That the appeal is allowed.

APPEAL from a decision of the Registrar of Trade Marks.

The appeal was heard before the Honourable Mr. Justice Noël at Ottawa.

J. C. Osborne, Q.C. and *R. G. McClenahan* for appellant.

Donald F. Sim, Q.C. and *W. F. Green* for respondent.

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

NOËL J. now (July 29, 1964) delivered the following judgment:

This is an appeal pursuant to the provisions of s. 55 of the *Trade Marks Act* from the decision of the Registrar of Trade Marks rendered May 31, 1963, whereby effective March 12, 1963, a corporation called Cheerio Yo-Yo and Bo-Lo Company Ltd. was registered as a registered user of several trade marks covered in the notice of appeal, the principal ones being "Cheerio", "Bo-Lo" and "Cheerio Yo-Yo".

The application for registration of Cheerio Yo-Yo and Bo-Lo Company Ltd. as a registered user was made on

March 8, 1963, by both the latter company and Samuel Dubiner, the owner of the trade marks. On March 18, 1963, a letter signed by Messrs. Gauld, Hill and Kilgour, on behalf of the appellant, was sent to the Registrar of Trade Marks requesting that they be notified if an application was made to register the above company so that they may have an opportunity to oppose it. The Acting Registrar of Trade Marks then replied as follows in a letter of March 21, 1963 to the above request:

> In reply to your letter of March 18, and in particular third paragraph, application was made on March 12, 1963, to register Cheerio Yo-Yo and Bo-Lo Company Ltd. as a registered user of the trade marks named in the application for cancellation of Cheerio Toys & Games Limited. That application has not yet been considered, but you are advised that *there is no provision in the Trade Marks Act for opposing a registered user application.* (the emphasis is mine).

On April 22, 1963, the Registrar wrote to Messrs. McCarthy & McCarthy, representing Samuel Dubiner and Cheerio Yo-Yo and Bo-Lo Company Ltd. acknowledging receipt of an application by both of their clients for registration of Cheerio Yo-Yo and Bo-Lo Company Ltd. as a registered user of the trade marks and requesting a written agreement, if any, between the parties upon which the application is based.

On April 24, 1963, Messrs. Gauld, Hill and Kilgour wrote to the Acting Registrar stating that the Director of Companies Branch in Quebec had not yet authorized the incorporation of Cheerio Yo-Yo and Bo-Lo Company Ltd., forwarding a photocopy of an advertisement which appeared in the March/April 1963 issue of Toys and Playthings, which implied that a company by that name exists and that it is a registered user of certain trade marks and requesting advice as to whether he had any record of a company by the above name being a registered user of any trade marks and particularly the trade marks "Yo-Yo", "Cheerio Yo-Yo" and "Bo-Lo".

On April 25, 1963, Messrs. McCarthy & McCarthy on behalf of Mr. Dubiner and Cheerio Yo-Yo & Bo-Lo Company Ltd. wrote the Registrar enclosing an original copy of the agreement between the parties upon which the registered user agreement is based and requesting that the subject matter of this agreement be kept confidential.

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The Registrar in response to the above letter wrote to Messrs. McCarthy & McCarthy on May 9, 1963 the following:

Gentlemen,

I acknowledge receipt of your letter of April 25 enclosing a copy of an agreement in support of the registered user application by Samuel Dubiner and Cheerio Yo-Yo and Bo-Lo Company Ltd.

. . .

Your attention is also drawn to Clause 7 of the agreement and it is pointed out that use of the trade marks by Cheerio Toys & Games Limited, as registered user of the trade marks in question, is permitted use and not an infringement.

Finally, on May 31 the Registrar informed Messrs. McCarthy & McCarthy and Cheerio Toys & Games Ltd. that effective March 12, 1963, Cheerio Yo-Yo and Bo-Lo Company Ltd. was registered as a registered user of the trade marks.

It therefore appears from the above correspondence that despite the appellant's desire notified to the Registrar or Acting Registrar of Trade Marks to be heard on these proceedings, it was not permitted to do so and the application was allowed.

The grounds for appeal are several and can be narrowed down to the following:

(1) The use of the trade marks by Cheerio Yo-Yo and Bo-Lo Company Ltd. would be contrary to the public interest; (2) the appellant was not given an opportunity to be heard although a request to do so had been made; (3) as the conditions and restrictions subject to which Cheerio Yo-Yo and Bo-Lo Company Ltd. is permitted to use the said trade marks do not require that the character and quality of its wares shall be the same as the wares of the appellant under the same marks, confusion and deception would result; (4) the use of the trade marks by a company having the corporate name Cheerio Yo-Yo and Bo-Lo Company Ltd. and by the appellant under its corporate name would cause or be likely to cause deception or confusion as to the origin of such wares; (5) that Cheerio Yo-Yo and Bo-Lo Company Ltd. have used the said trade marks otherwise than by way of permitted use and in such a way as to cause or be likely to cause deception or confusion; (6) that the owner of the trade marks and Cheerio Yo-Yo and Bo-Lo Company Ltd. failed to disclose facts

that if accurately represented or disclosed would have justified the Registrar in refusing the application for registration of the registered user; (7) the Registrar erred in registering the Cheerio Yo-Yo and Bo-Lo Company Ltd. as a registered user retroactively.

This appeal is launched, as we have seen pursuant to the provisions of s. 55 of the *Trade Marks Act* and before going any further in dealing with the above grounds of appeal it would be important to determine whether an appeal under the above s. 55 is available to the appellant in the present instance.

Section 55(1), (2) and (3) reads as follows:

> 55. (1) An appeal lies to the Exchequer Court of Canada from any decision of the Registrar under this Act within two months from the date upon which notice of the decision was despatched by the Registrar or within such further time as the Court may allow, either before or after the expiry of the two months.
>
> (2) The appeal shall be made by way of notice of appeal filed with the Registrar and in the Exchequer Court of Canada.
>
> (3) The appellant shall, within the time limited or allowed by subsection (1), send a copy of the notice by registered mail to the registered owner of any trade mark that has been referred to by the Registrar in the decision complained of and to every other person who was entitled to notice of such decision.

Now an appeal is usually limited to an actual party to the decision and although the appellant was not a party thereto, the latter would, however, under s. 55(3) of the Act have a right of appeal as it allows any person entitled to a notice of a decision made by the Registrar to appeal it and, of course, the appellant was entitled to and did receive such notice.

An appeal, however, would not, in my opinion, be the proper remedy here in all the cases which are in a general way covered by s. 49(10)(*c*)(i), (ii), (iii) and (iv) of the Act.

Indeed, I had occasion to determine in a case in which judgment was rendered this day under No. A-1190 of the files of this Court (*ante* p. 524) that the registered user section being one of exception, its provisions must be strictly adhered to and as a procedure was set down in the above section to obtain cancellation of the registration of a registered user, on the grounds therein mentioned, this procedure is the only one available in such cases.

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Noël J.

As all the grounds of appeal in this case, with the exception of the alleged refusal of the Registrar to hear the appellant either reproduce the grounds mentioned under the above section or are of a similar nature thereto, it therefore follows that as far as those grounds are concerned, the procedure of the above section for cancellation was the only one available to the appellant.

This, however, does not dispose of the matter as the appellant submits that the Registrar refused to hear it and that it was entitled to such a hearing under s. 49(12) of the Act which reads as follows:

49. . . .

(12) The Registrar shall not exercise any discretionary power under this section adversely to a person without giving each person who will be affected by the exercise of the power an opportunity of being heard personally or by his agent.

I am satisfied that the decision of the Registrar to register Cheerio Yo-Yo and Bo-Lo Company Ltd. as a registered user under the circumstances of the present case was adverse to the appellant in that the proposed user would be actively competing with the appellant and the former's name would be confusingly similar to that of the appellant and such a confusion or deception would, in my opinion, go beyond what the registered user's provisions tolerate.

Now, although as I decided in the first of the actions submitted to me involving the appellant herein, the latter ceased to be a registered user as of December 28, 1962, upon the breach of his user agreement, this does not mean, however, that the appellant from that date could no longer be a person injuriously affected by the ruling of the Registrar in approving Cheerio Yo-Yo and Bo-Lo Company Ltd. as a registered user. Indeed, it can be readily seen here that it is not because of its status as a registered user that it was injuriously affected but because of the fact that the registrar has approved a registered user under a trade name confusingly similar to that of the appellant and, in my opinion, the registered user section of the Act cannot be construed to allow conflicting trade names to operate with the resultant confusion and deception which such a situation would create, unless these trade names are those of companies which are in some way related, affiliated or connected as representing a group of traders in a manner such as no conflicting confusion would result from their concurrent use and, of course, that is not the situation we have here. As I had occasion to point out in the judgment referred to above, the registered user section of the Act must of necessity be interpreted strictly and cannot go beyond the confusion necessary to allow one or several persons to use the same registered trade mark.

Now whether the Registrar refused to hear the appellant on the basis that there was no provision under the Act for opposing a registered user application or for any other reason, makes, in my opinion, very little difference as it is clear from the correspondence referred to above that he did not give it the opportunity of being heard and bringing forth any facts which might have changed or altered his decision on the application although the appellant clearly had a right to be heard under s. 49(12) of the Act and this also was adverse to the appellant.

As the grounds for appeal on the basis that the Registrar refused to hear the appellant does not fall under any of the grounds mentioned in s. 49 (10)(c)(i), (ii), (iii) and (iv) it was therefore properly raised under s. 55 of the Act and this appeal should and is hereby maintained on that basis alone. Consequently, the registration of Cheerio Yo-Yo and Bo-Lo Company Ltd. as a registered user of the trade marks covered by registration numbers

N.S. 35/9570	N.S. 74/19279
N.S. 45/12078	N.S. 83/21542
N.S. 83/21541	N.S. 83/21544
N.S. 83/21543	N.S. 83/21554
N.S. 83/21545	N.S. 85/22029
N.S. 83/21555	N.S. 85/22096
N.S. 85/22066	N.S. 86/22303
N.S. 86/22285	N.S. 89/23192
N.S. 89/23191	N.S. 90/23430
N.S. 90/23301	N.S. 95/24662
N.S. 94/24465	N.S. 48/12848
N.S. 128/32786	

is set aside and the matter is referred back to the Registrar so that the appellant be given an opportunity to be heard. There will be no costs.

Judgment accordingly,

1963
April 10, 11

1964
Sept. 8

THE NEW BRUNSWICK ADMIRALTY DISTRICT

BETWEEN:

ARTHUR LAPIERRE, mariner and fisherman, as owner of the motor fishing vessel *DONALD HELENE* ... PLAINTIFF;

AND

The motor fishing vessel *GLOUCESTER NO. 26*, her owners and all other persons interested therein ... DEFENDANTS.

Shipping—Collision between two fishing vessels—Negligence—Failure to keep proper lookout—Apportionment of liability—Owner-master sued as owner—Limitation of liability—Interest on damages—Regulations for preventing collisions at sea, 1954, Rules 1, 9, 10, 24 and 29—Canada Shipping Act, R.S.C. 1952, c. 29, ss. 2(52), 657-659 and Amendment, S. of C. 1961, c. 32—International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957, Art. VI.

This is an action for damages arising out of a collision between two fishing draggers in the Gulf of St. Lawrence at about 2:30 a.m. on September 7, 1961. The vessel *Donald Helene,* which was drifting with its engine stopped when it was rammed by the vessel *Gloucester No. 26,* later sank while it was being towed to port.

It was found on the evidence that at the time of the collision the weather was fine and clear, the visibility was about twenty miles, the tide was about half-ebb, there was a northerly wind of about force 1, but there was no sea or swell. It was also found on the evidence that the *Donald Helene* was stopped in the water but under command at the time of the collision, that she was showing fore and aft navigation lights and that there were other draggers two or three miles away, of which some were stationary and others were moving.

Held: That the risk of there being another dragger or any vessel ahead of the *Gloucester No. 26* in its track was not reasonably improbable since any dragger might have pulled away from the fishing fleet to let its crew have a rest or to work as the crew of the *Gloucester No. 26* was doing.

2. That whether the *Donald Helene* was moving or not, or showing navigation lights or not, the owner-master of the *Gloucester No. 26* was at fault in not keeping the lookout required by the ordinary practice of seamen.

3. That since the *Gloucester No. 26* was well lighted, having in addition to her navigation lights, two spotlights where her crew were working, and since she could not have been more than a mile astern of the *Donald Helene* and approaching her directly when the mate of the *Donald Helene* made his last turn around his vessel, the mate was at fault in not seeing her at all.

4. That, there being no evidence to the contrary, it may be taken that the plaintiff is responsible for the conduct of the mate of the *Donald Helene* placed on duty as watchman.

5. That Rule 24 of the Regulations for Preventing Collisions at Sea, 1954, does not apply to vessels one of which has ceased to go ahead.
6. That the fault in each vessel was practically concurrent in time and identical in character and, accordingly, the parties were equally to blame for the collision.
7. That the defendant, Captain Noel, was the owner of the *Gloucester No 26* and at the material time was navigating his vessel as its master and that he was sued and appeared in his capacity as owner and not as master.
8. That although the action is *in rem,* the judgment is a personal judgment against Captain Noel without reference to the *res* as such, subject, however, to any privilege of limiting his liability which the *Canada Shipping Act* may accord him.
9. That where an owner-master negligently navigates his ship as master and is sued in the capacity of owner, s. 657 of the *Canada Shipping Act* alone applies and he does not have the legislative privilege of limiting his liability. If such owner-master were sued in his capacity of master, s. 659 of the *Canada Shipping Act* would apply and he would have that privilege.
10. That the plaintiff is entitled to interest from the date of the collision to the date of payment on the moiety of damages recoverable under this judgment.

ACTION for damages arising out of a collision between two fishing vessels.

The action was tried by the Honourable Mr. Justice Anglin, District Judge in Admiralty for the New Brunswick Admiralty District at Bathurst.

Leopold L. Langlois, Q.C. for plaintiff.

J. Paul Barry, Q.C. for defendants.

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

ANGLIN D.J.A. now (September 8, 1964) delivered the following judgment:

This action for damages arises out of a collision between two 60 foot, wooden hull, motor, fishing draggers in the Gulf of St. Lawrence a few miles east of Miscou Island, the northeast tip of Gloucester County, Province of New Brunswick, at night about 2:30 a.m. of September 7, 1961. Both crews had been fishing with other draggers. When night fell the plaintiff's *Donald Helene* drew off a mile or two from the fishing ground; its Diesel engine was stopped and the crew went to bed with the mate on watch. The defendant *Gloucester No. 26* later was proceeding in the track of the

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LAPIERRE v. *The Gloucester No. 26 et al.*

Anglin D.J.A.

drifting *Donald Helene,* its crew working on deck with spot lights, and its owner acting as master navigating. Its bow rammed the centre of the square stern of the other vessel. The latter was being towed to a port when it sank and was lost.

The plaintiff Arthur Lapierre of the Magdelen Islands, Province of Quebec, was the owner of and master on board the *Donald Helene* of 46 gross tons. He alleges that, on various grounds, the collision "was occasioned by the negligence and improper navigation and management of the Master, Owner and those on board the *Gloucester No. 26*", and claims damages for the loss of his vessel.

The plaintiff's writ was issued against "The Motor Fishing Vessel *Gloucester No. 26,* her owners and all other persons interested therein", and the vessel was arrested in a port in the New Brunswick Admiralty District. The latter vessel has a gross tonnage of 43.17. Her owner is Onesime Noel of Lameque, Shippegan Island, County of Restigouche, Province of New Brunswick, and he was master on board at the time in question. In their statement of defence "the defendants deny all allegations of negligence and allege that the accident was caused entirely by the negligence of the *Donald Helene* in lying idle in the water in a fishing ground with its engine stopped as a result of which its lights were not properly illuminated and in particular having no person on watch". "The defendants claim, without admitting liability, a declaration limiting the liability of the owners of the *Gloucester No. 26* in the event that such owners were held liable."

I find that, as alleged by the plaintiff, "the weather was then fine and clear, the visibility was about 20 miles, the tide was about half ebb; there was a northerly wind (approximately force 1) but there was no sea or swell". The defendants deny that the *Gloucester No. 26* "was moving at full speed but admit that it was moving". The defendants also admit "that certain spot lights were illuminated on the *Gloucester No. 26*", that "at the time of impact the *Donald Helene* was heading approximately 270° (M) and the *Gloucester No. 26* was coming on an almost parallel course", and that "efforts to tow the *Donald Helene* into port failed and she sank to the bottom at about 0620 A.D.S.T.".

First, it is contended for the plaintiff that the *Gloucester No. 26* was in breach of Rule 24 of the *Regulations for Preventing Collisions at Sea,* 1954, which provides:

> Notwithstanding anything contained in these Rules, every vessel overtaking any other shall keep out of the way of the overtaken vessel.

It is true that the *Donald Helene,* although stopped in the water, was "under way". Rule 1(*c*)(v). But a vessel must be going faster than the other, and having sufficient speed to be coming up with her, in order to be considered to be overtaking. *The Franconia*[1]. Rule 24 does not apply to vessels one of which has ceased to go ahead. Halsbury's *Laws of England,* 3rd Ed., vol. 35, Shipping and Navigation, para. 988.

Next, it is contended for the plaintiff that the *Gloucester No. 26* breached Rule 29 "in failing to keep a proper lookout and to take any precaution which may be required by the ordinary practice of seamen". The following passage from Marsden's *British Shipping Laws—Collisions at Sea,* (1961), is cited by Counsel in his brief:

> Para. 892 . . . If a ship is proved to have been negligent in not keeping a proper lookout she will be held answerable for all the reasonable consequences of her negligence; thus, for example, it may be negligence not to see and avoid another ship on a clear night even if that other ship has no lights. *The British Confidence,* (1951) 2 Lloyd's Rep. 615, (ship at anchor, no lights owing to electricity breakdown; other in fault for not seeing her loom in time) . . .

The same paragraph also contains the following:

> The lookout must be vigilant and sufficient according to the exigencies of the case . . . in crowded waters the lookout cannot report every light he sees, but must report every material light as soon as it becomes material. *The Shakkeborg* (1911) reported in note to *The Umsinga,* (1911) P. at p. 245 . . .
>
> In ordinary cases one or more hands should be specially stationed on the lookout by day as well as at night. They should not be engaged upon any other duty . . .

Onesime Noel, the defendant owner and master of the *Gloucester No. 26,* says:

> I am a fisherman, age 30, and began fishing at 17. Just before the accident I was at the starboard window in the wheelhouse and I was looking all around. My crew members were working on the front. Onc was working on the net, the other one was throwing planks into the hold. I had my light in the mast, I had a light at the bottom, I had a light in front of the wheelhouse which was turned on the port side, it was throwing light with a shade. I had my side lights. I had my stern light.

[1] (1876) 2 P.D. 8 (C.A.).

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Q. Did you see the *Donald Helene* before you struck them?

A. No.

Q Did you see any light?

A. No, after I struck I saw a small yellow light on the dory rack on the rear . . .

Cross-examination:

Q. How long had you been a Master of the fishing boat when the collision occurred?

A. Three years

Q. Have you ever attended a marine school, a navigation school?

A. No . . .

Q. Isn't it a fact that you stated to Captain Lapierre that you were watching your echo sounder (in the wheel house) at the time of the collision?

A. No. I told Captain Lapierre I was looking at the sounder and I was looking at the flag . . . I was looking at the front and I was looking through my door for the spot on my right. It is a buoy with a flag on it and gasolene lantern on it . . .

Q. I am speaking of these spot lights you were using to provide some lighting for your men working on deck.

A. I had a light on the front mast, I had a light on my cabin on the front and they were the only two lights that could give them some light . . .

Q. Isn't it a fact that you admitted before several witnesses that you were blinded by this forward light on your mast?

A. No, if I had been blinded I would not have seen the light which was on the spot . . . The visibility was good . . . A good light you could have seen it about 10 miles . . .

Q You said in your statement of defence you were going through a field of many trawlers

A. I was not going directly through the field, I was going alongside of the large field of draggers about half a mile from the group . . . I was going about 5 or 6 knots an hour . . . I didn't say (to other witnesses) I was going at 7 knots . . .

Q. Did you have somebody on the lookout that night?

A. Yes, I had two men on the front but I had not told them to watch, to be on the lookout, because it was fine . . . I had no lookout man; I had not given any orders to anyone to be on the lookout . . .

Q Now these other ships that were in the vicinity of your vessel, at what distance did you first see them?

A. I was about a mile from them . . . I could see all their lights.

Q. How do you explain you did not see the *Donald Helene* at all before the accident?

A. Myself there was only one light that I could have seen behind if it had been throwing sufficient light, because I was going directly on the stern of his boat and I couldn't see his light that was in his mast on the front . . . I couldn't have seen his red and green side lights . . .

Q. When you said that the stern light was yellow, was not of normal strength, what do you exactly mean?

A. Well, it was not throwing the light that it was supposed to throw.

Q. Where was that light located?

A. Underneath his dory, on the dory rack.

Q. Did you see the real stern light of the *Donald Helene* on her aftermast before the collision?

A. No, I didn't see the light on the aftermast.

Q. Did you see it after the collision?

A. No, there was no light on the aftermast . . . If there had been one it would be the only boat because there is no such boat with the light on the mast . . . If there was one I couldn't see it; it was not throwing light . . . It was not lit on the mast. There was one lit on the dory rack on the rear . . .

There is a conflict of testimony with respect to there being a navigation light showing aft on the main or "aftermast" of the *Donald Helene.* The plaintiff Captain Lapierre had already testified about his lights and other matters as follows (in narrative form slightly paraphrased):

The fishing decreased and I had stopped to give my men some rest . . . There were other draggers in the vicinity when we stopped. It was about 2 or 3 miles from the nearest . . . The mate was on watch and I and the remainder of the crew were sleeping or lying down . . .

There was a light on the back mast which was visible for at least 5 miles, because it was a 50 watt bulb. It was 2 feet above the dory. I had another light on the front mast which is supposed to be visible all around. They were the regular lights. The visibility was a good 20 miles.

Cross-examination:

I was asleep (at the time of the collision). What I did the first thing was to see if my lights were on. They would be running from the battery. The light at the stern would be the light I had on the stern mast. It would be the only light visible to a vessel approaching from the rear. It was white, a bulb 50; it was a new one installed in the evening.

After Captain Noel had testified as above with respect to his seeing only a light on the dory rack and none on the mainmast, Captain Lapierre was recalled and said:

There (on the dory rack) I put a light after the accident. I took an extension cord and I went to the rear to look at the damage and the repairs, and probably this small light stayed there.

(The dory rack is a frame between the stern and the rear of the wheelhouse carrying a dory about 7 feet above the deck. The dory serves as a lifeboat.)

I resolve this conflict by relying on two exhibits in evidence. One is an "Outboard Profile" of the *Gloucester No. 26* certified thereon by the Chairman of the Fisherman's Loan Board of New Brunswick that she was built "off these plans". The other is a like profile of the *Donald Helene*

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certified thereon by the Assistant-Manager and the Shipwright of Gaspe Shipbuilding Inc. that it is the plan of that vessel "built in our yard in 1956". The former blueprint shows no navigation light on the mainmast, and the latter does. It is probable that due to the confusion and excitement of the collision Captain Noel is mistaken in his recollection, and I find that the *Donald Helene* showed a proper navigation light aft as required by Rules 1, 9 and 10.

Counsel for the defendants submits in his brief that "the actions of both parties should be considered in the light of Rule 29 and liability determined by its application". And he cites the following passage from Marsden, *op. cit.*, (1953) 10th Ed. at p. 573:

> A vessel lying dead (stopped, per 11th Ed.) in the water has not the privileges of a ship at anchor. She is under way, and in case of risk of collision must comply with the regulations so far as she is able to do so. She must not rely upon the other ship keeping out of her way.

In the 1961 11th Ed. of Marsden, *op. cit.*, para. 899, the following has been added to this passage:

> If she is not under command she must show the appropriate lights or shapes under Rule 4, indicating that she cannot herself get out of the way. She may, moreover, attract attention by the means provided for in Rule 12.

Marsden's para. 722 contains the following:

> In *S.S. Mendip Range v. Radcliffe,* (1921) 1 A.C. 556, Viscount Findlay said that a vessel might use the "not under command" signal if she could only get out of the way of another after great or unusual delay.

There is no evidence that the *Donald Helene* was not under command at a material time, and I so find.

The following are extracts from the evidence of the mate on watch on the *Donald Helene*:

> I am 35 years of age, a fisherman since the age of 15. I checked the lights when I came on watch at 2 o'clock, there was a light on the stern mast and a light on the front mast. I checked them afterwards.
>
> I was standing in the wheel house when the collision took place.
>
> I went around the ship every 10 or 15 minutes. My last tour was about 15 minutes before the accident. I didn't notice that a boat was coming from behind; when I did notice it it was about 10 or 15 feet . . .
>
> Q. Did you hear the noise of the motor?
>
> A. No.
>
> Q. Did you see any of her lights?
>
> A. No, only when he got 10 or 15 feet from me . . .

Cross-examination:

Q. Have you any explanation as to why you didn't see the *Gloucester No. 26* prior to the time you did see it?

A. No, I didn't see it. A boat that does 7 or 8 knots an hour does not take long.

Q. The visibility was 20 miles, wasn't it?

A. Yes.

Q. So that would mean you could see it for 3 hours?

A. Yes, but it does not take 3 hours for a boat to travel 2 miles . . . There were other boats 2 and 3 miles away. Some were stationary and others were moving . . .

Q. But you didn't see the *Gloucester No. 26* until it was 10 or 15 feet from you?

A. No.

Q. Doesn't that mean you had not looked?

A. Well, I had noticed it was about 5 or 6 minutes before I had looked.

Q. Had you seen it then?

A. No, I had seen boats but I had not seen his boat.

Q. How close was the closest boat 5 or 6 minutes before the accident?

A. Some mile and a half—two miles.

Q. Do you believe the *Gloucester No. 26* came a mile and a half or two miles in that 5 or 6 minutes?

A. No, it couldn't travel quite that fast.

Q. Were you asleep at the time of the accident?

A. No, my window was open and I was looking out the window.

Q. What were you looking for?

A. I was looking forward and to the side.

Q. Had you looked to the rear at all?

A. At that time I had not really looked backward.

Q. You say you didn't hear the engine until the boat was 15 feet from you?

A. Yes.

Q. And the window of the wheelhouse was open?

A. Yes.

Q. How can you explain you didn't hear the engine before that?

A. Some make more noise than others . . .

Q. So had you seen them as watchman you could have signalled with the sound or signalled with the spot light?

A. Yes. If I had seen them in time I would have.

I find that the mate on watch on the *Donald Helene* and the owner-master navigating the *Gloucester No. 26* were both at fault in being in breach of Rule 29 which provides:

> Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences 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.

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There is no evidence to the contrary, and so it may be taken that the plaintiff is responsible for the conduct of the mate placed on duty as watchman. Marsden, *op. cit.*, para. 62.

The special circumstances of the *Donald Helene* were that she was stopped in the water, but under command; she was showing fore and aft navigation lights; there were other draggers "2 or 3 miles away of which some were stationary and others were moving"; and the visibility "was 20 miles". It appears that the mate appreciated that in those circumstances a lookout in all directions was called for, and so he went "around the ship every 10 or 15 minutes". But he "didn't notice that a boat was coming from behind" until "only when it got 10 or 15 feet from me", and then, of course, the collision on the stern was unavoidable. This other vessel was well lighted where, in addition to her navigation lights, the crew were working on deck under two spot lights. She could not have been more than about a mile astern and approaching directly when the mate made his last turn around his vessel. She was there to be seen, and was not an overtaking vessel within the contemplation of the Rules. The mate on watch was at fault in not then seeing her at all. If he had seen her, appropriate action, as he admits, could have been taken to avoid a collision.

In Halsbury, *op. cit.* p. 641, it is said with cases cited:

> For a vessel to be held at fault for not complying with one of the rules that refer to risk of collision it is not sufficient that the risk should exist. The circumstances must be such that the presence of another vessel, and of a risk of collision if nothing is done to prevent it, are apparent or ought to be apparent to those in charge. If it is probable but not certain that a vessel has done something to create a risk of collision, the risk must be assumed to exist.

As for the owner-master of the colliding vessel the special circumstances were the same, except that he was proceeding under power at "about 5 or 6 knots". He says: "Just before the accident I was at the starboard window in the wheelhouse and I was looking all around . . . I was about a mile from them (other draggers in the area). I could see all their lights". But he did not observe the navigation light showing aft on the *Donald Helene,* nor even the yellow light which he says was on the dory rack. He did not see her loom. The risk of there being another dragger or any vessel ahead

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in his track was not reasonably improbable. Any dragger might have pulled way from the fishing fleet to let its crew have a rest or to work as his own crew was doing. In any event, whether the other vessel was moving or not, or showing navigation lights or not, he was at fault in the lookout required by the ordinary practice of seamen.

To my mind the fault in each vessel was practically concurrent in time and identical in character. *The S.S. Volute*[1]. Accordingly, I find that the parties were equally to blame for the collision.

In view of Captain Noel being in part responsible for the collision the next issue is whether or not he is entitled under the provisions of the *Canada Shipping Act* to limit his liability. This issue requires an interpretation of an amendment made to s. 659 of that Act in 1961, when the privilege of limiting liability, long since enjoyed under statutory provisions by shipowners, was extended to other persons interested in shipping, including masters, members of a crew and other servants of an owner and of such other persons. It appears that since that amendment and a similar one made to the *Merchant Shipping Act* of the United Kingdom in 1958 there has been no reported decision of a Court on the interpretation now required.

(It is of interest to note that a guilty ship of less than 300 tons shall for the purpose of limitation of liability under the amendments of 1961 be deemed to be 300 tons, and that it shall be at the rate per ton of the value of 1,000 gold francs. My guess is that such value in Canadian funds is at the moment about $72.00. In a bill now before Parliament provision is made for the Governor in Council to specify from time to time the amount which shall be deemed to be equivalent to 1,000 gold francs. Where liability is apportioned see *The Queen v. Levis Ferry, Ltd.*[2]

I find that the defendant Captain Noel was the owner of the *Gloucester No. 26* and at the material time in question was navigating his vessel as its master, and hold that he was sued and appeared in his capacity as owner and not in his capacity as master. Although the action is *in rem*, the judgment is a personal judgment against him without reference to the value of the *res* as such, subject, however,

[1] [1922] 1 A.C. 129. [2] [1962] S.C.R. 629.

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to any privilege of limiting his liability which the *Canada Shipping Act* may accord him. The *S.S. Cristina*[1]; *The Tricape*[2]; *The Pacific Express*[3]; Marsden, *op. cit.*, para. 395.

Limitation of liability to an amount calculated by reference to the tonnage of the guilty ship depends, of course, entirely upon such statutory provisions. Before considering the provisions in question it is of interest to note that they may have been prompted by an *International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships* signed at Brussels in 1957 by several nations, including the United Kingdom and Canada. See the *Convention* in Marsden, *op. cit.*, para. 1286. It provided in part:

The High Contracting Parties,

Having recognized the desirability of determining by agreement certain uniform rules relating to the limitation of the liability of owners of sea-going ships, have decided to conclude a Convention for this purpose, and thereto have agreed as follows:

Art. 6.—(1) . . .

(2) Subject to paragraph (3) of this Article, the provisions of this Convention shall apply to the charterer, manager and operator of the ship, and to the master, members of the crew and other servants of the owner, charterer, manager or operator acting in the course of their employment, in the same way as they apply to an owner himself: . . .

(3) When actions are brought against the master or against members of the crew such persons may limit their liability even if the occurrence which gives rise to the claims resulted from the actual fault or privity of one or more of such persons. If, however, the master or member of the crew is at the same time the owner, co-owner, charterer, manager or operator of the ship the provisions of this paragraph shall only apply where the act, neglect or default in question is an act, neglect or default committed by the person in question in his capacity as master or as member of the crew of the ship.

In the United Kingdom by C. 62 of the statutes of 1958 the *Merchant Shipping Act* was amended as follows:

3.—(1) The persons whose liability in connection with a ship is excluded or limited by Part VIII of the Merchant Shipping Act, 1894, shall include any charterer and any person interested in or in possession of the ship, and, in particular, any manager or operator of the ship.

(2) In relation to a claim arising from the act or omission of any person in his capacity as master or member of the crew or (otherwise than in that capacity) in the course of his employment as a servant of the owners or of any such person as is mentioned in subsection (1) of this section,—

(*a*) the persons whose liability is excluded or limited as aforesaid shall also include the master, member of the crew or servant, and, in a

[1] [1938] A.C. 485.

[2] [1956] Ex. C.R. 219.

[3] [1949] Ex. C.R. 230.

case where the master or member of the crew is the servant of a person whose liability would not be excluded or limited apart from this paragraph, the person whose servant he is; and

(b) the liability of the master, member of the crew or servant himself shall be excluded or limited as aforesaid notwithstanding his actual fault or privity in that capacity, . . .

In Canada by C. 32 of the statutes of 1961 the *Canada Shipping Act* was amended to read in part as follows:

657. . . .

(2) The owner of a ship, whether registered in Canada or not, is not, where any of the following events occur without actual fault or privity, namely . .

(d) where any loss or damage is caused to any property . . . through

(i) the act or omission of any person, whether on board that ship or not, in the navigation or management of the ship . . .

liable for damages beyond the following amounts, namely:

658. (Deals with the power of the Exchequer Court to consolidate claims.)

659. The provisions of section 657 and 658 extend and apply to

(a) the charterer of a ship;

(b) any person having an interest in or possession of a ship from and including the launching thereof; and

(c) the manager or operator of a ship

where any of the events mentioned in paragraphs (a) to (d) of subsection (2) of section 657 occur without their actual fault or privity, and to any person acting in the capacity of master or member of the crew of a ship and to any servant of the owner or of any person described in paragraphs (a) to (c) where any of the events mentioned in paragraphs (a) to (d) of subsection (2) of section 657 occur, whether with or without his actual fault or privity.

The submission of Counsel for the defendant Captain Noel is that, although he was sued and appeared in the action as the owner of the *Gloucester No. 26*, nevertheless he was also her master, and thus he qualified under s. 659 as "any person". Accordingly, it is contended, he is entitled to limit his liability under s. 659 notwithstanding his fault, if he was at fault.

In the *Canada Shipping Act* by s. 2(52) "'master' includes every person having command or charge of a ship, but does not include a pilot".

With respect to the above amendment made in the United Kingdom in 1958 it is said in Marsden, *op. cit.*:

Para. 60. The statutory limitation of liability does not apply to protect an owner, or a part owner, by whose actual fault or with whose privity the collision occurred unless, it seems, under the provisions of the *Merchant Shipping (Liability of Shipowners and Others) Act, 1958*, s. 3,

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the act or omission in respect of which he seeks to limit has occurred when he was acting in the capacity of master or a member of the crew of his own vessel. There is, however, at present no decision as to the meaning of the section . . . Before the enactment of the *Merchant Shipping (Liability of Shipowners and Others) Act, 1958,* the provisions of which apply only to liabilities arising from an occurrence that took place after August 1, 1958, an actual wrongdoer who was not an owner was not protected. In the great majority of cases, such a wrongdoer was not worth suing unless his employers could be persuaded to indemnify him, but in one case, at least, in an action instituted after the owners of a vessel had limited their liability, the plaintiffs obtained judgment for the balance of the damage sustained from an actual wrongdoer, the master of the vessel. *Chalmer and Blackwater Navigation, Ltd. v. J. Mumford,* (1940) 66 Ll.L. Rep. 10.

Para 195. It has been said that to constitute actual fault the owner's action need not have been the sole or next or chief cause of the occurrence, but it must be a contributory cause. *The Bristol City,* (1921) P 444, (C.A.).

With respect to Marsden's comment on the above amendment made in the United Kingdom in 1958 it is to be noted that the phraseology thereof differs from that in the above amendment made to the *Canada Shipping Act* in 1961, and that we are here concerned only with construing the latter.

Observations on the interpretation of a statute providing for limitation of liability were made in the Ontario Court of Appeal in *The Georgian Bay Transportation Co. v. Fisher*[1]. On the main issue it was held that the ship in question was not a British ship within the meaning of the statute, and therefore the owner was not entitled to limit liability with respect to a claim for a loss of life by the ship foundering. The following are extracts from the judgments:

Per Patterson, J A : The subject of actual fault or privity was before the Court of Admiralty in 1865, and 1866, in two cases, viz.: *The Spirit of the Ocean,* 34 L J. Adm. 74; and *The Obey,* 1 A. & E. 102 L.R. In each case the master, who was on board when the collision occurred, was said to be part owner of the vessel; and in each case it was held by Dr. Lushington, that the fault of the part owner, although it might destroy his own right of limitation of his liability, would not involve his co-owners in that consequence . . .

I find the limitation clauses treated by Judges of the highest eminence as proper to be construed strictly, because they derogate from common law rights . . .

Per Burton, J.A.: It has frequently been held that the limitation of liability, created by this and similar statutes, is not one to be favoured, inasmuch as it operates severely upon the sufferers, and that it is incumbent therefore upon parties seeking freedom from liability to bring themselves strictly within the words of the enactment.

[1] (1880) 5 Ont. Ap. R. 385.

The Spirit of the Ocean[1] was followed in *Gale v. S.S. Sonny Boy*[2].

In *The Maple Prince*[3] the District Judge in Admiralty for British Columbia said, with reference to construing the *Canada Shipping Act* as of that date:

> Anomaly is inherent in the whole concept of the statutory limitations which are bound to produce irrational results. There is nothing logical in holding that a tug-owner can limit his liability by the tonnage of the one tug involved in an accident when he may have a whole fleet of ships available to make amends for his negligence. But we must take the policy of Parliament as we find it.

In this last case the policy of Parliament was clear on the terms of the statute.

The principles on which a statute is ordinarily to be construed were reviewed by the Judicial Committee in *City of Vancouver v. Bishop of Vancouver Island*[4]. In that case a municipal tax act exempted "every building set apart and in use for the public worship of God". It was held that the exemption applied to the land and the church upon it. The Committee said that one principle was:

> The grammatical and ordinary sense of the words is to be adhered to. unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further . . .

In *Canadian Performing Right Society, Ltd. v. Famous Players Canadian Corporation, Ltd.*[5], the Judicial Committee said with respect to construing a section of the Copyright Act, 1921, of Canada:

> Great stress is laid by the appellants on the extreme inconvenience of a literal construction . . . One answer to this argument is that it ought to be addressed to the legislature and not to the tribunal of construction, whose duty it is to say what the words mean, not what they should be made to mean in order to avoid inconvenience or hardship . . . Of course, if it could be established that the provision in question is capable of two meanings, one of which would produce a reasonable and the other an unreasonable and unjust result, much might be said in favour of adopting the former. But it is here that the appellants' difficulty arises . . .

In the present problem I think that the terminology of the sections of the *Canada Shipping Act* in question show

[1] 34 L.J. Adm. 74.
[2] [1945] 2 D.L.R. 363.
[3] [1955] Ex. C.R. 225.
[4] [1921] 2 A.C. 384.
[5] [1929] A.C. 456.

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clearly enough what the policy and intent of Parliament is, and we need not consider whether the result is reasonable or unreasonable, just or unjust, from the point of view of either a plaintiff who suffered damage or a defendant who was at fault or in privity causing it. In my opinion, for the following reasons, that intent is that where an owner-master negligently navigates his ship as master and is sued in the capacity of owner s. 657 alone applies, and therefore he does not have the legislative privilege of limiting his liability. If, however, such owner-master is sued in the capacity of master, s. 659 applies and he does have that privilege.

Two elements in construing those sections are quite clear. It has long since been well settled in interpreting a provision in shipping legislation giving an owner the benefit of limiting his liability that an owner-master, sued in his capacity as owner, has "destroyed" his privilege through his negligence as master, for as owner he was in privity with himself with respect to his fault as master. And it is also clear that the words "any person" found in ss. 657 and 659 are so comprehensive that they must include a person who is an owner-master navigating the ship.

I would think that it is not without significance that Parliament used the word "extend" in providing in s. 659 that "the provisions of sections 657 and 658 extend and apply to etc.". The grammatical and ordinary sense of the word "extend" connotes that the extension is to a person other than an owner as such whose privilege is fully provided for in s. 657. It is elementary that a person's conduct may be in one or another capacity in the eyes of the law, and he must sue or be sued in the capacity appropriate to the matter in question. Hence it may be taken that Parliament has envisaged that a shipowner might well at times be navigating his ship in the capacity of master. The extension of the benefit of limiting liability was therefore given to a person, who may be an owner, "acting in the capacity of master". To say that "any person" in s. 659 is an owner acting in the capacity of owner would result in having to take the intent of Parliament as being that the privilege he lost under s. 657 he regained under s. 659. One may hardly assume that Parliament's policy was to create that inconsistency.

I trust that it will be understood that my attempt to construe the *Canada Shipping Act* has not been influenced by what may have been agreed upon in the *Brussels Convention* of 1957, nor by the amendment in the United Kingdom in 1958 which apparently the learned author (Registrar of the Admiralty Court in London) of the latest revision of Marsden on *Collisions at Sea* would construe otherwise than I do the Canadian amendment of 1961. I have kept in mind that in a matter of limitation of liability with respect to shipping accidents it is the function of the legislature and not a Court to achieve any uniformity which the nations concerned may desire.

The plaintiff is entitled to interest from the date of the collision to the date of payment on the moiety of damages for the loss of his vessel recoverable under this judgment. *The Queen v. Levis Ferry, Ltd., supra.* The defendants in their defence "claim" a declaration limiting liability, which I will treat as a counterclaim. See the practice spoken to in *Gale v. S.S. Sonny Boy, supra*; *The M.S. Pacific Express, supra.*

There will be judgment in favour of the plaintiff Captain Arthur Lapierre of the *Donald Helene* against Captain Onesime Noel of the *Gloucester No. 26* and her bail for half the amount of damages caused by collision, with interest at 5 per centum per annum from September 7, 1961, to date of payment, and with half the plaintiff's costs. If the parties are unable to agree on the damages, the assessment thereof is referred to the Registrar. The defendants' counterclaim for a declaration limiting their liability is dismissed with costs. Expenses in common, such as reporting the evidence, will be borne equally by the parties.

Judgment accordingly.

1964 Mar. 20, 21 Apr. 1, 2 June 12

BETWEEN:

HER MAJESTY THE QUEEN ....PLAINTIFF;

AND

HARRY S. DEVEREUX ....DEFENDANT.

Crown—Indian Act, R.S.C. 1952, c. 149, ss. 18(1), 20, 24, 25(2), 28(1), 31(1), 37, 45(1), 48, 49, 50, 58(1)(c) and (3)—Indian Act, R.S C. 1927, c. 98, s. 34(2)—Indian Act, S. of C. 1951, c. 29, s. 18(1)—Right of Indian Band to possession of Reserve Land—Right of Band to possession of Reserve Land suspended or terminated in certain cases—Right to possession lawfully acquired by individual member of band is assignable and transmissable subject to the provisions of the Statute—Right to possession vested in band or in individual Indian but not in both at same time.

In this action the Crown claims on behalf of the Six Nations Band of Indians possession of a farm forming part of the Six Nations Indian Reserve near Brantford, Ontario, on which the defendant has resided since 1934, at which time it was lawfully in the possession of Rachel Ann Davis, the widow of a member of the Six Nations Band. The defendant worked the farm under a leasing agreement with Mrs. Davis from 1934 to 1951, when, at the request of Mrs. Davis and the defendant, a lease of the farm was granted by the Crown to the defendant for a term of ten years. The defendant purchased the livestock and farming implements belonging to Mrs. Davis and took possession of the farm although Mrs. Davis continued to reside there until her death in 1958. She devised her rights in the farm to the defendant, who continued in possession for the balance of the term of the lease and, for the terms of two subsequent one-year permits granted by the Crown and was still in possession at the time of the trial. After the termination of the Crown lease in 1961 the Crown advertised for tenders for the farm from members of the Six Nations Indian Band and four tenders were received, the highest one, submitted by one Clause, being accepted. The Administrator of Indian Estates, purporting to act as the administrator of the estate of Mrs. Davis, executed an agreement to sell the said lands to Clause. By agreement between the defendant and the Crown and on the application of Clause and the defendant, the defendant was granted the right to use and occupy the property for one year ending November 30, 1961 and by a similar agreement the said rights of the defendant were continued until November 30, 1962, these two agreements being the two one-year permits referred to earlier. Clause agreed with the defendant to apply for a five-year lease of the farm to the defendant and for renewals thereof until the purchase price should be paid but the application was opposed by the Band Council and it was not approved by the Minister. In May 1962 Arnold and Gladys Hill, who knew of the arrangements between Clause and the defendant, purchased from Clause his right in the property, the assignment of Clause's rights to them being approved by the Administrator of Indian Estates as Administrator of the Davis estate.

In November 1962 the Council of the Band notified the defendant to vacate the property at the expiration of the second one-year Crown permit and took other steps to force the defendant to leave the property, culminating in this action. The resolution by which the Band

Council instructed the Attorney General of Canada to institute this action was an assertion by the Council of a right of the Band as a whole and not of any right of Arnold and Gladys Hill. There was no evidence adduced of any transfer or assignment to the Band of the right of possession of the property either from the executor of the Davis estate or from the Administrator of Indian Estates, or from Clause, or from the Hills.

Held: That the main issue in the action is not whether the defendant has any right to remain in possession of the land in question, but whether the Six Nations Indian Band, on whose behalf the action has been brought, is entitled to the possession claimed on its behalf.

2 That s. 31(1) of the *Indian Act* confers no new substantive right but simply provides a procedure for the enforcement of existing rights of an individual Indian or of a Band.

3. That in this case the action is to enforce a right of possession asserted by the Band and on the facts it has not been established that the Band has any such right in the land in question.

4. That the action is dismissed.

ACTION by Crown to recover possession of land on behalf of the Six Nations Band of Indians.

The action was tried before the Honourable Mr. Justice Thurlow at Brantford.

N. A. Chalmers for plaintiff.

P. A. Ballachey, Q.C. for defendant.

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

THURLOW J. now (June 12, 1964) delivered the following judgment:

In this action the Crown claims on behalf of The Six Nations Band of Indians possession of a farm consisting of portions of lots 52 and 53 of what is known as the River Range in the township of Onondaga near Brantford, Ontario. The farm in question forms part of an area known as the Six Nations Indian Reserve, which is administered by the Department of Citizenship and Immigration as a reserve to which the *Indian Act* applies and the action is brought at the instance of the Council of the Band pursuant to s. 31(1) of the *Indian Act* R.S.C. 1952,c.149, by which it is provided that:

31. (1) Without prejudice to section 30, where an Indian or a band alleges that persons other than Indians are or have been

(*a*) unlawfully in occupation or possession of,

(*b*) claiming adversely the right to occupation or possession of, or

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(c) trespassing upon

a reserve or part of a reserve, the Attorney General of Canada may exhibit an Information in the Exchequer Court of Canada claiming, on behalf of the Indian or the band, the relief or remedy sought.

While there is no reason to question that the Six Nations Indian Reserve of which the farm in question forms part is a reserve within the meaning of the statute no evidence was offered of the origin of the reserve or of the nature of the rights of the Six Nations Band of Indians in it.

The defendant, who is not an Indian, has resided on the farm in question since 1934. At that time the farm was lawfully in the possession of Rachel Ann Davis, the widow of a member of the Six Nations Band and the defendant moved there pursuant to a leasing agreement with her under which he was to work the farm on shares. While this arrangement appears to have been void under s. 34(2) of the *Indian Act* R.S.C. 1927, c. 98. insofar as it purported to give the defendant possession of the premises and the right to reside thereon, it continued until 1951 when, at the request of Mrs. Davis and the defendant, a lease of the farm was granted by the Crown to the defendant for a term of 10 years commencing December 1, 1950, embodying most of the terms of a new arrangement which had been made by Mrs. Davis and the defendant. At that time the defendant purchased the livestock and farming implements belonging to Mrs. Davis and became possessed of the farm under the lease though Mrs. Davis continued to live there and to occupy certain portions of the premises under the terms of the arrangement until her death in April 1958. By her will, probate of which was granted on May 30, 1958 by the Surrogate Court of the County of Brant to the executors therein named, Mrs. Davis gave her rights in the farm to the defendant and following her death the defendant continued in possession and despite the expiration of the lease and of two one year permits to use and occupy the land for agricultural purposes, subsequently granted by the Crown pursuant to s. 28(2) of the Act, remained in possession at the time of the trial of the present action.

As I view it, the main issue in the action is not whether the defendant has any right to remain in possession of the land in question but whether the Six Nations Indian Band, on whose behalf the action has been brought, is entitled to the possession claimed on its behalf. By s. 18(1) of the Act it is enacted that:

> 18. (1) Subject to the provisions of this Act, reserves shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart; . . .

but by ss. 20 to 28 inclusive, provisions are made under which individual members of a band may acquire a right to possession of land in a reserve which right is transferrable under specified conditions to other members of the band, the band itself being entitled to come into possession as reversioner in certain specified situations.

With respect to the transmission or disposition of a right to possession of land in a reserve on the death of a member having such a right the statute in s. 48 makes provision for distribution of the estates of Indians who die intestate and in ss. 45(1), 49 and 50 provides as follows:

> 45. (1) Nothing in this Act shall be construed to prevent or prohibit an Indian from devising or bequeathing his property by will.
>
> 49. A person who claims to be entitled to possession or occupation of lands in a reserve by devise or descent shall be deemed not to be in lawful possession or occupation of that land until the possession is approved by the Minister.
>
> 50. (1) A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.
>
> (2) Where a right to possession or occupation of land in a reserve passes by devise or descent to a person who is not entitled to reside on a reserve, that right shall be offered for sale by the superintendent to the highest bidder among persons who are entitled to reside on the reserve and the proceeds of the sale shall be paid to the devisee or descendant, as the case may be.
>
> (3) Where no tender is received within six months or such further period as the Minister may direct after the date when the right to possession or occupation is offered for sale under subsection (2), the right shall revert to the band free from any claim on the part of the devisee or descendant, subject to the payment, at the discretion of the Minister, to the devisee or descendant, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.
>
> (4) The purchaser of a right to possession or occupation of land under subsection (2) shall be deemed not to be in lawful possession or occupation of the land until the possession is approved by the Minister.

It is I think of importance to observe at this point that the only situation in which the right of possession reverts to the band under these provisions is that described in s.

50(3) that is to say, when no tender has been received within the specified time.

Turning now to the facts the evidence discloses that at the time of her death Rachel Ann Davis held a certificate of possession of the land in question issued under s. 20 of the *Indian Act* and had the right to possession of the land subject only to the lease existing at that time which had been made by the Crown at her request to the defendant. This right was not sold immediately after her death but on January 4, 1961, following the termination of the defendant's lease the Indian superintendent at Brantford advertised for tenders for the property from members of the Six Nations Indian Band, such tenders to be submitted by the end of March 1961, and as a result four tenders varying in amount and in terms of payment were received from members of the band including one from Hubert M. Clause and another from Arnold D. Hill and Gladys Hill. The tender of $15,000 by Clause was the highest in amount and subsequently by an agreement dated August 21, 1961, Arthur C. Pennington, the administrator of Indian Estates, purporting to act as administrator of the estate of Rachel Ann Davis, as vendor, agreed to sell the land to Clause for $15,000 of which $1,000 was payable on execution of the agreement and the remainder in yearly payments of $800 with interest on the balance at 6 per cent. per annum. The contract provided *inter alia* that immediately on execution of it Clause should have the right to possession of the land and that no assignment of the agreement by him should be valid or of any effect between the vendor and him until approved by the Minister of Citizenship and Immigration. Whether the contract itself or possession of the property by Clause was ever approved by the Minister for the purposes of s. 50(4) of the Act was not established but it appears that on the application of Clause and the defendant the latter was by an agreement between himself and the Crown dated May 12, 1961, granted the right to use and occupy the property from December 1, 1960, to November 30, 1961, at a rental of $350, and it also appears that by a similar agreement made at the request of the defendant and of Clause dated November 16, 1961, the defendant was granted the right to use and occupy the property from December 1, 1961, to November 30, 1962, at a rental of $1,020.

In March 1962 while the second of these agreements was in effect Clause, who at all material times had intended to raise at least part of the money to make the payments on his contract by having the land leased by the Crown for his benefit to the defendant, by a further contract obligated himself to the defendant to apply for a five year lease of the premises to him and for renewals thereof until the purchase price should be paid. The form which this transaction took appears to have been dictated by ss. 28(1) and 58(3) of the Act. By s. 28(1) it is provided that

> . . . a deed, lease, contract, instrument, document or agreement of any kind whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

It is also provided in s. 37 that

> Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart.

By s. 58(3) however the Minister is empowered to

> . . . lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered.

The application referred to in Clause's contract with the defendant was prepared and forwarded but the council of the band was opposed to it and it was not approved by the Minister. In May 1962 Arnold and Gladys Hill, who I think knew enough of the arrangements existing between Clause and the defendant to fix them with notice thereof, purchased from Clause his rights in the property and by an indenture dated June 1, 1962, concurred in by Arthur C. Pennington as administrator of the estate of Rachel Ann Davis, Clause assigned his rights in the property to them. The document bears an "approved" stamp with a signature under which is the word "Director", but whether or not this indicates approval by the Minister was not established. A second application for a five year lease to the defendant was prepared by his solicitor and forwarded to the Hills for signature but they do not appear to have signed it and the lease was not granted.

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As the termination of the second of the two permits granted to the defendant by the Crown approached, the council of the band came into the picture. In November 1962 it notified the defendant to vacate the property at the expiration of his permit and in January 1963 it passed a resolution requesting the Indian superintendent at Brantford to notify the defendant to quit and remove from the reserve on or before January 31, 1963. This the superintendent did. On that date and on February 12, 1963, as well, summonses were issued on informations laid by the chief councillor of the band in both cases charging that the defendant on the respective dates "did unlawfully trespass on the Six Nations Indian Reserve contrary to section 30 of the Indian Act". Both charges were dismissed. Thereafter on July 4, 1963, the council passed a resolution stating:

> That the Six Nations Band Council alleges that Harry Devereux is unlawfully in possession of that parcel or tract of land and premises situate, lying and being in the Six Nations Indian Reserve No. 40, in the Province of Ontario and being composed of lots 52 and 53 in the River Range in the Township of Onondaga, containing by admeasurement an area of 225 acres, more or less, and that the Six Nations Band Council instructs the Attorney-General of Canada to exhibit an Information in the Exchequer Court of Canada, pursuant to S. 31(1)*a* of the Indian Act to recover possession of the said lands on behalf of the Six Nations Band.

The present action was then brought.

It will be observed that this resolution is an assertion by the council of a right of the band as a whole. It is not an assertion of the right of Arnold and Gladys Hill and it was expressly stated by counsel for the Crown in the course of the trial that he was not asserting any right of the Hills. Moreover there is no evidence of any transfer or assignment to the band of the right of possession of the property either from the executors of the Davis estate or from the administrator of Indian Estates or from Clause or from the Hills.

In William and Yates on Ejectment, Second Edition, the fundamental principles applicable in actions to recover possession of land are expressed as follows at pages 1 to 3:

> To entitle a plaintiff to bring an action for the recovery of possession of land he must have a right of entry either legal or equitable. A right of entry means a right to enter and take actual possession of lands, tenements, or hereditaments, as incident to some estate or interest therein.
>
> . . .
>
> A person in possession of land in the assumed character of owner, but without any title, has a good title against all the world except the rightful owner, and he can recover possession from any person, except the rightful owner, who deprives him of possession.

Before the Judicature Acts this right of entry must have been, in any court of common law, a *legal* right; a mere equitable title would have been insufficient to support an action of ejectment. Since the Judicature Acts all the courts are bound to give to a plaintiff, or to a defendant, the same relief upon an equitable title as the Court of Chancery would formerly have given, even against the Crown. Now, therefore, a plaintiff claiming possession under an equitable title will succeed upon proof of an equitable right to the actual possession; but it may be necessary to make the person in whom the legal estate is vested a party to the proceedings.

. . .

The right of entry must be a right to the immediate possession of the property. A reversionary or other future estate is not sufficient until it has become an estate in possession by the forfeiture, defeasance, or expiration of the prior estate. If, therefore, it is shown that there is a tenancy existing in any other person which is good against the plaintiff he cannot recover possession. So also if there is an outstanding term which has not been surrendered.

With respect to the right to possession of land in an Indian reserve, whatever may have been the exact legal position prior to the enactment of *The Indian Act* S. of C. 1951, c. 29 of 1951, s. 18(1) of that Act makes it clear that thenceforth subject to the provisions of the Act, reserves are held by the Crown for the use and benefit of the respective bands for which they were set apart, and this appears to me to vest in the band a right to the use and to the benefit of the land including the right to possession of it. The provisions of s. 24 providing for sale to the band by an Indian of his right of possession and of s. 25(2) and 50(3) providing for reversion of an individual Indian's right of possession to the band in certain situations lend support for this conclusion. But this right is subject to the other provisions of the statute and accordingly is suspended or terminated with respect to the land involved in situations which under other provisions of the act are inconsistent with the band's right of possession as for example when a lease is granted pursuant to s. 58(1)(*c*) or when an individual member of the band lawfully obtains possession of land in a reserve pursuant to s. 20.

Now when an individual member has lawfully secured possession of land in a reserve he has under the statute a right to possession which is assignable and transmissible subject to and in accordance with the provisions of the statute and which, as I read the Act, continues to be vested in him or in anyone who takes by assignment from him or on his death in the same way and to the same full extent as title to land outside the reserve would continue to be

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vested in him or his assignee or successor, subject only to any provisions of the statute which may be inconsistent therewith. It is thus conceivable that a right of possession once lawfully obtained by an individual member of a band may persist for an indefinite period and may pass on numerous occasions to other members of the band and such a right does not become extinct even when the party beneficially entitled to it is one who is not personally qualified to exercise it. To my mind such a right is clearly inconsistent with the existence at the same time of a right of possession in the band and it appears to me to follow from this that when a member of a band obtains lawful possession of land in a reserve the right which the band would otherwise have to possession of that land is at an end, though circumstances may arise in which the band may once again have a right of possession either by purchase of the individual member's right or on reversion of the right to the band under ss. 25(2) or 50(3). The statutory scheme accordingly in my opinion contemplates a statutory right of possession of any part of a reserve being vested in an individual member of a band, or in the band itself, but not in the band when it is vested in the individual member.

In the present case the band at no material time had a right to possession since Mrs. Davis undoubtedly had (subject to the outstanding lease to the defendant) the right to possession of the land described in the certificate issued to her under s. 20 of the Act and since this right never reverted to the band under s. 50(2), which is the only provision of the Act under which it could have so reverted, because that provision never came into operation inasmuch as tenders were received within six months after the right was offered for sale.

In this view it is unnecessary to consider any question as to the validity or effect of the sale to Clause or of the assignment by him to the Hills and while the right to possession may have passed to Clause and then to the Hills under these transactions, it is also unnecessary to determine in whom the right is now vested since the only material question is whether it has been shown to be vested in the band.

In the course of argument reliance was placed by counsel for the plaintiff on the judgments of this Court in *The*

King v. McMaster[1] and *The King v. Easterbrook*[2] and the judgment of the Supreme Court of Canada[3] affirming the judgment in the latter case but the question which Maclean P. considered in the *McMaster* case at p. 74 was quite different from that which arises here and neither in that case nor in the *Easterbrook* case was there any question of the right to possession of the land being vested in an individual member of the band. I am accordingly of the opinion that these cases do not apply in the present situation.

It was also submitted that s. 31(1) confers on a band a statutory right to the relief claimed in an action brought by the Attorney General of Canada at its request pursuant to the section. As I read it, however, this subsection confers no new substantive right but simply provides a procedure for the enforcement of existing rights of an individual Indian or of a band. In the present case the action is to enforce a right of possession asserted by the band and on the facts it has not been established that the band has any such right in the land in question.

The action therefore fails and it will be dismissed with costs.

Judgment accordingly.

[1] [1926] Ex. C.R. 68. [2] [1929] Ex. C.R 28.
[3] [1931] S.C.R. 210.

BETWEEN:

1963
Apr. 4-6

HOFFMANN-LA ROCHE LIMITED .....APPELLANT;

AND

1964
July 23

DELMAR CHEMICALS LIMITED .....RESPONDENT.

Patents—Patent Act, R.S.C. 1952, c. 203, s. 41—Compulsory licence—S. 41(3) aims at freeing new process from absolute control of patentee—Applicant for licence required by Patent Act to prove competence to produce food or medicine in question—Good reason for refusing licence—Limits to discretion of Commissioner of Patents under s 41(3)—Public interest and interests of patentee—Patentee not to challenge the adequacy of the teaching of his specification—No duty on Commissioner to investigate questions of public safety—Procedure on applications under s 41(3) to be established by Commissioner—Commissioner not required to hold oral hearing or hear oral argument—Amount of royalty.

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The appellant appealed from a decision of the Commissioner of Patents granting to the respondent a licence under s. 41(3) of the *Patent Act* to use for the preparation or production of certain sedative drugs an invention patented by the appellant. The royalty to be paid by the respondent was fixed by the Commissioner at 12½ per cent of the net selling price of the crude product before processing for patients' consumption. The grounds of appeal were that the Commissioner's decision was made without proper investigation of the relevant facts and without granting the appellant's demands for an opportunity to cross-examine a deponent whose affidavits accompanied the respondent's application and reply and for a hearing at which oral evidence might be offered and oral argument presented. The appellant alleged that the respondent was not capable of using the invention and manufacturing the product safely and of producing a medicine that was safe for the public.

Held: That the problem posed for the Commissioner when dealing with an application under s. 41(3) of the *Patent Act* is whether the public interest in having the food or medicine available at the lowest possible price consistent with due reward to the inventor and the public interest in affording to interested persons the opportunity to devise improvements in the patented process and to use them immediately will be better served by refusing the licence than by granting it.

2. That apart from the question of the public interest, the interest of the patentee is a proper matter to be taken into account in the sense that the Commissioner may think that the patentee should be entitled to assurance that the royalty or other consideration for the licence will be paid and where the circumstances indicate the need for it, the unwillingness of the applicant to secure the payment may also be good reason for refusing an application.

3. That in this case the patentee's counterstatement contained nothing which the Commissioner was under any necessity to regard as good reason for instituting an inquiry or for refusing a licence.

4. That the substantial requirements of justice have not been violated by the Commissioner's refusal in the circumstances to accede to the appellant's demand for an oral hearing and that the appellant's submission that in the circumstances it was incumbent on the Commissioner in the public interest to grant the appellant's demand for an oral hearing or for an opportunity to cross-examine on the applicant's affidavit is unfounded.

5. That there was no legal necessity for the Commissioner to satisfy himself of the immediate competence of the applicant to manufacture and store the product and the capability of the applicant to do at once everything necessary to meet such standards as the patentee may wish to see observed in the use of its invention is beside the point, such matters being governed not by the patentee but by the law of the land including the provisions of s. 41 of the *Patent Act*.

6. That as there is nothing in the record upon which to base or justify a finding as to the amount of royalty to be paid by the licensee, this matter will be referred back to the Commissioner.

APPEAL from a decision of the Commissioner of Patents.

The appeal was heard by the Honourable Mr. Justice Thurlow at Ottawa.

Gordon F. Henderson, Q.C. and *R. G. McClenahan* for appellant.

W. L. Hayhurst for respondent.

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

THURLOW J. now (July 23, 1964) delivered the following judgment:

This is an appeal from a decision under s. 41(3) of the *Patent Act* R.S.C. 1952, c. 203. by which the Commissioner of Patents granted to the respondent a licence to use for the purpose of the preparation or production of medicine the invention patented by Canadian patent number 612497 dated January 10, 1961, and settled the royalty payable therefor by the respondent at 12½ per cent of the selling price of the bulk product. The basis of the appeal is the complaint by the appellant that the Commissioner's decision was made without a proper investigation of the relevant facts, and without granting the appellant's demands for an opportunity to cross-examine a deponent whose affidavits accompanied the respondent's application and reply or for a hearing at which oral evidence might be offered and oral argument presented. Had such a hearing been held and had such cross-examination been allowed the appellant would, in its submission, have been able to show that the process described in the patent by which a drug sold by the appellant under the trade name Librium is made, involved dangers to the persons employed in making it and in the vicinity and that unless properly prepared and used involved dangers to the persons using it as well, that the respondent was not capable of exercising the necessary care in making and taking care of the drug and that if allowed to prepare and sell it in bulk the appellant's control over the use of the drug would be lost with consequent danger of its reputation being destroyed. These it was submitted were matters which the appellant ought to have been permitted to establish by an oral hearing and by cross-examination of the respondent's deponent, and which ought to have persuaded the Commissioner to refuse the application.

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Before outlining the facts a few comments on s. 41(3) may be in order. The subsection reads as follows:

> (3) In the case of any patent for an invention intended for or capable of being used for the preparation or production of food or medicine, the Commissioner shall, unless he sees good reason to the contrary, grant to any person applying for the same, a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise; and, in settling the terms of such licence and fixing the amount of royalty or other consideration payable the Commissioner shall have regard to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention.

This provision represents a limitation on the exclusive rights which an inventor may obtain in an invention of the kind to which the subsection applies. Generally speaking, under the provisions of the *Patent Act* the inventor of any new and useful art, process machine, manufacture or composition of matter or of any new and useful improvement therein is entitled, subject to the provisions of the Act and on complying with the requirements thereof, to obtain a patent granting to him for 17 years the exclusive right to make, construct and use his invention and to sell it to others to be used. The rights obtainable under the statute are, however, not absolute but are limited by the provisions against abuse contained in ss. 66 to 73, by s. 67(3) of which it is declared that in considering whether there has been abuse as defined in the Act it shall be taken that patents for new inventions are granted not only to encourage inventions but to secure that new inventions shall so far as possible be worked on a commercial scale in Canada without undue delay. In the case of inventions to which s. 41(1) applies, that is to say, inventions relating to substances prepared or produced by chemical processes and intended for food or medicine the scope of the rights obtainable is also restricted as therein provided to exclusive rights in a new process and in a new product when made by a new process, *vide Hoffman-La Roche & Co. v. Commissioner of Patents*[1], *Commissioner of Patents v. Winthrop Chemical Company Incorporated*[2], and Rand J. in *Parke, Davis & Co. v. Fine Chemicals of Canada Ltd.*[3]. In cases to which s.

[1] [1955] S.C.R. 414.
[2] [1948] S.C.R. 46.
[3] [1959] S.C.R. 219.

41(3) applies the rights of the patentee are subject as well to the authority thereby conferred on the Commissioner to grant licences to others to use the invention. Apart from the rights obtainable under the statute, which are granted in consideration of the disclosure by the inventor of the invention to the public, it is the right of any member of the public to make, use and sell the invention, subject only to such restrictions or controls if any on the use and sale thereof as may be provided by the law.

With respect to the purpose of s. 41(3) Rand J. in *Parke, Davis & Co. v. Fine Chemicals of Canada Ltd.* said at p. 222:

> The legislative policy underlying the subsection to be gathered from its special terms and the section as a whole is obvious: all new substances, apart and as distinguished from processes, are, in the public interest, to be free from legalized monopoly, the conclusive evidence of which is the fact that no new substance may alone be patented; all unpatented processes are open to be used to produce the substance patented with its new process, with only the new process protected.

I would carry the matter a stage further and say that the subsection also aims at freeing the new process from the absolute control of the patentee by denying him both the exclusive right to refuse licences and thus to prevent the use of the process by others, (except where in a particular case the Commissioner sees good reason for refusing a licence) and the right to dictate the terms of a licence.

In requiring the Commissioner "unless he sees good reason to the contrary" to grant a licence "to any person applying for the same" Parliament has imposed no qualification of any kind on the person to whom a licence is to be granted save that of being a "person applying for the same", and there is no statutory requirement that an applicant prove anything to entitle him *prima facie* to the licence for which he applies. In particular there is no statutory requirement that he prove that he is competent to produce the food or medicine or that he is possessed of the equipment, know-how and resources to do so, though the Commissioner may consider it of some importance, depending on the facts of the case, to be informed of the applicant's qualifications and if he thinks necessary to inquire into them. Nor has Parliament defined what sort of consideration ought to be regarded by the Commissioner as

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"good reason" why a licence should not be granted. However, by providing in s. 41(4) for an appeal to this Court from the Commissioner's decision Parliament while leaving the matter generally to the discretion of the Commissioner has imposed the limitation that his decision is not to be made capriciously but upon grounds which an appellate court would regard as sufficient to justify his conclusion. Thus in the *Parke Davis* case to which I have already referred, where the licence had been granted and on appeal certain matters which had been rejected by the Commissioner as reasons for refusing the licence, were put forward Martland J. said at p. 228:

> As to whether he should have seen "good reason to the contrary" regarding the application for this licence, it would seem that this is a matter for the judgment of the Commissioner of Patents. The wording in question is "the Commissioner shall, unless he sees good reason to the contrary, grant to any person applying for the same . . ." In this case the Commissioner did not see such good reason. The decision is his to make and it cannot be said, on the evidence, that his decision was manifestly wrong, bearing in mind that one of the main considerations before him is that of the public interest.

The authority of the Court to determine whether the judgment of the Commissioner is "manifestly wrong" in my opinion necessarily involves authority to determine when necessary what sort of reason may or may not be treated as good reason within the meaning of the statute, but as Parliament has seen fit to leave the Commissioner's discretion unfettered it would not in my opinion be desirable for this Court on an appeal to lay down principles for its exercise beyond what is necessary for the particular case. The purpose of the section, however, is of prime importance in every case and the problem which it appears to me to pose for the Commissioner is whether the public interest in having the food or medicine available at the lowest possible price consistent with due reward to the inventor and the public interest in affording to interested persons the opportunity to devise improvements in the patented process and to use them immediately will be better served by refusing the licence than by granting it. If, for example, the Commissioner is satisfied that the granting of an application will make the product more expensive to the public or that it will cause a reduction rather than an increase in research being carried on the Commissioner may, depending on all the circumstances of the case, reach the conclusion that good reason for refusing the licence appears. Moreover, apart from the question of the public interest, the interest of the patentee is a proper matter to be taken into account in the sense that the Commissioner may think that the patentee should be entitled to assurance that the royalty or other consideration for the licence will be paid and where the circumstances indicate the need for it the unwillingness of the applicant to secure the payment may also be good reason for refusing an application. But, as I read the section, neither the ability of the particular applicant to produce the food or medicine safely nor his ability to produce a safe food or medicine is a matter which the Commissioner is concerned to ensure. These are matters for the authorities to whom the administration of the provisions of the law respecting the manufacture and distribution of foods and drugs, applicable whether there is a patent or not, is committed. The licence which the Commissioner may grant under s. 41(3) is plainly not an authority to do anything contrary to law. It operates only to authorize the applicant's use of the patented invention which the patentee would otherwise be in a position to prevent. Moreover, since the grant of the patent is conditional upon and in consideration of the disclosure by the inventor of the invention to the public in such terms as will enable those skilled in the art to make use of it after the patent has expired it is not open to the patentee on an application of this kind to contend that a person possessed of the knowledge common to the art by following the directions of the specification will not be able either to use the invention safely or to use it to produce a safe product for in either case he attacks the validity of the rights which his patent purports to give him.

When the ability of the applicant to manufacture a new food or medicine is put forward, in support of an application under s. 41(3) and is not disputed, it may no doubt influence the Commissioner more readily to grant a licence to the particular applicant but it is at most a collateral fact and is relevant only in the sense that the Commissioner might regard it as of some importance in determining whether good reason for refusing the licence existed if it were shown that the applicant had not the qualifications of a workman of ordinary skill and competence in the art.

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But whether the ability of the applicant as one skilled in the art is raised or not the question for the Commissioner is still the same and is to be resolved by reference to the interests which I have mentioned, bearing in mind that the statute directs that the matter be determined in favour of granting the licence unless good reason appears for thinking that these interests will be better served by refusing it.

It is also worthy of note at this stage, because of the directions given by the Commissioner to which I shall refer later in these reasons, that no procedure for dealing with applications for licences under s. 41(3) is prescribed either by the statute itself or by the regulations made pursuant to it. This is in marked contrast with the provisions of ss. 67 to 73 relating to abuse of patent rights where the procedure to be followed is prescribed in ss. 70 and 71 and in the Rules made under the Act, with some particularity. That procedure involves *inter alia* a written application setting out the applicant's interest and the facts upon which his case is based, verified by statutory declaration, notice thereof to the patentee and advertisement in the Canada Gazette and the Canadian Patent Office Record, a counter-statement by the patentee, if he opposes, verified by statutory declaration fully setting out the grounds of opposition and a hearing if any party demands it or the Commissioner himself so appoints. In contrast with the situation on an application under s. 41(3) in proceedings under the abuse provisions the onus of proving abuse rests on the applicant and the procedure prescribed apart from being less suited to an application under s. 41(3) is not applicable thereunder in the absence of a direction by the Commissioner that it be followed in a particular case. With respect to the requirements of procedure under s. 41(3) Cameron J. in *Parke, Davis & Company v. Fine Chemicals of Canada Limited*[1] after quoting from the judgment of Lord Selborne in *Spackman v. Plumstead Board of Works*[2] held at p. 484:

> In the instant case, Parliament has conferred on the Commissioner power to decide the question, but his decision is of a very limited nature. He is required to grant the licence "unless he sees good reason to the contrary". In the absence of any requirement or direction as to how he should proceed "the law will imply no more than that the substantial requirements of justice shall not be violated."

[1] [1959] Ex. C.R. 478. [2] (1885) 10 A.C. 229.

I turn now to the facts, all of which appear from the Patent Office file. The respondent filed its application on or about March 24, 1962, and in it alleged *inter alia* that the patent was one to which s. 41(3) applied since the invention claimed was intended for and capable of being used for the production of certain sedative drugs which were medicines within the meaning of the subsection, that to the best of the applicant's knowledge and belief the process claimed in the patent was not being carried on in Canada, that the applicant wished to use the process for the preparation or production in Canada of the substances referred to in the patent and had applied to the patentee for a licence to do so but had been informed that a decision could not be expected for some months, that the applicant and its predecessor company had since 1941 been engaged in the synthesis and manufacture of many pharmaceutical fine chemicals most of them organic synthetics used as medicines, that the applicant was a substantial and reputable company with facilities and know-how for carrying out the process and was ready, willing and able to carry on manufacture of the products in its own plant in Canada using its own equipment and personnel, that it employed some thirty people including a number of technicians, three chemists engaged in research and development work and one in analytical control work, that it had certain production facilities in its plant and had verified experimentally on an adequate scale that it could produce the products economically in commercial quantities, that its estimates indicated that it could sell the products at between \$350 and \$450 per kilo and that it therefore applied for a non-exclusive licence under the patent, limited to the use of the invention for the purpose of the preparation or production of medicine but not otherwise with the consequent right to use and sell the products and submitted that there was no good reason for refusing the licence. This was accompanied by an affidavit of Geza S. Delmar, the president of the appellant company, stating that he had personal knowledge of the facts set forth in the application and that such facts were true to the best of his knowledge and belief.

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On April 2, 1962, the Commissioner wrote to the applicant's solicitors acknowledging receipt of the application and saying:

> As there are no rules governing the prosecution of an application under the provisions of section 41 subsection 3 of the Patent Act, I direct that the following procedure be adopted:
>
> 1. You are to advertise the application in the Patent Office Record and in the Canada Gazette. The advertisement should be in the form accompanying this letter.
>
>   A five dollar ($5.00) fee is required for advertisement in the Patent Office Record.
>
>   You should advise me of the date at which the advertisement has appeared in the Canada Gazette.
> 2. Within sixty days from the date of this letter you must serve the patentee, Hoffmann-La Roche Limited, 1956 Bourdon Street, Ville St. Laurent, Montreal 9, Quebec, with a copy of the application and affidavit.
> 3. The patentee will have sixty days within which to file a counter-statement with me and serve a copy thereof upon you.
> 4. You will have thirty days to file a reply with me and serve a copy thereof on the patentee's representative.

This, it will be observed, so far as it went, was similar to the procedure prescribed under ss. 70 and 71 of the Act. By another letter written the same day the Commissioner also advised the appellant of the filing of the application, that the applicant had been requested to serve the appellant within 60 days with a copy of the application and of the supporting affidavit that the appellant would have 60 days within which to file and serve its counter-statement supported by affidavit and that the applicant would have 30 days to file and serve a reply, but he does not appear to have advised the appellant of his directions to the applicant to advertise the application.

On August 2, 1962 the appellant, having in the meantime obtained a two month extension of time, filed a counter-statement which read as follows:

> 1. Hoffmann-La Roche Limited, the owner of Canadian Patent 612497 opposes the application made under Section 41(3) of the Patent Act by Delmar Chemicals Limited for a licence under the said patent.
> 2. Librium, the trade name under which Hoffmann-La Roche Limited sells the invention of the said patent, belongs to a new class of compound which has not, heretofore, been employed in medical therapeutics.

3. It is the first specific medication for the symptoms of anxiety and tension and has accordingly been subject to use by the medical profession, both as specific or adjunctive therapy in treating medical, surgical or psychiatric disorders.
4. Previously available medications would relieve the symptoms of anxiety and tension, but either to a lesser extent than Librium, or by also producing undesirable side effects, such as habituation or addiction.
5. The librium manufacturing process involves the use of highly volatile solids dangerous to inhale, the use of numerous chemicals which can cause skin afflictions and the use of highly explosive solvent systems. Applicant's described production facilities are not adequate to cope with the manufacture of librium.
6. Librium substance is light sensitive and will break down into its derivatives if not properly controlled. Some of these derivatives are more potent than the parent compound and would cause an overdosage which produces undesirable side effects such as drowsiness and ataxia (muscle incoordination). Some of the derivatives are less potent which would render the substance ineffective and others are definitely toxic.
7. Delmar Chemicals Limited, in its application, states that it has verified, experimentally, on an adequate scale, that it can produce the patented products. Making a drug in the laboratory and manufacturing it on a commercial scale are two vastly different propositions. Commercial production requires great care and the use of specialized equipment and facilities for both manufacturing and storing which are not possessed by the applicant. Cutting corners in the manufacture of the drug would involve great danger both during manufacture and to the ultimate consumer.
8. The fact that Delmar Chemicals Limited has been found to be qualified to manufacture certain products in other instances does not mean that it is qualified to manufacture the drug involved in this application.
9. Librium substance has been used in substitution for barbiturates and is therefore subject to abuse. It is under consideration for classification for restricted distribution as a controlled drug under Schedule G of The Food & Drug Act.
10. If Delmar Chemicals Limited obtains the licence it seeks, it can then sell librium substance to any other drug manufacturer or retailer in Canada and the quality of the manufacturing, storage and capsulating treatment accorded the drug will no longer be subject to control. A licence to one to manufacture the bulk substance is, in effect, a licence to all to sell it, and, with a drug such as that involved in this instance, the public interest would not be served by making the drug open and available to the public free from control.
11. If, contrary to the submissions herein, a licence is granted, the royalty payable thereunder should be commensurate with the maintenance of research incentive and with the importance of both the process and the substance involved.
12. A "demand for hearing" will be made by Hoffmann-La Roche Limited.

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This was accompanied by a statutory declaration by John S. Frolick, the vice-president of the appellant company, stating only that he had read the counter-statement and on the basis of the knowledge which he had by virtue of his position of vice-president, he found that the facts stated in the counter-statement were true to the best of his knowledge and belief. On the same day a notice demanding a hearing in respect of the application and requesting that a date for such hearing be fixed was served on the Commissioner who appears to have endorsed on it the notation "No provision for hearing under s. 41(3) Commissioner's discretion for rules of procedures. J.W.T.M. 2.8.62."

On August 8 the Commissioner wrote to the appellant's solicitors acknowledging receipt of the counter-statement and demand for a hearing and saying:

> In answer I must say that there being no regulations governing the practice under section 41 subsection 3 of the Patent Act, the Commissioner is entitled to set the procedures. Under the circumstances the Commissioner is not bound to hold a hearing on demand by one of the parties.
>
> The applicant has according to my instructions a period of thirty days to file a reply if he wishes. After that time I shall study the application and decide whether a hearing is warranted or not.

The respondent's reply was filed on August 18. In it considerable portions of what was set out in the counter-statement were admitted including paragraphs 1 to 4, the first sentence of paragraph 5 and the statements in paragraph 6 as to the stability of the products but the other statements were met with either denials or argumentative explanations or both. In particular it stated that insofar as the respondent's facilities might turn out to be inadequate it was prepared to acquire any necessary facilities. The reply ended with a paragraph submitting that there was no need for a hearing and that the counter-statement showed no good reason why a licence should be refused and requesting that a licence be granted. This was accompanied by a further affidavit of Geza S. Delmar stating that he had personal knowledge of the facts set forth in the reply and that they were true to the best of his knowledge and belief.

Thereafter, though not invited to do so by the Commissioner, the applicant's solicitors on September 7 wrote a three page letter to him submitting that issues of public safety were raised in the counter-statement which required full investigation, that the magnitude of the danger could not be appreciated without such an investigation and that the applicant itself was not fully aware of such danger, that the problems of safety were not associated with the carrying out of the patented process but were collateral problems relating to risks involved in safely dissipating noxious fumes, production and disposal of toxic by-products and the use of appropriate apparatus and equipment that an examination of the appellant's and respondent's plants should be made for the purpose of comparing them and that oral evidence to be adduced at a hearing and cross-examination of the respondent's witnesses would establish the inability of the respondent to produce the product safely. The letter then proceeded to request a hearing or in the alternative that the appellant should be given at least an opportunity to cross-examine Mr. Delmar, and that the Commissioner visit the respective plants and it concluded with a suggestion that because of the public safety factors involved in the case it was in the public interest that the Commissioner be satisfied that the respondent is capable of making the product.

The respondent thereupon replied to the arguments so made by a letter in which among other things its solicitor objected to the Commissioner visiting the plants as suggested and on November 19, 1962, the Commissioner wrote to the appellant's solicitors stating that he had considered the petition in the light of their letter and had come to the conclusion that he need not visit the plants as suggested adding that a careful study of the patent and of patents covering closely related compounds had not revealed that there was anything unusual and that he would decide in a few weeks whether or not a hearing would be held.

The appellant's solicitors thereupon sent another letter to the Commissioner this time emphasizing its view that the respondent was not competent to produce a safe product and properly test it and the consequences which might ensue from an unsafe product being put on the market, and inviting the Commissioner to check with the Food and Drug Directorate with respect to the accuracy of certain statements in the respondent's reply and again demanding a hearing.

Shortly afterwards the respondent's solicitors replied to the submission so made and concluded by submitting that the appellant by its correspondence had argued its case and

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shown no good reason for a hearing to argue it over again and that none of the points raised by the patentee furnished any justification for refusal of a licence to the respondent.

Some two months later the Commissioner wrote to the appellant's solicitors enclosing a copy of his decision on the application and saying:

> This is a case which presents no difficulty and I have therefore made my ruling without a hearing considering that in my opinion no good reason to the contrary had been advanced.

In his formal decision the Commissioner after quoting s. 41(3) stated that he had no choice but to grant a licence unless he saw good reason to the contrary and that as there were no regulations governing his inquiry he was at liberty to use his judgment in any individual case in order to arrive at a just and fair conclusion. Then after very briefly reviewing some of the arguments and statements made by the parties he found that he had no reason to believe that the applicant had not the ability to make the compound, adding that the respondent was a well known manufacturer of synthetic organic compounds and therefore he decided that no hearing was necessary in the case and that the petition should be granted. In a further paragraph he also set a royalty to be paid by the respondent of $12\frac{1}{2}\%$ of the net selling price of the crude product before processing for patients' consumption. The present appeal was then taken.

The appellant's main submission, as I understand it, is that its counter-statement raised questions of public interest and of public safety which it thereupon became the duty of the Commissioner on behalf of the public to investigate fully before deciding to grant a licence, that in denying the appellant's request for an oral hearing and for an opportunity to cross-examine Mr. Delmar the Commissioner had deprived the appellant of its right to show him the several dangers to public safety involved in licencing the respondent to use the patented process to produce the drug and the magnitude of such dangers, that the Commissioner had reached a conclusion as to the extent of dangers incident to the manufacture of the drug on information obtained from other patents the identity of which was not made known to the appellant and that the appellant therefore had not had the fair hearing to which, as a party whose property was affected by the decision, the appellant was entitled.

In my opinion there is no duty cast upon the Commissioner by the statute, to investigate on behalf of the public, questions of public safety. His concern is not with public safety but with the effects of the monopoly rights of the patentee on the freedom of others to use the invention to promote the public interest in obtaining the new medicine as cheaply as possible and in enabling others to devise and use improvements in the patented process. When the Commissioner grants a patent he is not concerned with what dangers to the public may be involved in the lawful practice of it and neither is this his field of concern when application is made for a licence to practice what but for such licence would be infringement of the monopoly and but for the monopoly the applicant could practice without it. Moreover, even if in the special features of a particular case the dangers involved in practicing an invention could be regarded as affording a reason for refusing a licence the extent to which the Commissioner would for such purpose initiate inquiries for the purpose of ascertaining on behalf of the public the extent to which such dangers exist would be for him to decide rather than for the patentee to dictate, as, in my view, it seeks here to do. Having required the publication of a notice of the application in the Canada Gazette calling upon all parties wishing to oppose the application to show cause if they had any, why the licence should not be granted, by filing a counter-statement and having received only the patentee's counter-statement, in which no case of any special features requiring exceptional safeguards in the public interest was stated, I think it was plainly open to the Commissioner to reach the conclusion that so far as public safety was concerned no further inquiry was required or even indicated. The statements in the counter-statement with such admissions as were contained in the reply comprised the whole of the material properly before the Commissioner for consideration on this point under the procedure which he had directed and if matters thought to be of importance for his consideration were not stated in the counter-statement the appellant in my opinion cannot at this stage be heard to complain. None of the paragraphs of the counter-statement appears to me

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to state anything which the Commissioner was under any necessity to regard as good reason for instituting an inquiry or for refusing a licence. In effect instead of stating and establishing reasons why a licence should not be granted the appellant in its counter-statement has done nothing but suggest a number of areas where if the Commissioner searches hard enough he may conjure up reasons, and at the same time has demanded the right to present its case at an oral hearing rather than by the procedure which the Commissioner has directed. While the appellant in demanding an oral hearing may have hoped for an opportunity to amplify the presentation of the matters stated in the counter-statement it could scarcely have been unaware that the invitation to file a counter-statement verified by affidavit was its opportunity to present its case and that no further opportunity would necessarily be afforded to it. The reference by the Commissioner in his letter of April 2, 1962 to a counter-statement, rather than simply to a statement of reasons if any, to be supported by affidavit, may have been ill advised as being suggestive of the procedure under ss. 70 and 71, in which a right to a hearing in some instances arises, but I do not think the appellant or its solicitors could have been under misapprehension of the true position on this account or that anyone would on that account have been justified in concluding without inquiry that a hearing would necessarily be held on demand of either party. It is also of significance that no request was made for an oral argument on the material filed. I am therefore of the opinion that the substantial requirements of justice have not been violated by the Commissioner's refusal in the circumstances to accede to the appellant's demand for an oral hearing and that the appellant's submission that in the circumstances it was incumbent on the Commissioner in the public interest to grant the appellant's demand for an oral hearing or for an opportunity to cross-examine Geza S. Delmar on his affidavits is unfounded. Moreover, as the allegation of public danger was not squarely stated in the counter-statement but was first raised in the letter written by the appellant's solicitors in support of its request for an oral hearing and was not verified even by the glib declaration which accompanied the counter-statement the fact that the Commissioner may have satisfied himself that there was nothing to the point by reference to other patents rather than by ignoring the suggestion and rejecting the invitation to visit the appellant's plant out of hand is in my view immaterial.

There remains the question of whether the appellant had an adequate hearing in respect of the issue raised in the counter-statement as to the competence of the respondent to manufacture the drug in question. The possession by the respondent of the equipment required for production of the drug was asserted by the respondent in its application and was challenged by the appellant in the counter-statement, whereupon the respondent in its reply stated that insofar as its facilities might turn out to be inadequate it was prepared to acquire any necessary facilities. Attention was directed to this as indicating that the respondent did not know what was required for commercial production and distribution of the drug and was therefore not competent to manufacture and distribute it and it was submitted that an oral hearing on this question should have been held with an opportunity for the appellant to adduce evidence on the point or that at the least cross-examination of Mr. Delmar on his affidavit should have been allowed. In his formal decision the Commissioner took into account statements contained in the respondent's reply and found that he had no reason to believe that the respondent had not the ability to make the compound, thus in a negative way resolving the issue against the appellant.

If the adequacy of the respondent's existing facilities and its immediate competence to manufacture the drug were of critical importance to the authority of the Commissioner to grant a licence I doubt if a decision based on a finding of such ability could in the circumstances be allowed to stand but there was no legal necessity that the Commissioner be satisfied of the immediate competence of the respondent to manufacture and store the product, and the issue though raised in the statement that its facilities were inadequate, in my opinion, was but a side issue at best. Nowhere is the fact of the respondent being a manufacturer of pharmaceutical fine chemicals with a substantial background of experience in that field and with a considerable establishment of its own as alleged in its application, put in

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issue. Beyond that the capability of the respondent to do at once everything necessary to meet such standards as the patentee might wish to see observed in the use of its invention is in my opinion beside the point. Such matters are governed not by the patentee but by the law of the land including the provisions of s. 41 of the *Patent Act* and if the inventor properly disclosed his invention and the best means known to him of putting it into operation no further qualification beyond those which have not been disputed should be required. Nor can the patentee be heard to challenge on an application of this kind the adequacy of the teaching of his specification. On the application and counter-statement coupled with the admissions of the reply there were in my view no material matters in dispute and there was nothing to indicate any good reason within the meaning of the statute why the licence should be refused. I am therefore of the opinion that the Commissioner was correct in finding as stated in the letter accompanying the decision that no good reason had been advanced for refusing the licence and that his decision to deny a further hearing and to grant the licence should be affirmed.

On the question of royalty, however, as there is nothing in the record upon which to base or justify a finding the case is in my view indistinguishable from that of *Parke Davis & Co. v. Fine Chemicals of Canada Limited*[1] and *Aktiebolaget Astra, Apotekarnes Kemiska Fabriker v. Novocol Chemical Manufacturing Company of Canada Limited*[2], and I shall therefore follow the course adopted in those cases and refer the matter back to the Commissioner. In that respect alone the appeal will be allowed.

As success is divided there will be no costs of the appeal to either party.

Judgment accordingly.

[1] [1959] S.C.R. 219.

[2] [1964] Ex. C.R. 955.

BETWEEN: 1963 Sept. 10-13 — 1964 Aug. 5

HENRY WERTMAN ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ....RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 21(1) and (4) and 139(1)(e)—Transfer of property from husband to wife—Whether execution of pre-nuptial contract and marriage effects transfer within meaning of s. 21(1)—S. 21(1) applicable whether or not transferor resident in Canada at time of transfer—Income from property substituted for property transferred by taxpayer to wife—No part of money borrowed jointly by taxpayer and wife or raised on their joint credit is property transferred within s. 21(1)—Rentals for apartment building accrued to owners as owners, not as traders—Whether operation of apartment building to be regarded as mere rental of property or operation of business—Taxpayer occupied full-time in management of apartment building.

The appellant and his wife were married in Poland in 1938 where they were then domiciled, and came to Canada in 1949, settling in Vancouver, B.C. While in Poland, before the war, the appellant converted as much of his property as possible into gold or other precious metal and hid it. After the war he and his wife moved to Munich where they lived for three years before coming to Canada. He took with him to Munich his cache of coin and United States currency, which he deposited in two Swiss banks. To this he added the caches of his deceased brothers and sister which he had later removed from Poland. The appellant and his wife had executed a pre-nuptial contract which provided for a general community of all the property of both spouses whether held at the time of marriage or acquired subsequently during the marriage.

In 1949 funds in excess of $100,000 were transferred from the Swiss banks to the appellant's account in Vancouver and this money was used by the appellant to purchase a parcel of real estate in Vancouver, title to which was taken in the names of the appellant and his wife, upon which they constructed an apartment building containing forty-nine apartments. On its completion the building represented a total investment of about $415,000, of which $122,500 was brought by the appellant from Europe, $13,000 was invested by the appellant's son and the balance of about $280,000 was borrowed by the appellant and his wife, virtually all of it through two mortgages on the property. The appellant devoted his full time to the management of the apartment building.

For the year 1956 the appellant declared 45 per cent of the net income from the apartment building as his income and the respondent in re-assessing added thereto the 45 per cent thereof which the appellant had treated as income of his wife. There was no dispute as to the 10 per cent of the net income treated as income of the appellant's son.

Held: That there is nothing in the evidence of the pre-nuptial contract and of its effect under the law of Poland which would serve to dispel the *prima facie* conclusion arising from the fact of ownership of the apartment building by the appellant and his wife and the law of British

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Columbia that the income from their 90 per cent interest in the property belonged to them in equal shares, and accordingly, the whole of the income from the 90 per cent interest is not taxable as income of the appellant by reason of any right of his thereto under the pre-nuptial contract.

2. That there is no element of retroactivity involved in applying s. 21(1) of the *Income Tax Act* to transactions which occurred before the appellant and his wife came to Canada. The section applies to residents and non-residents and there is no reason why its application should be confined to situations in which the transfer was made when the transferor was resident in Canada.

3. That on the facts whatever interest the appellant's wife had in the funds in the Swiss banks must for the purposes of this case be regarded as property transferred to her by the appellant within the meaning of s. 21(1) and insofar as the income from the apartment building can be regarded as income from property substituted for those funds, her share thereof was properly included in the computation of the appellant's income pursuant to s. 21(1).

4. That no part of the money raised jointly by the appellant and his wife and used to finance construction of the apartment building can be regarded as having been property transferred by the appellant to his wife and to the extent of her share in the investment of these funds her interest in the apartment building cannot be regarded as property to which s. 21(1) applies.

5. That there is nothing in the situation which affects the rentals with a trading character as distinct from mere income receipts from property and the operation of the apartment building was not a business in which the appellant and his wife were partners within the meaning of s. 21(4) of the Act.

APPEAL from a decision of the Tax Appeal Board.

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

W. R. D. Underhill for appellant.

Alan F. Campney and *R. Tassé* for respondent.

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

THURLOW J. now (August 5, 1964) delivered the following judgment:

This is an appeal from a judgment of the Tax Appeal Board[1] which dismissed an appeal by the appellant from a re-assessment of income tax for the year 1956. The matter in issue is the liability of the appellant for income tax in respect of an amount of $4,154.18 which the Minister in making the re-assessment included in the computation of

[1] 25 Tax A B.C. 31.

the appellant's income. Basically the appellant's case is that this amount was income of his wife, Eugenia Wertman and was not taxable as his income.

The appellant and his wife were married in 1938 in Lvov, Poland, where they were then domiciled, and after living in Munich for three years following the end of the war came to Canada early in 1949. When he came to Canada the appellant had in his own name in two Swiss banks, deposits of funds worth in excess of $100,000 Canadian dollars. In September and October 1949 funds totalling $104,041.07 were transferred from the Swiss bank accounts to an account in his name in a bank in Vancouver, and these were subsequently used to purchase early in 1950 a parcel of real estate in Vancouver for $22,500, title to which was taken in the names of the appellant and his wife, and to pay a part of the cost of constructing an apartment building thereon pursuant to a contract made in May 1950 by the appellant and his wife with a builder. In June 1950 a further amount of $6,018 was transferred from Switzerland to the appellant's bank account in Vancouver and this amount was later used for the same purpose. These funds were not however sufficient to pay the whole cost of the building and by the time the project was completed a further $210,000 borrowed by the appellant and his wife from the New York Life Insurance Company on the security of the property, $13,000 invested by the appellant's son, $11,000 representing the proceeds of the sale of a dwelling house in Vancouver which the appellant had purchased in the names of himself and his wife shortly after their arrival in Canada, and some smaller amounts borrowed from friends had gone into the construction and a further mortgage for $65,000 representing the balance due on the contract had been given to the builder. When completed some time in 1951, the property, which became known as the "Park Strand" represented a total investment of an amount in the vicinity of $415,000 of which $122,500 was admittedly brought by the appellant from Europe, $13,000 was invested by the appellant's son and the remainder totalling about $280,000 was financed by moneys borrowed by the appellant and his wife.

For the years 1952 to 1955 the appellant's income tax returns were prepared by a Mr. Hogg, an accountant in the employ of the builder and in them 90 per cent of the net income from the Park Strand was reported as income

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of the appellant, the other 10 per cent being treated as income of the appellant's son. Mr. Hogg was, however, not in a position to assist the appellant in preparing his return for 1956 and at his suggestion the appellant consulted a chartered accountant who in preparing the 1956 return treated 45 per cent of the net income of the Park Strand as income of the appellant, another 45 per cent of it as income of the appellant's wife and the remaining 10 per cent as income of the appellant's son. No question arises in these proceedings as to the 10 per cent treated as income of the appellant's son but the Minister in making the re-assessment added to the appellant's income the $4,154.18 representing the 45 per cent of the net income from the Park Strand treated as the income of his wife and it was his action in so doing which gave rise to the appellant's appeal first to the Tax Appeal Board and later to this Court.

Both in the notice of re-assessment and in the notification by the Minister under s. 58 of the *Income Tax Act,* R.S.C. 1952, c. 148, following notice of objection by the appellant it was stated that the $4,154.18 was deemed to be income of the appellant pursuant to s-s. (1) of s. 21 of the Act but in the latter document it was also stated "that in the alternative if there was a partnership between the taxpayer and his wife the taxpayer has been correctly assessed under s-s. (4) of the said s. 21." On the appeal to this Court it was also sought to support the assessment on the ground that the interest of the appellant and his wife in the Park Strand was held by them as community property under the terms of a pre-nuptial contract the effect of which was that the appellant was alone entitled to the enjoyment of the income therefrom and was therefore taxable in respect of the whole of it.

The questions to be determined are accordingly:

1. Whether the appellant was entitled to the whole 90 per cent of the income from the Park Strand under the terms of the pre-nuptial contract. If so the appellant is taxable in respect thereof and that is the end of the matter. But if not the further question arises:

2. Whether and to what extent the interest of the appellant's wife in the Park Strand is property transferred to her by the appellant or property substituted therefor so as to bring into operation the provisions of s. 21(1) of the Act. If the assessment cannot be supported in its entirety under s. 21(1) there arises the further question:

3. Whether the appellant is taxable in respect of his wife's income from the Park Strand under the provisions of s. 21(4) of the Act.

I turn now to the evidence respecting the terms and effect of the pre-nuptial contract. While the making of such a contract was admitted by the Minister in his reply to the notice of appeal no copy of it was available at the trial. The appellant explained its absence by his evidence that he had destroyed his copy in 1939 when the Russians overran the portion of Poland in which he lived and that as this part of Poland has since the war been Russian territory it was impossible under present circumstances to ascertain whether or not the notary's copy is still in existence let alone to obtain a copy of it. His wife was not called as a witness. His evidence, however, satisfies me that the contract was of a common type and provided for a general community of all the property of both spouses whether held at the time of marriage or acquired subsequently during the marriage.

Evidence of the effect of such a contract under Polish law was given by Mr. Jacob Kalisky, a notary public now residing in Vancouver who between 1925 and 1939 was a member of the Polish bar and practiced as a barrister and solicitor in Warsaw. Mr. Kalisky came to Canada in 1941 and has since then resided in Vancouver. He stated that in 1938 the law respecting family relationships in that part of Poland which prior to 1918 had been under Austrian domination and in which the City of Lvov was situated was the General Civil Code of Austria which came into effect by Imperial decree in 1811 and was later applied to that part of Poland which fell under Austrian rule following the Napoleonic wars, and that by 1938 as a result of judgments of the Supreme Court of Poland married women

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were no longer subject to any legal disabilities or incapacities in any part of Poland and could enforce their rights in the courts in their own names even against their husbands. He also stated that under the General Civil Code of Austria joint ownership of property with a right of succession to the whole of the property vested in the surviving owner was unknown, that community of property under which a man and his wife held property in equal shares in common was known but arose only by virtue of a pre-nuptial contract and that while there was complete freedom of contract as to the terms which might be inserted in them, such contracts ordinarily provided either that all property then possessed by the intended spouses together with all property that might thereafter during the marriage be acquired by either of them should be community property, this type being known as a general community, or merely that all property thereafter acquired by either spouse during the marriage should be held in community, which type was known as a special community. Whether special or general, however, the income from community property in his opinion belonged to the community, with the management of such income resting with the husband not as his own property but in his capacity as the head of the family. During the continuance of his management the husband was not obliged to render accounts but his power with respect to the disposition of community property including income belonging to the community was that of a manager under a power of attorney. He was obliged to provide proper maintenance for his wife and he had authority to make expenditures of the income of the community suitable to his status but in the administration of his function, he was bound to exercise the care of a *pater familias* with respect to both the capital and income of the community and at the termination of his management he was required to render an account and was chargeable with amounts alienated beyond his authority. In case of emergency or danger to the community property he was removeable from his position as manager even in cases where the management had been expressly given to him for all time.

In my opinion there is nothing in the evidence of the contract and of its effect under the law of Poland which would serve to dispel the *prima facie* conclusion arising from the fact of ownership of the Park Strand by the appellant and his wife and the law of British Columbia that the income from their 90 per cent interest in the property belonged to them in equal shares. Rather the evidence to which I have referred in my opinion serves to reinforce that conclusion. The case of *Sura v. Minister of National Revenue*[1], which was relied on by counsel on behalf of the Minister in my view is clearly distinguishable on the marked differences between the rights of the husband in that case under the law of the Province of Quebec to deal with income forming part of the community property without being accountable therefor and the rights of the appellant in this case under the pre-nuptial contract and the law of Poland applicable thereto when the contract was made. In the *Sura* case Taschereau J. (as he then was) described the rights of the husband under the Quebec Law thus at p. 69:

> Le mari administre les trois masses et en perçoit les revenus qui servent à augmenter l'actif commun. Lui seul peut disposer de ces revenus, lui seul en a la jouissance sans restrictions, et rien ne peut sortir du fonds commun à moins que ce ne soit comme résultat de l'expression de sa volonté. Il reçoit pour lui, et nullement comme mandataire ou fiduciaire pour le bénéfice de son épouse. Cette dernière ne retire aucun revenu, et son bénéfice consiste dans l'augmentation des biens communs dont elle est copropriétaire et dans lesquels elle a un droit éventuel au partage futur.

That the judgment in the *Sura* case was not intended to govern the situation which might arise where property is held in community under contract either in Quebec or elsewhere is moreover made plain at p. 72 where the learned judge said:

> De plus, quand il s'agit de communauté conventionnelle, il est certain que la situation peut être différente, car les conjoints peuvent toujours par contrat, tout en stipulant la communauté qui doit déterminer le régime marital financier, faire toutes sortes d'autres conventions qui, évidemment, ne doivent pas être contraires aux bonnes mœurs ni à l'ordre public. (C.C. 1257, 1262, 1268). Pour les fins de la présente cause, il serait superflu de les discuter.

It follows from what I have said that the whole of the income of the 90 per cent interest of the appellant and his wife in the Park Strand is not taxable as income of the appellant by reason of any right of his thereto under the

[1] [1961] S.C.R. 65.

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pre-nuptial contract and that the assessment cannot be supported on that basis.

Accordingly it becomes necessary to consider the second question, that is to say, whether and to what extent the assessment can be supported under s. 21(1) of the Act. That subsection provides as follows:

> 21(1) Where a person has, on or after August 1, 1917, transferred property, either directly or indirectly, by means of a trust or by any other means whatsoever, to his spouse, or to a person who has since become his spouse, the income for a taxation year from the property or from property substituted therefor shall, during the lifetime of the transferor while he is resident in Canada and the transferee is his spouse, be deemed to be income of the transferor and not of the transferee.

The moneys which the appellant and his wife invested in the Park Strand fall into two categories, viz. (1) funds brought to Canada from Switzerland amounting to $122,500 or thereabouts and (2) borrowings made by them to complete the building totalling about $270,000. With respect to the origin of the $122,500 and the half interest of the appellant's wife therein evidence was given by the appellant that at the time of their marriage in 1938 he owned and operated a cheese factory in which he employed from 16 to 18 persons and that he was a comparatively wealthy man. His wife owned nothing prior to the marriage but as a result of the pre-nuptial contract and the marriage became entitled to a one-half interest in all his property whether held at the time of the marriage or subsequently acquired. As early as 1934 when Hitler came to power in Germany the appellant and his brothers and sister foresaw that there was trouble ahead for people of the Jewish race and each began to limit his business operations and to convert as much of his wealth as possible into gold or other precious metal and to hide this in some safe place. In his case the cache was hidden under the foundation of his house and one or more of his brothers and sister hid their caches in similar places. Each let the others know where his cache was stored and according to the appellant there was an understanding among them that the survivors or survivor, if any, of them and their spouses should be entitled to dig up and take possession of the caches if and when the opportunity to do so should arise. Shortly after the outbreak of the war Lvov was occupied by Russian forces and the appellant's factory was then confiscated. Later in 1941 the city was occupied by German forces and when this occurred the appellant and his wife went into hiding and remained hidden until the cessation of hostilities in 1945. The eastern portion of the former Polish territory, in which Lvov was situated, then became Russian territory and the appellant and his wife took advantage of an opportunity offered to Poles living there to leave with their belongings which included their cache of coin and some United States currency. The appellant and his wife moved first to Cracow in the remaining part of Poland and later to Munich where they resided for three years while awaiting visas to come to this country and during that period the appellant made a number of trips to the former homes of his sister and brothers, none of whom were alive, and recovered their caches which he deposited along with his own in Swiss banks. This in brief outlines the appellant's account of the origin of the funds later brought to Canada from Switzerland. With respect to the alleged arrangement the appellant in cross-examination said that he considered that his children would have been entitled to his cache had he and his wife not survived but that the children of his sister and brothers were not told of the hiding places or the arrangement and had no claim on the funds either of their parents or uncles who did not survive.

This account of the origin of the funds in the Swiss banks differs markedly from that alleged in the notice of appeal to this Court as well as from the account given in the appellant's notice of objection and in his evidence before the Tax Appeal Board and it leaves me unsatisfied that either he alone or he and his wife jointly became entitled to the caches which he recovered under any arrangement operating as a contract to that effect between himself and other members of his family. Rather I am of the opinion that the appellant simply came into possession of the funds which he deposited in the Swiss banks, other than the portion thereof representing his own cache, by virtue of his knowledge of how to find them and as a result of the efforts which he put forth to recover them. It may be that a portion of them would fall to him by inheritance on the deaths of one or more of his brothers who died childless but there is no evidence of the law of inheritance in the places where the caches were hidden and it is impossible to ascertain on the evidence how much of it, if any, would fall within that category. Any that might have fallen within

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that category must accordingly be treated as in the same category as the remainder which must in any event in my view for the purposes of this appeal be regarded as funds to which he had no greater right than that which simple possession gave him.

Turning now to s. 21(1) there is not, in my opinion, any element of retroactivity involved, as contended by counsel for the appellant, in applying the words of the provision to transactions which occurred before the appellant and his wife came to Canada. The subsection to my mind is nothing more than a statutory prescription of the manner in which the income of a person is to be measured or computed for the purposes of the Act, it occurs in a group of sections applicable alike to the computation for the purposes of the Act of the income of both residents and non-residents, and I can see no valid reason why its terms, which on their face are as applicable to residents as to non-residents should be confined to situations in which the transfer was made when the transferor was resident in Canada. Accordingly, I reject the contention that the subsection does not apply to transfers made by the appellant to his wife prior to their coming to Canada and as all that is necessary to constitute a transfer within the meaning of the subsection is that the owner of property should so deal with it as to divest himself of it and vest it in his spouse, regardless of the means or route by which he accomplishes the result, *vide David Fasken Estate v. Minister of National Revenue*[1], it seems clear that insofar as the funds brought by the appellant to Canada represented property which the appellant had on hand at the time of his marriage in 1938 or property later substituted therefor, any interest which the appellant's wife had in them as a co-owner of the community property came to her by virtue of her husband having entered into the prenuptial contract and the marriage and thus transferred such interest to her. Insofar as the funds brought to Canada might conceivably have represented additions to the cache of the appellant arising from earnings between the time of the marriage and the summer of 1941 when he and his wife went into hiding it is sufficient to say that there is no evidence that anything arising from earnings during that period was added to his cache and insofar as the funds represented amounts which he himself recovered and took

[1] [1948] Ex. C.R. 580 at 592.

into his possession after the end of hostilities there is in my opinion no satisfactory evidence upon which I can reach the conclusion that the assumption of the Minister that the interest of the appellant's wife in the funds was property transferred to her by the appellant has been rebutted. In particular I am not satisfied that in recovering possession of the caches he did so as agent for his wife or that these should not be regarded as property which the appellant took into his possession and put into the community and thereby transferred an undivided one-half interest in his rights therein to his wife. In the result therefore I am of the opinion that whatever interest the appellant's wife had in the funds in the Swiss banks must for the purposes of this case be regarded as property transferred to her by the appellant within the meaning of s. 21(1) and that insofar as the income of the Park Strand can properly be regarded as income from property substituted for the funds brought to Canada from the Swiss bank deposits her share thereof was properly included in the computation of the appellant's income pursuant to s. 21(1). With respect to these funds the result is accordingly the same whether the appellant's wife is regarded as having had a half interest in them before they were brought to Canada or is regarded as having acquired her interest therein upon investment of them in the dwelling and in the Park Strand property in the joint names of the appellant and his wife.

It does not, however, follow from this that the whole of the share of the appellant's wife in the income from the Park Strand was income from property transferred to her by her husband within the meaning of s. 21(1) for the evidence indicates that the contract for the construction of the Park Strand as well as the mortgages of the property were made by the appellant and his wife and that when the Park Strand became an income producing property it represented a capital investment not alone of the money drawn from the Swiss bank accounts but of some $270,000 as well which the appellant and his wife had jointly borrowed or raised on their joint credit. No part of this money can in my opinion properly be regarded as having been property transferred by the appellant to his wife and to the extent of her share in the investment of these funds her interest in the Park Strand cannot be regarded as property to which

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s. 21(1) applies. The assessment in my opinion is accordingly supportable under s. 21(1) to the extent that the income in question was income from property substituted for money which had been on deposit in the Swiss banks but is not supportable under s. 21(1) insofar as it represents income from the remainder of the moneys invested by the appellant and his wife in the Park Strand. It follows that unless the assessment can be upheld in its entirety under s. 21(4) it will be necessary to refer it back to the Minister for reconsideration and re-assessment in accordance with the reasons and findings herein expressed.

This brings me to the issues which arise under s. 21(4). This sub-section provides as follows:

> Where a husband and wife were partners in a business, the income of one spouse from the business for a taxation year may, in the discretion of the Minister, be deemed to belong to the other spouse.

In his reply to the appellant's notice of appeal to this Court the Minister pleaded that the appellant and his wife were partners in the business of owning, managing and operating the apartment building known as the Park Strand and that determination made by him by virtue of the powers vested in him by s-s. (4) of s. 21 of the *Income Tax Act* is final and conclusive and not subject to review. He did not, however, offer any evidence of his having exercised or purported to exercise the power given to him by s. 21(4) and the only suggestion of such an exercise to be found in the evidence is in the words "in the alternative if there was a partnership between the taxpayer and his wife the taxpayer has been properly assessed under subsection (4) of the said section 21" which appeared in a copy of the notification by the Minister under s. 58 of the Act offered in evidence by counsel for the appellant.

I have some doubt that this statement establishes that the discretion of the Minister was in fact exercised, since it does not say so and does not even say that the Minister was of the opinion that a partnership existed, but in view of the conclusion which I have reached on the applicability of the subsection, it is not necessary to consider the effect of the wording so used. The subsection applies only "where a husband and wife are partners in a business", and it can be applied only to the income of one or the other of the spouses from that business. Under s. 139(1)(*e*) of the Act the word "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or a concern in the nature of trade, but does not include an office or employment.

The evidence discloses that the Park Strand has 49 apartments and that the rentals for the year 1956 amounted to $55,716.50. The appellant devotes the whole of his working time to its affairs and he said that it keeps him busy from morning to night. He arranges the letting of apartments to tenants and for necessary repairs even to doing some of the painting himself and he collects the rents and pays the expenses. A janitor is employed who looks after the boiler room and the sweeping and cleaning. In the financial statement which accompanied the appellant's income tax return, the wages of the janitor as well as other outgoings including fuel and the cost of operating a car to take the appellant back and forth between his home and the Park Strand and on errands in connection with repairs, are charged against the rentals and the balance is shown as belonging to the appellant and his wife and son in the proportions of 45, 45 and 10 per cent respectively. No charge is made for the appellant's services.

The Minister's case for applying s. 21(4) is that the concepts of income from property and income from business are not mutually exclusive but blend completely and that while the rentals derived from the Park Strand can be regarded as income from property, they can and should also be regarded as income from the business of leasing apartments in the Park Strand which was a business in which the appellant and his wife were partners. The appellant on the other hand submitted that the appellant and his wife and son were simply co-owners of property, that there was no business carried on in respect of the rental of suites, that the three owners were not partners in any such business and that in any case, the source of the income was the property and not a business of letting suites.

The question of when receipts from the letting of real property may be considered to be receipts from a business as opposed to mere receipts from property has, so far as I am aware, arisen in only two cases in this country. In the earlier of these, *Martin v. Minister of National Revenue*[1], which arose under the *Excess Profits Tax Act* O'Connor J.,

[1] [1948] Ex. C.R. 529.

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after citing passages from the judgments of the Master of the Rolls, and of Brett L.J., in *Erichsen v. Last*[1], as to the meaning of trade said at p. 533:

> A landowner in dealing with his own land and granting leases thereof and so receiving rents and profits is not carrying on business. But the question here is has the appellant reached the point where land ownership has passed into commercial enterprise in land. In *The Rosyth Building & Estates Co., Ltd., v. P. Rogers* (1918-24) 8 T.C. 11 at 17, the Lord President said:
>
> > It may in the ordinary case be difficult to determine the point at which mere ownership of heritage passes into the commercial administration by an owning trader, but that is a question of fact of a kind which is not infrequently met with under the Income Tax Acts . . .

On the facts before him, from which it appears that the taxpayer in the case of at least some of her tenants provided services, heat, electric stoves, furniture and linens, in addition to the premises, O'Connor J., then held that the taxpayer was engaged in a commercial enterprise.

In the later case, *Marks v. Minister of National Revenue*[2], where several persons had joined in acquiring an apartment building, which was thereafter held by a trustee for them and managed by an agent, Mr. Boisvert in the Tax Appeal Board considered that the substance of the transaction in which the property was acquired was not one of setting up a business but one of "sheer investment" and that the owners were not engaged in a business.

In Great Britain income from real property is computed for taxation purposes on a special basis prescribed under Schedule "A" and because of this, cases in which the revenue authorities have sought to bring the rentals of real property into the computation of profits taxable under Schedule "D" as profits of a trade are not strictly parallel and thus not applicable in considering a case arising under the provisions of the Canadian statute. They do, however, offer some light on the subject of what is income from property as distinguished from income from trading and incidentally indicate that there is considerable diversity of opinion on the question whether the letting of real property can be regarded as a trade. In *Inland Revenue Commissioners v. Sangster*[3], Rowlatt J., observed at p. 597:

> On the other hand Mr. Tomlin asks, "Supposing he has land and keeps on building on it and never sells it at all but has rent from the houses that he builds, is he carrying on a business?" One cannot help feeling that the

[1] (1881) 4 T.C. 422. [2] (1962) 30 Tax A.B.C. 155.
[3] [1920] 1 K.B. 587.

answer to that question must be "No," because he is merely investing his money in new property and keeping it; he is not dealing with it in any way.

In *Fry v. Salisbury House Estate Limited*[1] where an incorporated company owned a building containing some 800 rooms which were let to some 200 tenants as offices, singly or in suites, and the company provided a staff of porters and cleaners who performed certain services for the tenants for which additional rents and charges were paid to the company, Viscount Dunedin in the course of his speech remarked at p. 446:

that the company is carrying on a business I do not doubt. The memorandum of association shows that it is.

Lord Warrington of Clyffe, however, at p. 451 said:

There is nothing in the facts stated in the case which would properly lead to the conclusion that in dealing with the property the company is acting otherwise than an ordinary landowner would act in turning to profitable account the land of which he is the owner. It would in my opinion be impossible to hold that in such a case the landowner is carrying on a trade. Such a person would I think clearly be assessable under Schedule A only, and his taxable income would be measured by the conventional annual value and not by the amounts of the rents he actually received.

But the Crown contends that the fact that the taxpayer is a limited company may distinguish its operations from those of an individual. Assuming the memorandum of association allows it, and in this case it unquestionably does, a company is just as capable as an individual of being a landowner and as such deriving rents and profits from its land, without thereby becoming a trader, and in my opinion it is the nature of its operations, and not its own capacity, which must determine whether it is carrying on a trade or not.

Lord Atkin reached his conclusion without finding it necessary to express an opinion on this particular point saying at p. 454:

In my opinion it makes no difference that the income so derived forms part of the annual profits of a trading concern.

He also said at p. 458:

My Lords, it may well be that another mode of expressing the result I have stated is to hold that a person capable of being assessed under Schedule A cannot be said in respect of his income from land to be earning profits from "trade". This view appears to commend itself to some of your Lordships. I do not dissent from it, but I view it with some misgiving. I find it difficult to say that companies which acquire and let houses for the purposes of their trade, such as breweries in respect of their tied tenants and collieries, and other large employers of labour in respect of their employees, do not let the premises as part of their operation of trading.

[1] [1930] A.C. 432.

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Personally I prefer to say that, even if they do trade in letting houses, their income, so far as it is derived from that part of their trading, must be taxed under Schedule A and not Schedule D.

Opinions more closely connected with the particular statute under consideration were voiced by Lord Tomlin who said at p. 463:

> Further in my view the perception of rents as landowner is not an operation of trade within the meaning of the Act.

and by Lord Macmillan who said at p. 467:

> Landowning, however profitable, is not a trade within the meaning of the income tax code.

Later at p. 470 also with reference to the division required by the statute, Lord Macmillan said:

> This clearly contemplates a separation between the two characters of landowner and trader. A landowner may conduct a trade on his premises, but he cannot be represented as carrying on a trade of owning land because he makes an income by letting it. The relatively insignificant services for which the company makes charges to its tenants are not in my opinion sufficient to convert the company from a landowner into a trader, though the profits so made may quite properly be charged with tax under Schedule D. To hold otherwise would be to invert the rule that the principal follows the accessory.

See also the discussion by Lord Greene M.R., in *Croft v. Sywell Aerodrome, Limited*[1].

Under the Canadian statute what is taxed as income from a property or a business is the "profit therefrom" for a taxation year, and this poses the question "what is the profit from the property or business?" In the great majority of cases it is quite immaterial whether the profit is regarded as arising from a business or from property, but when the question does arise, it is in my opinion simply one that must be resolved on the facts of the particular case and I know of no single criterion on which it may be determined. That the rentals are primarily or entirely receipts from property may be a factor of great importance but it is not necessarily conclusive for the question in a case such as the present one is not so much what the income is derived from but whether the income can be fairly described as income from a business within the meaning of that term as used in the Act. Moreover, cases are I think

[1] [1942] 1 K.B. 317.

readily conceivable where particular income may be accurately described as income from property and just as accurately regarded as income from a business.

On the evidence in the present case the sum received as rentals from the Park Strand should I think be regarded as having accrued to the appellant and his wife and son predominantly, if not entirely, in their capacity as owners of the property rather than as traders, and I also think that the rentals should be regarded as having accrued predominantly, if not entirely, from the use by tenants of the property in the sense that they represent payments for the tenants' occupation thereof rather than payments arising from the process of letting apartments and providing certain limited services such as heat of which the tenants have the benefit. To my mind while there is a sense in which the rentals can be said to be revenues from a business of letting apartments or operating an apartment building for the purpose of securing rentals, it is a fanciful and unrealistic way of describing them for it puts the emphasis of the description of their source where it does not belong viz., on the mere *sine qua non* or conduit pipe of the letting activity rather than on the fact that they arise from the use or exercise of the owners' right of occupation of the property by tenants who pay not for the letting but for the use of the property. There may well be cases wherein the extent of various services provided by the landlord under the terms of the leasing contract is such that the rental paid by the tenant can be regarded as in a substantial measure a payment for such services as well as for the use of the property and the interrelation of the use of the premises with the use of such services may be so extensive that the whole sum paid could readily be regarded not as mere rental of property but as true receipts of a business of providing apartments and services to tenants but I do not regard this as a case of that kind. The nature of the services provided in my opinion also has a bearing on the question some, such as maid service and linen and laundry service, being more indicative of a business operation than the heating of the building which in my view is so closely concerned with the property itself as to offer no definite indication one way or the other. Nor do I think that the fact that the management of the

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property occupies the appellant's time or the fact that he uses his car to go to and from the property indicate that the operation is a business for at most these facts indicate that he renders a service to himself and to the other owners of the building which so far as charged for represents a proper outgoing against revenue for the purpose of ascertaining the net profit divisible among the owners regardless of whether the rentals are mere income from property or income from a business. If the appellant had a profit from such charges it would no doubt be taxable as his income but there is no indication that he had any profit therefrom and no such issue has been raised. Moreover while the appellant's share of the net profit of the Park Strand may to him represent both his share of the profit and in a sense the result of his efforts the share of his wife in her hands does not represent return for effort on her part but simply income from her property and it is her share alone with which the case is concerned. On the whole there appears to me to be nothing in the situation which affects the rentals with a trading character as distinct from mere income receipts from property and I am accordingly of the opinion that the profits from the Park Strand were not profits from a business and that the operation of the Park Strand was not a business in which the appellant and his wife were partners. Section 21(4) therefore cannot be invoked to support the assessment.

The appeal accordingly succeeds in part and it will be allowed with costs and the re-assessment will be referred back to the Minister for reconsideration and re-assessment in accordance with these reasons.

Judgment accordingly.

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BETWEEN:

ATLANTIC ENGINE REBUILDERS LIMITED .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 12(1)(e) and 85B(1)(a) and (b)—Sales of rebuilt engines for cash and rebuildable engines—Deposit to secure delivery of rebuildable engine to taxpayer—Whether deposits are receipts of income or revenue nature—Taxpayer entitled to deduction for liability to refund deposits—Liability to refund deposits a presently existing trading obligation.

The appellant rebuilds worn engines and other motor vehicle parts and distributes them to car and truck dealers in the Atlantic provinces. The great bulk of the used engines and parts obtained by the appellant for rebuilding comes from the dealers to whom the appellant delivers the rebuilt products. During 1958, the year in question, the appellant delivered its rebuilt products under an agreement by which the purchasing dealer paid a certain price and undertook to deliver to the appellant a rebuildable engine or part of the same model as that delivered to him, and in addition, he was required to pay a core deposit, the whole of which was refundable to the dealer on delivery of the rebuildable engine or part. The agreement contained no time limit for the delivery of the rebuildable engine or part to the appellant and no provision for forfeiture of the core deposit in the event of non-delivery. In general the core deposits were set at amounts greatly in excess of the value of the rebuildable engines or parts required to be delivered by the dealer.

In computing its income for 1958 the appellant included the amount of the core deposits charged in respect of engines or parts more than seven months before the end of the year. These were brought into income on the assumption that they were no longer likely to be redeemed. The appellant also credited the value of engines the delivery of which was secured by the remaining deposits but it did not include such remaining deposits or the amount by which they exceeded the value of the engines the delivery of which was secured by them. The respondent added the latter amount to the appellant's income and assessed tax accordingly.

Held: That the deposits here in question were receipts of an income nature because they arose from the appellant's trading transactions of which in each case the deposit formed a part.

2. That the deposits as well as the value of the rebuildable engines to which the appellant became entitled as a result of the transactions should have been included in the receipts for the year.

3. That the appellant in computing the profit from its business was entitled to a deduction in respect of the liability to refund the deposits which arose on their receipt, such liability not being contingent and the amount necessary to provide for its retirement when due not being a

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reserve or contingent account or sinking fund within the prohibition of s. 12(1)(e) of the *Income Tax Act*.

4. That although the appellant may in effect have understated its revenue by omitting the core deposits unredeemed at the end of 1958, it has in that event also understated to the same extent its liabilities incurred in the same transactions. It follows that the Minister could not properly add the deposits to the appellant's income without at the same time allowing an equivalent amount as a deduction.

5. That the appeal is allowed.

APPEAL under the *Income Tax Act*.

The appeal was heard by the Honourable Mr. Justice Thurlow at Moncton.

G. B. Cooper and *Donald J. Friel* for appellant.

G. W. Ainslie for respondent.

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

THURLOW J. now (August 17, 1964) delivered the following judgment:

The issue in this appeal, which is from a re-assessment of income tax for the year 1958, is the liability of the appellant for tax in respect of a sum of $38,213.00 representing the balance of amounts known in the appellant's business as core deposits which the Minister, in making the re-assessments, included in the computation of the appellant's income. Two questions arise in connection with these deposits the first being that of whether they must be included in the computation of the appellant's income and the other, whether, if the deposits must be included, the appellant is entitled to a deduction in respect of its liability to repay them.

The circumstances in which the amounts in question arose are as follows. The appellant since early in 1955 has carried on, under a franchise arrangement with the Ford Motor Company of Canada, an operation which consists of rebuilding worn engines and certain other parts for Ford cars and trucks and distributing the rebuilt engines and parts to Ford dealers in the Atlantic provinces. To carry on this operation successfully a constant supply of used engines and parts of the types or models for which the demand is active is required for use as the raw material to be processed.

Some of these used engines and parts are purchased outright from persons offering them for sale but the great bulk of them is obtained and the necessary supply thus assured in transactions with the Ford dealers to whom the rebuilt products are delivered. Throughout the year 1958 the appellant delivered its products on the basis of a model for model exchange but upon terms which, besides requiring the dealer to deliver to the appellant a rebuildable engine or part of the same model as that delivered by the appellant and to pay a price, also required the dealer to pay a core deposit the whole of which was refundable to the dealer upon delivery to the appellant of the rebuildable engine or part. The term requiring payment of a core deposit had not been in effect prior to 1957 but was adopted by the appellant in that year as a device to coerce the dealers, who otherwise tended to be slow about it, into making prompt delivery of used rebuildable engines or parts. In the ordinary case there would be some delay on the part of the dealer in delivering a rebuildable engine or part and it is not difficult to understand that if the engine to be replaced by the rebuilt engine was not in rebuildable condition or was not available by reason of its having been sold to a competitor of the appellant some considerable time might elapse before an engine of the required model became available for delivery to the appellant. In this situation the appellant deliberately set the core deposits for various models at amounts greatly in excess of the prices at which rebuildable engines and parts of the particular models could be purchased on the open market. In general the value of the used engine or part was but 30% of the amount at which the core deposit was set. While the terms of the transaction required payment of both price and deposit within 30 days no time limit was fixed within which delivery of the used engine or part was required and there was no provision for forfeiture of the deposit or for applying it in discharge of the dealer's contract to deliver an engine. On the other hand when a used engine or part of the required model was delivered by the dealer either prior to or at the time of delivery of the rebuilt engine or part by the appellant no core deposit was imposed. The core deposit requirement was very effective and over a three year period resulted in delivery of used engines by dealers equal in numbers to 96% of the number of rebuilt engines delivered by the appellant to them.

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That the nature and substance of these transactions was as I have described them is to my mind fully established by the evidence including in particular Exhibits 1, 2, 6 and 7. Exhibit 1 is a catalogue and price list of the appellant which sets out terms and prices similar to those on which the appellant distributed its products during 1958 and page 4, among other items, contains the following:

CORE DEPOSIT

At time of shipment a core deposit will apply on all assemblies shipped by Engine Rebuilders Ltd. (refer to price list). This amount is refundable upon receipt of the complete rebuildable used engine in the original shipping crate.

On a typical page among those dealing with prices one finds at the top of the page: "Model for Model Exchange Engine price list" and below in several columns the core deposits, suggested retail and trade prices and dealers net prices in respect of various models of engines. Exhibits 2, 6 and 7 are typical invoices used by the appellant in each of which in the column headed "item" are the printed words "Rebuilt Motor Exchange". Moreover, the whole course of conduct of the appellant's business as described by the witnesses and in particular the witness, Richard Douglas Bannon, indicates that the nature and substance of the transactions was that of an exchange of engines with a money payment to represent the difference in values but requiring as well a deposit to ensure that the dealer would honour his part of the contract to exchange engines by delivering a rebuildable used engine or part. I emphasize this interpretation of the transactions because of the insistence by counsel for the Minister on his submission that the substance of the transactions was that of an outright sale at a price composed of both price and core deposit and a subsequent repurchase by the appellant from the dealer of a used engine at a price equal to the core deposit. In my view such a conclusion is not warranted by the evidence and I reject it.

Several further features of the transactions which appear to me to be established should also be mentioned.

(1) When a rebuilt engine was delivered by the appellant to a dealer the consideration therefor was the price plus a rebuildable engine of the same model.

(2) The amount of the core deposit was not part of the consideration for the rebuilt engine delivered by the appellant.

(3) When a core deposit was paid by a dealer a corresponding obligation to repay it arose and existed throughout the period during which the deposit was held by the appellant though such obligation did not become due or recoverable by the dealer until he had delivered a rebuildable used engine of the model in question.

(4) The acceptance by a dealer of a rebuilt engine on the terms which I have mentioned raised a contractual obligation on his part to deliver a rebuildable used engine of the same model which obligation remained in effect until it was performed or was discharged by agreement. The fact that in practice the appellant did not enforce this obligation by suing for damages but employed the technique of retaining a deposit of much greater value than that of the engine is not in my view, inconsistent with the existence of the obligation.

(5) When a rebuildable used engine was delivered by the dealer pursuant to the contract it was delivered in discharge of this obligation and the consideration for it was the rebuilt engine which the appellant had already delivered to him.

(6) The refunding of the deposit was not the consideration for the engine which the dealer so delivered.

Of the charges for core deposits made by the appellant during the year 1958 in transactions of this nature $51,020 remained unredeemed by the delivery of engines or parts at the end of the year. Of this $44,307.97 had been actually received by the appellant during the year and the remaining $6,712.03 was made up simply of unpaid charges in the customer's accounts. In the ordinary course of business most of this would be refunded or re-credited within a few months as the used engines were delivered.

In computing its income for the year 1958 for the purposes of the *Income Tax Act* R.S.C. 1952, c. 148 the appellant credited its core expense account with an amount of $5,485 which amount represented all such unredeemed deposits with respect to engines as had been charged more than seven months before the end of the year together with $1,000 representing unredeemed deposits in respect of smal-

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ler parts. In so doing the appellant acted on the assumption that in view of the delay it was unlikely that these deposits would ever be redeemed and in effect brought them into income. It also credited to the same account a sum of $7,322 which it calculated to be the value to it of the engines the delivery of which was secured by the remaining deposits, thus in effect bringing their value into income as well, but it did not credit or include either such remaining deposits or the amount by which they exceeded the value so attributed to the engines and parts the delivery of which was secured by them. The difference of $38,213 between the amount of such remaining deposits and the value of the engines, delivery of which was so secured, was thus in no way included in the appellant's computation and it was the Minister's action in adding this amount to the appellant's declared income and assessing tax accordingly which gave rise to the present appeal.

The Minister's case for including the unredeemed core deposits in the computation was based first on s. 85B of the Act and in particular on subsection (1)(*b*) thereof on the basis of their having been "amounts receivable in respect of property sold in the course of the [appellant's] business in the year" which are specifically required by that subsection to be brought into the computation and alternatively on the contention that these deposits were in any event trading receipts which apart altogether from s. 85B must under established principles be taken into account when computing income from the appellant's business within the meaning of sections 3 and 4 of the Act.[1]

From this position counsel went on to submit that the appellant was not entitled to any deduction in respect of its liability to repay the deposits as the liability was in his submission at most a contingent liability which would come into existence only upon delivery by the dealer of a used engine or part and any deduction in respect thereof was prohibited by s. 12(1)(*e*) of the Act.

Sections 3 and 4 and paragraphs (*a*) and (*b*) of subsection (1) of s. 85B provide as follows:

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, . . .

[1] R.S.C. 1952, c. 148.

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.

85B. (1) In computing the income of a taxpayer for a taxation year,

(*a*) every amount received in the year in the course of a business

(i) that is on account of services not rendered or goods not delivered before the end of the year or that, for any other reason, may be regarded as not having been earned in the year or a previous year, or

(ii) under an arrangement or undertaking that it is repayable in whole or in part on the return or resale to the taxpayer of articles in or by means of which goods were delivered to a customer,

shall be included;

(*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 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; . . .

With respect to the interpretation of these paragraphs s. 85B(2) provides that

85B. (2) Paragraphs (*a*) and (*b*) of subsection (1) are enacted for greater certainty and shall not be construed as implying that any amount not referred to therein is not to be included in computing the income from a business for a taxation year whether it is received or receivable in the year or not.

S. 12(1)(*e*) reads as follows:

12. (1) In computing income, no deduction shall be made in respect of

(*e*) an amount transferred or credited to a reserve contingent account or sinking fund except as expressly permitted by this Part

Having regard to the conclusion which I have expressed as to the nature and effect of the transactions I doubt that s. 85B(1)(b) can apply to require that the deposits in question be brought into the computation of the appellant's income. First the transactions in which the deposits arose were not strictly speaking sales at all but a type of barter or exchange. Secondly, at the end of the year, which I regard as the time when the subsection applies, the bulk of the deposits were not receivable but had already been received. Thirdly, and this is the chief source of my doubt, the deposit required under these contracts for the purpose of securing the performance of the dealer's undertaking to deliver a used engine does not appear to me to be clearly "receivable

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in respect of goods sold" within the meaning of that expression in the subsection. However, in view of the conclusion which I have reached as to the treatment of the deposits for tax purposes apart from s. 85B(1)(b) I do not regard it as necessary either to reach a firm conclusion on whether s. 85B(1)(b) applies or to consider the extent of the changes which the enactment of that subsection has wrought in what is required to be included in the receipts when computing the income of a business to which the subsection applies further than to say that the subsection does not appear to me to permit the omission of anything which prior to the enactment would have been required to be brought into the computation as receipts.

As I see it the question whether the deposits must be brought into account in computing the appellant's income turns on the answer to the question whether they are receipts of an income or revenue nature. If so they are part of the revenue of the business and must be brought into the computation.

That the deposits here in question were receipts of an income nature is, I think, indicated by the fact that they arose from the appellant's trading transactions of which in each case the deposit formed a part. Each deposit secured the performance of a specific trading obligation and if applicable to any purpose the purpose was that of compensating the appellant for the loss resulting from the failure of the dealer to honour that particular trading obligation. In the meantime however until the deposit was refunded or so applied the appellant was free to deal with it as its own. There was no trust attaching to the money. From what I have said of them it is I think clear that these core deposits did not have the dual quality of both part payment and security as did those considered in *Elson v. Price Tailors Ltd.*[1] but were purely security deposits, resembling in that respect those considered in *Davies v. The Shell Company of China Ltd.*[2] though at the same time differing from them in that there the contracts under which the deposits were made contained provisions as to their disposition in certain default situations, which however did not arise. The deposits in the *Shell of China* case were held to be capital rather than trading receipts but the deposits in the present case appear to me to have been much more closely related to

[1] [1963] 1 All E.R. 231.

[2] 32 T.C. 133.

the appellant's trading transactions than were the deposits considered in that case and in my view were receipts of a trading or revenue nature within the principle of *Landes Brothers v. Simpson*[1], *Imperial Tobacco Company v. Kelly*[2] and *Tip Top Tailors Ltd. v. M. N. R.*[3] The deposits as well as the value of the rebuildable engines to which the appellant became entitled as a result of the transactions should accordingly in my opinion have been included in the receipts for the year.

But if I am right in concluding that these deposits should have been included in the computation as receipts it seems to me to follow inexorably that in computing the profit from its business the appellant was entitled to a deduction in respect of the liability to refund the deposits which arose on their receipt. These in my opinion were not contingent liabilities and the amount necessary to provide for their retirement when due was not a reserve, contingent account or sinking fund within the prohibition of s. 12(i)(*e*) of the Act. They were in my opinion presently existing trading obligations arising from trading transactions the profits from which could not be computed if the deposits were brought into the account without an offsetting deduction in respect of the obligations which the receipt of the deposits had engendered. Jenkins L. J. appears to have had the same concept in mind when in posing the question for decision in *Davies v. The Shell Company of China* he said at page 155:

> Therefore, as it seems to me, the question here really resolves itself into this: On the facts of this case, were these deposits trading receipts received by the Company in the course of its trade, *and giving rise to corresponding trade liabilities in the form of the Company's obligation as to repayment,* or should they be regarded simply as loans received by the Company and thus as receipts of a capital nature giving rise to a corresponding indebtedness on capital account and not forming part of the Company's trading receipts or liabilities at all?

The emphasis has been added.

As I view it one might analyze the typical transaction in the present case by saying that on delivery of a rebuilt engine to a dealer the appellant became entitled to receive

(*a*) a sum of money as price
(*b*) a used rebuildable engine and
(*c*) a deposit to secure delivery of the rebuildable engine.

[1] 19 T.C. 62. [2] 25 T.C. 292.
[3] [1957] S.C.R. 703.

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The trading receipts from such a transaction thus consist of the total of (*a*), (*b*) and (*c*) but on receipt of the deposit (*c*) the appellant became liable to repay a like amount to the dealer some day not earlier than the delivery of the rebuildable engine and the trading account must accordingly show this liability as well. This liability in my opinion was not one that arose on delivery of the engine but existed from the time of receipt of the deposit. It became due and payable when the engine was delivered which in the ordinary course would be within a short time and continued to be an existing obligation until in the course of business it was discharged by payment or was otherwise settled. It appears to me that even in the case of the deposits which the appellant has treated as unlikely to be redeemed and has in effect brought into its income the dealer after the end of the year was still entitled to deliver an engine and claim a refund of his deposit and in view of the lack of provision in the contract for forfeiture of the deposit there appears to have been no limit on the time within which this right was open to the dealer. But whether a right of forfeiture at some stage existed or not it appears to me that the appellant's liability persisted until it was discharged by payment or forfeiture or was released by agreement and it would be only then that the liability would necessarily disappear from its trading accounts.

Moreover, when at length it did disappear it would not be because the liability had never arisen or existed but because in a subsequent transaction it had been discharged or released and if at that stage a profit was shown by reason of the liability having been discharged for less than the full amount of the deposit the latter transaction in my opinion rather than the one in which the deposit was received would be the transaction from which such profit was realized.

I should add that the fact that the rebuildable engines to be delivered by the dealers were to be used by the appellant as inventory in its business is in my view entirely irrelevant and that the cases on anticipated losses on inventory contracted for but not delivered at the end of the accounting period, which were cited by counsel for the Minister, in my opinion, are not applicable.

Moreover, as the conclusion which I have reached by reference to the nature of the transaction is the same as it would be under the principle expounded by Lord Radcliffe in *Owen v. Southern Railway of Peru*[1] it is unnecessary to deal with the contention of counsel for the Minister that that case is inapplicable under the *Income Tax Act* because of the provisions of s. 12(1)(*e*).

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It follows that while the appellant may in effect have understated its revenue by omitting the core deposits unredeemed at the end of 1958 it has in that event also understated to the same extent its liabilities incurred in the same transactions. It also follows that the Minister could not properly add the deposits to the appellant's income without at the same time allowing an equivalent amount as a deduction. The appeal therefore succeeds and it will be allowed with costs and the re-assessment will be varied accordingly.

Judgment accordingly.

[1] 36 T.C. 602.

BETWEEN:

1962 Sept. 17 — 1964 Sept. 11

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

ERNEST HENRY MONTAGUE FOOT ....RESPONDENT.

Revenue—Income tax—Income—Income tax returns—Duty of taxpayer in reporting income—Misrepresentation of taxpayer in declaring income—Meaning of "incorrect", "any misrepresentation"—Income Tax Act, R.S.C. 1952, c. 148, s. 46(4)(a) and (b)—Income Tax Act, 1948 S. of C., c. 52, s. 42(4)(a) and (b)—Income War Tax Act, R.S.C. 1927, c. 97, s. 55.

This is an appeal by the Minister of National Revenue from a decision of the Tax Appeal Board in respect of re-assessments of the respondent's taxable income by the appellant for the taxation years 1947 to 1951 inclusive.

The respondent resided in Victoria, British Columbia and practiced law there during the years under review. His income included, in addition to his income from the practice of law, revenue from several productive assets, mostly in the real estate category.

The re-assessment of the respondent's income for the entire period of five years was made on June 6, 1958. The respondent admitted all the twenty-six allegations of fact set forth in the appellant's Statement of

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Facts but added, with respect to each material year "that in filing the said returns for the said years and in furnishing the said information and statements he honestly believed in the truth of the information contained therein".

The respondent argued that, the misrepresentation having been innocent, the re-assessments were barred.

Held: That in s. 55 of the *Income War Tax Act,* R.S.C. 1927, c. 97 the adjective "incorrect" is a generic expression encompassing all manner of misrepresentation, innocent or fraudulent; and no time limitation restricted the Minister's action whenever an incorrect return necessitated redress.

2. That the words "any misrepresentation" as used in s. 42(4)(*a*) of the *Income Tax Act,* 1948 S. of C. c. 52 and in s. 46(4)(*a*)(i) of the *Income Tax Act,* R.S.C. 1952, c. 148 are synonymous with the expression "incorrect" as used in the *Income War Tax Act* and extend to both wilful and unintentional misrepresentation.
3. That reticence is a passive form of misrepresentation within the meaning of that term as used in s. 42(4)(*a*) of the *Income Tax Act,* 1948 and s. 46(4)(*a*)(i) of the *Income Tax Act,* R.S.C. 1952.
4. That the standard of proof required in a case of this kind is the balance of probabilities; the normal test in civil proceedings, and not proof beyond a reasonable doubt.
5. That the appeal is allowed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Dumoulin at Victoria.

E. S. MacLatchy, Q.C. and *R. L. Radley* for appellant.

W. R. McIntyre for respondent.

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

DUMOULIN J. now (September 11, 1964) delivered the following judgment:

This is an appeal from the judgment of the Tax Appeal Board[1], dated February 6, 1961, in respect of re-assessments for the respondent's taxation years 1947, 1948, 1949, 1950 and 1951.

The respondent, throughout the five material years, 1947 to 1951, inclusively, resided in the City of Victoria, B.C., practicing there the profession of barrister.

Apart from the income accruing to him as a member of the local Bar, Mr. Montague Foot derived a considerable

[1] (1961) 26 Tax A.B.C. 65 *et seq.*

revenue annually, stemming from several other productive assets, mostly in the real estate category.

Each year, this taxpayer, more or less at his own convenience, filed an income tax return that, after the aggregate five-year period, induced officials of the Income Tax Department, on June 12, 1957 precisely, to seek from him "certain information pursuant to the provisions of subsection (2) of s. 126 of the *Income Tax Act.*"

On subsequent dates, Foot delivered additional indications through his accountant, Mr. J. M. LeMarquand, whose services he had retained in the Fall of 1954, in prevision, possible, of such a contingency.

The outcome of these inquiries, in the text of paragraph 6 of the Notice of Appeal "showed that the Respondent had made misrepresentations in filing the said returns of income for the taxation years 1947, 1948, 1949, 1950 and 1951, wherefor the Appellant reassessed the income of the Respondent for these taxation years."

One Mr. Kenneth Stokes, an assessor of the Minister's Department, attended to the preparation of these re-assessments and there appears hereunder a comparative tableau of (a) the respondent's own returns, (b) those of his accountant, and (c) the definite figures arrived at by Mr. Stokes.

Year	*Foot's*	*LeMarquand's*	*Stokes*
1947	$ 5,452.50	$ 11,979.58	$ 11,565 24
1948	3,860.00	14,612.95	19,998.27
1949	15,092.00	14,101.37	17,854.58
1950	14,485.00	10,490.20	19,304.70
1951	14,310.00	29,394.52	25,020 00
	$ 53,199.50	$ 80,578.62	$ 93,742.79

The two first sums, those of the respondent and of his accountant LeMarquand, attest respectively a difference of $40,543.29 and of $13,164.17 with that of the departmental re-assessment, Mr. Foot's figures constituting the determinative factors of misrepresentation.

On June 6, 1958, having reached the conclusion that the respondent misrepresented his income during the aforesaid five taxation years, the appellant "by virtue of paragraph (a) of section 55 of the *Income War Tax Act,* and paragraph (a) of subsection (4) of section 46 of the *Income Tax Act,* reassessed the taxpayer . . ." for the entire period.

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In his reply, the respondent uniformly admits all the 26 allegations of fact set forth in the Statement of Facts, with only this recurring reservation applied to each material year: "that in filing the said returns for the said years and in furnishing the said information and statements he honestly believed in the truth of the information contained therein."

From then on it became evident that the defence was wholly predicated on the would-be redeeming excuse of innocent misrepresentation and that opponents of the principle affirmed in *Minister of National Revenue* v. *Taylor*[1] were seeking "another day in Court."

It is therefore apposite, as an initial step, to recite the provisions of the successive Acts relied upon by the appellant in section 27 of his Statement of Facts.

Section 55 of the *Income War Tax Act* (R.S.C. 1927, c. 97) enacts that:

> 55. Any person liable to pay the tax shall continue to be liable, and in case any person so liable shall fail to make a return as required by this Act, or shall make an *incorrect* (emphasis mine throughout) or false return, and does not pay the tax in whole or in part, the Minister may *at any time* assess such person for the tax, or such portion thereof as he may be liable to pay . . .

Two particularities in the law of 1927 deserve a special notice. Firstly, the adjective "incorrect" is a generic expression encompassing all manners of misrepresentation, innocent or fraudulent. Secondly, no time limitation restricted the Minister's action whenever an "incorrect" return necessitated redress.

Next, comes s. 42(4) (*a* & *b*) of the *Income Tax Act* (S.C. 1948, c. 52):

> 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 the 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.

The term "incorrect" in the older text now becomes "misrepresentation" preceded and qualified by the adjective "any". If, then, the assumption above is sound, that the

[1] [1961] Ex. C.R. 318 *et seq.*

word *"incorrect"* must include *misrepresentation* of whatever hue, it stands to reason that this latter wording merely is a synonym of the former, nothing is changed. The only difference between ss. 55 of 1927 and 42 of 1948, consists in the shrinkage to 6 years of a heretofore unlimited right of review.

Possibly, it may tax the imagination to conjecture a practical instance of what is meant by the residuary words "in any other case". But is that my problem or the legislator's whose language sometimes detracts from the meaningful standards presumed of it by treatises on "Interpretation of Statutes".

Lastly, section 46(4)(*a*) and (*b*), c. 148 of the 1952 Revised Statutes of Canada goes thus:

> 46. (4) The Minister may at any time assess tax, interest or penalties, under this Part or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the taxation year, and may
>
> (*a*) *at any time* if the taxpayer or person filing the return
>
> i) has made *any misrepresentation* or committed any fraud in filing the return or in supplying any information under this Act
>
> . . .
>
> (*b*) . . . re-assess or make additional re-assessments or assess tax, interest or penalties under this Part, as the circumstances require.

In other conjectural cases, the revisionary delay granted to the Minister is cut down from 6 to 4 years. For the remainder any comment attaching to s. 42(4) of 1948, finds an equally fitting application here, namely, I repeat, that *"any misrepresentation"* is synonymous with the expression "incorrect" in s. 55 of the 1927 Revised Statutes, and, finally, that the preceding qualificative extends to both wilful and unintentional misrepresentation.

Save for unfrequent exceptions requiring technical interpretations, statutory words are given their common, linguistic meaning, and assuredly "incorrect return" should be understood according to its current sense.

Funk and Wagnalls' New Standard Dictionary, 1942 edition, defines the adjective "incorrect" as something "not in agreement with . . . (2) truth", whilst in Webster's Unabridged Dictionary, it is an assertion "not in accordance with the truth; inaccurate; not exact; as, an *incorrect* (emphasis in the text) statement, narration or *calculation*" (italics added).

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Clearly, no ethical specification attaches to the notion of "incorrect"; it is considered objectively, not subjectively, and was looked upon in that light by Parliament. Additional plausibility for this view may be found in the proviso to s. 47(1) of the *British Income Tax Act* 1952, determining the moral nature of the vitiating fiscal infraction; I cite:

> Provided that where any form of fault 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.*

Except for fraud or wilful default, prescription intervenes after six years in favour of the taxpayer. Opposition is manifest between the English Act based upon intentional infringement and the Canadian one, wholly unconcerned with any similar intent.

Furthermore, common sense and equity cannot be easily reconciled with the bestowal of a compassionate treatment upon error and negligence.

Why, for instance, should anyone, especially a well-off man, careless in writing his income papers, gain, after four years, a remission of taxes on undeclared revenues of over $40,000 when a normally diligent citizen acquits himself to the last dollar of his fiscal obligations? One might presume this consideration did not escape our law-makers' wisdom as they drafted a section of the *Income Tax Act* more stringent than its English counterpart. Acting otherwise could blaze a path to an eventual subversion of the Income Tax policies.

Three years ago, Mr. Justice Cameron, late of our Court, wrote an exhaustive review of this identical matter in the *Taylor* case (*supra*) as previously said. In his lucid pronouncement, the learned Judge dealt at some length with the differentiating traits of innocent and fraudulent misrepresentation, more particularly at pages 325 and 326 of the official report. My humble approach to the question, along slightly different lines, induces me to refer the litigants to that authoritative judgment, with which I am in full agreement, particularly as to the following enunciations:

On page 324 ([1961] Ex. C.R., 318):

> For the purpose of this case (equally true of the instant issue), 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.

On page 327:

> It is to be noted also that the section refers to "any misrepresentation" and it would be improper, therefore, to construe the term as excluding a particular sort of 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 misrepresentation.

I would moreover point out a passive form of misrepresentation: reticence, which may well qualify the practice resorted to by the respondent. Halsbury, (Laws of England, Third Ed. vol. 26, no. 1562) with customary clarity, affords us this conclusive commentary:

> 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.

The second part (2) of the passage above fits the actual situation to a nicety if my view of the case is correct. Surely, the "representee" was justified in his expectation that the "representor", a lawyer and business man, had fulfilled his duty "to state certain matters" exactly since, each year, he read the "representor's" signed certificate affirming that:

> 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.

This last paragraph also serves the purpose of declaring the standard of satisfaction a judge should require in a case of this kind, namely, the balance of probabilities, a normal test in civil proceedings, in contradistinction to satisfaction beyond reasonable doubt, the test in criminal matters (cf. *Amis* v. *Colls*[1]).

Consequently, for the reasons stated, the appeals of the Minister for the taxation years 1947, 1948, 1949, 1950 and 1951 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.

[1] [1960] T.R. 213 at 215.

1964
June 4
June 29

BETWEEN:

HELEN RYRIE BICKLE, JUDITH WILDER, WILLIAM PRICE WILDER and CHARTERED TRUST COMPANY, Executors of the Estate of EDWARD WILLIAM BICKLE .. } APPELLANT;

AND

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

Revenue—Estate tax—"Successive approximations" and "algebraic" methods of calculating deduction under s. 7(1)(d) of Estate Tax Act—Estate tax and succession duty principles—Computation of aggregate taxable value of estate—Computation of estate tax where gift to charity—Computation of estate tax where estate tax and provincial succession duty payable out of charitable gift—Estate Tax Act, R.S.C. 1958, c. 29, ss. 7(1)(d) and 8(1)(w).

This is an appeal from an assessment of the respondent for tax under the *Estate Tax Act* on the assets of the Estate of Edward William Bickle. By his will the deceased had set aside 50% of his estate to provide for his wife for life, and, after making certain other provisions, he had left the balance of his estate, after payment of all succession duties and estate taxes, to the E. W. Bickle Foundation. It was not disputed that the Foundation is an organization, a gift to which, in computing the aggregate taxable value of property passing on death, gives rise to a deduction from the aggregate net value of the property by virtue of s. 7(1)(*d*) of the *Estate Tax Act.*

The sole question in issue is the computation of the amount of the "aggregate taxable value" within the meaning of the *Estate Tax Act,* and the sole difficulty in arriving at this figure arises from a dispute as to how the deduction envisaged by s. 7(1)(*d*) of the *Estate Tax Act* should be computed.

Held: That the assessment based on the computation of the deduction under s. 7(1)(*d*) of the *Estate Tax Act* by the "successive approximations" and the "algebraic" methods is wrong in law, firstly because succession duty principles were applied in making the calculation whereas estate tax principles should have been applied, and secondly because the first calculation, in any event, is wrong in law in that the amount of the Ontario succession duty calculated on the exempt portion of the estate was deducted from the aggregate net value in determining the aggregate taxable value of the estate, whereas s. 7(1)(*d*) authorizes the deduction from the exempt portion of the estate of only the "combination" of Ontario duty and estate tax, and until the figures for both Ontario duty and estate tax have been computed it is not correct to make a deduction at all.

2. That in the case of succession duty, the tax is on the disposition or devolution from the deceased to the successor who is called upon to pay the tax, and the amount is dependent on the total value of the

estate, the value of the particular succession and the relationship of the beneficiary to the deceased; however, under the *Estate Tax Act*, the tax is in no way affected by the relationship of the beneficiary to the deceased or by the size of the individual bequest, but is determined by the size of the taxable estate, which is the value thereof after gifts to charity and other permissible deductions have been made.

3. That under the *Estate Tax Act* the tax falls upon the property passing on the death of the deceased and is therefore, in the main, an indirect tax falling primarily on the executor who passes the burden on to the persons who pay, whereas succession duty is essentially a direct tax falling on the successors.
4. That the deduction under s. 7(1)(*d*) of the *Estate Tax Act* should be computed by deducting from the "aggregate net value" of the estate the amount of the exempt gift to charity without regard to the special provisions for estate tax by reason of s. 7(1)(*d*) of the Act, thereby obtaining the net value of the estate. From this figure the deduction of the basic and survivor exemptions produces the tentative "aggregate taxable value" of the estate. The gross tax should then be computed from the "aggregate taxable value" by using the table set out in s. 8(1)(*w*) of the Act. The appropriate Ontario Tax Credit (on the assets which qualify) should then be deducted from the gross tax, and the resulting figure is the estate tax payable (except for the situation envisaged by s. 7(1)(*d*) where the charity is to bear the costs of the succession duty and estate tax).
5. That because of s. 7(1)(*d*) of the *Estate Tax Act* there is not a full exemption of the gift to charity in cases where the cost of estate tax and Ontario succession duty is payable out of the charitable bequest and it is therefore necessary to make one more calculation which is the same as the first calculation except that the computation of net value of the estate is made by subtracting from the "aggregate net value" the amount of the exempt gift to charity less the Ontario succession duty and also less the estate tax found in the first calculation.
6. That the appeal is allowed.

APPEAL from assessment under the *Estate Tax Act*.

The appeal was heard by the Honourable Mr. Justice Gibson at Toronto.

J. J. Robinette, Q.C. for appellant.

The Honourable R. L. Kellock, Q.C. and *M. A. Mogan* for respondent.

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

Gibson J. now (June 29, 1964) delivered the following judgment:

This is an appeal by the Executors of the Estate of Edward William Bickle under the *Estate Tax Act*, 1958 R.S.C., c. 29 as amended, from an assessment dated July

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31, 1962, wherein a tax was levied in the sum of $1,132,929.08 on the assets of this estate.

The relevant facts in this matter are that the late Edward William Bickle died at Toronto, in the Province of Ontario, on May 2, 1961, and probate of his Last Will and Testament and Codicil was granted to the Executors, the appellants herein, by the Surrogate Court of the County of York, on May 19, 1961.

By his Last Will and Testament and Codicil, the deceased set aside 50 per cent of his estate to provide for his wife for life, made certain other provisions regarding her maintenance, made certain cash payments and then, provided that after her death, his daughter and grandchildren should take that part of the estate absolutely.

The will and codicil further provided that, after payment of all succession duties and estate taxes, the balance of the residue was to be paid to the E. W. Bickle Foundation.

It is not in dispute that the E. W. Bickle Foundation is an organization, a gift to which, in computing the aggregate taxable value of property passing on the death, gives rise to a deduction from the aggregate net value of the property by virtue of s. 7(1)(*d*) of the *Estate Tax Act*.

By notice of assessment dated July 31, 1962, the Minister of National Revenue assessed the estate tax owing in the sum of $1,132,929.08.

In making such assessment, the Minister computed the amount of the deduction in respect of the gift to the E. W. Bickle Foundation in the sum of $528,712.34.

The "aggregate net value" of this estate, within the meaning of s. 2 of the *Estate Tax Act* is not in dispute.

The sole question in issue is the computation of the amount of the "aggregate taxable value" within the meaning of the *Estate Tax Act;* and the sole difficulty in arriving at this figure arises from a dispute as to how the deduction envisaged by s. 7(1)(*d*) of the *Estate Tax Act* should be computed.

This particular deduction is the amount of the tax under the *Estate Tax Act,* because on the facts of this case, it is necessary to compute the estate tax in order to determine the amount of the gift going to the charity after the tax has been paid.

The subject of the dispute might be put another way, namely by saying that the amount of the deduction, which is in dispute between the parties, which is allowable under s. 7(1)(*d*) of the *Estate Tax Act* is dependent on the amount of tax payable; and at the same time the amount of the estate tax payable under the *Estate Tax Act* is dependent on the amount of this particular deduction which is in dispute.

Only one witness gave evidence, namely Mr. John Kroeker, an actuary with the Department of Insurance of the Government of Canada. He said that the technique employed by the Minister in computing the deduction in dispute was what is known as the "successive approximations" method. By this method, in this particular case, (as will be noted hereunder) the Minister made ten calculations before arriving at what is termed the "Final Computation", by which computation the Minister found the estate tax payable to be $1,132,929.08.

Mr. Kroeker stated that all calculations to the 10th calculation, in his opinion, were mathematically correct, and that the tax applied in each calculation was based on the table contained in s. 8 of the *Estate Tax Act,* and that in this particular case the provisions contained in s. 8(1)(*w*) applied.

He also stated that it required 16 calculations in order to reduce the successions to nil; but the Minister had stopped at 10 calculations because the difference in tax, by not continuing the calculations beyond the 10th to the 16th calculation, was very small.

Exhibit R-1 filed in this appeal sets out the calculations numbered 11 to 16 made by Mr. Kroeker, which demonstrates this.

Mr. Kroeker also said that there was another method which could have been used to compute the estate tax payable, and it is known as the "algebraic method".

Exhibit R-2 is a memorandum consisting of seven (7) pages prepared by him showing how he calculated the amount of estate tax using the algebraic method, and allowing for a deduction under s. 7(1)(*d*) of the *Estate Tax Act.*

Mr. Kroeker's evidence was to the effect that, conforming to the same premises that were adopted in the successive

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approximations method in the computation by the algebraic method, the same amount of estate tax was computed.

To assist in explaining how this assessment was made, there is set out hereunder the first, the second, the ninth, and the tenth calculations, and the Final Computation made by the Minister by which he found the estate tax payable to be $1,132,929.08:

1st Calculation

Aggregate Net Value	$ 5,242,455.21
Exempt Section 7(1)(*d*) $2,261,847.64—$600,212.95 (P.V.)	1,661,634.69
Net Value	3,580,820.52
Basic and Survivor Exemption	60,000.00
Aggregate Taxable Value	$ 3,520,820 52
Tax on $3,520,820.52	$ 1,637,743 08
Provincial Tax Credit Schedule A	813,011.58
Estate Tax	$ 824,731.50

2nd Calculation

Aggregate Net Value	$ 5,242,455.21
Exempt Section 7(1)(*d*) $2,261,847.64—600,212.95 (P.V.)—824,731.50=	836,903.19
Net Value	$ 4,405,552.02
Basic and Survivor Exemption	60,000.00
Aggregate Taxable Value	$ 4,345,552.02
Tax on $4,345,552 02	$ 2,083,098.09
Provincial Tax Credit Schedule (B)	1,034,009.34
Estate Tax Payable	$ 1,049,088.75

9th Calculation

Aggregate Net Value	$ 5,242,455.21
Exempt Section 7(1)(*d*) $2,261,847.64—600,212.95—1,132,897 61=	528,737.08
Net Value	$ 4,713,718.13
Basic and Survivor Exemption	60,000.00
Aggregate Taxable Value	$ 4,653,718.13
Tax on $4,653,718.13	$ 2,249,507.79
Provincial Tax Credit Schedule (J)	1,116,585.44
Estate Tax Payable	$ 1,132,922.35

10th Calculation

Aggregate Net Value	$5,242,455.21
Exempt Section 7(1)(*d*) $2,261,847.64—600.212.95 (P.V.)—1,132,922.35=	528,712.34
Net Value	$4,713,742.87
Basic and Survivor Exemption	60,000.00
Aggregate Taxable Value	4,653,742.87
Tax on $4,653,742.87	$2,249,521.14
Provincial Tax Credit Schedule (K)	1,116,592.06
Estate Tax	$1,132,929.08

Final Computation

Total Value of Estate as per ET.60			$5,072,540.45
Increase as per attached ET.85			229,778.55
			$5,302,319 00
General Debts		$59,616.60	
Add Additional Surrogate Court fees		471 00	
Income Tax 1960 Year		683.46	
		$60,771.06	
Less Income Tax Refund 1961 year	$14 67		
Disallow Interest on Nixon Note	892.60	907.27	59,863.79
Aggregate Net Value			$5,242,455 21
Brought Forward:			$5,242,455.21
Exempt Section 7(1)(*d*) $2,261,847.64—600,212.95—1,132,922.35=			528,712.34
Net Value			$4,713,742 87
Basic and Survivor Exemption			60,000.00
Aggregate Taxable Value			$4,653,742.87
Tax on $4,653,742.87			$2,249,521.14
Provincial Tax Credit as per Schedule (K)			1,116,592.06
Estate Tax Payable			$1,132,929 08

On this appeal the following cases were cited by counsel for the Minister in support of the assessment made in this matter: *New York Central Railway* v. *Minister of National Revenue*[1] and *John Foster Dulles et al. v. Johnson*[2].

[1] 53 D.T.C. 5; 7 Tax A.B.C. 334. [2] 273 F.R., 2nd Series, 362.

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Counsel for the appellant in support of the submission that these successive calculations were wrong in law cited: *Arlow* v. *Minister of National Revenue*[1].

The principle of law to be applied in interpreting the provisions of s. 7(1)(*d*) of the *Estate Tax Act* on the facts of this particular case, is not to be found in any decided case in our Courts.

In adjudicating upon the true meaning of this subsection, it seems patent that consideration should be given to the premise that the Parliament of Canada when it enacted s. 7(1)(*d*) of the *Estate Tax Act* must have intended that the calculation of the deduction authorized could be understood and made by the great body of practicing solicitors, accountants, trust officers, insurance advisers, and others, who day to day are called upon to advise individual members of the public in matters such as this and which advice is now usually given in connection with what is called Estate Planning; and that the services of an actuary should not be necessary for these purposes.

I am of the opinion that, although the "successive approximations" method and the "algebraic method" of computing the deduction under s. 7(1)(*d*) may be technically correct, based on the premises stated to the assessor of the Minister who made these calculations, and to Mr. Kroeker the witness in this case, they were in law incorrectly employed in the computation of the deduction in dispute in this particular case.

In the result, I have reached the conclusion that the assessment is wrong in law in two respects.

Firstly, it is wrong in law because succession duty principles were applied in making the calculations to compute the estate tax assessed as payable herein, whereas estate tax principles should have been applied.

Secondly, irrespective of whether succession duty principles were applied, or estate tax principles should have been applied, the First Calculation of the assessor for the Minister, above noted, is wrong in law, and therefore all the other successive calculations, however made, are also wrong in law.

[1] [1954] Ex. C.R. 420.

In considering the first error in law, it is relevant to observe that the difference between the succession duty principles and the estate tax principles is fundamental.

As is patent, in succession duty cases, the tax is on the disposition or devolution from the deceased to another person called the successor who is called upon to pay the tax; and the amount is dependent on the total value of the estate, the value of the particular succession and the relationship of the beneficiary to the deceased.

Under the *Estate Tax Act,* however, the tax is in no way affected by the relationship of the beneficiary to the deceased or by the size of the individual bequest. The rate of tax is determined by the size of the taxable estate, and the taxable estate is the amount after gifts to charity and other permissible deductions have been made; and it should be observed that these deductions are true deductions. For example, the statutory deduction for a surviving widow or children can be taken whether or not the surviving widow or children actually benefit; and another example is the deduction for provincial succession duty which may be taken whether or not a provincial duty is paid.

Under the estate tax enactments, the tax falls upon the property passing on the death of the deceased. The executor must pay the entire bill for the estate tax (subject to certain exemptions not relevant here).

The estate tax, therefore, in the main, is an indirect tax falling primarily on the executor who passes the burden on to the persons who pay.

Succession duty is essentially a direct tax falling on the successors.

Considering this particular estate, with estate tax principles in mind, it is clear that the testator made gifts to certain named beneficiaries and also gave these beneficiaries the entire Ontario succession duty and estate tax payable on those gifts.

In my opinion, however, he only gave such duty and tax once. The balance the testator gave to the charity.

The further calculations made by the Minister, in my opinion, are not made by applying true estate tax principles and the amounts found as a result are not amounts given

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by the testator by his Will nor are the beneficiaries receiving any benefits from them.

The successive calculations reducing the successions to nil, applying succession duty principles in such calculations, therefore, are not correct in law in this case.

In considering the second error in law, namely the manner in which the first calculation was made, it should be noted that herein lies the substantial differential in the computation of both the deduction under s. 7(1)(*d*) of the Act and the estate tax payable.

As noted above, the assessor for the Minister found the aggregate net value of this estate at $5,242,455.21. The assessor then at this first stage deducted (purportedly under the authority of s. 7(1)(*d*) of the *Estate Tax Act*) the amount of the Ontario succession duty found in the sum of $600,212.95 from the sum of $2,261,847.64, the exempt portion of the estate, and thereby obtained a figure of net value. He then deducted from this figure of net value so found, the basic and survivor exemption of $60,000 to arrive at an aggregate taxable value which he found at $3,520,820.52.

This deduction of the Ontario succession duty, at this stage, in my opinion, should not have been done. It only should have been done commencing with the second and succeeding calculations (if it was correct in law to make succeeding calculations after the second calculation, which in my view it was not).

I say this was incorrect for two reasons.

Firstly, in a case such as this, section 7(1)(*d*) only authorizes the deduction from the exempt portion of the "combination" of Ontario duty and estate tax, and until the figures for both Ontario duty and estate tax have been computed, it is not correct to make a deduction at all.

Secondly, for a reason separate and unrelated to the direction given in this sub-section as to how the deduction should be computed by the employment of the word "combination", the deduction should not have been made for Ontario duty alone in this first computation because estate tax under the *Estate Tax Act* is of general application throughout Canada and in the case of estates in provinces which have rented their succession duty to the federal government there could not be, in such first calculation, a deduction for provincial succession duty because there would be no figure to insert in such first calculation.

In this connection, I am of the opinion also that, in calculating the aggregate taxable value of this estate, there is nothing mathematically incorrect, whether the successive approximations method or the algebraic method is employed, in refraining from making any deduction from the exempt amount in the sum of $2,261,847.64 of the Ontario duty of $600,212.95 until a first figure is found for the estate tax payable in this matter.

This first figure of estate tax is the computation of it without regard to the fact that duty and tax are payable out of the deductible bequest.

Using the successive approximations approach, therefore, the assessor could have refrained, until he made the second calculation, from deducting the Ontario duty of $600,212.95, at which time he would also have had a first figure for estate tax and, at this stage of his calculations therefore he would have had the "combination" of such duties "including any tax payable under this Part" (which are the directory words employed in s. 7(1)(*d*) of the Act).

Using the algebraic method, it is also possible to give effect to the word "combination" contained in s. 7(1)(*d*) of the Act. It will depend, of course, on the premises upon which the person making the computation proceeds. In this case, Mr. Kroeker made his calculations on the premises of a memorandum delivered to him by the Department of National Revenue which directed that Ontario duty alone should be deducted in making the first calculation.

In any event, the algebraic method is just a method of verifying what may be done under the successive approximation method, and the same result will obtain using this method as will obtain using the successive approximations method. But the result in either case will depend on the

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premises contained in the instructions given to the person making such computation.

It is my opinion that the calculations made herein by the assessor and by Mr. Kroeker were wrong in law because the instructions given to them were wrong for the above reasons.

In the result, therefore, I am of the opinion that the manner in which the deduction under s. 7(1)(*d*) of the *Estate Tax Act* should be computed so as to find the true estate tax payable is as follows:

a) the first figure to record is the amount of the "aggregate net value" of the estate;

b) from this figure should be deducted the amount of the exempt gift to charity, without regard to the special provisions for estate tax by reason of s. 7(1)(*d*) of the Act. A figure of net value results;

c) from this figure of net value should be deducted the basic and survivor exemption, which in this case is pursuant to s. 7(1)(*b*) of the Act;

d) this computation produces a figure of tentative "aggregate taxable value";

e) the gross tax should then be computed on this figure of "aggregate taxable value" by using the table set out in s. 8(1)(*w*) of the Act;

f) the appropriate Ontario Provincial Tax Credit, (on the assets which qualify) should then be deducted from the said gross tax found by making the computation referred to in the above paragraph, and the figure resulting is the estate tax payable (except for the situation envisaged by s. 7(1)(*d*) where the charity is to bear the costs of the succession duty and estate tax).

Because of s. 7(1)(*d*) of the Act there is not a full exemption of the gift to charity in cases such as this where the cost of the gift of estate tax and of Ontario succession duty is payable out of the charitable bequest, and it is therefore necessary to make one more calculation. This calculation should be done in the same manner as outlined above, except for one matter, viz. that the computation of net value (referred to in paragraph (*b*) above) is done by subtracting from "aggregate net value" the amount of the exempt gift to charity minus the Ontario succession duty and also minus the estate tax found pursuant to clause (*f*) above.

Putting these two calculations, above referred to, in other words and inserting figures, they are as follows:

1st Calculation

Aggregate Net Value		$ 5,242,455.21
Less Exemptions		2,261,847.64
Net Value		2,980,607.57
Less Basic and Survivor Exemptions		60,000.00
Aggregate Taxable Value		$ 2,920,607.57
Tax on $2,920,607.57		$ 1,313,627.78
Less Provincial Tax Credit: (Value of assets which do not qualify for Provincial Tax Credit: $25,624.85)		
½ × $2,980,607.57—$3.61—$25,621.24 × $1,313,627.78= / 2,980,607.57		651,167.13
Estate Tax Payable		$ 662,460.65

2nd Calculation

Aggregate Net Value		$ 5,242,455.21
Less Exemptions: $2,261,847.64—$600,212.95—$662,460.65 (Estate Tax found in first calculation)		999,174.04
Net Value		$ 4,243,281.17
Less Basic and Survivor Exemptions		60,000.00
Aggregate Taxable Value		$ 4,183,281.17
Tax on $4,183,281.17		$ 1,995,471.83
Less Provincial Tax Credit: (Value of assets which do not qualify for Provincial Tax Credit $30,658.50—computed:)	$ 38,250.63	
less: 38,250.63—$600. × 999,174.04= / 5,242,455.21—287,389.57	7,592.13	
	$ 30,658.50	
½ × $4,243,281.17—$30,658 50 × 1,995,471 83 / $4,243,281.17		990,527.08
ESTATE TAX PAYABLE		$ 1,004,944.75

It should be noted that the above computations are made on the assumptions that there is no dispute about the following figures, namely:

1) that the aggregate net value is $5,242,455.21;

2) that the exemptions are $2,261,847.64;

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3) that the Ontario duty found is $600,212.95;

4) that the assets which do not qualify for Ontario provincial tax credit amount to $25,624.85 on the first calculation, and to $30,658.50 on the second calculation.

Therefore, on these computations I find that the amount of the gift to the E. W. Bickle Foundation is $656,689.94, and the estate tax payable I find is $1,004,944.75.

The appeal, therefore, is allowed with costs and the matter remitted for re-assessment, not inconsistent with these reasons.

Judgment accordingly.

1960 May 30

1963 Sept. 26, 27

1964 Sept. 2

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

PILLSBURY HOLDINGS LIMITED ....RESPONDENT.

Revenue—Income—Income tax—Appeal from income tax assessment—Payments or benefits flowing from corporation to shareholder—Waiver of interest on loan to shareholder—Whether corporation and shareholder dealing at arm's length—Transaction not within s. 8(1)(c) if bona fide—Transactions which are devices or arrangements for conferring benefit or advantage on shareholder qua shareholder—Onus of proof with respect to assumptions alleged to have been made in assessing taxpayer—Allegations made by Minister in notice of appeal—Onus of proof in appeals from income tax assessment—Income Tax Act, R.S.C. 1952, c. 148, s. 8(1).

The respondent was the majority shareholder in each of two subsidiary companies, Renown Mills Limited and Copeland Flour Mills Limited. In 1952 it borrowed $500,000 from Renown and $560,000 from Copeland which it used to purchase shares in these two companies, giving in respect of each loan a demand promissory note bearing interest at 4½% payable semi-annually. In June 1953, in response to a request from the respondent, Renown and Copeland waived payment of interest for the first six-month period which ended on May 31, 1953. In May 1954

Renown and Copeland each accepted payment of its loan to the respondent and waived payment of interest thereon from May 31, 1953 to the date of payment.

The sole question in issue is whether the amounts payable by the respondent to the two subsidiary companies as interest on the loans, payment of which was waived by them, are required to be included in computing the respondent's income under s. 8(1) of the *Income Tax Act*.

Held: That s. 8(1) of the *Income Tax Act* is aimed at payments, distributions, benefits and advantages flowing from a corporation to a shareholder other than dividends during the lifetime of the corporation; payments and distributions in respect of reductions in capital during the lifetime of the corporation and payments and distrbutions on the occasion of the winding-up of the corporation.

2. That Parliament intended, by s. 8 of the *Income Tax Act,* to sweep into income, payments, distributions, benefits and advantages that flow from a corporation to a shareholder by some route other than the dividend route and that might be expected to reach the shareholder by the more orthodox dividend route if the corporation and the shareholder were dealing at arm's length.

3. That there can be no conferring of a benefit or advantage within the meaning of s. 8(1)(*c*) where a corporation enters into a *bona fide* transaction with a shareholder.

4. That s. 8(1)(*c*) clearly applies to transactions between closely held corporations and their shareholders that are devices or arrangements for conferring benefits or advantages on shareholders *qua* shareholders and it is a question of fact whether a transaction that purports, on its face, to be an ordinary business transaction is such a device or arrangement.

5. That even where a corporation has resolved formally to give a special privilege or status to shareholders, it is a question of fact whether the corporation's purpose was to confer a benefit or advantage on the shareholders or was some purpose having to do with the corporation's business such as inducing the shareholders to patronize the corporation.

6. That when the Minister sets forth in his Notice of Appeal the assumptions on which the assessment appealed from is based the taxpayer can meet this pleading by (*a*) challenging the Minister's allegation that he did assume those facts, (*b*) assuming the onus of showing that one or more of the assumptions was wrong or (*c*) contending that, even if the assumptions were justified, they do not of themselves support the assessment.

7. That, as an alternative to relying on the assumptions on which the assessment was based, the Minister may allege by his Notice of Appeal further and other facts that would support or help in supporting the assessment but the onus would presumably be on the Minister to establish such facts.

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8. That the waiver of interest payable by a borrower who is a shareholder of the lender is not a transaction to which s. 8(1)(*c*) applies unless it is also an ararngement or device whereby the corporation confers a benefit or advantage on the shareholder *qua* shareholder, and the Minister not having alleged that in making his assessment he assumed that to be so in this case, there is no onus on the respondent to disprove that fact which is essential to its being taxable.

9. That since the Minister has made no allegation that either the first or second round of waivers of interest constituted a device or arrangement for conferring a benefit or advantage on the borrower *qua* shareholder, the assessment cannot stand.

10. That the appeal is dismissed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Cattanach at Toronto.

F. J. Cross, G. W. Ainslie and *D. H. Aylen* for appellant.

S. E. Edwards, Q.C. for respondent.

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

CATTANACH J. now (September 2, 1964) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board[1] dated June 20, 1958, allowing an appeal by the respondent (whose name at that time was Pillsbury Canada Limited) from its assessments under the *Income Tax Act*, 1952, R.S.C., c. 148, for its 1953 and 1954 taxation years.

The appeals relate to certain amounts that were payable by the respondent in those years as interest on monies borrowed from two subsidiary companies, in each of which the respondent was a majority shareholder. The sole question in issue is whether subsection (1) of section 8 of the *Income Tax Act* requires that those amounts be included in computing the respondent's incomes for those taxation years by reason of certain resolutions passed by the lender

[1] (1958) 19 Tax A.B.C. 431.

companies which purport to relieve the respondent of its liabilities to pay those various amounts.

Subsection (1) of Section 8 of the *Income Tax Act* reads as follows:

> 8. (1) Where, in a taxation year,
>
> (*a*) a payment has been made by a corporation to a shareholder otherwise than pursuant to a *bona fide* business transaction,
>
> (*b*) funds or property of a corporation have been appropriated in any manner whatsoever to, or for the benefit of, a shareholder, or
>
> (*c*) a benefit or advantage has been conferred on a shareholder by a corporation,
>
> otherwise than
>
> (i) on the reduction of capital, the redemption of shares or the winding-up, discontinuance or reorganization of its business,
>
> (ii) by payment of a stock dividend, or
>
> (iii) by conferring on all holders of common shares in the capital of the corporation a right to buy additional common shares therein,
>
> the amount or value thereof shall be included in computing the income of the shareholder for the year.

The first question that arises is whether, assuming that the resolutions referred to had the effect of extinguishing the respondent's liabilities to pay the interest in question, the result was that benefits or advantages were conferred on a shareholder by the subsidiaries within the meaning of paragraph (*c*) of subsection (1) of section 8. As I reach the conclusion that that question must be answered in the negative, the appeal must be dismissed. If that question were answered in the affirmative, a number of other questions would arise which, by reason of the view that I take of the first question, I need not consider.

The facts relevant to the first question may be stated briefly.

On October 14, 1952, the respondent borrowed $500,000 from Renown Mills Limited (hereinafter referred to as "Renown") and $560,000 from Copeland Flour Mills Limited (hereinafter referred to as "Copeland") which money was employed with other money belonging to the respond-

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ent to pay for shares in those two companies. In respect of each loan, the respondent gave to the lender a promissory note payable on demand bearing interest at the rate of $4\frac{1}{2}\%$ payable semi-annually.

At the time that the loans were made, the respondent acquired over 99% of Copeland's issued shares and all of Renown's issued shares except those that already belonged to Copeland.

In 1953, certain events took place in relation to the interest that fell due on May 31 of that year. On May 22, 1953, the President of the respondent, who was also President of Copeland and of Renown, wrote to Copeland as follows:

On May 31st, 1953, the first payment of interest, amounting to $15,810 41 on the principal of our loan of $560,000 now outstanding, is due and payable to your company.

For several reasons, principally due to organizational problems and operating conditions, this company finds itself without sufficient income and funds to meet this interest commitment on May 31st, 1953.

Accordingly, we would respectfully ask that you consider formally and unconditionally waiving this interest charge for the period ending May 31st, 1953.

We have every reason to feel confident our company will be operating as originally planned, to enable it to service its commitment and we hope substantially retire its indebtedness to you during the ensuing year.

We anticipate your favourable consideration of our request.

On June 30, 1953, Copeland's Board of Directors adopted a resolution reading as follows:

The Chairman read to the meeting a letter from Mr. R. J. Pinchin, President, Pillsbury Canada Limited, dated 22nd day of May, 1953, in which he referred to the loan which had been made by Copeland of $560,000 made to the Pillsbury Co. on October 15th last repayment of which was secured by a promissory note with interest. He indicated that as of May 31st of this year the amount of interest owing was $15,810.41.

The letter from the President of Pillsbury pointed out that due to operating conditions and organization problems the company was without sufficient funds or income to meet this commitment and he requested that this Board give consideration to waiving the interest for this period.

The matter was discussed, whereupon it was moved, seconded and unanimously carried,

RESOLVED:

that in view of the communication referred to above and the financial situation of Pillsbury Canada Limited for the reasons appearing therein, this company unconditionally waive and forever forego the right to claim and receive from Pillsbury Canada Limited the sum of $15,810.41, being the interest on the loan made to the Pillsbury Company and due on the 31st of May 1953; provided that such waiver and renunciation shall not be or be deemed to be a waiver or renunciation of any future commitment of the Pillsbury Company to this company.

A similar letter was written by the President of the respondent to Renown and a similar resolution was adopted by Renown's Board of Directors.

In 1954, certain events took place affecting the interest that came due after May 31, 1953. On May 10, 1954, the respondent's Board of Directors adopted a resolution reading as follows:

The Chairman stated that it was desirable to repay to Copeland Flour Mills Limited the sum of $560,000 and to repay to Renown Mills Limited the sum of $500,000 which had been borrowed from these companies respectively on the 14th day of October 1952. He further stated that the creditor companies had each agreed to waive the payment of interest on these respective sums as and from the 31st day of May 1953 to date of payment providing such payments of principal were effected on or before the 31st day of May 1954.

The matter was discussed, whereupon it was moved, seconded and unanimously carried,

RESOLVED:

that the President be and he is hereby authorized to effect repayment of monies borrowed by the company as follows: to Copeland Flour Mills Limited the sum of $560,000 to Renown Mills Limited the sum of $500,000 provided always that such payments were in full settlement of all monies owing on these respective loans.

On May 10, 1954, Renown's Board of Directors adopted a resolution reading as follows:

The Secretary informed the meeting that he had been advised that Pillsbury Canada Limited was prepared to consider repayment of the sum of $500,000 and interest owing to the company by the Pillsbury corporation on condition that the company waive the payment of interest owing on this loan as and from the 31st day of May 1953. The matter was discussed, whereupon it was moved, seconded and unanimously carried,

RESOLVED:

that this company accept from Pillsbury Canada Limited the sum of $500,000 as in full payment for the loan for the said principal sum of

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$500,000 owing by Pillsbury Canada Limited as and from the 14th day of October 1952 and that the company specifically waive the right to receive any interest on such sum from Pillsbury Canada Limited as and from the 31st day of May 1953 to date of payment.

On May 11, 1954 Copeland's Board of Directors adopted an almost identical resolution.

The evidence is that, apart from the above, there were no written communications between the companies concerning these matters.

It is not possible, by an analysis of the language and function of subsection (1) of section 8, to find a simple formula for determining in advance the answer to all the questions that will arise under that subsection. Each question will have to be solved as it arises. Nevertheless, some consideration must be given to the function of this provision in the *Income Tax Act* and to the wording of the provision as a whole in considering the ambit of paragraph (*c*) in relation to the facts of this case.

The normal payments and distributions by a corporation to a shareholder *qua* shareholder are

(*a*) dividends during the lifetime of the corporation,

(*b*) payments and distributions in respect of reductions in capital during the lifetime of the corporation, and

(*c*) payments and distributions on the occasion of the winding-up of the corporation.

Provisions in the *Income Tax Act*, other than section 8, govern the taxability of such payments and distributions when made in the orthodox way. In the remainder of this judgment, when referring to dividends, I intend to refer to any of these payments or distributions referred to in this paragraph.

Subsection (1) of section 8 is aimed at payments, distributions, benefits and advantages flowing from a corporation to a shareholder other than those referred to in the immediately preceding paragraph. While the subsection does not say so explicitly, it is fair to infer that Parliament intended, by section 8, to sweep in payments, distributions, benefits and advantages that flow from a corporation to a shareholder by some route other than the dividend route and that might be expected to reach the shareholder by the more orthodox dividend route if the corporation and the shareholder were dealing at arm's length. This is true of paragraph (*a*) of subsection (1). A corporation normally makes payments to its shareholders as dividends unless the payment is pursuant to a *bona fide* business transaction, in which event it is not a payment accruing to the shareholder *qua* shareholder. If a payment is made to a shareholder *qua* shareholder, paragraph (*a*) requires that it be brought into the shareholder's income whether or not it is made as a dividend. Similarly, as far as paragraph (*b*) of subsection (1) is concerned, the normal method whereby a corporation appropriates funds or property to, or for the benefit of, its shareholders is by a declaration of dividend payable in cash or in kind. If funds or property are appropriated to or for the benefit of a shareholder *qua* shareholder in any other way, paragraph (*b*) requires that they be brought into his income.

Paragraph (*c*) of subsection (1) of section 8 may be expected, therefore, to apply to cases where benefits or advantages have been conferred on a shareholder in such circumstances that the effect is, in substance, equivalent to the payment of a dividend to the shareholder. Where a corporation, for example, is in a business of providing services for a fee or other charge, and performs its services for one or more of its shareholders free of charge, the effect is, assuming that such shareholders would have used such services in any event, that the revenues of the corporation are less than they would be if such shareholders paid on the same basis as other customers and consequently there are less profits available for distribution to the shareholders by normal methods. Such a provision of services by a corporation to its shareholders, is one way whereby a corporation might confer a benefit or advantage on shareholders within the intent of paragraph (*c*). Similarly, a corporation that rents or lets property, real or personal, in the course of its business, might rent or let its property to a shareholder for nominal amounts. While I have referred to a corporation

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that does not charge a shareholder anything, or only charges a shareholder a nominal amount for something it does in the course of its business for customers other than shareholders, any corporation might resort to similar methods for conferring a benefit or advantage on shareholders even if it were not in the business of providing services or letting or hiring property.

By way of contrast, in my view, there can be no conferring of a benefit or advantage within the meaning of paragraph (*c*) where a corporation enters into a *bona fide* transaction with a shareholder. For example, Parliament could never have intended to tax the benefit or advantage that accrues to a customer of a corporation, merely because the particular customer happens to be a shareholder of the corporation, if that benefit or advantage is the benefit or advantage accruing to the shareholder in his capacity as a customer of the corporation. It could not be intended that the Court go behind a *bona fide* business transaction between a corporation and a customer who happens to be a shareholder and try to evaluate the benefit or advantage accruing from the transaction to the customer.

On the other hand, there are transactions between closely held corporations and their shareholders that are devices or arrangements for conferring benefits or advantages on shareholders *qua* shareholders and paragraph (*c*) clearly applies to such transactions. (Compare *Robson v. M.N.R.*[1]). It is a question of fact whether a transaction that purports, on its face, to be an ordinary business transaction is such a device or arrangement.

In applying paragraph (*c*) full weight must be given to all the words of the paragraph. There must be a "benefit or advantage" and that benefit or advantage must be "conferred" by a corporation on a "shareholder". The word "confer" means "grant" or "bestow". Even where a corporation has resolved formally to give a special privilege or status to shareholders, it is a question of fact whether the corporation's purpose was to confer a benefit or advantage

[1] [1952] 2 S.C.R. 223.

on the shareholders or some purpose having to do with the corporation's business such as inducing the shareholders to patronize the corporation. If this be so, it must equally be a question of fact in each case where the Minister contends that what appears to be an ordinary business transaction between a corporation and a shareholder is not what it appears to be but is in reality a method, arrangement or device for conferring a benefit or advantage on the shareholder *qua* shareholder.

I must now consider whether paragraph (*c*) applies to the facts of this appeal. As indicated above, for the purposes of the question I am now considering, I am assuming, without deciding, that the resolutions waiving the payments of interest had the effect of extinguishing the respondent's liabilities to pay the interest.

In considering whether paragraph (*c*) applies to the facts of this appeal, it is important to have in mind how the matter comes before the Court. The Minister, by his Notice of Appeal, set forth the assumptions on which the assessments appealed from were based. See paragraph 6 of the Notice of Appeal, which reads as follows:

6. In assessing the taxable income of the Respondent as referred to in paragraphs 4 and 5 in respect of the taxation years of 1953 and 1954, the Appellant assumed:

(*a*) that during the 1953 and 1954 taxation years the Respondent was a shareholder of Renown Mills Limited and Copeland Flour Mills Limited, both corporations incorporated in Canada;

(*b*) that on or about the 14th day of October, 1952, the Respondent borrowed the sum of $500,000.00 from Renown Mills Limited and $560,000.00 from Copeland Flour Mills Limited for the purpose of purchasing shares in the capital stock of each corporation and in respect of each loan gave promissory notes dated the 14th day of October, 1952, payable on demand, and bearing interest at the rate of 4½% per annum due and payable on the 31st day of May and 30th day of November in each year;

(*c*) that Renown Mills Limited waived the interest due and payable on the dates referred to in subparagraph (*b*) during the 1953 taxation year in the amount of $14,166.44, and during the 1954 taxation year in the amount of $22,253.42;

(*d*) that Copeland Flour Mills Limited waived the interest due and payable on the dates referred to in subparagraph (*b*) during the 1953 taxation year in the amount of $15,810.41, and during the 1954 taxation year in the amount of $24,923.84.

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The relevance of this pleading appears from the decision of the Supreme Court of Canada in *Johnston v. Minister of National Revenue*[1] per Rand J., delivering the judgment of the majority, at p. 489:

> 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.

(For the word "appellant" in that quotation, may be substituted "respondent" for the purpose of this appeal). The respondent could have met the Minister's pleading that, in assessing the respondent, he assumed the facts set out in paragraph 6 of the Notice of Appeal by:

(a) challenging the Minister's allegation that he did assume those facts,

(b) assuming the onus of showing that one or more of the assumptions was wrong, or

(c) contending that, even if the assumptions were justified, they do not of themselves support the assessment.

(The Minister could, of course, as an alternative to relying on the facts he found or assumed in assessing the respondent, have alleged by his Notice of Appeal further or other facts that would support or help in supporting the assessment. If he had alleged such further or other facts, the onus would presumably have been on him to establish them. In any event the Minister did not choose such alternative in this case and relied on the facts that he had assumed at the time of the assessment).

The respondent did not challenge the Minister's allegation that he had, in assessing, assumed the facts set out in paragraph 6 of the Notice of Appeal. Neither did the respondent attempt to show that the assumptions were wrong in fact. The respondent did however put evidence before the Court to show exactly what the facts were and contended that those facts did not support the assessments.

It is clear that the first pair of transactions were ordinary business transactions whereby the respondent borrowed money from the two subsidiaries and agreed to pay interest.

[1] [1948] S.C.R. 186.

No attack was made on the *bona fides* of these transactions. They created the relationship between the respondent and each of the other two companies of borrower and lender.

The question whether the act of the lender corporation in extinguishing the obligation to pay interest was the conferring of a benefit on the respondent within paragraph (*c*) of subsection (1) of section 8 must, as I have already emphasized, be considered in each case as a question of fact.

The Minister, according to his Notice of Appeal, in each case assumed, in making the assessment, that the interest was waived (paragraph 6 of the Notice of Appeal) and concluded that the lender conferred a benefit or advantage within paragraph (*c*), (section B of the Notice of Appeal). In effect, the Minister takes the position that waiver of interest payable by a borrower who happens to be a shareholder of the lender is the conferring of a benefit or advantage within paragraph (*c*) regardless of the circumstances surrounding the waiver. In my view, the mere fact of waiver, even if legally effective to cancel the debt, is not sufficient of itself to bring the transaction within paragraph (*c*). To come within that paragraph, it must be an arrangement or device whereby a corporation confers a benefit or advantage on a shareholder *qua* shareholder. The Minister does not allege that he assumed, in making the assessments, that the waiver was an arrangement or device adopted by the corporation to confer a benefit or advantage on the respondent as a shareholder. There was no onus on the respondent to disprove that fact, which is essential to its being taxable, unless the Minister assumed that fact when assessing. It may be that the Minister's appeal should be dismissed on that ground.

In any event, as far as the second round of waivers are concerned, they were expressed to be settlements negotiated by a borrower with its lender under the terms of which immediate payment of a large amount of principal was to be made in consideration of interest being cancelled. There is no allegation that this quite ordinary type of transaction between a debtor and lender is a mere subterfuge whereby

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the lender corporation is conferring a benefit or advantage on the borrower *qua* shareholder and, in the absence of any issue having been made by the Minister of that question of fact, I cannot so find.

I have more difficulty, as far as the first round of waivers is concerned, inasmuch as it does seem improbable that the lender would have cancelled the interest outright, instead of merely giving time for payment, on a claim by the borrower that it was in difficulties, were it not for the fact that the borrower owned practically all the shares in the lender corporation. However, there was no allegation that the waiver was anything other than what it purported to be, that is, a lender granting relief to a borrower in difficulties. Had the transactions been attacked in the Notice of Appeal and at the trial as being a device or arrangement for conferring a benefit on the respondent *qua* shareholder, it might well have been difficult for the respondent to have resisted the attack. However no such attack was made and the assessments cannot therefore stand.

The appeal is dismissed with costs.

Judgment accordingly.

ENTRE: 1963 nov. 18, 19 & 20 — 1964 oct. 7

DAME MÉDORA FAUBERT ....REQUÉRANTE;

ET

SA MAJESTÉ LA REINE ....INTIMÉE;

ET

ÉDOUARD BÉLANGER ....REQUÉRANT;

ET

SA MAJESTÉ LA REINE ....INTIMÉE.

Couronne—Pétition de droit—Expropriation—Lois sur les expropriations, S.R.C. 1952, ch. 106, art. 9—Avis d'expropriation—Validité de l'avis—Vices de forme—Loi sur l'Administration de la Voie Maritime du St-Laurent, S.R.C. 1952, ch. 242, art. 18(1)—Lots de grève non subdivisés en bordure du fleuve St-Laurent—«Bastures»—Plan cadastral—Erreurs dans le plan cadastral—Code Civil de Québec, art. 2174—Droit de propriété—Prescription trentenaire—Prescription décennale—Code Civil de Québec, art. 2206 et 2242.

L'avis d'expropriation affectant, entre autres lots, les terrains des deux requérants, et se lisant, en partie, comme suit: «. . . is a plan and description of a certain beach and deep water lot, being a part of the St. Lawrence River in the Montreal Harbour area, shown within edged green lines, situated in the cadastral Parish of St. Antoine de Longueuil, registration division of Chambly, Province of Quebec, taken, including therein reefs and islets but excluding thereof and therefrom mines and minerals, . . ." est attaqué parce qu'il serait insuffisant en ce qu'il ne donne que des indications astronomiques, sans mensurations topographiques, ni la moindre mention du numéro cadastral des lots expropriés; le tout contrairement aux dispositions de la *Loi sur les Expropriations*, S.R.C. 1952, ch. 106, art. 9. En outre, les requérants se plaignent de l'expropriation du fait que l'approbation du gouverneur en conseil n'aurait pas été obtenue, au préalable; tel que le prescrit la *Loi sur l'Administration de la Voie Maritime du St-Laurent*, S.R.C. 1952, ch. 242, art. 18(1). La défense, soutenant la régularité de l'expropriation, conteste le titre de propriété des requérants aux lots affectés ajoutant que les lots n'apparaissent même pas au plan cadastral officiel. Sur la preuve quant à l'indemnité la Cour accordait la somme de $6,000.00 à l'un des requérants et, à l'autre, celle de $1,000.00 avec intérêt et dépens dans chaque cas. *Jugé*: Ayant reçu antérieurement à la date de l'expropriation une indication assez précise des intentions de l'État, les pétitionnaires ne peuvent guère prétendre que l'omission des numéros de lots dans l'avis et la description d'emprise ait pu les induire en erreur. Quant aux tiers, dans l'intérêt desquels l'enregistrement des droits réels est aussi exigé, la vue de certains travaux exécutés sur ces terrains, les inciterait à faire les recherches requises au bureau d'enrégistrement. Ainsi, l'objectif précisé dans l'instance *Eugène Lamontagne v. His Majesty*

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the King (1917) 16 R.C. de l'E. 203, substantiellement confirmée par *The King v. Crawford* [1960] R.C.S. 527, est suffisamment atteint dans la présente cause.

2° Quant au second grief, l'arrêté ministériel, P.C. 1955-696 daté le 12 mai 1955 et se lisant, en partie, comme suit:

> His Excellency the Governor General in Council, on the recommendation of the Minister of Transport, is pleased . . . to approve The St. Lawrence Seaway Authority taking or acquiring without the consent of the owner or owners, pursuant to section 18 of The St. Lawrence Seaway Authority Act, such part of the lands described in the schedule hereto required for the Lachine Section of the St. Lawrence Seaway as are not the property of Her Majesty in right of Canada.

défère en tout point à l'obligation préalable édictée par la loi.

3° L'irrégularité consistant dans le fait que la nomenclature des terrains expropriés n'apparaît pas au plan cadastral de la paroisse St-Antoine de Longueuil, est sans importance dès que des indices suffisants font légalement présumer le droit de propriété des requérants. Du reste, l'art. 2174 du Code Civil de la Province de Québec, dernier alinéa, applicable ici puisqu'il s'agit des droits civils des parties, stipule que: «Le droit de propriété ne peut être affecté par les erreurs qui se rencontrent dans le plan ou le livre de renvoi; . . .»

4° Les terrains sont des lots de grève et l'expression «bastures» était cette mention expresse et spéciale exigée par une jurisprudence constante pour en conférer la propriété absolue au Seigneur de Longueuil, à ses hoirs et ayant cause, à la réserve près de ce qui était indispensable à l'usage public des eaux de fleuve (Cf. *Dumas vs Migneault* (1898) 15 C.S.Q. 276). Les requérants ont donc acquis, en qualité de propriétaires incommutables, ces étendues de grève, tant par prescription trentenaire et même décennale au gré des articles 2246 et 2206 du Code Civil.

PÉTITIONS DE DROIT en vue d'attribuer une indemnité à la suite d'expropriations par la Couronne.

Les causes furent instruites devant l'Honorable Juge Dumoulin, à Montréal.

François Dorval pour les requérants.

Paul Ollivier, c.r. et *G. Coderre* pour l'intimée.

Les faits et questions de droit sont exposés dans les motivés que rend maintenant (7 octobre 1964) monsieur le JUGE DUMOULIN:

L'intitulé de cette pétition de droit ne mentionne qu'une des parties affectées par l'expropriation; il convient d'ajouter celui de l'autre pétitionnaire, Édouard Bélanger, dont les procédures portent le numéro A-899 des régistres de cette Cour, car, dès le début de l'audition, tous sont convenus d'une preuve commune aux deux cas.

LES FAITS:

Madame Médora Faubert, domiciliée au numéro civique 1324, Boulevard Rainville, dans la Paroisse de St-Antoine de Longueuil, Cité de Longueuil, l'une des municipalités sises sur la rive sud du St-Laurent, représente qu'elle est la propriétaire d'une certaine partie non-subdivisée du lot original #159 aux plan et livre de renvoi officiels de la Paroisse St-Antoine de Longueuil, contenant 300 pieds de largeur par 700 pieds de profondeur, bornée en front par le fleuve St-Laurent, en arrière par un chemin public, d'un côté par le résidu du lot 159, et de l'autre côté par le numéro 160, tel qu'il appert à son titre d'achat produit comme pièce P-46. Il s'agit en l'occurrence d'un contrat de vente (P-46) intervenu le 10 juillet 1946, devant M[e] J. H. Rodolphe Langevin, notaire, résidant et pratiquant à Montréal, entre Monsieur Hormidas Bertrand de Montréal-Sud, et Dame Faubert, épouse séparée de biens, suivant contrat de mariage, de Joseph Sénécal, cultivateur, et dûment autorisée par celui-ci aux fins de cette transaction.

Le prix payé pour ce terrain s'élevait à $7,900.

Édouard Bélanger, pour sa part, déclare qu'il est propriétaire d'une certaine partie non-subdivisée du lot numéro 159 aux plan et livre de renvoi officiels de la Paroisse St-Antoine de Longueuil, comté de Chambly, située sur le côté opposé du Boulevard Rainville, mesurant 74.30 pieds de largeur sur 300 pieds de profondeur, bornée en front par le Boulevard Rainville, en arrière et des deux côtés par une autre partie non-subdivisée dudit lot 159, appartenant à Madame Médora Faubert, maintenant veuve de Joseph Sénécal, comme il appert à un contrat produit à l'appui de la pétition numéro A-899 sous la cote P-48.

Cette pièce consiste en un acte de vente intervenu le 5 septembre 1952, devant M[e] Rolland Lamoureux, notaire, résidant et pratiquant à Montréal, entre Dame Corinne Lemay, veuve majeure et non remariée de feu Louis Dupuis, et Édouard Bélanger de la Cité de Montréal.

Les terrains des deux expropriés sont contigus; celui de Bélanger, acquis au prix de $12,500, se trouvant à l'ouest du lot de Madame Faubert.

De cet endroit, l'on a une vue en droite ligne sur l'Île Ste-Hélène et sur une partie du Port de Montréal.

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Au mois de mars 1955, (pièce P-57), l'Administration de la Voie Maritime du St-Laurent, sollicita de certains riverains, les requérants entre autres, l'autorisation de déposer sur leurs propriétés, en bordure du fleuve, les déblais provenant du creusage du canal que cette compagnie était à construire. L'Administration de la Voie Maritime s'engageait à combler ces terrains jusqu'au sommet de la berge du fleuve et à niveler la terre ainsi déposée. Cet incident n'a pas grande importance sur l'issue de la cause, mais j'ai cru ne pas devoir l'omettre étant donné la signification que le savant procureur des pétitionnaires lui accorde dans un mémoire d'une valeur vraiment exceptionnelle.

Le 28 juin 1955, cet organisme de l'État, que l'Intimée reconnaît être «une corporation agissant aux droits et mandataire de Sa Majesté la Reine aux droits du Canada», déposait au bureau d'enregistrement du comté de Chambly un avis d'expropriation «concernant une certaine grève ainsi qu'un lot en eau profonde, partie du fleuve St-Laurent . . .». Cette citation est extraite de la première page du mémoire des procureurs de l'intimée, travail dont l'objectivité et l'étendue des recherches méritent aussi de vifs éloges.

Ce lot comprend une superficie approximative de 563.5 acres, et l'avis, à la première page du document, (pièce D-1), se lit:

I, the undersigned, President of THE ST. LAWRENCE SEAWAY AUTHORITY, do hereby certify that the attached is a plan and description of a certain beach and deep water lot, being a part of the St. Lawrence River in the Montreal Harbour area, shown within edged green lines, situated in the cadastral Parish of St. Antoine de Longueuil, registration division of Chambly, Province of Quebec, taken, including therein reefs and islets but excluding thereof and therefrom mines and minerals, in the name of the ST. LAWRENCE SEAWAY AUTHORITY, with the approval of the Governor in Council under Order-in-Council P.C. 1955-696 of May 12, 1955, under authority of the St. Lawrence Seaway Authority Act 242, R.S.C. 1952, for the purpose of the said Act.

Dated at Ottawa, in the Province of Ontario, this 13th day of May 1955.

Lionel Chevrier
PRESIDENT
The St. Lawrence Seaway Authority

Il ne fut pas catégoriquement établi que cette superficie totale de 563 arpents englobât plusieurs lots, mais le plan produit avec l'avis d'expropriation, et ceux numérotés D-3, D-4, D-5 annexe A, et P-56, puis l'examen de ces quatre pièces et du plan cadastral P-54, sembleraient bien démontrer l'inclusion d'autres lots.

Cette Société de la Couronne, comme l'exigeaient les devis de construction du canal de la Voie Maritime, a détourné les égouts de la Cité de St-Lambert, en amont des terrains des requérants, et procédé à l'enfouissement d'un nouveau tuyau conducteur sur toute la largeur des propriétés d'Édouard Bélanger et de Madame Faubert. Outre ces ouvrages, deux bâtisses furent aussi construites, l'une abritant une station de transformation d'électricité, l'autre un système de pompage muni d'un puits profond, exutoire des égouts de St-Lambert, qui, de cet endroit, sont expulsés dans le fleuve St-Laurent.

Au haut de la page 3 du mémoire des pétitionnaires, nous voyons que:

> Lorsque les requérants ont constaté que l'Administration de la Voie Maritime du St-Laurent avait installé en permanence les constructions susdites sur leurs terrains, ils ont porté plainte et ont réclamé indemnité et compensation, mais il leur a été répondu qu'ils n'avaient droit à aucune indemnité, ni compensation.
>
> De là les deux pétitions de droit.

Les demandes pécuniaires des pétitions postulent, de la part de Madame Médora Faubert, une somme de $375,400 avec intérêts depuis le 4 mars 1955, et du chef de M. Édouard Bélanger, un montant de $44,580 avec intérêts de cette même date.

LE DROIT:

Dans leurs procédures littérales, les pétitionnaires allèguent, en droit, l'invalidité totale de l'expropriation prétendument effectuée le 28 juin 1955, au motif que l'Administration de la Voie Maritime du St-Laurent ne se serait pas conformée aux dispositions de la *Loi sur les Expropriations,* c. 106 des Statuts Revisés du Canada, 1952. A l'encontre de cette prétention, le sous-Procureur général du Canada, au nom de Sa Majesté la Reine, a soutenu la régularité de l'expropriation et contesté le titre de propriété des parties contestantes aux lots affectés, ajoutant que ces terrains n'apparaissaient même pas au plan cadastral (P-54) de la Paroisse St-Antoine de Longueuil.

L'ordre logique à suivre dans mes notes semble tout indiqué. La Cour devra initialement se prononcer sur la suffisance de description de l'emprise dans la pièce statutaire

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D-1, puis, advenant une solution favorable aux prétentions de l'intimée, décider l'objection au droit de propriété des pétitionnaires.

Je dois reconnaître que la description des lots 159(1) et partie non-subdivisée d'icelui m'a semblé, à première vue, tout à fait inusitée. Jamais, auparavant, dans aucune des expropriations qui me furent soumises, ai-je lu une description rédigée comme celle-ci, au moyen d'indications astronomiques, sans mensurations topographiques, sans la moindre mention du numéro cadastral des lots dont on prétend s'approprier.

La pièce D-1 contient dans ce style 67 paragraphes qui, à la simple lecture, ne permettraient certainement pas à nul autre qu'un arpenteur-géomètre d'identifier la propriété. Par ailleurs, sur le plan annexé, tracé à l'encre verte, apparaît un parallélogramme où sont répétés les repères astronomiques et qui renferme, dans son aire, les terrains en question.

Les requérants reprochent, d'abord, à cet avis d'expropriation de ne donner aucune désignation nominative des lots ou parties de lots expropriés, et je dois convenir de l'exactitude de cette allégation. Cependant, ces anomalies de forme suffisent-elles en droit à invalider la prise de possession. Les critères régissant l'exercice de cette faculté régalienne qu'est l'expropriation, diffèrent assez d'avec ceux habituellement suivis dans les relations entre particuliers. Ces normes, nous les trouverons succinctement exposées, et de façon très nette, dans une cause assez ancienne, remontant à 1917, l'instance *Eugène Lamontagne v. His Majesty the King*[1], où M. le Juge Audette, de cette Cour, écrivait que:

> The principle of construing special acts adversely to the promoters where the language is ambiguous has not been applied in the case of a public body on which powers have been conferred to carry out works of a public character. This distinction is founded on the difference in aim between a public body carrying out a scheme for public purposes only and a company incorporated for the construction of an undertaking from which profit is intended to be derived. *Cripps' Compensation* (5th ed), p. 23 This, however, is not said in aid of arriving at a conclusion on the plain language of the wording of the section above referred to, which, indeed, should receive a fair and just interpretation on the face of it. And though the statute must be complied with, a substantial compliance is sufficient. The substance and not the form will be looked to. *Lewis* on *Eminent Domain* (3rd ed. 547). Now sec. 8 of the *Expropriation Act* should receive a fair, large and liberal construction and interpretation as

[1] (1917) 16 R C de l'E., 203 aux pp. 204, 208, 209, 210.

will best ensure the attainment of the object of the Act and of such provision and enactment, according to its true intent, meaning and spirit. (*Interpretation Act*, sec. 15). And the language of the section ought not to be construed with such technical narrowness as would both defeat its very purpose and be refractory to common sense.

The object of the deposit of the plan and description is to give notice to the public in general, and to the owner of the land in particular, of the expropriation of such lands. Anyone taking plan No. 2 and the description going with the same, as above recited, would have not the slightest difficulty, or a moment of hesitation, in ascertaining what the Crown has actually expropriated. Indeed the number of each cadastral lot is to be found in the description and is also indicated upon the plan itself and in juxtaposition with all the other lots of the same parishes.

Puis, à la page 210, le savant Juge continue en ces termes:

The object and intention of the legislation doubtless was that the description of the land taken should be such as would identify it, and that the description should be of such certainty, that there should be no mistake as to its location and identity. Certainty to a common intent as to such particulars was all that could have been intended. And it has not been contended at bar that there was any difficulty in identifying the lot in question. Indeed it has been conceded that it was not necessary to give the description to each lot by metes and bounds, but that the Crown *doit donner quelque chose qui nous fait distinguer ce qu'elle prend.*

* * *

Indeed, where the cadastre is in force, as in the present case, under Art. 2168 C.C.P.Q., '*the number given to a lot upon the plan and in the book of reference is the true description of such lot, and is sufficient as such in any document whatever*'. Could any thing be clearer and more rational? And with this provincial law, the intent of the federal law absolutely agrees, and the one is cited in support of the other by way of illustration and comparison.

En regard de cet exposé, il importe de reproduire la description que l'avis d'expropriation donnait des lots concernés (p. 204):

All those lots, pieces or parcels of land situate, lying and being in the Parish of St. Gabriel de Valcartier, County of Quebec, Province of Quebec, and more particularly described as follows:—Consisting of Lots 1 to 43 inclusive: Concession 1 (new and old); Lots 54 to 95 inclusive: Concession 2 (new and old); Lots 96 to 154 inclusive: Concession 3 (new and old); . . .

La Cour Suprême du Canada, dans *The King v. Crawford*[1], décidée en 1960, a substantiellement confirmé cette interprétation. Tout comme dans l'instance *Lamontagne v. King (supra),* l'insuffisance de l'avis déposé au bureau du conservateur des hypothèques (Registrar of Deeds) dans la province d'Ontario, était alléguée par l'intimée. Or, voici la teneur de cet avis:

[1] [1960] R.C S. 527, aux pp. 528, 529, 538.

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ALL and Singular those certain parcels or tracts of land and premises, situate, lying and being in the Township of Gloucester, County of Carleton and Province of Ontario, and being composed of . . .

The whole of Lots 2, 3, 4, and 5 of Concession IV (Rideau Front) and Parts of Lots 2, 3, 4, 5, and 6 of Concession III (Rideau Front),

All in the above-mentioned Township of Gloucester. After setting out all the parcels of land these words appear:

All of which may be more particularly described as follows:—
(Then follows a detailed description at the end of which is)

ALL AS SHOWN coloured red on the accompanying plan dated July 8th, 1947 . . .

Cette identification détermina le Tribunal à maintenir l'appel interjeté au nom de Sa Majesté la Reine; je citerai quelques passages des notes de l'honorable Juge Cartwright:

In my opinion on the true construction of the opening sentence of s. 9(1), read in the context of the remainder of the sub-section and of the whole act, what is required is that the lands proposed to be taken shall be laid down or marked out on a map or plan and shall also be described by metes and bounds in a written verbal description, which plan and description shall then be deposited in the office of the proper registrar of deeds.

Cette jurisprudence, je dois l'avouer, a été cause que j'ai longuement hésité à croire qu'il ne m'était pas interdit de valider, dans les conjonctures du cas, l'avis d'expropriation. Les pétitionnaires ont reçu, je pense, antérieurement au 28 juin 1955, l'indication assez précise des intentions de l'État. J'ai dit, précédemment, qu'au mois de mars 1955, Bélanger et Madame Faubert avaient été requis de consentir à ce que les déblais de la Voie Maritime fussent entassés sur leurs lots de grève. Peu après, la construction des bâtisses fut entreprise sur ce même sol. Ils ne peuvent guère prétendre que l'omission des numéros de lots dans l'avis et la description d'emprise ait pu les induire en erreur. Quant aux tiers, dans l'intérêt desquels l'enregistrement des droits réels est aussi exigé, la vue de l'usine de pompage, du bâtiment abritant les engins électriques, les trois ou quatre puits collecteurs forés sur ces terrains, les inciterait à faire les recherches requises au bureau d'enregistrement. Ainsi, me semble suffisamment atteint l'objectif précisé par feu monsieur le Juge Audette dans l'instance *Lamontagne v. King (supra)*: "The object of the deposit of the plan and description is to give notice to the public in general, and to the owner of the land in particular, of the expropriation of such lands."

Toutefois, il est de mon devoir d'ajouter que le document à l'étude ne doit certes pas servir de modèle et j'éprouve le sentiment qu'il touche à l'extrême limite de ce qui peut être excusable, pour ne point déroger aux prescriptions de l'art. 9 de la *Loi sur les Expropriations* à l'effet «qu'un plan et une description de ce terrain . . . sont déposés dans les archives du bureau du registrateur des titres du comté ou de la division d'enregistrement où est situé le terrain».

Il m'est plus facile de disposer de l'allégation au paragraphe 4 des deux pétitions de droit «que l'Administration de la Voie Maritime du St-Laurent s'est emparée du susdit terrain sans obtenir au préalable l'approbation du gouverneur en Conseil, tel que le prescrit la Loi sur l'Administration de la Voie Maritime du St-Laurent, et ses amendements;». La pièce D-2, ci-après citée *partim,* datée le 12 mai 1955, défère en tout point à l'obligation préalable édictée par l'art. 18(1) de la *Loi sur l'Administration de la Voie Maritime du St-Laurent,* S.R.C. 1952, c. 242:

> His Excellency the Governor General in Council, on the recommendation of the Minister of Transport, is pleased . . . to approve The St. Lawrence Seaway Authority taking or acquiring without the consent of the owner or owners, pursuant to section 18 of The St. Lawrence Seaway Authority Act, such part of the lands described in the schedule hereto required for the Lachine Section of the St. Lawrence Seaway as are not the property of Her Majesty in right of Canada.

Nous verrons tantôt que ces terrains sont des lots de grève non subdivisés dont la nomenclature n'apparaît pas au plan cadastral (pièce P-54) de la Paroisse St-Antoine de Longueuil. Ce silence, dont il n'est pas nécessaire de rechercher l'explication, est sans gravité dès que des indices suffisants font légalement présumer le droit de propriété des requérants. Du reste, l'art. 2174 du Code Civil de la Province de Québec, dernier alinéa, applicable ici puisqu'il s'agit des droits civils des parties, stipule que: «Le droit de propriété ne peut être affecté par les erreurs qui se rencontrent dans le plan ou le livre de renvoi; . . .»

Il y a lieu de conjecturer que la description en style d'astronomie fut le motif qui empêcha le registrateur de noter, selon la Loi, au registre officiel, l'expropriation, malgré sa déclaration officielle, apposée sur la pièce D-1, «que le présent document est une copie conforme d'un semblable document qui a été dûment enregistré par dépôt à ce bureau . . . le 28 juin 1955.»

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Deux certificats de recherche émis par le bureau d'enregistrement de Chambly, respectivement datés le 21 novembre 1955 et le 17 juillet 1961, mis au dossier avec les numéros P-8 et P-9, ne mentionnent nullement cet enregistrement que le registrateur prétend avoir effectué. Une fois de plus, l'irrégularité semble découler des indications astronomiques dont s'est servie l'intimée dans la description de l'emprise.

La conclusion, sur ce premier point, est que la Cour croit permissible, surtout pour des motifs d'opportunité propres à cette cause, d'exonérer l'avis d'expropriation des vices de forme dont il paraît entaché.

Une longue et intéressante discussion a porté sur le droit de propriété. Les pétitionnaires invoquent accessoirement la prescription trentenaire qu'ils font remonter à 1908 (pièce P-22), soit à un contrat de mariage intervenu, le 14 octobre 1908, devant Me Choquet, notaire public, de la Province de Québec, résidant et pratiquant en la cité et le district de Montréal, entre Georges Wilfrid Parent, d'une part, futur époux de Mademoiselle Gracia Lerigé de la Plante, et cette dernière, fille mineure dûment autorisée par sa mère, veuve, d'autre part; le stipulant faisant donation à sa future épouse de deux lots de terre connus et désignés, l'un, sous le numéro I de la subdivision du lot numéro 159 des plan et livre de renvoi officiels de la Paroisse de St-Antoine de Longueuil, avec les bâtisses y érigées et la partie non-subdivisée dudit lot officiel numéro 159, bornée d'un côté par le fleuve St-Laurent, contenant environ 300 pieds de front sur environ 700 pieds de profondeur.

La séquence des titres démontre que tel est bien le lot originaire, dont des transactions subséquentes transféreront la propriété à Edouard Bélanger et à Madame Faubert, (cf. P-46 et P-48 précédemment relatés en partie, et D-5).

Ces actes attestent que les vendeurs cèdent en outre aux acheteurs les droits acquis par possession et prescription.

Cette stipulation m'oblige de retracer l'historique de ces deux lots. Pour cela, nous devons remonter aux premiers temps de la colonie. Le 10 juillet 1676, l'Intendant Jacques Duchesneau, selon les instructions du Gouverneur de la Nouvelle-France, concédait à Charles Lemoyne, écuyer, sieur de Longueuil, la seigneurie du même nom, avec l'Île Ste-Hélène et les Îles Rondes, et réunissait en une seule et même seigneurie celles précédemment octroyées en 1657 et 1664 audit Charles Lemoyne. Cette consolidation comprendrait désormais un domaine de «50 arpents de terre de front sur cent de profondeur d'une part, isles Sainte Hélène et islet rond d'austres, et estendue de terre depuis ledit sieur de Varennes jusqu'aux dits 50 arpents de front et depuis iceux jusqu'à ladite seigneurie de La Prairie de la Magdelaine, avec les isles, islets et bastures adjacentes . . .». Il est expressément reconnu par l'un des témoins de l'intimée, le notaire Arthur T. Wickham, que le lot 159 en totalité se trouve dans le tracé de l'ancienne seigneurie de Longueuil. L'admission du notaire Wickham est aux pages 13, 14 et 15 de la transcription officielle des témoignages. Je citerai ce passage. Le notaire, à qui l'intimée a confié le relevé des titres produits, (voir la pièce D-5), est tour à tour interrogé par les procureurs, Me François Dorval et Me Paul Ollivier:

Me F. DORVAL:

Q. Notary Wickham, you do know exactly where is located this lot which is actually in litigation before the Court?

A. I do.

Q. Do you know in which parish it is located?

A. I do.

* * *

Q. You don't know where the Seigneurie de Longueuil is located?

A. Yes, I do know that.

Q. Where is the Seigneurie de Longueuil located?

A. If I may be permitted to produce the plan, I can show you on the plan.

Me P. OLLIVIER:

Q. Is that the cadastral plan?

A. The cadastral plan.

(The plan is shown to the witness and he indicates on the plan the location of the Seigneurie de Longueuil).

Me F. DORVAL:

Q. Would you tell the Court if lot 159 is located in the Seigneurie de Longueuil?

A. Yes.

Ce témoin, et l'un des experts appelés par l'intimée, l'arpenteur-géomètre I. A. Faubert (transcription, pp. 23, 24) déclarent qu'une partie du lot 159, c'est-à-dire une étendue de grève, ne porte aucun numéro cadastral sur le plan officiel.

Une autre question se pose: que faut-il entendre par zone de grève?

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La marée fluviale cesse à peu de distance en amont de Trois-Rivières et, dans le port de Montréal, il ne se produit naturellement d'autres crues des eaux que celles occasionnées par des pluies excessives ou, vers le mois d'avril, par les débâcles et le lent mouvement des glaces.

Un auteur justement estimé, qui a traité avec grande compétence de ces matières de concession seigneuriale, de propriété foncière, de droits ripuaires ou riverains, l'arpenteur-géomètre Jean Bouffard, naguère chef du service des arpentages au gouvernement de Québec, définit, à la page 75, numéro 62, de son «Traité du Domaine», ce qu'est un lot de grève:

> Par lot de grève il faut entendre la partie du lit de la rivière qui découvre à chaque marée pour les rivières sujettes à la marée; pour les autres, cette partie qui découvre dans les basses eaux de l'été; dans les deux cas, il faut comprendre par lot de grève la partie située entre la ligne des eaux hautes et celle des basses eaux.

Cette définition, l'état des lieux, les déclarations des témoins, ont induit l'intimée à tacitement convenir qu'il s'agit bien de lots de grève. Cet assentiment ressort de certains passages, aux pages 19 et 28 du savant mémoire de ses procureurs:

A la page 19:

> De tout ceci, il nous paraît devoir conclure que le titre de concession de la seigneurie de Longueuil octroyait au Seigneur de Longueuil, par l'interprétation à donner aux mots 'isles, islets et bastures', un droit de propriété sur les lots de grève bornant la seigneurie sur le fleuve Saint-Laurent.

A la page 28, l'intimée fait sienne l'opinion des pétitionnaires:

> Il est à remarquer ici que les pétitionnaires n'ont nullement nié, et loin de là, qu'il s'agissait en l'occurrence d'un lot de grève. Toute l'argumentation du savant procureur des pétitionnaires, dans son mémoire, relativement aux droits de propriété, repose sur le titre de concession du Seigneur de Longueuil et plus particulièrement sur l'interprétation à donner aux mots «isles, islets, et bastures». Or, nous savons maintenant que les auteurs et la jurisprudence sont à l'effet que le mot «bastures» entend le mot grève.

L'étendue des droits riverains, concédés aux seigneurs par le Roi de France, fut l'un des principaux sujets soumis à la décision de la Cour Seigneuriale de 1854, présidée par Sir Hippolyte Lafontaine, alors Juge en chef du Bas-Canada. La vingt-septième question à cette Cour était la suivante:

> Dans les seigneuries bornées par un fleuve ou une rivière navigable, les Seigneurs pouvaient-ils légalement se réserver le droit d'y faire la

pêche, ou imposer des redevances à leurs censitaires pour l'exercice de ce droit? Quels étaient leurs droits sur les grèves de ces fleuves ou rivières? . . .

Seule la réponse à la seconde partie nous intéresse. Elle décidait que:

> Quant aux fleuves et rivières navigables, ou parties d'iceux, non sujets à la marée, les droits du Seigneur s'étendaient jusqu'à l'eau, sauf les servitudes de droit, et sans préjudice à ce qu'il a été dit ci-dessus quant aux octrois spéciaux dans les rivières navigables[1].

Une dernière citation établira hors de tout doute, croyons-nous, que les terrains expropriés, autrefois partie intégrante de la seigneurie de Longueuil, sont des lots de grève, et que l'expression «bastures» était cette mention expresse et spéciale exigée par une jurisprudence constante pour en conférer la propriété absolue au Seigneur de Longueuil, à ses hoirs et ayants cause, à la réserve près de ce qui était indispensable à l'usage public des eaux du fleuve. J'ai paraphrasé, en quelque sorte, un jugement de feu l'Honorable Juge Cimon, dans l'affaire *Dumas v. Migneault*[2]. Le savant Juge s'exprimait ainsi:

> Il est évident que les seigneurs de la seigneurie de l'Isle-Verte ont eu, dans leur titre originaire, en outre de leur seigneurie, un octroi spécial et exprès de la propriété de la grève du fleuve en front de leur seigneurie, c'est-à-dire de l'espace de fleuve couvert et découvert par les marées, ce qui est compris dans les termes: 'ensemble les «battures, isles et islets qui se rencontrent vis-à-vis les «dites deux lieues jusqu'à la dite Isle-Verte» . . . ' Les juges de la cour seigneuriale (réponses aux questions 26 et 27) ont reconnu la légalité d'un pareil octroi exprès, pourvu que cela ne contrevint pas à l'usage public des eaux du fleuve, qui est inaliénable et imprescriptible.

De tout ceci, il ressort que ces grèves ne font pas partie du lit du fleuve St-Laurent. S'il en eût été autrement, il paraîtrait problématique que l'on eût songé à exproprier une nappe d'eau.

Enfin, la Cour estime que les requérants ont acquis, en qualité de propriétaires incommutables, ces étendues de grève, tant par titres translatifs de propriété que, si besoin était, par prescription trentenaire et même décennale au gré des articles 2242 et 2206 du Code Civil.

Jugement confirmé.

[1] Lower Canada Reports, Questions Seigneuriales, vol. A, page 69A.
[2] (1898) 15 Cour Supérieure, 276.

1964
Sept. 18
Oct. 19

BETWEEN:

CRYSTAL SPRING BEVERAGE CO. LTD. .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Disallowance of capital cost allowance in respect of payment for franchise—Legal and accounting expense incurred in obtaining franchise—Payment made to obtain franchise or purchase goodwill—Deduction of amount in respect of cost of purchasing goodwill—Income Tax Act, R.S.C. 1952, c. 148, s. 11(1)(a), Regulation 1100(1)(c) and Schedule B of Class 14.

This is an appeal from the income tax assessment of the appellant for 1961 by which the respondent disallowed the appellant's claim for capital cost allowance in respect of cost of a franchise or concession for which it had paid the capital sum of $18,000, and added to the appellant's income a sum of $200 for legal expense. The appellant also claimed the sums of $225 and $200 paid to accountants and solicitors in connection with the acquisition of the franchise or concession.

It was agreed by the parties that what the appellant claimed to be a franchise is a franchise within the meaning of the *Income Tax Act.*

The appellant had for about seven years bottled and sold Seven-Up beverages throughout South Vancouver Island under a sub-franchise agreement between it and Seven-Up Vancouver Ltd., the holder of the franchise for that area from The Dominion Seven-Up Co. Ltd. During this period the appellant had purchased assets in Victoria, B.C. from Seven-Up Vancouver Ltd. and had substantially developed sales of Seven-Up in South Vancouver Island.

Because the sub-franchise agreement with Seven-Up Vancouver Ltd. was terminable by either party on 60 days' notice the appellant attempted to obtain a direct franchise for the same area from The Dominion Seven-Up Co. Ltd. The appellant was informed that The Dominion Seven-Up Co. Ltd. would not consider granting it a franchise while Seven-Up Vancouver Ltd. held a franchise for the South Vancouver Island area. Consequently, after negotiation, the appellant paid $18,000 to Seven-Up Vancouver Ltd. in consideration of its relinquishing its franchise for the South Vancouver Island area. The appellant then obtained a franchise from The Dominion Seven-Up Co. Ltd. for the area of South Vancouver Island for a term of five years, renewable for an additional five years.

The issue is whether the $18,000 paid by the appellant to Seven-Up Vancouver Ltd. is money paid for a franchise or, in other words, is part of the capital cost to the appellant of the franchise.

The evidence established that the appellant would not have received the franchise from The Dominion Seven-Up Co. Ltd. if it had not caused Seven-Up Vancouver Ltd. to relinquish its franchise rights and that

Seven-Up Vancouver Ltd. would not have relinquished its franchise without the payment to it of $18,000 by the appellant.

Held: That there is a direct causal connection between the issuance of the franchise to the appellant and the payment of $18,000 by the appellant to Seven-Up Vancouver Ltd. The appellant paid this sum for the purpose of earning income and the capital cost of this payment should be allowed pursuant to s. 11(1)(*a*), Regulation 1100(1)(*c*) and Schedule B of Class 14 of the *Income Tax Act*.

2. That the payment of $18,000 was not for the purchase of goodwill of Seven-Up Vancouver Ltd. because all that Company had to give was control of the right to market Seven-Up in the territory of South Vancouver Island.

3. That the appeal is allowed.

APPEAL under the *Income Tax Act*.

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

J. Alan Baker, Q.C. for appellant.

Alan B. Macfarlane for respondent.

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

GIBSON J. now (October 19, 1964) delivered the following judgment:

This is an appeal by the appellant from the income tax assessment for the year 1961, by which the Minister disallowed the appellant's claim for the cost of a franchise or concession for which it allegedly had paid the capital sum of $18,000; and from the Minister's addition to the appellant's income of $200 for legal expense; and for the further claim for an allowance as a deductible expense of $225 for a fee paid to accountants of the appellant and of a $200 fee paid to the solicitor of the appellant, both of which fees being incurred in connection with the acquisition of the franchise or concession.

The facts are that in the taxation year 1961, the appellant claimed as a capital cost allowance a portion of a sum which it alleged it paid to obtain a franchise from the parent company of Seven-Up beverages, The Dominion Seven-Up Co. Ltd. The Minister disallowed the claim on the basis that this expenditure by the appellant was not a cost of the franchise.

The franchise of the appellant is dated April 17, 1961, and was filed as Exhibit A-1 on this appeal.

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Gibson J.

The parties agree that this Exhibit A-1 is a franchise within the meaning of the *Income Tax Act.*

The allegation of the appellant is that in order to obtain this franchise from The Dominion Seven-Up Co. Ltd. it was necessary for it to arrange for and pay a company known as Seven-Up Vancouver Ltd. to relinquish a franchise it had for the area known as South Vancouver Island.

The appellant had for a period of seven years before the date of the franchise, Exhibit A-1, bottled and sold Seven-Up beverages under a sub-franchise agreement between it and the said Seven-Up Vancouver Ltd.

After arranging for Seven-Up Vancouver Ltd. to relinquish its franchise with the Dominion parent company, the appellant alleges it negotiated this new franchise for itself with The Dominion Seven-Up Co. Ltd.

In the course of negotiations with Seven-Up Vancouver Ltd., a sum of money was requested by it from the appellant and in the result the appellant paid to it the sum of $18,000.

The issue is whether this $18,000 paid by the appellant to Seven-Up Vancouver Ltd. allegedly for the relinquishment of the franchise by Seven-Up Vancouver Ltd. with the Dominion Seven-Up Co. Ltd. is money paid for a franchise or, in other words, is part of the capital cost to the appellant of the franchise. If it is, the provisions of section 11(1)(*a*), Regulation 1100(1)(*c*) and Schedule B of Class 14 of the *Income Tax Act* are applicable and the appellant is entitled to a capital cost allowance prorated over the term of the franchise agreement.

The franchise agreement, Exhibit A-1, is for five years plus a five-year option, which for the purpose of the *Income Tax Act* would result in an apportionment for capital cost allowance over a ten-year period.

Counsel for the Minister concedes that the monies paid to accountants and solicitors of the appellant in the sum of $225 and $200 respectively are proper expenses against income if, in fact, on the true interpretation of the *Income Tax Act* in relation to the facts of this case the appellant is permitted to charge a capital cost allowance for the payment made to Seven-Up Vancouver Ltd. in connection with this franchise.

The appellant adduced evidence through its President and General Manager, Mr. Eric Brinkworth.

According to his evidence, the appellant bottled and distributed Seven-Up in the southern part of Vancouver Island under a sub-franchise from Seven-Up Vancouver Ltd. since May 1953, until 1960.

Prior to May, 1953, Seven-Up Vancouver Ltd. had a plant in South Vancouver Island but the evidence was that it could not make any money on such a small operation and the officials of it approached the appellant and as a result rented its plant to the appellant; and the appellant also bought certain chattels and equipment from Seven-Up Vancouver Ltd.

At the time of this arrangement the appellant had its own plant and was bottling Orange-Crush, and for about a year the appellant operated in both plants, but after one year found that this method of carrying on business was uneconomical and consolidated the operations into the plant then owned by and leased from Seven-Up Vancouver Ltd.

At that juncture the appellant bought this plant from Seven-Up Vancouver Ltd., but continued to operate under a sub-franchise from it, buying syrups, and joining in certain advertising and promotional activities with it.

At all material times after this, the plant which was located at 540 John St., Victoria, B.C., was owned and operated by the appellant company and Seven-Up Vancouver Ltd. owned none of the assets in that plant.

This arrangement continued for about seven years when the appellant built up its business and in the year 1960 it appears that it was buying about a hundred gallons of extract at a cost latterly of about $204 per gallon. The cost, if the appellant had a direct franchise at this stage, would have been approximately $100 per gallon according to the evidence.

The appellant became concerned that the Seven-Up Vancouver Ltd. might cancel his sub-contract which it was entitled to do by giving to the appellant sixty days notice.

It happened that the President of the appellant attended a convention in San Francisco during the spring of 1960

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and spoke with certain officials of the parent company of Seven-Up and explained his worry to them but got no satisfaction or indication that they would deal with the appellant so long as Seven-Up Vancouver Ltd. held a direct franchise but was told that under a sub-bottler's franchise or contract the appellant "was just building a roof on another man's house".

After returning, the President of the appellant negotiated with Seven-Up Vancouver Ltd. about relinquishing its franchise so that the appellant could obtain a direct franchise from the parent company of Seven-Up. At this stage, Seven-Up Vancouver Ltd. requested $50,000 for relinquishing their franchise but the appellant was not agreeable to paying that sum and as a consequence, in order to bring the matter to a head, it served sixty days notice of cancellation of its sub-franchise with it. It did this about July 1, 1960.

Subsequent to that, the appellant and Seven-Up Vancouver Ltd. negotiated to settle their conflict as to the quantum of payment to be made and towards the end of August, 1960, they eventually settled on the price of $18,000 to relinquish this franchise.

At this time, also, the President of the appellant contacted the parent company of Seven-Up Vancouver Ltd. and informed it of the arrangement and was given substantial assurance that it would receive a direct franchise once the Seven-Up Vancouver Ltd. vacated or relinquished its right to the franchise in South Vancouver Island.

Seven-Up Vancouver Ltd. authorized its solicitor, Sidney Halter of Winnipeg, Manitoba, to draw up a contract evidencing this settlement between it and the appellant and on October 3, 1960, the President of the appellant attended the office of Seven-Up Vancouver Ltd. and handed it a cheque for $18,000 and received the draft contract which had been prepared by Mr. Halter. The President of the appellant signed the same but took it with him saying that he wanted to consult his solicitor and accountant before delivering it to Seven-Up Vancouver Ltd.

In the result, the contract was never delivered because the solicitors for the two parties could not agree on its form.

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It was apparent that each had the provisions of the *Income Tax Act* in mind, but it is patent, according to the evidence, that the principals involved really were unaware at the material time of the precise relevant provisions which would produce to each the maximum tax advantage. The principals, however, were at one in their understanding that the payment of $18,000 was for relinquishing the franchise.

The appellant apparently felt that by obtaining this relinquishment of this territory franchise from Seven-Up Vancouver Ltd. so as to enable it to get the direct franchise with the parent company that it got protection and would be in a position to earn a greater income than had heretofore been the case. This in fact was the case.

The evidence was that the first draft agreement of franchise which came from the parent company to the appellant was unlimited as to time and it was not acceptable to the appellant who returned it to the parent company and then after negotiations the present form of contract, Exhibit A-1, was executed which provided for a term of five years plus a renewal for an additional five years.

The appellant alleged on this appeal that the rights that he was buying and paying $18,000 for to Seven-Up Vancouver Ltd. were for relinquishing the relevant territory; and all that Seven-Up Vancouver Ltd. could do and did do with reference to this new franchise which the appellant negotiated with the parent company, was to inform the parent company that it had relinquished its franchise with it.

The appellant submitted that the question of whether the $18,000 was paid for the relinquishment of a franchise was a settled question of fact because in paragraph 3 of the Reply to the Notice of Appeal of the respondent it was admitted "that the appellant agreed to pay and did pay Seven-Up Vancouver Ltd. the sum of $18,000 in consideration of relinquishing certain territory".

The only question to be decided, therefore, counsel for the appellant submitted, was the question of whether the payment made under these circumstances can be considered a cost of the franchise within the meaning of the *Income Tax Act*.

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Counsel for the appellant conceded that there was no decided case directly in point, but submitted in support of his argument that certain cases in certain respects were analogous, *viz*: *Lions Equipment Ltd. v. Minister of National Revenue*[1]; *Jan V. Weinberger v. Minister of National Revenue*[2]; *K. V. P. Co. v. Minister of National Revenue*[3]; *No. 283 v. Minister of National Revenue*[4]; *No. 614 v. Minister of National Revenue*[5]; and *E. Gordon Hudson v. Minister of National Revenue*[6].

Counsel for the respondent submitted that the $18,000 paid by the appellant to Seven-Up Vancouver Ltd. was either (a) a payment for goodwill, or (b) a payment made to a party who was not the franchise grantor and, therefore, the payment was not a part of the cost of a franchise within the meaning of the *Income Tax Act*.

He cited in support of his submission *Mark Crompton v. Minister of National Revenue*[7].

On the evidence adduced I am of opinion that the sole question of fact is whether the payment of $18,000 by the appellant to Seven-Up Vancouver Ltd. in consideration of the latter relinquishing certain territory is part of the legal cost of the franchise, Exhibit A-1.

(The matter of the addition to the appellant's income of $200 for legal expenses was abandoned by the respondent; and the matter of whether the $200 and $225 for legal and accounting fees respectively can be charged as expenses incurred in earning income has been agreed by counsel to be dependent on the determination of the above question of fact and the legal consequences flowing therefrom.)

I am of the opinion on the evidence adduced that the appellant would not have received the franchise, Exhibit A-1, from the parent company of Seven-Up if it had not caused Seven-Up Vancouver Ltd. to relinquish its franchise rights in the territory of South Vancouver Island; and that Seven-Up Vancouver Ltd. would not have relinquished the said franchise without the payment to it of $18,000 by the appellant.

[1] 64 D T.C. 35; 34 Tax A B C. 221.
[2] 64 D.T C. 5060; [1964] C T C 103.
[3] [1957] Ex. C.R. 286; 57 D.T.C. 1208.
[4] 13 Tax A.B C. 385; 55 D.T.C. 500.
[5] [1959] D T.C. 238; 22 Tax A.B C. 21.
[6] 58 D.T.C. 211; 19 Tax A B C. 95.
[7] 31 Tax A B C 269, 17 D T C 259

There is, in this case, therefore, in my opinion, direct casual connection between the issuance of the franchise, Exhibit A-1, to the appellant and the payment by the appellant to Seven-Up Vancouver Ltd. of the sum of $18,000. The appellant paid this sum for the purpose of earning income and in fact by reason of this payment resulting in the obtaining of the franchise, Exhibit A-1, the appellant did increase his income and as a consequence the capital cost of this payment should be allowed pursuant to the provisions of section 11(1) (a), Regulation 1100(1) (c) and Schedule B of Class 14 of the *Income Tax Act*.

I am of opinion that, in the circumstances of this case, the fact that the solicitors for the appellant and the solicitor for Seven-Up Vancouver Ltd. could not agree on the precise final form of a contract of relinquishment of franchise is not relevant to the decision herein because on the evidence adduced it is patent that the parties themselves were *ad idem.* The appellant paid to and Seven-Up Vancouver Ltd. received the $18,000 for the express and only purpose of the relinquishment of the latter's rights to the said franchise for the territory in South Vancouver Island.

I am further of the opinion that the payment of $18,000 made in this matter was not for the purchase of goodwill of Seven-Up Vancouver Ltd. because all that the vendor company had to give was control of the right to market the product Seven-Up in the said territory. In any event, even if this was considered to be goodwill, then payment for the same was made in this case for the purpose of getting Seven-Up Vancouver Ltd. out of the field and in these circumstances the capital cost of accomplishing this should be allowed by permitting a deduction from income each year for the whole of the sum paid pro-rated over the period for which the new franchise to the appellant was granted by the parent company Seven-Up. In this view of the transaction, the payment made by the appellant to Seven-Up Vancouver Ltd. was not a payment to a third party.

In the result, the appeal is allowed with costs.

Judgment accordingly.

1962 Jan 8-11, 23-26, 29-31, Feb. 1, 2 and 5. — 1964 Oct. 23

BETWEEN:

HOECHST PHARMACEUTICALS OF CANADA LIMITED and FARBWERKE HOECHST AKTIENGESELLSCHAFT VORMALS MEISTER LUCIUS & BRUNING ....PLAINTIFFS;

AND

GILBERT & COMPANY, GILBERT SURGICAL SUPPLY CO. LIMITED, JULES R. GILBERT LIMITED and JULES R. GILBERT ....DEFENDANTS.

Patents—Infringement—Validity—Process claim—Utility—Specification of patent—Inventiveness of application of known methods to known materials—Must be both new and useful to support invention—Product claim depending on process claim—Validity of process claim dependent on all or substantially all of products of class produced thereby possessing previously unknown usefulness—Utility of products of process claim consisting of application of known method to known material—Application of known method to limitless class of known materials to produce limitless class of expected products some of which may possess utility—Inventiveness where unexpected utility of certain tested members of the class of products produced forms foundation for sound prediction that all or substantially all members of class possess the utility—Invalidity of patent claim for process for making whole class of substances when no such broad invention has been made despite utility of some of products of class—Distinction between utility of products of invention and utility of specific substances of the class—Burden of proving that processes claimed would not produce whole class of useful substances where class composed of limitless number of substances—Pleading objections to patent—Patent Act, R.S.C. 1952, c. 203, s 41(1).

The plaintiffs are respectively the exclusive licensee and the owner of ten patents, the first of which issued on a parent and the remainder on divisional applications for patents in respect of an invention entitled "Manufacture of New Sulphonyl Ureas". They allege infringement on the part of the defendants of claim 10 in the first nine patents and claim 13 in the last one, the alleged acts of infringement being the sale and use by the defendants of the substance known generically as "tolbutamide", which is the compound claimed by the said claims.

The defendants admit the alleged use and sale of the compound "tolbutamide" but they deny infringement and they also plead that claim 1 in each patent is invalid because *inter alia* not all products produced by the process have utility as claimed, and claim 10 in the case of each patent (13 in the last patent) is invalid because *inter alia* claim 1 was necessary to support it.

Held: That the specifications of the patents in issue should be regarded as purporting to disclose several different inventions, one or more pertaining to a class or classes of substances, another to the single substance known as tolbutamide and several others to the particular

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substances claimed in claims 11 to 19 inclusive (14 to 21 in the last patent). This is so because the disclosure does not purport to be one of an invention of tolbutamide alone or of it and a process or processes for its preparation but on the contrary purports to relate to a class of sulphonyl ureas of which tolbutamide is one member, and it proceeds to outline in general terms methods by which ureas of the class may be produced and to assert utility for the substances of the class.

2. That there is nothing inventive in applying known methods to known materials or kinds of materials even if no one has previously applied the methods to the particular materials and even if the result is a new product. To have a patentable invention the products in such a case besides being new must be useful in the patent sense and only if they are both new and useful can they and the process for producing them be the subject of a patent.

3. That in the case of each patent the claim sued on is a claim for the substance known as tolbutamide when made by the process of claim 1 or an obvious chemical equivalent. In each case this is a claim to which s 41(1) of the *Patent Act* applies and assuming validity in other respects such a claim can be valid only if it is accompanied by a valid process claim and is limited to the substance when produced by that process or by an obvious chemical equivalent. Accordingly, in the case of each patent the validity of the claim sued on depends on the validity of claim 1.

4. That claim 1 in each of the patents cannot be supported as a valid claim unless all, or substantially all, members of the class of sulphonyl ureas defined in them possess some previously unknown usefulness.

5. That even if claim 1 in each of the patents were read as embracing only those members of the class which as a matter of practical chemistry or of commercial manufacture could be made, it would still be necessary to the validity of the claim for all, or substantially all, of such members to possess some previously unknown usefulness. If this utility is not common to all, or substantially all, of the members of the class, the process claimed in claim 1, consisting as it does of the application of a known method to known materials or to materials having known chemical features, does not represent an invention of a process at all, let alone a patentable invention of a process.

6. That a patent claim in respect of an invention, the embodiments of which are stated to include a process for the making of a whole class of substances, when no such broad invention has been made, will purport to confer an exclusive property in something which the inventor has not invented, and since the *Patent Act* authorizes the grant of a patent only for an invention which the inventor has made, such a claim will be invalid. Nor can the utility of some of the products of the class save the claim.

7. That in considering the evidence with respect to the question of the utility of the sulphonyl ureas of the class defined in claim 1 of the patents, it is important to distinguish between the utility of "the products of the invention", that is to say, insofar as claim 1 is concerned, the whole group of sulphonyl ureas included in the definition of the claim, and the utility of the specific substances of the class, including tolbutamide, which are cited as examples in the specifications or are described in the evidence.

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8. That it is highly improbable that all, or substantially all, of the members of the infinitely large class defined in claim 1 of the ten patents have either the blood sugar lowering activity to a useful extent or the freedom from toxicity or harmful side effects necessary to render them useful and that there was accordingly no invention as claimed in claim 1 of each of the patents and claim 1 is therefore invalid.
9. That because claim 1 of each of the patents is invalid claim 10 of the first nine patents and claim 13 of the last patent are invalid as well.
10. That while the objections to the patent are pleaded in a confusing manner, the objection which has been sustained is raised, and is thus open to the defendants, by the plea that claims 1 and 10 of the first nine patents and claims 1 and 13 of the last patent are invalid because there was no invention having regard to the common knowledge of the art.
11. That the action is dismissed.

ACTION for infringement of a patent.

The action was tried by the Honourable Mr. Justice Thurlow at Ottawa.

Christopher Robinson, Q.C. and *R. S. Smart* for plaintiffs.

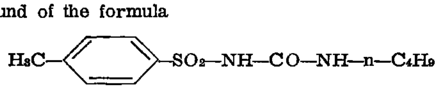
I. Goldsmith for defendants.

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

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

In this action the plaintiffs claim an injunction and other relief in respect of alleged infringement of ten patents numbered 582,621 to 582,627 inclusive, 588,513, 588,514 and 590,201, of which the first issued on a parent and the remainder on divisional applications for patents in respect of what is referred to in their specifications as "an invention entitled 'Manufacture of New Sulphonyl Ureas' ". Each of the patents contains a claim (numbered 10 in the first 9 of the patents and numbered 13 in the last) which reads:

The compound of the formula



whenever obtained according to claim 1 or the obvious chemical equivalent thereof

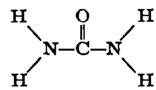
and in the case of each of the patents it is this claim alone which the plaintiff alleges has been infringed. There are various technical names which chemists would recognize as referring to the compound of the formula set out in these claims, one of which is N-(4 methyl benzene sulphonyl)-N_1-(n-butyl) urea. This is the name used in the specifications but the simplest name for the substance is the generic name, "tolbutamide".

The second named plaintiff is the owner of the ten patents and the other plaintiff is its exclusive licencee under them. The defendant, Gilbert and Company is a registered proprietorship of which the defendant, Gilbert Surgical Supply Co. Limited is the sole proprietor and it is alleged by the plaintiffs that this defendant has in the ordinary course of business sold throughout Canada tolbutamide in infringement of the patents and threatens to continue to do so and that the other corporate defendant has in the ordinary course of business used, in its plant in Toronto, tolbutamide in infringement of the patents and threatens to continue to do so. These defendants respectively admit selling and using tolbutamide which is admittedly imported from Italy but they deny that they sell or use it or threaten to do so in infringement of the patents. They also plead that claims 1 and 10 of the first nine patents and claims 1 and 13 of the last patent are invalid for a number of reasons some of which will be referred to later in these reasons and one of which is that there was no invention having regard to the common knowledge of the art. The allegations against the remaining defendant, Jules R. Gilbert, need not be considered as the action against him has been discontinued.

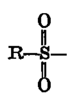
The value and importance of tolbutamide lies in its usefulness in the treatment of diabetes. Until shortly before its introduction in the latter part of 1956 treatment of the common form of this illness, known as diabetes mellitis, consisted mainly, if not entirely, in putting the patient on a diet designed to bring about and maintain a proper level of sugar in his blood and if this was not successful or efficient to accomplish the desired result, to administer insulin. Insulin could not be taken orally and thus had the disadvantages associated with administration by needle including those due to the reluctance of the patient and those due to his own shortcomings when administering it himself resulting in administering at times too much and at other times too little. Insulin also had undesirable effects on the tissue adjoining the site of injections carried out over a long period. Early in 1956 a substance known as carbutamide which was known to have blood sugar lowering activity, and which had bacteriostatic activity as well, came into use as an oral antidiabetic, the bacteriostatic activity was undesirable as it tended to destroy bacteria necessary to normal body functions and in October 1956 carbutamide was withdrawn from use in Canada and the United States apparently because of reported undesirable long term effects on the livers and kidneys of patients by whom it had been used. Tolbutamide had already been synthesized and, to some extent, tested before carbutamide was introduced and shortly before the latter was withdrawn it came into use in Canada for the same purpose. The evidence of Dr. J. B. R. McKendry satisfies me that tolbutamide has proven to be a satisfactory oral antidiabetic and has been of considerable value in the treatment of many cases where dieting alone has been insufficient to establish and maintain a proper blood sugar level. Since its introduction at least two other oral antidiabetics have come into use for the same purpose one of which, chlorpropamide, has more pronounced and longer lasting blood sugar lowering activity than tolbutamide but at the same time involves increased danger of undesirable long term effects. These substances are not suitable for the treatment of all types of diabetes nor are they effective for all patients or for what I shall call the severe cases of diabetes mellitis. For these insulin remains the standard remedy. But in a considerable proportion of the cases of diabetes mellitis tolbutamide is effective as a blood sugar lowering agent, and has the advantage of oral administration, and at the same time a satisfactory record of comparatively low toxicity and freedom from harmful side effects.

Before commenting on the specification I shall endeavour to explain some of the chemical concepts and terms which occur in them pertaining to sulphonyl ureas, an understanding of which appears to be necessary to interpret the specifications and to render what follows intelligible.

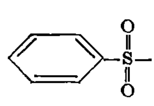
Urea is a single substance having a symmetrical molecular structure containing one atom of carbon, one of oxygen, two of nitrogen and four of hydrogen. The carbon atom has four valencies by which it may be linked to other atoms in the molecule of a substance. The oxygen atom has two valencies, the nitrogen atom has three and the hydrogen atom has one. In the urea molecule the carbon atom is at the centre with the oxygen linked to it and occupying two of its valencies the other two being linked to nitrogen atoms. The remaining positions of the nitrogen atoms are occupied by the hydrogen atoms. The structural formula may be represented thus:



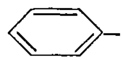
This represents the single substance known as urea but there is a huge group of conceivable substances in which the position of one or more of the hydrogen atoms in the urea molecular structure is occupied by some other atom or group of atoms and these substances are also known as ureas, their chemical names being determined by the names of the substituted atoms or groups and the position which they occupy. Thus such a substance having a sulphonyl group

(RSO_2 or structurally )

in the position of one of the hydrogen atoms in urea is known as a sulphonyl urea and since the R in this sulphonyl group may represent any organic radical, the substances which can be regarded as sulphonyl ureas alone constitute an enormous class. One of the commonest of the organic groups is the benzene ring which consists of six carbon and six hydrogen atoms and which on releasing one of its hydrogen atoms may be linked as the R in a group such as RSO_2 which may then be represented thus



When linked in such a group the benzene ring is also known as phenyl and the representation



in this structure is taken as meaning that there is a carbon atom at each corner of the hexagon with a hydrogen atom linked to it in the case of each carbon atom except

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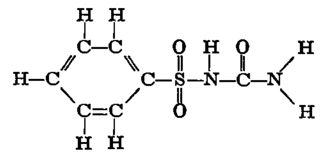
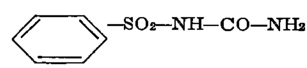
the one which is linked to the sulphur atom. The substance of the formula

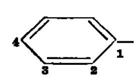


which may more simply be written as

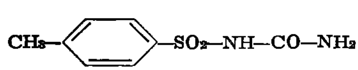


would thus be known as benzene sulphonyl urea.

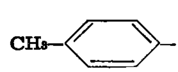
The benzene ring as well may have substituents in the place of hydrogen atoms in its structure and for identification purposes the corners, starting from that linked to another group, are referred to as ortho, meta and para, para being that at the opposite corner from that linked to another group. At other times the corner may be numbered thus



Accordingly if one has a methyl (CH_3) group in the para or 4 position of the benzene ring of benzene sulphonyl urea the molecule might be represented thus

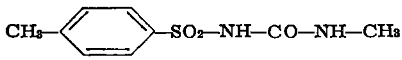


and the substance would be known as para methyl benzene sulphonyl urea or 4-methyl benzene sulphonyl urea. The group para methyl benzene



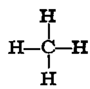
is a common one in organic chemistry and goes as well by the shorter name, paratoluene, and thus it would be equally correct to name the above mentioned substance paratoluene sulphonylurea. It will be observed that this para toluene sulphonyl group makes up the left hand portion of the molecular formula of the compound represented in the claims sued on.

Most of what I have said so far with respect to substitutions in the urea molecule has been concerned with substitution at one end only of the molecule. When there are substitutions at both ends it is necessary in the naming of the substance to distinguish accordingly. This is done by referring to the nitrogen atoms as N and N_1 and a substance with substitutions on both nitrogens such as

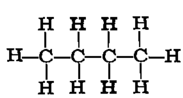


could thus be called N-para toluene sulphonyl-N_1-methyl urea.

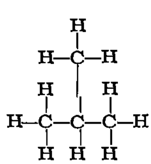
As previously mentioned the carbon atom has four valencies and when these are occupied by hydrogen atoms the substance is methane which may be represented as CH_4 or structurally as



The removal of one hydrogen atom from this group leaves CH_3, the group known as methyl, which may be linked by the remaining carbon valence to atoms or groups to form a great variety of compounds. Similarly when two, three or four or more carbon atoms are linked in singly bonded straight chain formation with the remaining valencies occupied by hydrogen atoms, the substances are known respectively as ethane, propane, butane, etc., the name depending on the number of carbon atoms in the chain. In the case of butane, C_4H_{10}, besides the straight chain formation



which is known as normal butane, the carbon atoms may be linked thus



and this substance is known as isobutane. Two different mono substituted derivatives of normal butane are conceivable, the difference depending on whether the linkage to other atoms is made with an end or an intermediate carbon atom and two further different mono substituted butyl groups may be derived from isobutane, the difference again depending on whether the linkage is to an end carbon atom or to the central carbon atoms. The name used to designate a butyl group of the kind wherein the carbon atoms are in straight chain formation and the bonding to other atoms or groups is by an end of the chain carbon atom is normal butyl and this is indicated in formulae by the letter -n- preceding the expression used to designate butyl in the formula. The other butyl groups are respectively known as secondary butyl, isobutyl and tertiary butyl. On referring back to the molecular formula represented in the claims sued on it will be seen that it is an n-butyl group which occupies one of the valencies of the nitrogen atom on the right hand side of the urea molecule.

Groups made up of carbon and hydrogen atoms, whether the carbon atoms are linked in straight chain or other patterns (other than ring patterns), are known by the general name of alkyl groups and this expression is broad enough to include any group of that nature whether it has one or any larger number of carbon atoms. Where such a group instead of being linked directly to other distinguishing components of a molecule is linked through an oxygen atom,

$$\begin{array}{ccccc} & & H & & \\ & & | & & \\ H & - & C & - & O- \\ & & | & & \\ & & H & & \end{array}$$

the group consisting of the alkyl group and the oxygen atom is known as an alkoxy group. This term is thus as broad in the number of conceivable groups which it includes as is "alkyl". Further terms to which reference will be made are "halogen" which is the family name of the four elements, fluorine, chlorine, bromine and iodine, and "aliphatic" which, as I understand it, is a term used with respect to all hydrocarbon groups both saturated and unsaturated except the class known as aromatic. Cyclo-aliphatic has a similar meaning but refers to aliphatic, as opposed to aromatic groups in which the carbon atoms are joined in a ring formation.

I turn now to the specifications. The disclosure portion of these is the same in the case of all ten patents the only differences between them being in the claims and in certain supplementary examples which are admittedly not relevant to the present case. The disclosure does not purport to be one of an invention of tolbutamide alone or of it and a process or processes for its preparation but on the contrary purports to relate to a class of sulphonyl ureas of which tolbutamide is one member, and it proceeds to outline in general terms methods by which ureas of the class may be produced and to assert utility for the substances of the class. Tolbutamide is mentioned from time to time as an example of the class but not until one reaches claim 10 (13 in the case of the last patent) is there any indication that the invention is concerned with anything but a whole class of substances and general methods of producing them. In this respect the specifications resemble that considered in *C. H. Boehringer Sohn v. Bell Craig Ltd.*[1] and for the reasons there given at pages 209 to 215 I am of the opinion that these specifications should be regarded as purporting to disclose several different inventions, one or more pertaining to a class or classes of substances, another to the single substance known as tolbutamide and several others to the particular substances claimed in claims 11 to 19 inclusive (14 to 21 in the last).

The specification of patent number 582,621—omitting immaterial details—is typical of the ten and commences as follows:

BE IT KNOWN that (several persons whose addresses are set out) having made an invention entitled

"Manufacture of new sulphonyl-ureas"

the following disclosure contains a correct and full description of the invention and of the best mode known to the inventor(s) of taking advantage of the same.

It is known from literature that certain compounds belonging to the class of aminobenzene sulphonamides are capable of lowering the blood sugar value in test animals, for example, of dogs. Thus, for example, para-aminobenzene-sulphonamido-isopropyl-thiodiazole produces a moderate lowering of the blood sugar value in dogs for 4 to 6 hours (compare: Jean la Barre and Jean Reuse, Arch. neerland. physiol. 28 [1947] page 475).

I pause to mention that the substance referred to is also known as IPTD and it was much too toxic for use in the treatment of human beings.

There are also known certain benzenesulphonyl ureas, such as N-benzenesulphonyl-urea, N-benzenesulphonyl - N′ - phenyl-urea, N - benzenesulphonyl-N′:N′-diethyl-urea, N-para-toluene sulphonyl-urea and N-para-toluenesulphonyl-N′-phenyl-urea (compare: Chem. Rev., volume 50, pages 28/29). However, these substances have not yet attained any commercial importance. Other products belonging to the series of sulphonyl-ureas are known from U.S. Specification No. 2,390,253 and French Specification No. 993,465.

[1] [1962] Ex. C.R. 201.

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No evidence of the U.S. Specification was given but the French Specification is in evidence and describes a method of preparing an enormous group of ureas embracing as a mere part the whole of the group referred to in the ten patents here in question. The method described in the French patent is also described in the ten specifications here in question and is the method involved in claim 1 of patent number 582,621. The specification continues:

The present invention provides sulphonyl-ureas of the general formula

$$R—SO_2—NH—CO—NH—R_1$$

in which R represents a phenyl radical which may contain one or two substituents selected from alkyl and alkoxy residues, of which the alkyl group is preferably of low molecular weight, and halogen atoms, or represents an aliphatic or cycloaliphatic hydrocarbon radical containing at least three carbon atoms, and R_1 represents an aliphatic or cycloaliphatic hydrocarbon radical containing at least 2 carbon atoms.

As alkyl residues, of which one or two may be present as substituents in the phenyl radical, and bound, if desired, through an oxygen atom, there may be mentioned, more especially, those of low molecular weight. Especially advantageous are those containing 1 to 3 carbon atoms, but residues containing 6 or more carbon atoms may be present. *When these residues are of higher molecular weight the activity of the products is generally considerably lower.* Instead of being alkylated or alkoxylated, the benzenesulphonyl compounds may contain as substituents in the phenyl residue one or two halogen atoms, preferably chlorine or bromine atoms, or a halogen atom and an alkyl or alkoxy group. The processes for making the sulphonyl-ureas described above are also suitable for making the halogenated benzene sulphonyl compounds.

The primary amines used as starting materials in the above processes advantageously contain saturated or unsaturated aliphatic or cyclo-aliphatic hydrocarbon radicals containing 3 to 6 carbon atoms. However, they may contain radicals of higher molecular weight, but *radicals containing more than 12 carbon atoms generally reduce the activity of the products.*

(The italics are my own.)

With respect to the second italicized statement exhibit H indicates that at 12 carbon atoms the activity has reached zero. This passage however refers only to the substituents on the right hand side of the urea molecule and it may be noted at this point that claim 1 is restricted in that respect to groups containing from 2 to 8 carbon atoms. There follow several pages of general description of the methods—all of which were already well known to chemists—and of various starting materials of which it is stated that many of them "suitable for use in the present process have been described in literature". Up to the end of this portion of the disclosure there is accordingly nothing whatever to indicate a patentable invention for there is nothing inventive in applying known methods to known materials or kinds of materials even if no one has previously applied the methods to the particular materials and even if the result is a new product. To have a patentable invention the products in such a case besides being new must be useful in the patent sense and only if they are both new and useful can they and the process for producing them be the subject of a patent. *Vide* Jenkins, J. in *Re May & Baker et al.*[1] at page 281.

The next nine pages of the specification, however, deal with the utility of the products. The specification states:

> As has been demonstrated by experiments on animals and in clinical tests, the products of the invention produce a substantial lowering of the blood sugar level. They may be used as such or in the form of their salts, or in the presence of substances that cause salt formation. For salt formation there may be used, for example, amonia, an alkaline substance such as an alkali metal or alkaline earth metal hydroxide, an alkali metal carbonate or bicarbonate, or a physiologically tolerated organic base. The compounds can be made up, inter alia, into preparations suitable for oral administration and lowering the blood sugar in the treatment of diabetes.

There follows a description of the results of tests on animals dealing, first, with the blood sugar lowering activity of nineteen members (tolbutamide being one) of the class in tests on rabbits, dealing next with the same activity of thirteen members (tolbutamide being one) of the class in tests on dogs and, finally, with the results of tests on humans. In this respect the specifications states as follows, the italics being intended to point out expressions which in my opinion indicate that what is being asserted is not utility for tolbutamide alone but for all the products of the alleged invention.

> Clinical tests performed on a large number of patients have fully established the efficacy of the *products of the present invention*, for example, N-(4-methyl-benzene-sulphonyl)-N′-(n-butyl)-urea and N-(4-methyl-benzene-sulphonyl)-N′-isobutyl-urea, in lowering the blood sugar level. For example, the first named compound lowers the blood sugar level of healthy human beings by an average of 20-40 mg/per cent. In the case of certain diabetics a lowering, for example, of about 300 mg/per cent to the normal value of about 120 mg/per cent has been observed. *The products of the invention* have been tested as anti-diabetics in light and severe cases of diabetes mellitus. In many cases an impressive improvement in the metabolism was observed, more especially in sthenicadipose patients of advanced age. High glycosuriae and hyperclycaemiae have been normalised to a far-reaching extent, and the patients were freed from troublesome polydypsia and polyuria. In some cases the products develop their action on the very first day, and in general between the 2nd and 5th day. The reduced glycosuria is invariably accompanied by a distinct lowering of the blood sugar

[1] 65 R.P.C. 255.

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level. The renal threshold for glucose is not raised. *During the administration of the compounds* the usual diabetes diet must be strictly observed. Observations so far made show that *the compounds are effective in most,* but not in all forms of diabetes.

With some patients successfully treated for a prolonged period with *the compounds of the invention* the metabolism remains compensated for some time after the compounds have ceased to be administered and can be re-established, if necessary, by renewed administration. So far no insulin-resistance has been observed. The patients can be changed over to insulin treatment at any stage after treatment with *the compounds of the invention.* The blood count, function of the liver and the urine of the patients treated were carefully checked and displayed no pathological changes. The patients can also be treated with a combination of *the products of the invention* and insulin, whereby a saving in insulin and an improvement of the metabolism are achieved. In these cases the patients must be treated under particularly strict supervision, because the combined effects involve an increased risk of insulin shock.

The compounds of the invention may be administered in accordance with the following guiding principles, in which N-(4-methyl-benzenesulphonyl)-N'-(n-butyl) urea is used as an example.

To produce rapidly a sufficiently high blood sugar level, 2-3 grams of this compound are administered on the first day with careful checks of the metabolism. On the second day the dose is reduced to 1.5-2 grams, and on the following days 1 to 1.5 gram each are administered. In some cases the dose can be further reduced or entirely dispensed with, while keeping constant check on the sugar in the blood and in the urine. Owing to the protracted action of the compound the daily dose can be administered all at once. Higher doses do not as a rule produce an increased action.

The compounds of the invention are usually extremely well tolerated. *Their* acute *toxicity* (tested on mice or rats), as can be seen from the following Table, is between 1 and several gram/kg at an LD_{50}, for oral administration:

Next there is a table indicating the results of lethal dose tests of twelve members of the class (tolbutamide being one) on mice and of tolbutamide on rats, and the specification continues:

Tests conducted with N-(4-methyl-benzene-sulphonyl)-N'-n-butyl-urea, marked S^{34}, have shown that the blood very rapidly absorbs *the compounds* from the alimentary canal. Their discharge into the urine also occurs relatively rapidly and almost quantitatively. No detectable amounts accumulate in particular organs, and *the good tolerance of the compounds* can be attributed to this fact. Thorough pharmacological investigations, more especially with respect to muscle and liver glycogen, have shown that the lowering of the blood sugar by the compounds of the invention is not the symptom of a toxic action. Moreover, the tolerance in the endurance test, as has been demonstrated on animals by administering over a period of several months a daily dose of 100 mg/kg, *for example,* of N-(4-methyl-benzene-sulphonyl)-N'-n-butyl-urea, is very high.

Extensive clinical tests performed on numerous patients have demonstrated *the good tolerance of the compounds,* for example, N-(4-methyl-benzene-sulphonyl)-N'-n-butyl-urea and of N-(4 methyl-benzenesulphonyl)-N'-isobutyl-urea.

As compared with compounds of similar constitution of the sulphanilyl series *the compounds of the present invention* are distinguished, on one hand, in that they are more resistant to external oxidising influences, such as atmospheric oxygen, which is of importance to their shelf-life and handling, and, on the other, in that *they* have no bacteriostatic action.

Furthermore, the new compounds do not produce the secondary effects of sulphonamides on the blood (Heinz bodies) or on the thyroid gland, nor the digestive disturbances caused by action on the bacterial flora of the alimentary tract.

Next there follow, introduced by the statement "The following examples illustrate the invention", 41 examples describing methods of preparation of various members of the class. Three of these are examples of specific methods for the making of tolbutamide. In another example, forming part of a supplementary disclosure, which describes the making of a compound differing from tolbutamide only in that its right end group is an isobutyl group, it is stated tolbutamide may be similarly made. This completes the disclosure portion of the specification.

The specification then states:

THE EMBODIMENTS OF THE INVENTION IN WHICH AN EXCLUSIVE PROPERTY OR PRIVILEGE IS CLAIMED ARE DEFINED AS FOLLOWS:

and in the case of each of the ten patents there is a group of claims the first of which is for a process for making the same class of sulphonyl ureas, but in each case by a different chemical reaction. Claim 1 of patent 582,621 is typical and reads as follows:

1. A process for the manufacture of sulphonyl-ureas of the general formula

$$R—SO_2—NH—CO—NH—R_1$$

in which; R is a radical selected from the group consisting of phenyl, substituted phenyl having up to two substituents selected from the group consisting of alkyl-alkoxy and halogen, and aliphatic and cycloaliphatic hydrocarbon containing 3-8 carbon atoms; R_1 represents a radical selected from the group consisting of aliphatic and cycloaliphatic hydrocarbon containing 2-8 carbon atoms, and salts thereof; said process comprising reacting together compounds of the formula.

$R—SO_2—NH_2$ or its alkali salts and $R_1—NCO$.

It is the portion of this claim commencing with the words "said process comprising reacting together" which differs from claim 1 of the other nine patents and in which they differ from each other.

It will be observed that the number of mathematically conceivable substances embraced in the class defined in this

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claim is infinite. More than one hundred substances are conceivable by taking any one of the left hand or R substituents and applying all the possible variations of the finite class defined for the right hand or R_1 group. A group many times the size of that number is also conceivable by applying it to the various substituents embraced within the finite portions of the left hand or R group. But in using the expressions "alkyl" and "alkoxy" and in embracing both single substituents in the phenyl ring in any of three positions and combinations of any two substituents in any two positions the language places no mathematical limit whatever on the number of carbon atoms or the formations thereof which such groups can have and thus makes the number of members of the class mathematically infinite. Nor is there evidence of how many members of this class are conceivable either as a matter of practical chemistry or for the purposes of practical commercial manufacture. As a matter of interpretation however it is in my opinion clear that the claim refers to every mathematically conceivable sulphonyl urea of the class for I can see no basis upon which anyone who might contrive to make a substance of the class, however inconceivable the preparation of such a substance may have been at the time of the drafting of the claim, could successfully maintain that his substance was not within the class. But even if the claim were read as referring only to those members of the class which as a matter of chemistry or even of commercial manufacture could conceivably be made, I see no reason to doubt that it would refer to a class many thousands strong. (*Vide* evidence of Professor Brown at pages 325 to 327).

I turn now to the objections to the validity of claims 1 and 10 (13 in the last) raised by the defendant in the course of the argument. A few of these objections applied to only one or two of the ten patents and in view of the conclusion I have reached it will serve no purpose either to set them out or to deal with them. The remainder applied in the same way to all ten patents. It was submitted:

(1) that there is ambiguity in the specifications as to what the invention is.

With respect to this point I have already expressed the view that the specification purports to disclose several different inventions.

(2) that the class of sulphonyl ureas or particular members of it could be new only once and therefore could not afford unexpected utility more than once for the purpose of supporting a patent and that since it is impossible to tell on the evidence which of the ten processes was carried out first to produce members of the class, all ten patents must be treated as invalid;

(3) that as a group the compounds were not new having been disclosed by three earlier French patents, that some members of the group were not new and that it should be inferred that tolbutamide itself had in fact been made earlier and was not new at the date of the alleged invention of the patents in suit;

(4) that if on the one hand the invention as disclosed is regarded as being broad enough to include the whole class of substances it is plain that all of the substances have not been produced, but, if on the other hand the invention is regarded as embracing only the substances the preparation of which is described in the disclosure it is plainly much narrower than what is claimed and in either case the claims claim more than the inventor invented;

(5) that claim 10 (13 in the last) is invalid because

(*a*) tolbutamide was not new, for the reason mentioned in (3) above;

(*b*) the blood sugar lowering effect of tolbutamide was obvious having regard to the known substance, carbutamide, the molecule of which differs from that of tolbutamide only in having an amino, (NH_2), group in the position of the methyl, (CH_3), group on its left end; and

(*c*) claim 1 which is necessary to support it, is invalid.

(6) that claim 1 is invalid because

(*a*) it covers more than the inventor invented,

(*b*) not all the products produced by the process had novelty,

(*c*) not all products produced by the process have utility as claimed,

(*d*) it covers processes which do not work; and

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(*e*) it is ambiguous in that

(i) the word "alkyl" is of indefinite usage sometimes meaning only groups derived from the alkane series of hydrocarbons and at other times being used to include them and groups derived from the alkene and alkyne series of hydrocarbons as well; and

(ii) while meanings are defined for R_1 and R_2 in the sulphonyl-ureas produced by the process, no meaning is defined for either R or R_1 in the starting materials.

I do not find it necessary for the purposes of this judgment to deal with all of these objections as the evidence satisfies me that at least one of them, that is to say (5)(*c*) coupled with (6)(*c*), with which I shall deal, is sound and is sufficient to dispose of the action. In the case of each patent the claim sued on is a claim for the substance known as tolbutamide when made by the process of claim 1 or an obvious chemical equivalent. In each case this is a claim to which s. 41(1) of the *Patent Act* R.S.C. 1952, c. 203, applies and assuming validity in other respects such a claim can be valid only if it is accompanied by a valid process claim and is limited to the substance when produced by that process or by an obvious chemical equivalent. *Vide C. H. Boehringer Sohn v. Bell Craig Ltd.*[1] In the case of each patent therefore the validity of the claim sued on depends on the validity of claim 1.

I turn therefore to the question of the validity of the claims numbered 1. In the case of each patent the method of preparing the ureas referred to in claim 1 was not new and it is stated in the patent that many of the starting materials were already known. It was moreover admitted in the course of the trial that for the purposes of this case it could be taken that all of them were known. In this situation the principles stated by Jenkins J. in *Re May & Baker*[2] and applied by the Supreme Court of Canada in *Commissioner of Patents v. Ciba Ltd.*[3] *appear* to me to apply. In the *May & Baker* case Jenkins J. said at page 295:

Now it seems to me that in considering this question one must begin by determining what is the character of the inventive step to which the

[1] [1963] S.C.R. 410.

[2] 65 R.P.C. 255.

[3] [1959] S.C.R. 378.

invention as claimed by the unamended specification would, if valid, have owed its validity as an invention. If I am right in the conclusions stated earlier in this judgment with regard to subject-matter, there is no inventive step, no element of discovery, merely in making new substances by known methods out of known materials.

What is indispensably necessary in order to elevate a process of this description from a mere laboratory exercise to the status of a patentable invention is the presence of some previously undiscovered useful quality in the substances produced. Assuming that the substances produced do possess some previously undiscovered useful quality, for example some remarkable value as drugs, then although the methods are known and the materials are known yet the application of those methods to those materials to produce those new substances may amount to a true invention, because of the discovery that those particular known materials when combined by those methods not merely produce those new substances but produce, in the shape of those new substances, drugs of remarkable value.

I think it necessarily follows that the identity of the materials chosen (by luck or good management) by the supposed inventor for the production of his new substances is of the essence of his invention.

Earlier in his judgment the learned Judge had said at page 281:

Before referring to this evidence, I should, I think, endeavour to state the principles on which, and limits within which, an invention consisting of the production of new substances by known methods from known materials can be supported from the point of view of subject-matter. I understand them to be these:—

(i) An invention consisting of the production of new substances from known materials by known methods cannot be held to possess subject-matter merely on the ground that the substances produced are new, for the substances produced may serve no useful purpose, in which case the inventor will have contributed nothing to the common stock of useful knowledge (the methods and materials employed being already known) or of useful materials (the substances produced being, *ex hypothesi*, useless).

(ii) Such an invention *may*, however, be held to possess subject-matter provided the substances produced are not only new but useful, though this is subject to the qualification that the substances produced must be truly new, as opposed to being merely additional members of a known series (such as the homologues) and that their useful qualities must be the inventor's own discovery as opposed to mere verification by him of previous predictions.

(iii) Even where an invention consists of the production of further members of a known series whose useful attributes have already been described or predicted, it may possess sufficient subject-matter to support a valid patent provided the somewhat stringent conditions prescribed by *Maugham, J.*, as he then was, in *I.G. Farbenindustrie A-G's Patents* (47 R.P.C. 289) as essential to the validity of a selection patent are satisfied, i.e. the patent must be based on some substantial advantage to be gained from the use of the selected members of

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> the known series or family of substances, the whole (or substantially the whole) of the selected members must possess this advantage, and this advantage must be peculiar (or substantially peculiar) to the selected group.

It follows from the facts which I have mentioned with respect to the methods and starting materials and the principles so expressed that in the present case there could be no patentable invention corresponding to claim 1 of the ten patents having regard to the common knowledge of the art, and that claim 1 in each case cannot be supported as a valid claim unless all, or substantially all, members of the class of sulphonyl ureas defined in them possess some previously unknown usefulness. Even if the claim were read as embracing only those members of the class which as a matter of practical chemistry or of commercial manufacture could be made, it would still be necessary to the validity of claim 1 in each patent, for all, or substantially all, of such members to possess the utility. If this utility is not common to all, or substantially all, of the members of the class the process claimed in claim 1, consisting, as it does in the case of each of the patents, of the application of a known method to known materials or to materials having known chemical features does not represent an invention of a process at all let alone a patentable invention of a process. It may be that some members of the class of products have the necessary utility and in these cases there may well be invention both of the particular products and of the process by which particular starting materials may be used to produce them. But it is an entirely different matter to say that there is invention in a process which consists in applying a known method of reaction to a limitless class of known materials to produce an equally limitless class of expected products when all that can properly be said of such products is that some of them have utility and others, the identity of which is not known, may have it as well but that the infinite majority of the substances of the class have never been made or tested by anyone. The only statement of general application that can properly be made with respect to such a process is that in all cases the expected chemical reaction will probably occur to produce the expected product and there thus is no patentable invention involved in it, for *ex hypothesi* it is already known that the reaction will occur and the disclosure of it "contributes nothing to the common stock of useful knowledge or of useful products". Unless therefore the unexpected utility of certain tested members of the class could, in the nature of the case, afford a foundation for a sound prediction that all or substantially all members of the class possess the utility there could be no invention whatever either of the class of products or of the process by which they may be produced. It follows that a patent claim in respect of an invention, the embodiments of which are stated to include a process for the making of a whole class of substances, when no such broad invention has been made, will purport to confer an exclusive property in something which the inventor has not invented, and since the *Patent Act* authorizes the grant of a patent only for an invention which the inventor has made such a claim will be invalid. Nor can the utility of some of the products of the class save the claim. *Vide* Jenkins, J. in *Re May & Baker et al* at page 288, lines 5 to 11.

Turning now to the question of the utility of the sulphonyl ureas of the class defined in claim 1 it was not suggested that any of these ureas has any usefulness whatever except as a blood sugar lowering substance useful in the treatment of disease requiring that particular effect. Moreover, even within this field in order to have utility in the patent sense it would be necessary for the sulphonyl ureas of the class to have some advantage over the known methods for reducing and controlling blood sugar in patients suffering from the disease. As previously mentioned, known methods of reducing blood sugar consisted of dieting, which might not be adequate, the administration of insulin, which would probably be adequate but which suffered from disadvantages arising from the method of administration by needle, and the oral administration of IPTD, which would be highly detrimental to the health of the patient and cannot therefore be regarded as a practical method at all. I mention the administration of IPTD, however, because it serves to point up that the fact that a new substance might show blood sugar lowering activity when administered orally is not by itself sufficient to warrant the conclusion that it would possess advantages over known methods of blood sugar lowering and thus be useful in the patent sense.

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In this connection reference should also be made to the question whether, at the material time, the oral administration of carbutamide was a further known method of treatment. Carbutamide had already been tested and had been put on the market in January 1956 and was thus in use for the better part of that year before tolbutamide made its appearance on the market in September 1956. Moreover, at page 18, line 13, of the patent (exhibit 2) substances of the series of which carbutamide is both a member and one which closely resembles tolbutamide in molecular structure, are mentioned for the purpose of comparison of effects. On the other hand exhibit H states that tolbutamide had been prepared and tested for toxicity and activity and tried in clinical tests before carbutamide was known. Having regard to the lengthy testing required before a substance of this kind is put on the market and to the length of time carbutamide was in use before tolbutamide made its appearance it seems to me more probable that carbutamide was discovered first and should therefore be regarded as part of the prior art, but as, on the evidence, the matter is not free from doubt I propose to omit it from consideration. The question as to utility for which I propose to seek an answer on the evidence is accordingly (paraphrasing the question posed by Jenkins, J. in *Re May & Baker et al.*[1] at page 283, lines 4 to 7): Can it be predicated of all the products of the process claim in claim 1 of each of the patents—or of substantially all of such products—that they have advantages for lowering and controlling the blood sugar level of patients suffering from diseases such as diabetes over the known methods of (1) dieting; and (2) the administration of insulin? I should add at this point, as did Jenkins, J. at page 283, line 7, that in considering the evidence on this question, it is important to distinguish between the utility of "the products of the invention" that is to say, in so far as claim 1 of each of these patents is concerned, the whole group of sulphonyl ureas included in the definition of the claim, and the utility of the specific substances of the class, including tolbutamide, which are cited as examples in the specifications or are described in the evidence. Tolbutamide and several other members of the class may well possess the necessary advantages, in fact tolbutamide

[1] 65 R.P.C. 255.

appears to have utility even if carbutamide is regarded as part of the prior art, but all that is a far cry from saying that all or substantially all members of the class have utility.

At this point I think I should say, as I did in *C. H. Boehringer Sohn v. Bell Craig Limited*[1], that while the burden of proving that the processes claimed in claim 1 of the patents in suit would not produce a whole class of useful substances as defined therein, rested on the defendants the proposition that all or substantially all of the limitless number of substances which could be produced by these processes as defined have value as oral antidiabetic medicines, when it is apparent from the mere size of the class that most of its members could never have been made or tested by anyone, is so preposterous as to require little in the way of evidence to dispel any presumption of its truth. Presumed or not the proposition shocks ones credulity.

But however that may be, it is in evidence that the pharmacological effects of new and untried substances are not generally predictable or, if predictable at all, are not predictable to any great extent. Thus there is evidence given by Professor Herbert C. Brown, a professor of chemistry of outstanding qualifications, that significant discovery generally arises largely by chance and that before any drug is introduced it must be tested upon thousands of test animals to make sure it has no undesirable effects upon the body and tissues, and only if it passes these tests does it reach the stage of clinical tests and observations to ensure that it has no undesirable effects on human functions. He also stated with respect to blood sugar lowering substances that it is not sufficient to have material which does the job of lowering the blood sugar, that in addition the material must be one which the body can tolerate for long periods of time and can use without damage to the body and that this can only be determined by extensive testing. In cross-examination he further stated, and though not himself a pharmacologist he was, in my opinion, adequately qualified so to state, that even a pharmacologist would not be able to predict the pharmacological effects of compounds which have not been made and tested. The evidence of Dr. McKendry to my

[1] [1962] Ex. C.R. 201 at 244.

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mind also substantiates the view that the usefulness of a new substance in the treatment of disease is not predictable and can only be determined after extensive testing. This generalization is I think borne out as well by the evidence of Professor Brown that between 1918 and 1926 it was discovered that three different substances of the group known as guanidines possessed some blood sugar lowering activity and that one was less toxic than the other two, but that when applied clinically over a long period liver and kidney damage resulted from its use. The generalization is I think further supported by the evidence that in the years between 1935 and 1952 following the discovery of sulfanilamide numerous substances of that family, one of which was IPTD, were synthesized and tested in the hope of finding more effective and less toxic medicinal substances, and that this was done even though it was in a sense predictable with respect to some of them that they would have bacteriostatic effects similar to those of sulfanilamide itself, but in greater or less degree. The evidence as to the testing of metahexamide and the use of carbutamide is, I think, to the same effect.

Next there is evidence that the number of substances which have been made and described by chemists amounts to about 1 million which makes it clear that the great bulk of conceivable substances embraced within the class defined in the claims have not in fact been produced or tested and that nothing is in fact known of what their pharmacological effects or usefulness may be. There is evidence that some 700 members of the class have indeed been synthesized and to some extent tested for the purpose of determining their blood sugar lowering activity but while exhibit H indicates that many of this number showed the presence of the activity in greater or less degree, apart from mentioning several members of the class of which the toxicity is regarded as low, the evidence indicates nothing as to the toxicity or undesirable side effects of most of the substances tested. It is, however, stated in exhibit H at page 450 with respect to the whole series of the class in which the R group is unsubstituted phenyl that the substances "in particular those with an n'butyl group (preparation 19154 melting point 130°-132°) have a good blood sugar lowering activity but no practical substance of particular significance resulted from this series". The evidence of Dr. Brown at pages 253 to 255 confirms the hypoglycemic activity of the substance with no substitution on the benzene ring and with an n-butyl group on the right end i.e., N-benzene sulphonyl, N_1-n-butyl urea, but says nothing of its toxicity or side effects save that it does not have undesirable bacteriostatic activity. It also appears from the evidence that small differences in the molecules of two substances may make a great deal of difference as to whether the substance will be useful for a particular purpose or not or will exercise additional effects which are not desired. Thus the carbutamide molecule differs from the tolbutamide molecule only in having an amino rather than a methyl group at the left end but the substance exhibits undesirable bacteriostatic activity. The removal of the amino group and replacement of it by a hydrogen atom apparently eliminates the bacteriostatic activity but while the substance has good blood sugar lowering activity according to exhibit H it is not a "practical substance of particular significance". On the other hand replacing the hydrogen atom with a methyl group yields the substance known as tolbutamide which is apparently the most useful member that is known of the class. It is also worthy of note that according to exhibit H when the methyl group is present in the para position on the phenyl ring, the substances of the class exhibit no bacteriostatic activity, and the theory is that the methyl group is oxidized in the body, but the same assertion is not made with respect to members of the class having other substituents on the phenyl ring in para or other positions.

Exhibit H also states that "the results of tests show that all p-alkyl or p-alkoxy sulphonyl ureas with a suitable N_2 radical possess an exceptional blood sugar lowering activity insofar as the number of carbon atoms of the substituent in the p position does not substantially exceed 6". Considered along with the statement in the specifications that when the alkyl or alkoxy groups bound to the benzene ring are "of higher molecular weight the activity of the products is generally considerably lower", this appears to me to indicate that there are members of the class in which apart altogether from the questions of toxicity the blood sugar lowering effect itself may be zero or so small as to be useless. The claims however include

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p-alkyl and p-alkoxy groups with any number of carbon atoms.

It is also of significance that of the whole host of substances embraced in the class, up to the time of the trial, only two, tolbutamide and chlorpropamide, were in use and Dr. McKendry had heard of no others known to be useful. Had there been any known pharmacological use for any of the other products I think Dr. McKendry would have known and would have been able to tell about it and his inability to do so, satisfies me that for the great bulk of the class no such use is known.

On the whole, therefore, I am of the opinion that it is highly improbable that all, or substantially all, of the members of the infinitely large class defined in claim 1 of the ten patents have either the blood sugar lowering activity to a useful extent or the freedom from toxicity or harmful side effects necessary to render them useful and that the question which I have posed as to whether it can be predicated of all the products of the process claimed in claim 1 of each of the patents—or of substantially all of such products—that they have advantages for lowering and controlling the blood sugar level of patients suffering from diseases such as diabetes over the known methods of (1) dieting; and (2) the administration of insulin, should be answered in the negative. It follows in my opinion that there was no invention as claimed in claim 1 of each of the patents, that claim 1 in each case is accordingly invalid and that because it is invalid claim 10 of the first nine patents and claim 13 of the last patent are invalid as well.

I should add that while the objections to the patent are pleaded in a manner which I have found confusing, the objection which I have sustained is in my opinion raised, and is thus open to the defendants, by the plea that claims 1 and 10 of the first nine patents and claims 1 and 13 of the last patent are invalid for the reason that there was no invention having regard to the common knowledge of the art. As claim 10 of the first nine patents and claim 13 of the last patent are the only claims sued on, a plea in defence that claim 1 in each case was invalid is relevant, so far as I can see, only as a defence to the claim for a declaration of the validity of the patents or as a defence to the whole of the action on the ground that the claims sued

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on were not supported by valid process claims as required by s. 41(1) of the *Patent Act*. The first phase of the objections which I have sustained, that is, that claim 10 in each of the first nine patents and claim 13 of the last patent are invalid because claim 1 in each case, which under s. 41(1) is necessary to support them, is invalid, is thus included in the plea and the objection to claim 1 in the case of each patent on the ground that there was no invention corresponding to it because the utility of the products, which is the essence of the invention of the process as claimed, is lacking, is the substance of the objection to claim 1 which I have held to be well founded.

In view of the conclusion which I have reached on the validity of the claims sued on it is not necessary for the purposes of this judgment that I should consider the issue of infringement and as no question of credibility arises in connection with it I do not propose to deal with it.

The action accordingly fails and it will be dismissed with costs but the plaintiffs are entitled to the costs occasioned by the defendants' motion to amend their particulars of objection and may tax and set off such costs against those recovered by the defendants.

Judgment accordingly.

BETWEEN: 1964 — Jan. 15-17, 20-22 — Nov. 18

BONUS FOODS LTD., ...PLAINTIFF,

AND

ESSEX PACKERS LIMITED, ...DEFENDANT.

Trade marks—Infringement—Validity—Registration—Descriptive of character or quality of wares—Distinctive or adapted to distinguish—Trade mark which is not "descriptive" is not "misdescriptive"—Similar trade marks—Similar wares—Misstatements in application for registration of trade mark—Confusion of public—User of trade marks in same area—Infringement deemed to exist—Length of time trade marks have been in use—Nature of the wares—Nature of the trade—Trade Marks Act, S. of C. 1952-53, c. 49, ss. 2(b), 6(1), (2) and (5), 7(b), 12(1), 18(1), 19, 20 22, 26(1) and (3), 29(b), 40(1)(c) and (2) and 47(1)—Unfair Competition Act, R.S.C. 1952, c. 274, ss. 2(l) and (m) 22(1), 26(1) and 30(1)(a).

The plaintiff claims relief against the defendant for infringement by the defendant of the plaintiff's rights as owner of a registered trade mark,

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for directing public attention to the defendant's canned food products in such a way as to be likely to cause confusion in Canada between them and the plaintiff's canned food products, and for using the plaintiff's registered trade mark in a manner likely to have the effect of depreciating the value of the goodwill attaching thereto. The defendant counterclaimed to have the entry of the plaintiff's trade mark in the Trade Marks Register struck out.

One Louis Giuriato became the registered owner of the trade mark "Bonus" effective June 2, 1944 in respect of "food products, namely, salad oils, ripe olives, green olives, grated cheese", this trade mark being assigned in June 1947 by him to Bonus Foods, of which he was the sole proprietor. At the time of the assignment, the registration was amended to include "Ravioli dinner and spaghetti sauce; noodle chicken dinner; peas; and noodle mushroom dinner" in the statement of the wares in association with which the mark was used.

The plaintiff and its predecessor in title had been using the registered trade mark "Bonus" on goods sold in different parts of Canada and abroad for the period from some time before the effective date of its registration, June 2, 1944, until the time of the trial of this action. No premiums or prizes were given by the plaintiff or its predecessor in connection with wares sold under the mark "Bonus".

The defendant carries on a business as a slaughterer, processor, manufacturer, seller and distributor of a complete line of food products and in 1961 it started to manufacture and sell two different lines of dog food, utilizing for that purpose by-products of its slaughtering operations; one of these lines being marketed under the name "Bonus Dog Food", despite the fact that the defendant had been advised, upon attempting to register "Bonus" as a trade mark in respect of dog food, that the plaintiff had been registered as owner of the trade mark "Bonus" in respect of certain foods for humans. The defendant offered premiums to purchasers of Bonus dog food. Most of the defendant's sales were made in Ontario, the Greater Montreal area and the Atlantic provinces while the plaintiff sold most of its products in the Western provinces and through export.

Held: That infringement of the exclusive right to the use throughout Canada of a trade mark, as conferred on the registered owner thereof by s. 19 of the *Trade Marks Act,* consists in the unauthorized use of the mark by someone else on goods of the kind in respect of which the mark was registered.

2. That the two allegations of the defendant that the registration of the plaintiff's trade mark is invalid as not being distinctive or adapted to distinguish because the word "Bonus" is incapable of being adapted to distinguish the goods of one from those of another and because the word is laudatory of goods and accordingly lacks the quality of distinctiveness, could relate either to the time of registration or to the time that these proceedings were brought.

3. That the word "Bonus", while it is a noun and not an adjective, may conceivably be used to describe a prize or premium that is given with a purchase or to describe the transaction by which a principal object plus some premium or "prize" is sold but it cannot be regarded as descriptive of the "character or quality" of articles of food being sold as such.

4. That the word "Bonus" has no generally understood meaning in relation to the character or quality of wares It may be contrasted with "Gold

Medal" or "premium", which have generally accepted meanings in relation to the quality of wares

5 That if the trade mark is not "descriptive" of the character or quality of wares it is not "misdescriptive" of the character or quality of wares

6. That any idea that might be conjured up by the word "Bonus" in relation to the character or quality of canned meat is so remote as to be fanciful.

7 That once it is decided that a word is not "descriptive" or "misdescriptive" of the character or quality of the wares, the possibility of its not being adapted to distinguish the plaintiff's wares from wares of the same category of some other person becomes remote.

8. That the word "Bonus" is capable of distinguishing the wares of one person from the wares of another and is not laudatory of the goods in association with which it is used.

9. That the attack on the trade mark "Bonus" on the ground that it was similar on the date of its registration to the registered trade mark "Bonox" fails because it was not alleged by the defendant that the mark "Bonox" was registered for use in connection with "similar wares" and, in any event, "Bonox" is not similar to "Bonus" in this context.

10 That the trade mark "Bonus" registered prior to the registration of the plaintiff's mark was registered in respect of ". . . beverages, sold as soft drinks and syrups and extracts for making the same" which cannot be regarded as "similar" to the wares in respect of which the plaintiff's trade mark was registered

11 That there is no provision in the *Trade Marks Act* under which "misstatements" made in the application for registration, become grounds for invalidating the registration of the trade mark and s. 18 of the *Trade Marks Act* does not extend to such a case unless the misstatement had the effect of making the trade mark "not registrable".

12 That there has been no infringement of the plaintiff's registered trade mark in the sense that the defendant has done something that the plaintiff had the exclusive right to do. Section 19 of the *Trade Marks Act* does not confer on the plaintiff the exclusive right to use "Bonus" as a trade mark in relation to canned dog food.

13 That it must be emphasized that, to bring the defendant within s. 20 of the *Trade Marks Act,* it does not have to appear that the plaintiff and defendant had, in fact, used the mark "Bonus" in the same area or that the public had ever, in fact, been confused in the sense that they had thought that the plaintiff's canned meats, spreads, chicken and other products had been made by the same person as made the defendant's canned dog food

14 That the test in s. 6(2) is not what has happened in fact but what inference would be likely to be drawn if it did happen that the plaintiff and defendant used the mark "Bonus" in respect of these different classes of goods in the same area. A finding must be made whether, in the purely hypothetical event of user by the plaintiff of its registered trade mark rights and user by the defendant of the mark "Bonus" in respect of its dog food in the same area, it would be likely to lead to the inference that the wares in relation to which the plaintiff used the trade mark and the wares in relation to which the defendant used it were manufactured or sold by the same person

15 That the finding made as a result of the test provided for in s. 6(2) of the *Trade Marks Act* might conceivably lead to the conclusion that the

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defendant must be deemed to have infringed the plaintiff's registered trade mark even if the plaintiff's sales were, in fact, restricted to a small area in British Columbia and the defendant's sales were in fact restricted to a small area in Newfoundland and even if no single member of the public had ever, in fact, seen wares originating from them both.

16. That in reaching a conclusion on the hypothetical question framed by s. 6(2) of the Act, the Court must have regard to all the surrounding circumstances including those enumerated in s. 6(5)(*a*) to (*e*).
17. That the "inherent distinctiveness of the trade marks . . . and the extent to which they have become known", in s. 6(5)(*a*) of the Act, applies only in the case where there are two different trade marks, each more or less established in the public mind to such an extent that the public would not infer that they pointed to one person.
18. That "the length of time the trade marks have been in use" in s. 6(5)(*b*) of the Act, does nothing in this case to negative the inference of one manufacturer or one vendor, otherwise flowing from the use of the same brand, because the alleged infringer is using the registered owner's registered trade mark and as the owner has been using it for over twenty years and the alleged infringer has been using it only during a developmental period.
19. That with respect to the words "the nature of the wares . . ." as used in s. 6(5)(*c*) of the Act, the plaintiff uses the mark on canned meat for human consumption and the defendant uses it on canned meat for consumption by dogs and, on the evidence, the probability is that one person would manufacture both of these kinds of wares and this is the inference that would be drawn by an ordinary member of the public.
20. That with respect to the words "the nature of the trade" as used in s. 6(5)(*d*) of the Act, the same manufacturers, trade channels, retail outlets and purchasers are likely to be concerned with canned meat for human consumption and canned meat for dog consumption.
21. That the ordinary person making the rounds of grocery stores or supermarkets would be led to the conclusion, upon seeing the word "Bonus" on the label on dog food and also on the label on canned meat for human consumption, that both products were put out by the same manufacturer or by the same vendor.
22. That the use of the word "Bonus" in respect of canned dog food is likely to have the effect of depreciating the value of the goodwill attaching to the plaintiff's registered trade mark for the reason that most members of the public are likely to have some repugnance to buying food for human consumption under the same brand name as that under which dog food is sold, particularly if, in both cases, it is canned meat.
23. That it is doubtful whether s. 22 of the *Trade Marks Act* has any application to a case where the defendant has infringed or is deemed to have infringed the trade mark.
24. That the defendant has infringed the plaintiff's registered trade mark.

ACTION for infringement of a trade mark.

The action was tried by the Honourable Mr. Justice Cattanach at Ottawa.

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R. S. Smart and *J. J. Ellis* for plaintiff.

G. F. Henderson, Q.C. and *R. G. McClenahan* for defendant.

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

CATTANACH J. now (November 18, 1964) delivered the following judgment:

This is an action in which the plaintiff claims relief against the defendant in respect of three separate causes of action, namely,

(*a*) for infringement by the defendant of the plaintiff's rights as owner of a registered trade mark,

(*b*) for directing public attention to the defendant's canned food products in such a way as to be likely to cause confusion in Canada between them and the plaintiff's canned food products contrary to paragraph (*b*) of section 7 of the *Trade Marks Act,* chapter 49 of the Statutes of Canada, 1952-53, and

(*c*) for using the plaintiff's registered trade mark in a manner likely to have the effect of depreciating the value of the goodwill attaching thereto contrary to section 22 of the *Trade Marks Act.*

There is also a counterclaim by the defendant to have the entry of the plaintiff's trade mark in the Trade Marks Register struck out.

On February 14, 1946, Certificate of Trade Mark Registration No. N.S. 82/21344 was issued under the *Unfair Competition Act,* c. 38 of the Statutes of 1932, showing registration as of June 2, 1944 (the date of application) in favour of Louis Giuriato of the mark "Bonus" in respect of "Food products, namely, salad oils, ripe olives, green olives, grated cheese". As of June 11, 1947 there was registered an assignment of this registered trade mark from Louis Giuriato to Bonus Foods, the sole proprietor of which was Louis Giuriato. The registration was amended, as of the same time, to include "Ravioli dinner and spaghetti sauce; noodle chicken dinner; peas; and noodle mushroom dinner" in the statement of the wares in association with which the mark was used. As of February 19, 1954, there was registered an assignment of the registration in favour of Bonus Foods Ltd., the plaintiff in this action. On April 22, 1955, the registration was amended to include "canned products: chicken, chicken stew; ravioli dinner with tomato sauce and cheese, devilled ham sandwich spread, ham and chicken

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sandwich spread, chicken spread, chicken a la king, turkey, turkey salad spread, ham loaf, chicken loaf, beef and chicken sandwich spread, chestnuts" in the statement of wares in association with which the mark was used.

The plaintiff company was incorporated on February 2, 1953 to take over a business previously carried on by Louis Giuriato under the firm name of "Bonus Foods". From some time prior to 1941, when he first used the trade mark "Bonus", Louis Giuriato had carried on business under the name "Giuriato Brothers", first as a retail grocer only, and then with some manufacturing and wholesale operations added to the retail grocery business. Commencing in 1945, he carried on the retail grocery business under the name of Giuriato Brothers in one place and carried on the manufacturing and wholesale business in quite separate premises under the name of "Bonus Foods". This continued until 1951, when the retail grocery business was closed down. Finally, as indicated above, the plaintiff company was incorporated in 1953 and took over the wholesale and manufacturing business which until that time Louis Giuriato had been operating under the name of "Bonus Foods".

The plaintiff and its predecessor in title had been using the registered trade mark "Bonus" on goods sold in different parts of Canada and abroad from some time before the effective date of its registration, June 2, 1944, until the time of the trial of this action. The articles of food in relation to which it was so used varied from time to time but, from 1955 until the time of trial, these included such articles as canned dinners (e.g., ravioli dinner), meat spreads and canned boneless chicken. Wares of this kind have been sold in Ontario and Quebec since 1959.

No premiums or prizes were given by the plaintiff or its predecessor in connection with wares sold under the mark "Bonus". The only evidence of any attribution of any significance to the word constituting the mark was the appearance, on at least two of the samples of the plaintiff's labels that were put in evidence, of words conveying a message to the effect that the bonus is in the flavour.

The plaintiff has not, regarded from the national point of view, a very large operation. In 1954, it had total sales amounting to over $160,000, broken down as follows:

British Columbia	$ 138,859
Ontario	14,241
Quebec	7,809
Other	3,934

By 1963, the total sales had grown to over $350,000, broken down as follows:

British Columbia	$ 212,533
Alberta	49,641
Saskatchewan	13,217
Manitoba	35,413
Ontario	10,482
Export	37,986

During the first eleven months of 1963, its sales amounted to well over a half million dollars, broken down as follows:

British Columbia	$ 290,762
Alberta	19,531
Saskatchewan	2,921
Manitoba	15,077
Ontario	27,710
Export	194,944

In some respects at least, the plaintiff's sales efforts were limited at the time of the trial by the fact that it was operating at the full capacity of its plant and it was, at that time, planning larger facilities.

The defendant carries on a business as slaughterers, processors, manufacturers, sellers and distributors of a complete line of food products. In 1961, it started to manufacture and sell two different lines of dog food, utilizing for that purpose by-products of its slaughtering operations that it would otherwise have had to destroy at some expense. One of these two lines was sold under the name "Bonus Dog Food" notwithstanding that the defendant had been advised, upon attempting to register "Bonus" as a trade mark in respect of dog food, that the plaintiff had been registered as owner of the trade mark "Bonus" in respect of certain foods for humans.

During the short period that the defendant had been selling dog food under the mark "Bonus", its sales of that

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dog food amounted to about a million pounds, or $100,000, per year. Such sales were restricted to Ontario, the Greater Montreal area and the Atlantic provinces, although it is possible that some of the dog food sold to chain groceries may have been retailed in other provinces.

The defendant spent no money on advertising its "Bonus" dog food in the ordinary media. Instead of doing so, it encouraged sales of this product by offering premiums to persons who sent in small cash payments with labels taken from the tins. In this way, the defendant apparently thought that it was giving some significance to the word constituting the mark "Bonus" in the sense of "something extra—a premium". In other words the defendant was intending to say, by using the word "Bonus": "If you buy 'Bonus' dog food, you are going to get something extra".

These proceedings were instituted by a Statement of Claim filed March 21, 1962 which, after alleging *inter alia* the plaintiff's ownership of Trade Mark N.S. 82/21344, alleged that,

> 4. The plaintiff has continuously used the trade mark in Canada from at least the year 1955 in association with canned fowl and meat food products.
>
> 5. The defendant has sold and distributed in Canada a canned animal food which contains meat and bears on each can in prominent lettering the word "Bonus", and the defendant continues to do so.
>
> 6. By its actions aforesaid, the defendant has
>
> (*a*) infringed the rights of the plaintiff in relation to the said registered trade mark,
>
> (*b*) directed public attention to its canned food products in such a way as to be likely to cause confusion in Canada between the canned food products of the defendant and the canned food products of the plaintiff,
>
> (*c*) used a trade mark registered by the plaintiff in a manner likely to have the effect of depreciating the value of the goodwill attaching thereto, contrary to the provisions of Section 22 of the Trade Marks Act.

At this point in the recital of events, it should be noted that there is a technical defect in the Statement of Claim in so far as it is intended to set out a claim for infringement of the plaintiff's registered trade mark. Assuming the validity of the trade mark, the plaintiff's right, in consequence of its registration, is, by virtue of s. 19 of the *Trade Marks Act,* "the exclusive right to the use throughout Canada of such trade mark" in respect of the wares in respect of which it was registered. Infringement of that right consists in the unauthorized use of the mark by someone else on goods of the kind in respect of which the mark was registered. The allegation in the Statement of Claim that the defendant, by its actions, "infringed" the plaintiff's rights, might be taken to be a rather unsatisfactory way of saying that the defendant had used the mark "Bonus" in Canada in respect of some of the wares in respect of which that mark was registered in the plaintiff's name. (If that had been intended, the pleading is defective in that it does not contain a statement "of the material facts on which the party pleading relies" as required by Rule 88 of the Rules of this Court.) However, it is clear from the facts and the course of the trial that the plaintiff was not relying on an actual infringement of its trade mark but was relying on facts that would bring into operation s. 20 of the *Trade Marks Act,* so as to require the Court to "deem" that the plaintiff's right to exclusive use has been infringed by the defendant. To ascertain what facts would bring s. 20 into operation, that section must be read with s-ss (1), (2) and (5) of s. 6 of the same Act. The facts that would, if proved, bring s. 20 into operation are:

(*a*) the defendant sold certain canned food, namely, dog food, in association with the trade mark "Bonus", and

(*b*) the use of the mark "Bonus" in respect of canned dog food and of the mark "Bonus" in respect of canned chicken, meat spreads and other meat products designed for human consumption, in the same area, would be likely to lead to the inference that the wares associated with both marks are manufactured or sold by the same person.

While these facts were not alleged, and therefore not, as such, put in issue by the pleadings, as the trial and argument proceeded as though they had been pleaded and as though the fact in para. (*b*), *supra,* had been denied, and as there has been no objection by the defendant to this procedural defect, I propose to deal with the claim as though the matter had been pleaded as indicated. (The defendant, by the Statement of Defence, does allege that "the use by it of the word Bonus is not likely to cause confusion between its wares...and the wares... of the Plaintiff"; but it does not deny that such confusion would occur on the

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hypothesis of the defendant's user taking place "in the same area" as the plaintiff's user.)

I come now to the Statement of Defence and Counterclaim. As far as the claims under s. 7(*b*) and s. 22 of the *Trade Marks Act* are concerned, the defendant's defence is a simple denial of the allegations of fact in para. 6(*b*) and (*c*) of the Statement of Claim, on which these claims are based. With reference to the claim for infringement of the plaintiff's registered trade mark, the defendant's defence may be taken, as I understand it, to fall into two parts, namely,

(*a*) a contention that the facts are *not* such as to bring into play the "deeming" provision in s. 20, which contention is put on two different bases, viz.:

(i) a denial of the allegation of fact that I have formulated, *supra,* namely,

(*b*) the use of the mark "Bonus" in respect of dog food and of the mark "Bonus" in respect of canned chicken, meat spreads and other meat products designed for human consumption, in the same area, would be likely to lead to the inference that the wares associated with both marks are manufactured or sold by the same person

and

(ii) an allegation that would bring the defendant within one of the exceptions spelled out in s. 20 to the operation of the "deeming" provision in that section, which allegation is framed as follows:

11. The Defendant alleges and the fact is that it has used the word BONUS in association with canned animal food, bona fide, other than as a trade mark and as an accurate description of the character or quality of its wares in such a manner as is not likely to have the effect of depreciating the value of the goodwill attaching to the alleged trade mark registered under No. NS 82/21344

and

(*b*) a contention that the plaintiff's trade mark registration is invalid.

The grounds put forward for attacking the validity of the plaintiff's registered trade mark may be summarized as follows:

(*a*) that the registration is invalid under s. 18(1) of the *Trade Marks Act* because the mark "Bonus" was not, at the date of registration, "registrable" under

s. 26(1) of the *Unfair Competition Act,* inasmuch as it was "clearly descriptive or misdescriptive of the character or quality of the wares" in connection with which it was proposed to be used within the meaning of those words in para. (*c*) of the said s. 26(1);

(*b*) that it is invalid under s. 18(1) of the *Trade Marks Act* because the mark "Bonus" did not fall within the definition of "trade mark" in s. 2(*m*) of the *Unfair Competition Act,* not being distinctive or adapted to distinguish, and so it was not "registrable" under s. 26(1) of that Act; (presumably, on the submissions made by the defendant, if it was not "distinctive" at the time of registration, it was not "distinctive" at the time these proceedings were commenced, and the registration is therefore invalid by virtue of s. 18(1)(*b*) of the *Trade Marks Act,* but this was not pleaded);

(*c*) that it is invalid under s. 18(1)(*a*) of the *Trade Marks Act* read with s. 26(1)(*f*) of the *Unfair Competition Act* because the word mark "Bonus" was, at the date of registration similar to the word mark "Bonox" already registered under No. 135/30944 or to the word mark "Bonus" already registered under No. N.S. 81/21227; and

(*d*) that it is invalid in that the application of January 6, 1955 to extend the wares covered by the registration contained misstatements relating to the date when the marks were first used on the wares covered thereby contrary to the requirements of s. 29(*b*) of the *Trade Marks Act.*

Three different reasons are set out in the Statement of Defence in support of the second ground, *supra,* namely, that the mark "Bonus" is not distinctive or adapted to distinguish. Two of these are,

> (*a*) The word "Bonus" is incapable of being adapted to distinguish the goods of one from those of another,

and

> (*b*) The word "Bonus" is laudatory of goods and accordingly lacks the quality of distinctiveness.

These two reasons could relate either to the time of registration or to the time that these proceedings were brought and

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so, if valid, would be a ground for holding the registration invalid. The third reason relates to an intervening period of time. It reads,

> 8B. The trade mark "Bonus" was non-registrable in that it was non-distinctive or not adapted to distinguish as required by S. 2(*m*) of the Unfair Competition Act.
>
> ...
>
> (*c*) The use of the word "Bonus" as a trade mark by Bonus Foods over a period of time commencing in 1945 and terminating in 1947 while Louis Giuriato was the registered owner thereof, renders the said mark non-distinctive.

It will be convenient to deal first with the attacks on the validity of the registration of the plaintiff's trade mark.

The relevant provisions of the *Unfair Competition Act* are:

...

> 2. In this Act,
>
> (*l*) "similar", in relation to wares, describes categories of wares that, by reason of their common characteristics or of the correspondence of the classes of persons by whom they are ordinarily dealt in or used, or of the manner or circumstances of their use, would, if in the same area they contemporaneously bore the trade mark or presented the distinguishing guise in question, be likely to be so associated with each other by dealers in or users of them as to cause such dealers or users to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin;
>
> (*m*) "trade mark" means a symbol that has become adapted to distinguish particular wares falling within a general category from other wares falling within the same category, and is used by any person in association with wares entering into trade or commerce for the purpose of indicating to dealers in, or users of such wares that they have been manufactured, sold, leased or hired by him, or that they are of a defined standard or have been produced under defined working conditions, by a defined class of persons, or in a defined territorial area, and includes any distinguishing guise capable of constituting a trade mark;
>
> 22. (1) There shall be kept under the supervision of the Registrar a register of trade marks in which, subject as hereinafter provided, any person may cause to be recorded any trade mark he has adopted, and notifications of any assignments, transmissions, disclaimers and judgments relating to such trade mark.
>
> 26. (1) Subject as otherwise provided in this Act, a word mark is registrable if it
>
> (*a*) does not contain more than thirty letters or numerals or both divided into not more than four groups;
>
> (*b*) is not the name of a person, firm or corporation;
>
> (*c*) is not, to an English or French speaking person, clearly descriptive or misdescriptive of the character or quality of the wares in con-

nection with which it is proposed to be used, or of the conditions of, or the persons employed in, their production, or of their place of origin;

(d) would not if sounded be so descriptive or misdescriptive to an English or French speaking person;

(e) is not the name in any language of any of the wares in connection with which it is to be used;

(f) is not similar to, or to a possible translation into English or French of, some other word mark already registered for use in connection with similar wares; and

(g) is not such as to suggest the name in French or English of some feature of a design mark already registered for use in connection with similar wares which is so characteristic of the design mark that its name would not be unlikely to be used to define or describe the wares in connection with which the design mark is used.

30. (1) Any person who desires to register a trade mark under this Act otherwise than pursuant to a judgment, order or declaration of the Exchequer Court of Canada shall make an application in writing to the Registrar in duplicate containing

(a) a statement of the date from which the applicant or named predecessors in title has or have used the mark for the purposes defined in the application and of the countries in which the mark has been principally used since the said date;

. . .

The *Unfair Competition Act* was repealed by s. 68 of the *Trade Marks Act,* c. 49 of the Statutes of 1953, which, by virtue of a proclamation under s. 67 thereof, came into force on July 1, 1954.

The relevant provisions of the *Trade Marks Act* are:

12. (1) Subject to section 13, a trade mark is registrable if it is not

(a) a word that is primarily merely the name or the surname of an individual who is living or has died within the preceding thirty years;

(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;

(d) confusing with a registered trade mark; or

(e) a mark of which the adoption is prohibited by section 9 or 10.

18. (1) The registration of a trade mark is invalid if

(a) the trade mark was not registrable at the date of registration;

(b) the trade mark is not distinctive at the time proceedings bringing the validity of the registration into question are commenced;

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(c) the trade mark has been abandoned;

and subject to section 17, it is invalid if the applicant for registration was not the person entitled to secure the registration.

. .

26. (1) There shall be kept under the supervision of the Registrar a register of trade marks and if transfers, disclaimers, amendments, judgments and others relating to, and of registered users of, each registered trade mark.

. . .

(3) The register kept under *The Unfair Competition Act*, 1932, or the *Unfair Competition Act*, chapter 274 of the Revised Statutes of Canada, 1952, forms part of the register kept under this Act and, subject to subsection (2) of section 43, no entry made therein, if properly made according to the law in force at the time it was made, is subject to be expunged or amended only because it might not properly have been made pursuant to this Act.

. .

29. An applicant for the registration of a trade mark shall file with the Registrar an application containing

. . .

(b) in the case of a trade mark that has been used in Canada, the date from which the applicant or his named predecessors in title, if any, have so used the trade mark in association with each of the general classes of wares or services described in the application;

. . .

40. (1) The Registrar may, on application by the registered owner of a trade mark made in the prescribed manner, make any of the following amendments to the register:

. . .

(c) amend the statement of the wares or services in respect of which the trade mark is registered;

. . .

(2) An application to extend the statement of wares or services in respect of which a trade mark is registered has the effect of an application for registration of the trade mark in respect of the wares or services specified in the application for amendment.

. . .

47. (1) A trade mark, whether registered or unregistered, is transferable, and deemed always to have been transferable, either in connection with or separately from the goodwill of the business and in respect of either all or some of the wares or services in association with which it has been used.

. . .

I reject the submission that the registration of the plaintiff's trade mark is invalid because it was, at the date of registration, clearly descriptive or misdescriptive "of the character or quality of the wares" in connection with which it was proposed to be used. The word "Bonus", while it is a noun and not an adjective, may conceivably be used to describe a prize or premium that is given with a purchase or to describe the transaction by which a principal object plus some premium or "prize" is sold. It cannot, in my view, be regarded as descriptive of the "character or quality" of articles of food being sold as such. It may be used to indicate that "something extra" is given with the wares being sold. It does not describe the character or quality of the wares being sold.

It is a matter of the general understanding of the meaning of the word. In my view, "Bonus" has no generally understood meaning in relation to the character or quality of wares. It may be contrasted with "Gold Medal" or "premium", which have generally accepted meanings in relation to the quality of wares. If it is not "descriptive" of the character or quality of wares, it is not "misdescriptive" of the character or quality of wares. Any idea that might be conjured up by the word "Bonus" in relation to the character or quality of canned meat, for example, is so remote as to be fanciful, as is illustrated by the use of the slogan "The bonus is in the flavour". The use of the word "Bonus" in other schemes referred to at trial illustrates the inappropriateness of applying the word "Bonus" to the "character or quality" of these particular wares. For example, "Bonus brands" in the I.G.A. "I give Away" competition are a number of food brands, arbitrarily selected for any particular period, the possession of which entitles a winner in a competition to an extra prize.

Once it is decided that a word is not "descriptive" or "misdescriptive" of the character or quality of the wares, the possibility of its not being adapted to distinguish the plaintiff's wares from wares of the same category of some other person becomes remote. In my view, "Bonus" is capable of distinguishing the wares of one person from the wares of another and is not laudatory of the goods in association with which it is used. Furthermore, I fail to see how use by Louis Giuriato, in the period from 1945 to 1947, to distinguish wares that he sold under two different the mark "Bonus" was used during this period exclusively firm names could have rendered the mark "Bonus" non-distinctive. In any event, I hold, on the evidence, that to distinguish goods manufactured or prepared by him under the name "Bonus Foods", that such goods were then either sold by him under the name "Bonus Foods" to third persons operating food shops or were sold to consumers through his own retail outlet operated under the name of

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"Giuriato Brothers", and that they, in either case, carried an indication that they were made by "Bonus Foods". There was not, in this period, a use of the trade mark by two different entities, as I understand the evidence. In any event, I cannot find that there was any lack of distinctiveness, either at the time of registration or at the time that these proceedings were commenced, whatever the situation may have been from 1945 to 1947.

The next ground of objection is found in para. 9 of the Statement of Defence, which reads as follows:

> 9. The Defendant alleges and the fact is that at the date of registration of the word BONUS as a trade mark under registration No. NS 82/21344, and at any other material time, such trade mark was similar to the trade mark BONOX registered under No. 135/30944 and/or to the trade mark BONUS registered under No. NS 81/21227.

The validity of this attack depends on s. 26(1)(*f*) of the *Unfair Competition Act*, which reads as follows:

> 26. (1) Subject as otherwise provided in this Act, a word mark is registrable if it
>
> . . .
>
> (*f*) is not similar to, or to a possible translation into English or French of, some other word mark already registered for use in connection with similar wares.
>
> . . .

It is to be noted that the allegations in para. 9 of the Statement of Defence do not bring the attack within s. 26(1) (*f*). Not only must the word mark under attack have been similar at the time of registration to a mark already registered, which was alleged, but the mark already registered must have been registered for use in connection with "similar wares", which was not alleged. In any event, "Bonox", in my view, is not "similar to" "Bonus", in this context, and the "Bonus" that was registered under No. N.S. 81/21227 was registered in respect of "...beverages, sold as soft drinks and syrups and extracts for making the same" which cannot, in my view, be regarded as "similar" to the wares in respect of which the plaintiff's trade mark was registered, having regard to the definition in s. 2(1) of the *Unfair Competition Act*.

The final ground of attack on the validity of the plaintiff's registered trade mark is contained in para. 8C of the Statement of Defence, which I repeat here for convenience:

> 8C. The trade mark registration is invalid in that the application of January 6, 1955 to extend the wares covered by the registration contained misstatements relating to the date when the marks were first used on

the wares covered thereby contrary to the requirements of S. 29(*b*) of the Trade Marks Act, S.C. 1954-5 c. 49.

Much time could be spent discussing whether s. 30(1)(*a*) of the *Unfair Competition Act* required the application for a trade mark to give separate dates for each of the general classes of wares described in the application, but s. 29(*b*) of the *Trade Marks Act* had become law before the 1955 application and it was explicit. Much time could also be spent discussing whether there was one or several general classes of wares set out in the application of January 6, 1955. I do not propose to express a view on this question because, as far as I have been able to ascertain, there is no provision in the statute under which the "misstatements", if there were misstatements, become grounds for invalidating the registration of the trade mark. S. 18 of the *Trade Marks Act* does not extend to such a case unless the misstatements had effect to make the trade mark "not registrable". As this amendment was under the *Trade Marks Act,* s. 40(2) gives the application therefor the effect of an application for registration and we must turn to s. 12 of the Act. I cannot find anything in that section that makes a mark "not registrable" merely because there is a misstatement in the application for registration. The matter might be different of course if there was a fraudulent misrepresentation, but there is no suggestion here of anything other than an innocent misstatement.

The principal case relied upon by the defendant in connection with the misrepresentation point is *Standard Brands Limited v. Staley.*[1] While the judgment in that case recites a statement in an application for registration of a trade mark to the effect that the applicant had used the mark since a certain date and says that the statement was not true, the decision that the registration was invalid is not based upon the fact that there was a misstatement in the application but upon the fact that what was so stated was a condition precedent to any right in the trade mark. The applicant had not used the mark at all and, at that time, under the *Unfair Competition Act,* it was "use" that created the "right".

The attacks on the validity of the registration of the plaintiff's trade mark having failed, the Counterclaim is dismissed with costs.

[1] [1946] Ex. C.R. 615.

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I come now to the question whether the defendant has infringed or must be deemed to have infringed the plaintiff's trade mark.

The basic facts, in my view, are simple. The plaintiff has a registered trade mark that confers on it the exclusive right to the use throughout Canada of the trade mark "Bonus" in respect of, among other things, "canned products: ...chicken, chicken stew, devilled ham sandwich spread, ham and chicken sandwich spread, chicken spread, chicken a la king, turkey salad spread, ham loaf, chicken loaf, beef and chicken sandwich spread..." The defendant, during the period in question, has been using the identical mark "Bonus" in respect of a canned dog food manufactured from meat.

The relevant provisions of the *Trade Marks Act* are:

2. In this Act,

. . .

(*b*) "confusing" when applied as an adjective to a trade mark or trade name, means a trade mark or trade name the use of which would cause confusion in the manner and circumstances described in section 6;

. .

6. (1) For the purposes of this Act a trade mark or trade name is confusing with another trade mark or trade name if the use of such first mentioned trade mark or trade name would cause confusion with such last mentioned trade mark or trade name in the manner and circumstances described in this section.

(2) The use of a trade mark causes confusion with another trade mark if the use of both trade marks in the same area would be likely to lead to the inference that the wares or services associated with such trade marks are manufactured, sold, leased, hired or performed by the same person, whether or not such wares or services are of the same general class.

. . .

(5) In determining whether trade marks or trade names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including

(*a*) the inherent distinctiveness of the trade marks or trade names and the extent to which they have become known;

(*b*) the length of time the trade marks or trade names have been in use;

(*c*) the nature of the wares, services or business;

(*d*) the nature of the trade; and

(*e*) the degree of resemblance between the trade marks or trade names in appearance or sound or in the ideas suggested by them.

19. Subject to sections 21, 31 and 65, the registration of a trade mark in respect of any wares or services, unless shown to be invalid, gives to the owner the exclusive right to the use throughout Canada of such trade mark in respect of such wares or services

20. The right of the owner of a registered trade mark to its exclusive use shall be deemed to be infringed by a person not entitled to its use under this Act who sells, distributes or advertises wares or services in association with a confusing trade mark or trade name, but no registration of a trade mark prevents a person from making

(*a*) any *bona fide* use of his personal name as a trade name, or

(*b*) any *bona fide* use, other than as a trade mark,

(i) of the geographical name of his place of business, or

(ii) of any accurate description of the character or quality of his wares or services,

in such a manner as is not likely to have the effect of depreciating the value of the goodwill attaching to the trade mark.

Clearly there has been no infringement of the plaintiff's registered trade mark in the sense that the defendant has done something that the plaintiff had the exclusive right to do. S. 19 does not confer on the plaintiff the exclusive right to use "Bonus" as a trade mark in relation to canned dog food.

The first question is therefore whether the plaintiff can bring the defendant's acts within the first part of s. 20. To do this (having regard to s-ss (1) and (2) of s. 6), it must appear that the use "in the same area" of the mark "Bonus" in respect of canned meat products for human consumption and of the same mark "Bonus" in respect of canned dog food made of meat would be likely to lead to the inference that all of these wares were manufactured "by the same person".

It must, to begin with, be emphasized that, to bring the defendant within s. 20, it does not have to appear that the plaintiff and the defendant had, in fact, used the mark "Bonus" in the same area or that the public had ever, in fact, been confused in the sense that they had thought that the plaintiff's canned meats, spreads, chicken and other products had been made by the same person as made the defendant's canned dog food. The test in s-s. (2) of s. 6 is not what has happened in fact but what inference would be likely to be drawn if it did happen that the plaintiff and the defendant used the mark "Bonus" in respect of these different classes of goods in the same area. A finding must be made whether, in the purely hypothetical event of user by the plaintiff of its registered trade mark rights and user by the defendant of the mark "Bonus" in respect of its dog food in the same area, it would be likely to lead to the inference that the wares in relation to

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which the plaintiff used the trade mark and the wares in relation to which the defendant used it were manufactured or sold by the same person. The answer to this question might conceivably lead to the conclusion that the defendant must be deemed to have infringed the plaintiff's registered trade mark even if the plaintiff's sales were, in fact, restricted to a small area in British Columbia and the defendant's sales were in fact restricted to a small area in Newfoundland and, even if no single member of the public had ever, in fact, seen wares originating from them both. This test is apparently so framed by s. 6(2) because s. 19 confers on the plaintiff an "exclusive right to the use throughout Canada".

In reaching a conclusion on the hypothetical question framed by s-s. (2) of s. 6, the Court must have regard to all the surrounding circumstances including those enumerated in paragraphs (*a*) to (*e*) of s-s. (5) of s. 6. As far as the enumerated circumstances are concerned, I find little difficulty in reaching a conclusion in this case:

(*a*) "the inherent distinctiveness of the trade marks ...and the extent to which they have become known": this factor could only operate to negative the type of "confusion" in question if there were two different trade marks, each more or less established in the public mind to such an extent that the public would not infer that they pointed to one person here there is only one trade mark "Bonus" and, if that were the only factor, it points to one manufacturer or vendor;

(*b*) "the length of time the trade marks...have been in use": here again, as the alleged infringer is using the registered owner's registered trade mark, and as the owner has been using it for over twenty years and the alleged infringer has only been using it during a development period, this factor does nothing to negative the inference of one manufacturer or one vendor, otherwise flowing from the use of the same brand;

(*c*) "the nature of the wares...": here a difference might negative the inference; if the difference were sufficient, the use of the same mark on different wares might give rise to no likelihood of an inference of a single manufacturer or a single vendor but, in this case, the plaintiff uses the mark on canned meat for human consumption and the defendant uses it on canned meat for consumption by dogs; in my view, on the evidence, the probability, in fact, is that one person would manufacture both of these kinds of wares and I think that this is the inference that would be drawn by an ordinary member of the public; I doubt that the ordinary member of the public realizes that a person who engages in both of these two classes of manufacture ordinarily camouflages that fact by using different brand names;

(*d*) "the nature of the trade": the same manufacturers, the same trade channels, the same retail outlets and the same purchasers are, according to the evidence and everyday knowledge, likely to be concerned with canned meat for human consumption and canned meat for dog consumption [I do not think that the fact that the defendant chose to use three salesmen to get this dog food moving has any bearing on the question to be decided under s. 6(2)];

(*e*) "the degree of resemblance between the trade marks . . . in appearance or source or in the ideas suggested by them": the trade marks here are identical.

The only other circumstances that occur to me as falling within s-s. (5) of s. 6 are the actual label and other literature employed by the defendant in marketing its dog food under the trade mark "Bonus". I have doubts whether such circumstances are relevant in making the hypothetical determination contemplated by s-s. (2) of s. 6. Assuming that they are, however, and putting myself, as well as I can, in the position of the ordinary person making the rounds of grocery stores or supermarkets, I have no doubt that, seeing the word "Bonus" as the label on dog food and the same word "Bonus" as the label on canned meats for human consumption would lead most people to the conclusion that they were put out by the same manufacturer or by the same vendor. I am assuming, as I think is the fact, that the ordinary person buying groceries and other wares off the shelf does not look beyond the brand on the label in distinguishing the origin of the wares he or she is contemplating buying. There is neither time nor inclination, during the course of a shopping excursion, to stop and peruse the fine print on the labels, much less appreciate

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the fine distinctions of meaning that might be taken therefrom.

The remaining question to be decided in determining whether the plaintiff has a cause of action for infringement of its registered trade mark is whether, on the facts of this case, it may be said that the defendant's use of the trade mark "Bonus" was a "bona-fide use, other than as a trade mark...of any accurate description of the character or quality of his wares...in such a manner as is not likely to have the effect of depreciating the value of the goodwill attaching to the trade mark" so as to fall within the class of exceptions in the second part of s. 20 of the *Trade Marks Act.* I am of opinion

(*a*) that the defendant used the word "Bonus" as a trade mark to distinguish one of its lines of dog food from other lines of dog food, including those manufactured and sold by others (it also used the word "Bonus" to refer to premiums that it was offering to purchasers but this in no way negatived the separate use as a trade mark);

(*b*) that the word "Bonus" was not used by the defendant as a description of the character or quality of its dog food, which was the wares that it was selling (it may have described the sale transaction as a sale of goods carrying the offer of a premium but that is quite a different thing); and

(*c*) that the use of the word "Bonus" in respect of canned dog food is likely to have the effect of depreciating the value of the goodwill attaching to the plaintiff's registered trade mark for the reason that most members of the public are likely to have some repugnance to buying food for human consumption under the same brand name as that under which dog food is sold, particularly if, in both cases, it is canned meat.

Any one of these three conclusions would lead me to the result that the defendant's use of the word "Bonus" does not fall within any of the exceptions to s. 20.

I therefore conclude that, by virtue of s. 20 of the *Trade Marks Act,* the defendant must be deemed to have infringed the plaintiff's registered trade mark.

Having come to that conclusion, and the plaintiff being therefore entitled to any relief that it seeks without relying on s. 7(*b*)or s. 22 of the *Trade Marks Act,* I do not propose to make any finding with regard to the question whether the plaintiff's claims can be based on either of those two provisions. I should say, however, that I have some doubt whether the evidence justifies the necessary finding of fact of actual or probable confusion that may be necessary to establish a case against the defendant under s. 7(*b*) (there is little or no evidence that the wares of the parties were ever sold in the same areas) and I have also some doubt whether s. 22 has any application to a case where the defendant has infringed or is deemed to have infringed the trade mark.

Before leaving the question of infringement, I wish to refer to one submission made in course of argument in case it might appear that I overlooked it. In course of argument, counsel for the defendant made the submission that because, on cross-examination, a witness for the plaintiff gave evidence that the plaintiff was no longer using the trade mark in respect of certain wares in respect of which it is registered, the plaintiff "has abandoned those wares" and "has a very narrow registration based upon those wares set out in the registration upon which he is now using it". The defendant did not plead abandonment under s. 18(1)(*c*) of the *Trade Marks Act* and the trial did not proceed on the basis that there was any issue of abandonment. If abandonment has been an issue, both sides would have had an opportunity to bring forth evidence on it and the record might have been quite different. No amendment was requested during argument to plead abandonment and it would not have been proper to have permitted an amendment at that time to plead an issue that was never in the contemplation of the parties or the Court during the taking of evidence.

In the absence of an affirmative verdict on a plea of abandonment, s. 19 of the *Trade Marks Act* must govern and the plaintiff's exclusive right is defined by the registration read with that section. In any event, the finding that I have made on validity and infringement would have been exactly the same even if the registration were now limited to the wares that were currently being manufactured by the plaintiff at the time that the defendant commenced to market its Bonus Dog Food.

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The plaintiff therefore succeeds on its claim for infringement of its registered trade mark and will have its costs of the action. The other claims in the Statement of Claim are dismissed without costs. If there is any difficulty in framing the minutes of judgment, the matter may be spoken to.

Judgment accordingly.

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Sept. 28-30
Oct. 1, 2

Nov. 27

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

OLVA DIANA ELDRIDGE .... RESPONDENT.

Revenue—Income—Income tax—Taxability of earnings from illegal operation or illicit business—Business expenses—Deductibility of expense laid out for purpose of gaining income—Deductibility of expense of account of employee incurred as result of terms of employment—Arbitrary assessment—Onus of proof when arbitrary assessment has been made—Income Tax Act, R.S.C. 1952, c. 148, ss. 12(1)(a), 44, 46 and 56.

The respondent operated a call girl business in Vancouver, British Columbia, for several years until she and her nine employees were arrested in November 1960, charged with conspiring to live on the avails of prostitution, and, after pleading guilty, were sentenced to varying terms of imprisonment. After the arrest of the respondent, police seized a voluminous amount of documents at her home, all of which were turned over to the Taxation Division of the Department of National Revenue in answer to a requirement dated March 20, 1961.

The respondent had filed net worth returns for the years 1958 and 1959 and an incomplete net worth return for 1960, accepted by the Taxation Division in the belief that she had no records of her business operations. After reviewing the documents turned over to them by the Vancouver police, the officers of the Taxation Division delivered Notices of Assessment for the years 1959 and 1960 which indicated revised taxable incomes for the two years of $22,046.75 and $19,103.77 respectively. The respondent did not object to the gross revenues calculated by the Taxation Division but objected to the assessments on the ground that substantial operating expenses were not allowed. Her appeal to the Tax Appeal Board was allowed in part and the appellant appeals from that decision.

The main expenses in issue are for rent for various premises in which to carry on her business, legal fees in connection with the charges against her and her employees and fees for bail bonds, telephone inspection fees to ensure against wire tapping, payments for assistance to her employees in the performance of their duties, protection fees, cost of liquor and the cost of buying up an entire issue of Flash newspaper.

Held: That it is abundantly clear from the decided cases that earnings from illegal operations or illicit businesses are subject to tax.

2. That all the items of expenses in issue, with the possible exception of the legal fees, the cost of the purchase of Flash newspaper and the fees paid for bail bonds, are of such a nature that, if proven to have been disbursed, would be proper deductions.
3. That it must be assumed that the law enforcement officers are conscientious in the exercise of their duties and are incorruptible and such assumption can be rebutted only by convincing evidence to the contrary.
4. That the legal fees paid by the respondent for the defence of one of the call girls charged under the Criminal Code in 1959 is properly deductible for the twofold reason that it was laid out for the purpose of gaining income, the girl upon her acquittal returned to work, which she could not have done if sentenced to imprisonment, and it was part of the girl's arrangement with the respondent that in the event of criminal prosecution as a result of the activities, the respondent would assume the cost of the girl's defence.
5. That although the fee paid to counsel for one of the girls arrested with the respondent in November 1960 cannot be justified as a legal expense laid out for the purpose of gaining income from the business since the business had been brought to an end by the wholesale arrests, it is properly deductible because it was a term of the call girl's engagement with the respondent that the respondent would assume responsibility for legal expenses as part of the girl's remuneration.
6. That the commission paid for procuring bail bonds for the respondent's employees was a responsibility assumed by the respondent as a term of the engagement of the call girls and the cost thereof is therefore properly deductible, but not the commission paid for procuring the bail bond for the respondent.
7. That the Minister of National Revenue is not bound by a return or information supplied by or on behalf of a taxpayer and may make what has been termed an "arbitrary" assessment under s. 46 of the *Income Tax Act*. In that event, the onus is on the taxpayer to show that the amount determined by the Minister is erroneous.
8. That the appeal is allowed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Cattanach at Victoria.

R. M. Hayman and *F. D. Jones* for appellant.

N. Mussallem and *M. G. Kemp* for respondent.

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

CATTANACH J. now (November 27, 1964) delivered the following judgment:

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This is an appeal from a decision of the Tax Appeal Board dated November 21, 1962 in respect of income tax assessments of the respondent for her 1959 and 1960 taxation years.

The respondent had been carrying on a call girl operation in the City of Vancouver, British Columbia during the taxation years under review and had been so engaged since 1953. She filed her first income tax return for the year 1957 and also filed returns for the three preceding years, 1954, 1955 and 1956, following a discussion in 1957 between the respondent and her tax consultant and officers of the Taxation Division of the Department of National Revenue. The respondent had not filed income tax returns and the purpose of the discussion in 1957 was to review the respondent's affairs generally. Because of the nature of the respondent's business, she alleged that she kept no books of account or similar records. At that time the officers of the Taxation Division pointed out the advantages and necessity of maintaining complete records for income tax purposes. However, since such records were apparently lacking, the officers of the Taxation Division obtained net worth statements for the taxation years 1953 to 1957 inclusive.

The respondent filed a net worth return for the years 1958 and 1959 and an incomplete return for the 1960 taxation year, also on a net worth basis.

In the latter part of 1960 the respondent's activities came under the surveillance of dedicated and efficient members of the morality squad of the Vancouver police who, after secret and careful preparation, arrested the respondent at her home on the evening of November 10, 1960 and seized a voluminous amount of documents. On the same night, or very shortly thereafter, the seven call girls who worked exclusively with the respondent, were also arrested, together with two girls who attended the telephones in the respondent's operations. The ten girls, including the respondent, were confined in jail, but all ten were, within the next few days, released on bail.

The respondent, her two telephone operators and the seven call girls who worked with the respondent, were all charged with conspiring to live from the avails of prostitution. The material seized by the police, conclusively

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established the guilt of the accused persons each of whom pleaded guilty to the charges laid against them and they were sentenced to varying terms of imprisonment.

By requirement dated March 20, 1961, all records seized by the police were obtained by the officers of the Taxation Division who thereupon undertook an exhaustive and painstaking reconstruction of the respondent's affairs for the 1959 and 1960 taxation years.

This reconstruction formed the basis of Notices of Assessment for the respondent's taxation years 1959 and 1960 and disclosed the following revenues and expenditures:

	1959	*1960*
Gross Revenue	$ 77,661.50	$ 80,749.00
Expenses:—		
Associates share of gross revenues	38,830.75	40,374.10
Dispatchers Wages (telephone operators)	6,504.20	7,862.25
Commissions	2,996 03	5,735.75
Telephone	276.13	409.67
Room rentals	1,583.50	1,783.50
Refreshments	1,120.94	862.56
Taxis	101.00	61.50
Bad debts	990 00	1,334.50
Miscellaneous	612.20	621.00
	$ 53,014.75	$ 59,045.23
Net income	$ 24,646.75	$ 21,703.77

In making the assessment for the respondent's 1959 taxation year the Minister recomputed the respondent's income as follows:

Net income previously assessed		$ 3,718.09
Add—unreported income		20,928.66
Revised net income		24,646.75
Deduct—Personal exemptions	$2,500	
Standard deduction	100	2,600.00
Revised taxable income		22,046.75

Upon the revised taxable income the Minister assessed tax amounting to $9,275.75 and levied a penalty amounting to $2,150.00

In making the reassessment for the respondent's 1960 taxation year the Minister recomputed the respondent's income in the following manner:

Net income reported	$ nil
Add unreported income	21,703.77

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Revised net income			21,703.77
Deduct—Personal exemption	$2,500		
Standard Deduction	100		2,600.00
Revised taxable income			19,103.77

The respondent objected to both such assessments. She admitted that gross revenues in the amounts of $77,661.50 in 1959 and $80,749.00 in 1960 were received by her. In fact I think the gross revenues received in the years in question were in excess of these amounts because in the year 1959 there were 71 days for which the daily recordings (which came into the hands of the taxation officials) were missing and 34 days in 1960. In addition there was gross income in the amount of $2,118.75 and expenses of $1,389.25 leaving a net income of $729.50 (see Exhibit A-48) which, because of the absence of dates, could not be allocated to the appropriate year and accordingly were omitted from the compilation. However, she complains that the expenses of $53,014.75 for the year 1959 and $59,045.23 for the year 1960 are not conclusive of the operating expenses incurred by her during the taxation years in that they do not include further items of expense, which will be considered in detail later.

The Minister, having reconsidered the assessments and having considered the facts and reasons set out in the respondent's notices of objections, by notification dated March 1, 1962 confirmed the assessments,

> ... on the ground that subsection (6) of section 46 of the Act provides that the Minister shall not be bound by any return or information supplied by or on behalf of a taxpayer and notwithstanding such return or information the Minister may assess the amount of tax payable by any person; that in the absence of proper proof and accounting records and upon investigation and in view of all the facts the Minister has under the said subsection (6) of section 46 assessed the tax payable by the taxpayer for the taxation years 1959 and 1960; that additional expenses claimed as deductions from income have not been shown to have been outlays or expenses incurred by the taxpayer for the purpose of gaining or producing income within the meaning of paragraph (*a*) of subsection (1) of section 12 of the Act; that a penalty has been levied in the 1959 taxation year in accordance with the provisions of section 56 of the Act.

The respondent appealed the assessments to the Tax Appeal Board. By a judgment dated November 21, 1962 the Tax Appeal Board allowed the respondent's appeal in part, directing that the sum of $11,860.00 be deducted from the respondent's assessed income for the year 1959 and the sum of $9,700 from her assessed income for 1960, and that the penalty imposed be duly reduced. In the aforesaid judgment the Tax Appeal Board stated that "due credit had not been given by the respondent (i.e. the Minister) to the appellant (the respondent herein) for certain expenses necessarily incurred by her for the gaining or producing of income during 1959 and 1960". However, the judgment does not indicate the details of the expenses which comprise the respective total sums of $11,860.00 and $9,700.00

It is from this judgment that the present appeal to this Court is taken.

The basic record of the respondent may be described as daily call sheets. The respondent's business was arranged exclusively by telephone. An apartment was maintained in the west end of Vancouver where the telephones were located. There was a normal staff of two girls, which was sometimes increased to three, who worked in shifts from 11:00 a.m. to 7:00 a.m. These girls received telephone calls from prospective customers. After checking the authenticity of the caller they would then arrange an assignation, the details of which were carefully recorded on a sheet of paper from a stenographer's notebook indicating the name of the caller, a code number for the girl assigned to the call and the place of assignation which was indicated by means of a certain sequence of the digits in the telephone number at the place. The time of the commencement of the girl's visit was also recorded and the time of its termination. The girl would report her arrival and departure by telephone so that the whereabouts of the girl was known at all times. If the girl did not so report, checks were made by calling the telephone number at the place of assignation and if difficulty was thereby apparent assistance was sent to the girl. Those circumstances were recorded on the daily sheet. In any event the daily sheets do record the duration of each visit and the fee therefore which was at the rate of $25 per hour. A great number of assignations were made in motel or hotel rooms engaged by the caller, but in many instances, where such was not feasible, the meetings were arranged in suites or rooms rented by the respondent. The girl who took the assignment would receive the payment from the customer and subsequently deliver the respondent's 50 percent share to the telephone operator, which amount was also recorded in the daily sheet by her.

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Unquestionably these daily sheets did comprise a complete record of the revenues received and were obviously necessary to ensure the accurate division thereof between the respondent and the girls.

Further, the arrangement whereby 50 percent of the fees received were delivered to the respondent was satisfactory to the call girls. It obviated the necessity for them to solicit in the streets thereby avoiding police surveillance, they were assured of assistance in the event of trouble with a customer, the way for them to enter and leave hotels and motels was smoothed by payments by the respondent to desk clerks and like employees and when calls were not made at hotels or motels a place of assignation was provided. Further the respondent also provided a centrally located apartment to which the girls could resort while awaiting calls rather than return to their own residences. This had the additional advantage to the respondent that she did not have to pay taxicab fares over greater distances.

If cheques were accepted in payment for services, the respondent bore the loss if the cheques were dishonoured.

The respondent undertook the responsibility for all legal expenses in the event of the girls who had an exclusive arrangement with her being arrested (including the provision of bail and counsel to conduct her defence).

The respondent testified that during the years she conducted this operation she had entered into such an arrangement with hundreds of girls. It often occurred that girls who did not have this exclusive arrangement with her were engaged, in which case the respondent's share of the fees earned was 30 percent. However, the respondent did not assume responsibility for any possible legal expenses of the girls so engaged who were considered by her to be casual employees.

The daily sheet was begun by the telephone operator, also referred to as a dispatcher, when she began the shift at 11:00 a.m. and was continued by her succeeding dispatcher and was concluded at the end of the shifts at 7:00 a.m. the following morning.

From the money on hand in the telephone rooms certain expenses were paid, such as the dispatchers wages, commission paid to desk clerks, bellhops, taxicab drivers and like persons for the referral of customers to the respondent, telephone bills, rent, groceries, taxicab fares, bad debts and miscellaneous expenses. These payments were also entered on the daily sheets. When these payments out were deducted from the revenues received from the girls, the cash on hand represented the respondent's income for the particular day. The dispatcher going off duty at 7:00 a.m. would then mail the daily sheet to the respondent at her home address.

From these sheets, for the years 1959 and 1960 which were found and seized by the police when the respondent was arrested at her home on the evening of November 10, 1961 and which were obtained from the police by the officials of the Taxation Division, those officers compiled summaries of the respondent's income and expenses for the years 1959 and 1960 for each month which were received in evidence as Schedules 2 and 3 to Exhibit A.46. The respondent admitted that the summaries so prepared are accurate summaries of the income and expense of the respondent from her operation during the years 1959 and 1960 so far as disclosed by the daily sheets which were received in evidence as Exhibit A.6, A.16, A.18 and A.24.

However, the respondent and two of her dispatchers testified that there were further expenses paid which were not included on the daily sheets. The total remaining for each daily sheet at the conclusion of the working day at 7:00 a.m. was transferred to "Bank". By being transferred to "Bank" was meant that the cash and cheques on hand were placed in a white envelope which was secreted in the telephone rooms behind a mirror in the bathroom. Expenses were sometimes paid after completion of the daily call sheet for the preceding day and before the beginning of the succeeding day's sheet by the dispatchers (who were trusted employees) from the cash in the envelope and noted by them on the envelope. These envelopes were picked up by the respondent or her agent at intermittent intervals. From the daily sheets which had been mailed to her and the notations of money paid out thereon and on the envelopes, the respondent could balance the cash in the envelopes against such notations and so ascertain the correctness of the amount of cash received by her. She testified that the envelopes with their notations

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were effectively destroyed by her forthwith after they had served this purpose.

While the daily sheets were the basis of the summary of income and expenses of the respondent for the taxation years in question and which in turn form the basis of the assessments presently under appeal, nevertheless, the officers of the Taxation Division meticulously checked other sources of information available to them, such as the bank accounts of the respondent with deposits and withdrawals.

In my view the summaries of revenue are accurate and if any error occurs therein, that error is in favour of the respondent.

The respondent freely admits that she was engaged in an illegal and illicit business, nor does she dispute the computation of the gross income received by her. The substance of her objection to the assessments is that further expenses were incurred by her in the operation of her business which should be taken into account and her taxable income reduced to the extent of those expenses.

At this point I would mention it is abundantly clear from the decided cases that earnings from illegal operations or illicit businesses are subject to tax. The respondent, during her testimony, remarked that she expressed the view to the officers of the Taxation Division that it was incongruous that the government should seek to live on the avails of prostitution. However, the complete answer to such suggestion is to be found in the judgment of Rowlatt, J. in *Mann v. Nash*[1] where he said at p. 530:

> It is said again· "Is the State coming forward to take a share of unlawful gains?" It is mere rhetoric. The State is doing nothing of the kind; they are taxing the individual with reference to certain facts. They are not partners; they are not principals in the illegality, or sharers in the illegality; they are merely taxing a man in respect of those resources. I think it is only rhetoric to say that they are sharing in his profits, and a piece of rhetoric which is perfectly useless for the solution of the question which I have to decide.

The respondent puts forward as further expenses items in the total amount of $20,255.40, which she claims should have been deducted in the year 1959 to arrive at her taxable income which if allowed, would reduce her taxable income for the year 1959 to $4,391.35.

[1] (1929-1932) 16 T C. 523.

With respect to the taxation year 1960, the respondent claims additional expenses to the total amount of $22,140 which, if allowed would result in a loss of $336.33 for the 1960 taxation year.

The items put forward by the respondent as operating expenses of her business for the 1959 taxation year, not taken into account in making the assessment on that year, are as follows:

	Cheques	*Cash*	*Total*
(1) Rent paid to Kamlo Motel	$ 475.40	$ 500.00	$ 975.40
(2) Rent for apartment at 1095 Bute St.	180 00	1,155.00	1,335 00
(3) Rent paid to Shirley Milne for apt. occupied by her		2,100 00	2,100.00
(4) Rent paid for additional suites		1,170.00	1,170.00
(5) Legal fees	425.00	500.00	925.00
(6) Telephone inspection		1,000 00	1,000.00
(7) Payments for assistance to girls	100.00	900 00	1,000.00
(8) Payments to casual employees ..	150.00		150.00
(9) Protection fees		9,000.00	9,000.00
(10) Liquor Payment fees		2,600.00	2,600 00
Totals for 1959 taxation year ..	$1,330.40	$ 18,925.00	$ 20,255.40

Items put forward by the respondent as operating expenses of her business during her 1960 taxation year which were not taken into account in making the assessment for that year, are as follows:

	Cheques	*Cash*	*Total*
(1) Rent paid to Shirley Milne for suite occupied by her for 11 months		$ 1,925.00	$ 1,925.00
(2) Legal fees		1,000.00	1,000 00
(3) Telephone inspection		1,000.00	1,000.00
(4) Purchase of entire issue of Flash newspaper		500.00	500.00
(5) Rent paid for additional suites ..		1,300.00	1,300.00
(6) Rent paid for suites at 1107 Howe St. (Vincent Lodge)		515 00	515.00
(7) Protection fees		7,500.00	7,500 00
(8) Fees paid for bail bonds		6,400.00	6,400.00
(9) Liquor payment fees		2,000 00	2,000.00
Total		22,140.00	22,140.00

All such items, with the possible exception of the items for legal fees, the purchase of Flash newspaper and fees

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paid for bail bonds, are of such a nature that, if proven to have been disbursed, would be proper deductions. With respect to such items as are deductible, if proven, counsel for the Minister contends that the onus, which is on the respondent, that she did so expend such sums, has not been discharged by the production of acceptable evidence. With respect to the payments of legal fees, for Flash newspaper and fees for bail bonds, he contends that even if payment of those fees is proved, they were not outlays or expenses made or incurred by the respondent for the purpose of gaining income from her business and accordingly the deduction thereof in computing income is precluded by s. 12(1)(a) of the *Income Tax Act.*

With such considerations in mind I propose to deal with each individual item advanced by the respondent. It will be observed that the items respecting (1) rent paid to Shirley Milne; (2) rent for additional suites; (3) telephone inspection (4) protection fees and (5) liquor payments, are common to both taxation years under review, for which reason I shall deal with those items first particularly since the circumstances and considerations applicable thereto are the same in each year.

The claim with respect of the premises at 1095 Bute Street, occupied by Shirley Milne is in the total amount of $4,025 being $2,100 for twelve months in the year 1959 and $1,925 for eleven months in the year 1960 which is at the rate of $175 per month. These premises were occupied by Shirley Milne as her personal living accommodation. Mrs. Milne was apparently an intimate and trusted friend of the respondent having previously lived with the respondent in her home. Shirley Milne occasionally acted as a call girl and sometimes acted as a telephone operator. However, in addition to being personally occupied by Shirley Milne as her living accommodation, the premises were used as a central location to which the call girls could resort to (and did so resort) between calls so as to be readily available and to avoid the necessity of travelling greater distances to places of assignation with a corresponding increase in taxicab fares. Further, the premises were used as a place of assignation when other such places were not available. Therefore, there is no doubt that these

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premises were used in the conduct of the respondent's business.

Mrs. Milne testified that the respondent paid the monthly rent of the premises and the cost of further expenses in connection with the maintenance of the premises to her in cash while she in turn paid the rent to the landlord and paid the bills for expenses. She further testified that the monthly rental was $105 and that the expenses usually amounted to $75 per month. She also added that the respondent paid for utility services such as electricity and telephone for which the respondent seeks to claim $370 or $185 for each year which amount was not previously claimed in the respondent's expenses as before outlined herein. This money was paid directly to Mrs. Milne by the respondent which undoubtedly accounts for the fact that entries of these expenditures were not made in the daily sheets by the telephone operators, nor was it contended by the Minister that any such payments could be attributed to the expenses outlined in Schedules 2 and 3 to Exhibit A.46 under the heading "Room Rentals" which were allowed by him in making the assessments. While I am satisfied that a monthly rental of $105 was paid for these premises and that the premises were used in the respondent's business, the evidence with respect to the additional expenses is extremely vague. With respect to the further monthly amount of $75, this was put forth as an estimate for expenses which were not particularized other than by mention in the evidence of the respondent and Mrs. Milne of maid service and groceries and a yearly amount of $185 for utilities, such as electricity and telephone, which was added as an afterthought. The relationship between Mrs. Milne and the respondent was not explained with any degree of exactitude, that is, whether she was the resident manager of the respondent for the operation of these premises and if so the nature of the arrangement for her compensation. I am certain that a portion of the expenses incurred were personal living expenses of Mrs. Milne. Further the additional expense put forward is admittedly an estimate unsupported by vouchers, receipts and no proper records or accounts were kept to support the statements. While I am satisfied that the monthly rental of $105 was paid, I have

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not been satisfied by adequate evidence which is the responsibility of the respondent to produce, as to the additional expenses claimed. Therefore, I would allow as a deduction as a business expense incurred by the respondent for these premises the sum of $1,260 for the year 1959 and the sum of $1,155 for the year 1960.

The second item applicable to the 1959 and 1960 taxation years is a claim, the rent of for "at least" one other suite leased at all times from April 1959 at an "average" rental of $130 per month. The amounts claimed by the respondent in this regard are $1,170 for the 1959 taxation year and $1,300. No satisfactory evidence was adduced to confirm the respondent's statement that such amounts were paid, nor as to the amounts alleged to have been paid. This amount is an obvious estimate because the respondent states it was an "average" rental, nor is it certain how many suites were rented, or the precise dates when they were rented. I have not been presented with evidence which would enable me to determine if any such amounts were paid and, even if any such amounts were paid, precisely how much was so paid. The appellant, by reason of her failure to keep proper records, has been unable to show to my satisfaction that the Minister erred in not crediting these amounts as an expense in her business.

The third item common to the 1959 and 1960 taxation years is an amount of $1,000 in each year for telephone inspections. The respondent, by reason of the nature of her business, suspected that a listening device might be surreptitiously attached to the telephones in her telephone room by the law enforcement authorities to secure information which might lead to the respondent's criminal prosecution and conviction and so hamper or terminate her business. To guard against such possibility she testified that she engaged an employee of the telephone company to ascertain if her telephones had been so tapped. Admittedly, the telephone company employee was prohibited by his employer from conducting such an inspection. The respondent claims that a fee was charged for each such inspection but that no receipt was given to the respondent. The respondent admits that she did not keep records of the number of such inspections or of the total cost thereof. The amount of $1,000 for each year is admittedly only a very rough estimate. Again, such vague generalities as were introduced in evidence are not adequate to discharge the onus on the respondent. That onus can only be discharged by precise and definite evidence. The respondent has not satisfied me by adequate evidence that any such amount was expended and, if so, of the amount so expended.

The fourth item common to the 1959 and 1960 taxation years is the amount claimed for protection fees, being $9,000 in 1959 and $7,500 in 1960. The respondent maintained that she could not conduct her business without the payment of protection to the law enforcement authorities. She alleges that she paid $750 per month for this purpose based on $100 for each call girl in her employ and $50 for the messenger who collected the money which she testified was paid in cash, placed in a white envelope and invariably collected the first of each month by a person who identified himself as Mr. Jones of Seattle. In exchange for such payment the respondent was advised of certain hotels to be avoided by her girls when these hotels were under police surveillance and like information. She also attributed the fact that her business was operated without molestation until November 10, 1960 to these protection payments being made. While the respondent hinted that she knew the recipients of these payments, she refused to identify such persons because, as she stated, she feared for the safety of the lives of her children and her own life if she made such disclosures. I must assume that the law enforcement officers are conscientious in the exercise of their duties and are incorruptible and such assumption can only be rebutted by convincing evidence to the contrary. The evidence which I received was not of this nature and accordingly I have not been satisfied that payments for protection were made.

The concluding item common to the years 1959 and 1960 is for liquor payment fees, being one case of liquor per week purported to have been given to officials of the civic administration amounting to $2600 for the year 1959 and $2,000 for the year 1960. These amounts are admittedly only an estimate. The respondent, at one stage of his testimony, said she caused to be delivered a case of high quality whiskey once a week, but during her examination for discovery she stated deliveries were made once a month. I have not been convinced that these gifts were, in fact,

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made and even if they were made, no evidence has been adduced from which I could ascertain the number of such gifts and so compute their value.

I now proceed to a consideration of the items put forward as operating expenses incurred by her exclusively in the 1959 taxation year.

The first such item is in the total amount of $975.40 alleged to have been paid for rooms in the Kamlo Motel used in the respondent's business daily from January 1, 1959 until March 31, 1959 at the rate of $12 per day plus telephone calls. The respondent rented these rooms in fictitious names of man and wife whom the call girl purported to visit, but there is no doubt whatsoever that the respondent paid the cost of engaging the rooms. Two payments were made by the respondent's cheques, one dated February 24, 1959 for $229.75 and the other dated April 15, 1959 for $245.65, being a total of $475.40 which are conceded by the Minister as not having been included in the computation of the respondent's taxable income. In my view an amount of $475.40 is a deductible business expense of the respondent's and of which cognizance should be taken in computing her taxable income for 1959. However, the respondent also claims an approximate amount of $500 as paid in cash for room rentals in the Kamlo Motel. This claim is admittedly a mere approximation and is not substantiated by such acceptable evidence as convinces me that such payments were made and if made the precise amount thereof.

The next item is a claim for rent paid to Mrs. W. deSantis for premises at 1095 Bute Street. Mrs. deSantis leased unfurnished premises from the landlord. She installed tastefully selected furniture and sublet the furnished premises to the respondent at an increased monthly rental of $180 per month. These premises were used by the respondent for her business during the months of April, May, June, July, August and part of September 1959, the rent paid for September being $65. The payments of $180 for July and August and $65 for September were entered on the daily call sheets and were credited to the respondent by the Minister in making the assessment for 1959. Therefore, the claim by the respondent in respect of this item must be reduced to $360 being the rent for April, May and June. The rent for May was paid by the respondent by cheque dated May 4, 1959. I am satisfied that the rent of $180 was also paid by the respondent in each of the months of April and June of that year. The inference is almost irrebuttable that, since the months following June were entered in the daily call sheets and allowed by the Minister as an expense, and the rent for May was paid by cheque, that the rent was also paid for the months of April and June. Therefore, the respondent is entitled to a deduction of $360 as a business expense in respect of this item.

The next item is a claim for $925 paid by the respondent to Mr. N. Mussallem in August 1959 for his services in defending one of the call girls engaged by the respondent on a charge under the Criminal Code. I might mention that Mr. Mussallem is counsel for the respondent in the present appeal and that the accused call girl was acquitted. In my opinion the amount of $925 paid by the respondent for legal expenses is properly deductible for the twofold reason (1) that it was laid out for the purpose of gaining income, the girl upon her acquittal of the charge returned to work which she could not have done if sentenced to imprisonment and (2) it was part of the girl's arrangement with the respondent that in the event of criminal prosecution as a result of the activities, the respondent would assume the cost of the girl's defence. Compare *The Minister of National Revenue v. Goldsmith Bros. Smelting and Refining Company Limited*[1].

The concluding item for the year 1959 is a claim for $1,000 as having been paid for assistance to the girls. It frequently happened that a girl sent on an assignment would encounter difficulty with the customer. In these events the respondent had an arrangement with certain men possessed of physical strength and some guile, which they exercised when set to extricate a girl from difficulty, for which services these men were paid. By cheque dated July 2, 1959 the respondent paid P. Graham $100 for these services performed by him, which, in my opinion, is properly deductible as a business expense. However, the respondent estimates that she paid a further $900 in cash during 1959 for like services for which there is no confirmation

[1] [1954] S.C.R. 55.

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by means of any record. Therefore, the further amount of $900 has not been substantiated to my satisfaction and is not allowed.

There now remains for consideration the items put forward by the respondent for business expenses incurred by her in the 1960 taxation year with which she was not credited by the Minister in making the assessment for that year, but excluding these items which I have already considered as applicable in both taxation years under review.

The first item is a claim for legal fees in the amount of $1,000 paid by the respondent to R. Myers for his services in defending one of the call girls when the respondent and her girls were arrested on November 10, 1960 and charged with conspiring to live from the avails of prostitution. This particular girl wished to be defended by counsel of her own choice. This payment of $1,000 cannot be justified as a legal expense laid out for the purpose of gaining income from the business since the respondent's business had been brought to an end by the wholesale arrests. However, it was a term of the call girl's engagement with the respondent that the respondent would assume responsibility for legal expenses as a part of the girl's remuneration. As such, I am of the opinion that this amount is properly deductible and should be allowed.

The second item is the payment of $6,400 for commission on procuring bail bonds for the respondent and the girls who were arrested and confined to jail on November 10, 1960, or immediately thereafter. The respondent testified that she paid the foregoing amount for this purpose and in this she was supported by a witness who termed himself a bonding agent and who testified under the protection of the *Canada Evidence Act* that he received $6,400 from the respondent as a commission for arranging the furnishing of bail of which he retained $1,400 for himself. One bondsman also testified under similar protection that he received $600 from the bonding agent for furnishing bail for one of the accused girls. I am, therefore, satisfied that the respondent did expend the amount of $6,400. This responsibility, like the responsibility for legal fees, was assumed by the respondent as a term of the engagement of the girls and the cost thereof in respect of the girls is therefore, in my opinion, properly deductible. However, $1,000 of the $6,400 so paid by the respondent was for the commission on bail for herself and accordingly the amount to be allowed should be reduced to $5,400.

The next item claimed as a business expense by the respondent is an amount of $500 paid for the entire issue of a newspaper called Flash, which was to be distributed on the British Columbia mainland. This newspaper, which specializes in the publication of scandalous stories, contained a story concerning the respondent which she considered scurrilous and detrimental to her business. The entire issue was, therefore, purchased by her to suppress this article. A copy of the newspaper was not produced but upon asking I was informed that the article had described the respondent as a Czarina of the particular underworld trade in which she was engaged who wished to obtain control of all prostitutes in the area and that the independents had risen against her, kidnapped her and subjected her to loathsome physical indignities which latter statements the respondent testified were completely false. From the brief description of the substance of the article which I received, I am unable to conclude that the respondent could have been of the opinion that the circulation of this newspaper would have been detrimental to her business. I must, therefore, conclude that this expenditure was not laid out for the purpose of earning income and that it must be disallowed.

The concluding item for the 1960 taxation year is a claim by the respondent for rent paid by her for five one room suites at various times in Vincent Lodge at 1107 Howe Street in the total amount of $515. A witness, who described himself as a property manager, produced receipts totalling that amount made out to fictitious persons. However, he did testify that the rent was paid by the respondent who was well known to him. That the respondent was well known to him has been confirmed to my satisfaction because I have observed that this witness made numerous bank deposits to the credit of the respondent's accounts as her agent. While I would not normally consider this witness to be particularly credible, nevertheless, he would be obligated to make an accurate report of the rents received to the landlord for whom he acted, although he may have been allowed considerable latitude as to the

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desirability of the tenants. I am, therefore, satisfied that the amount of $515 was expended by the respondent for these premises which was an operating expense and therefore properly deductible.

There is one further item common to both taxation years and that is a claim by the respondent for the payment of $1,837.50 to casual employees which arose as a result of evidence which occurred during the trial when the respondent's memory was assisted by an examination of cancelled cheques which had been seized by the police. By cheque dated July 21, 1959 an amount of $150 was paid by the respondent to a casual employee. The Minister concedes that this amount is properly deductible and such amount is, therefore, allowed with respect to the assessment for 1959. In 1960 there were payments to casual employees in the respective amounts of $937.50, $512.50 and $237.50. These payments were to the girls for their share of the proceeds from a payment to the respondent by a cheque for $3,500. If this were the proceeds of what was identified as the "yachting party" when a customer engaged the entire company of girls for the entertainment of his guests on a weekend cruise, then the Minister has credited these amounts as expenses of the respondent and her share thereof has been taken into account as revenue when making the assessment for 1960. If, however, as the respondent believes, this cheque for $3,500 was the proceeds from what has been identified as the "Penthouse party" when similar arrangements were made as for the yachting party, the respondent's share was not taken into account as revenue and it follows that the failure to credit the expense would be counterbalanced by the omission of the revenue in making the assessment. Therefore, if either was the case, the amount of $1,687.50 can be disregarded.

To summarize, it has been proven to my satisfaction that the respondent is entitled to deduct from her 1959 assessment a total amount of $3,270.40 as expenses incurred in the operation of her business, such total being made up as follows:

(1) Rent paid for suite occupied by Shirley Milne	$ 1,260.00
(2) Rent paid to Kamlo Motel	475.40
(3) Rent paid to Mrs. W. deSantis	360.00
(4) Legal fees	925.00

(5) Paid for assistance for girls	100.00
(6) Paid to casual employee	150.00
Total ....$	3,270.40

For the year 1960 the respondent is entitled to deduct as business expenses a total amount of $8,070 for the reasons outlined above, such total being made up as follows:

(1) Rent paid for suite occupied by Shirley Milne .....$	1,155.00
(2) Legal fees	1,000.00
(3) Commission on bail bonds	5,400.00
(4) Rent paid for Vincent Lodge	515.00
Total ....$	8,070.00

It was contended on behalf of the respondent that since she had filed tax returns on a net worth basis, which had been accepted by the Minister for the 1954, 1955, 1956 and 1957 taxation years, that there was no justification for the Minister in making arbitrary assessments under s. 46(6) of the Act, nor for imposing a penalty for evasion of tax under s. 56 of the Act.

I cannot accept either such contention. S. 46 is explicit that the Minister is not bound by a return or information supplied by or on behalf of a taxpayer and may make what has been termed an "arbitrary" assessment. If the Minister elects to do so then the onus is on the taxpayer to show that the amount determined by the Minister is erroneous. This, except to the extent above indicated, the respondent has failed to do. Further, s. 44 of the Act requires that a return of income for each taxation year shall be filed with the Minister by an individual without notice or demand in the form prescribed and containing information prescribed by him. This the respondent did not do, despite the fact that she was advised of the necessity of maintaining accurate records at her meeting with the Taxation officials in 1957. At no time was she informed or led to believe that a return not in the prescribed form and containing the prescribed information would be acceptable. On the other hand the respondent did maintain records from which an accurate tax return could have been prepared by her or on her behalf. Her suppression of those records and her destruction of some for the obvious reason that their seizure by the police would result in her criminal prosecution, as eventually happened, was a choice she made voluntarily and dictated by her choice of the means of

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earning her livelihood. She has no one to blame but herself. She, therefore, acted in a wilful manner as a result of which she attempted to evade payment of tax payable under Part I of the *Income Tax Act* for the 1959 taxation year or part thereof. Therefore, I can find no reason for interfering with the exercise of the Minister's discretion in imposing a penalty under s. 56 other than to direct that the amount of the penalty should be reduced corresponding to the amount by which the assessment should be reduced for that year.

The appeal is therefore allowed with costs and the assessment is referred back to the Minister for reassessment with the direction that an amount of $3,270.40 be deducted from the respondent's assessed income for the year 1959 and an amount of $8,070 from her assessed income for the year 1960 and that the penalty imposed for the year 1959 be correspondingly reduced, the whole in accordance with the foregoing reasons for judgment.

Judgment accordingly.

1963 avril 25

1964 déc. 7

ENTRE:

SA MAJESTÉ LA REINE ............DEMANDERESSE;

ET

GUY PLAMONDON ET HICKS ORIENTAL RUGS LIMITED .. } DÉFENDEURS.

Couronne—Collision entre véhicules moteurs—Action pour recouvrer dommages encourus par la Couronne—Action directe fondée sur l'article 1053 du Code civil de Québec—Action per quod servitium amisit—Provinces anglaises de la Common Law—Action directe en indemnité au profit de la Couronne irrécevable dans le Québec—Action rejetée.

La demanderesse réclame, à titre de dommages-intérêts, les déboursés qu'elle a encourus pour le compte de son employé, un soldat, blessé au cours d'une collision entre véhicules-moteurs, ces déboursés représentant le coût des soins médicaux prodigués ainsi que les salaire et allocation versés à ce soldat. Les défendeurs ont admis, en fait, leur responsabilité au sujet de l'accident, laissant seulement la question de décider si la Couronne pouvait justifier son recours en le basant uniquement sur l'article 1053 du Code civil de Québec pour le préjudice que l'auteur du délit lui a causé directement.

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Jugé: L'action *per quod servitium amisit* reconnue dans les provinces anglaises de la Common Law, savoir, une action directe en indemnité au profit de la Couronne, n'existe pas dans la province de Québec. (Cf. *Sa Majesté la Reine vs. Sylvain et al. ante* p. 261 confirmée par la Cour suprême du Canada [1965] R.C.S. 164).

2° Que dans les circonstances de la cause la demanderesse n'a pas réussi à justifier son recours en le basant uniquement sur l'article 1053 du Code civil.

ACTION par la Couronne en recouvrement de dommages-intérêts fondée uniquement sur l'article 1053 du Code civil de Québec.

La cause fut instruite devant l'Honorable Juge Kearney, à Montréal.

Raymond Roger pour la demanderesse.

Jacques Dansereau pour les défendeurs.

Les faits et questions de droit sont exposés dans les motivés du jugement que rend maintenant (7 décembre 1964) monsieur le JUGE KEARNEY:

La demanderesse réclame de la compagnie défenderesse, Hicks Oriental Rugs Limited, et du défendeur Guy Plamondon, à titre de dommages-intérêts, une somme de $3,446.80 en conséquence d'une collison survenue entre une motocyclette appartenant à et conduite par A. W. Forbes, un membre des Forces armées de sa Majesté la Reine, aux droits du Canada, et une voiture, propriété de la Compagnie Hicks Oriental Rugs Limited, conduite par l'un de ses employés (le dit Guy Plamondon) dans l'exercice de ses fonctions.

La demanderesse, à l'article 5 de l'information, déclare qu'elle a dû payer pour le compte du soldat A. W. Forbes des frais médicaux s'élevant à $2,209.20 avec, en outre, un salaire et une allocation s'élevant à $1,237.60—déboursés, ajoute-t-elle, en vertu des règlements en vigueur.

Dans leur défense, les procureurs des défendeurs ont plaidé que l'action en question était mal fondée en fait et en droit, mais à l'ouverture de l'enquête ils ont admis que les défendeurs étaient seuls responsables de l'accident et des dommages qui en ont résulté.

Dans leur réponse, les procureurs de la demanderesse ont lié contestation avec les défendeurs sur le dit point de droit.

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Les procureurs des parties, avec l'approbation de la Cour, ont consenti à ce que l'argumentation ait lieu par écrit.

Afin d'exposer clairement les soumissions en droit de la demanderesse, je citerai les trois premiers paragraphes de son factum:

> L'affaire présentement devant le tribunal pose la question de l'existence dans la province de Québec d'une action directe en indemnité au profit de la Couronne dont le pendant—quoique l'analogie ne soit pas parfaite—serait, pour les provinces de la *Common Law,* l'action *per quod servitium amisit.*
>
> La question doit être posée avec la plus grande précision. Il ne s'agit pas en l'espèce d'une indemnité appartenant à la victime du délit et que la Couronne tenterait de recouvrer par le truchement de la subrogation. Ni du recouvrement de dépenses ou déboursés faits par la Couronne en vertu d'une loi spéciale, telle la Loi sur l'indemnisation des employés de l'État, c. 134, S.R.C. 1952.
>
> Il s'agit d'une demande en dommages-intérêts que la Couronne fonde sur l'article 1053 du Code civil en réparation du préjudice que l'auteur du délit lui a causé à elle, directement.

Dans leur mémoire écrit, les procureurs des défendeurs s'appuyaient complètement et uniquement sur un jugement de l'honorable juge Dumoulin de cette Cour dans la cause de *Sa Majesté la Reine v. Sylvain et al.*[1]

Les deux causes sont semblables, même au point que lorsque l'action a été intentée elles étaient frappées de prescription en raison de l'article 2262, para. 2, du Code civil, et la responsabilité des défendeurs en fait a été admise; il s'agit donc purement d'une question de droit.

Le 19 novembre 1964, la Cour suprême, dans la cause de *Sylvain* (*supra*) en est venue—à l'unanimité—à une double conclusion: premièrement, que de l'aveu même de la partie appelante le recours *per quod servitium amisit* n'existait pas dans le droit civil de la province de Québec; et deuxièmement, que dans les circonstances du cas soumis au tribunal la demanderesse n'a aucun recours direct en recouvrement de dommages-intérêts en vertu de l'article 1053 du Code civil. Il suffira de citer ce dernier paragraphe du jugement de l'honorable juge Fauteux:

> Tel qu'engagé entre les parties, le débat, ainsi que le déclare l'appelante en son factum, «pose la question de l'existence dans la province de Québec d'une action directe en indemnité au profit de la Couronne dont le pendant—quoique l'analogie ne soit pas parfaite—serait, pour les provinces de la Common Law, l'action *per quod servitium amisit.*» A cette question, je donnerais une réponse négative et, limitant à l'espèce les considérations qui précèdent, je dirais que l'appelante n'a pas réussi, comme elle a cherché

[1] [1965] 1 R.C. de l'É. 261; [1965] R.C.S. 164.

à le faire, à justifier son recours en le basant uniquement sur l'article 1053 C.C.

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En raison du jugement de la Cour suprême plus haut mentionné, je considère que l'information de la demanderesse doit être rejetée.

Les défendeurs auront droit de recouvrer leurs frais après taxation.

Jugement en conséquence.

1963
Apr. 22
1964
Dec. 7

BETWEEN:

ARMAND PLOUFFE .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income tax—Income—Purchase of a business—Capital cost allowance—Licence for a limited period—Effect of claiming different amounts for capital cost allowance in notice of objection, notice of appeal and amended notice of appeal—Valuation of leasehold interest—Evaluation of goodwill—Leasehold interest as capitalization over term of lease of premium lessee willing to pay—Income Tax Act, R.S.C 1952, c. 148, ss. 11(1)(a), 20(5)(a) and (6)(g); Regulation 1100(1)(a), (b) and (c) and Schedule B, Clauses 13 and 14—Alchoholic Liquor Act, R.S.Q. 1941, c. 255, ss. 3(4), 35(1) and 36(3).

This action arises out of the purchase by the appellant of a tavern business in Montreal in June 1951 for $186,000, the business sold consisting of goodwill, all existing moveables used for its exploitation, certain merchandise or stock-in-trade and the vendor's right in a liquor licence or permit, as well as an assignment of a sub-lease of the premises which was held by the vendor.

The main issue turns on whether or not and to what extent the expenditure of $186,000 by the appellant constitutes the capital cost of property in respect of which deductions are allowed under ss. 11(1)(*a*) and 20(5)(*a*) of the *Income Tax Act*. The appellant, in his return for 1954 claimed that about 90 percent of the capital cost of the business was expended on depreciable property but the respondent, on reassessment decided that only about 20 per cent of the assets acquired fell within the definition of depreciable property and that the balance represented goodwill, which was a non-depreciable asset. In his notice of objection to the reassessment the plaintiff included a statement showing that of the total purchase price, $48,599 was for furniture and moveables, $3,500 for the sign, $60,750 for leasehold improvements and $58,500 for leasehold valuation. In his notice

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of appeal the appellant alleged that the total price of $186,000 was paid for depreciable property adding to the statement included with his notice of objection $14,650 for the liquor permit and $1.00 for goodwill. The appellant then delivered an amended notice of appeal wherein he alleged that he had paid $48,599 for furniture and moveables, $3,500 for the sign, $60,750 for leasehold improvements and $73,151 for leasehold interest. At the trial the appellant agreed to accept the respondent's allowances of $16,158.91 for furniture and fixtures (including the sign) and $17,285.19 for leasehold improvements, and the only question remaining to be decided, apart from those raised with respect to the liquor licence, is in relation to the amounts, if any, to be apportioned to leasehold interest and goodwill.

Held: That the appellant having claimed in the statement delivered with his notice of objection to the reassessment capital cost deductions on only $171,349 of the total of $186,000 he paid for the business, which creates a presumption that the difference was expended on something in respect of which he was not entitled to any capital cost allowance, the appellant's attempt to add the difference to his original apportionment for leasehold interest cannot succeed in the absence of convincing evidence in support thereof.

2. That the liquor licence issued to the appellant cannot be regarded as a licence "for a limited period" within the meaning of Class 14, Schedule B of Regulation 1100 of the *Income Tax Act* because, by virtue of s. 35(1) of the *Alcoholic Liquor Act,* R.S.Q. 1941, c. 255, the duration of the licence is neither fixed nor determinable, since it may be cancelled at the discretion of the Commission.

3. That although it may be said that nobody should know better than the appellant himself what amount he considered he paid for his leasehold interest, his initial valuation is more accurate and reliable than his subsequent tardy deviations therefrom, which were self-serving and made with the aid of hindsight.

4. That a well-recognized method of evaluating goodwill is to ascertain the net earnings of the business, allow a conservative rate of return on the capital cost of its acquisition and attribute any surplus to goodwill.

5. That in this case the most pertinent evidence as to the existence or otherwise of goodwill is to be found in the profit and loss statements of the business for the taxation years under review which indicate an average annual net profit of $10,691 and an average surplus profit after allowing a 5 per cent rate of return on capital, of $1,391, which could be attributed to goodwill.

6. That since by electing to claim only a fraction of the capital cost allowance to which he is admittedly entitled the appellant could wipe out the relatively small average annual amount of $1,391, which should otherwise be attributed to goodwill, there is sufficient evidence to substantiate the appellant's main contention that goodwill in this case is non-existent.

7. That the apportionment of the purchase price of the business that should be allocated to leasehold interest should be a sum equivalent to the premium which the appellant would be willing to pay rather than part with his lease, capitalized over the term of the lease.

8 That the appeal is allowed in part.

APPEAL under the *Income Tax Act*.

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

Redmond Quain, Jr., for appellant.

Paul Boivin, Q.C. and *Claude Guérin* for respondent.

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

KEARNEY J. now (December 7, 1964) delivered the following judgment:

The present appeal is from an income tax reassessment imposed by the Minister with respect to the appellant's taxation years 1954 to 1957 inclusive. As the issues involved are identical in each year, I shall confine myself almost exclusively to a consideration of the appellant's taxation year 1954.

On June 4, 1951 the appellant, by notarial deed effective June 1, purchased for $186,000 a tavern business from Gérard Beaucage which the latter, with the required permission of the Quebec Liquor Commission, was exploiting as the sub-tenant of premises located at 72 Beaubien Street, in the city of Montreal, which was owned by Paul Lalonde. According to the deed, the business sold consisted of goodwill, all existing movables which were being used for its exploitation, certain merchandise or stock-in-trade, and the vendor's right in a liquor licence or permit. Included in the sale price was an assignment of a sub-lease of the premises which the vendor had acquired from Albini Parent, the expiry date of which was June 1, 1964.

The deed makes no mention of the amount of the purchase price attributable to each of any of the aforesaid diversified assets, with the result that the issue turns on whether and to what extent the expenditure of the $186,000 constitutes capital cost of property in respect of which deductions are allowed by virtue of ss. 11 (1) (*a*) and 20 (5) (*a*) of the *Income Tax Act*, R.S.C. 1952, c. 148, Regulation 1100 (1) (*a*), (*b*) and (*c*) and particularly Classes 13 and 14 of Schedule B. The provisions of the Regulations made thereunder reads as follows:

11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:

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(a) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation.

20. (5) In this section and regulations made under paragraph (a) of subsection (1) of section 11,

(a) "depreciable property of a taxpayer" as of any time in a taxation year means property in respect of which the taxpayer has been allowed, or is entitled to, a deduction under regulations made under paragraph (a) of subsection (1) of section 11 in computing income for that or a previous taxation year;

* * *

REGULATION 1100—(1) Under paragraph (a) of subsection (1) of section 11 of the Act, there is hereby allowed to a taxpayer, in computing his income from a business or property, as the case may be, deductions for each taxation year equal to

Rates

(a) such amounts as he may claim in respect of property of each of the following classes in Schedule B...(Classes mentioned not applicable)

Leasehold Interest

(b) where a taxpayer has property of class 13 in Schedule B which was acquired by him for the purpose of gaining or producing income, such amount as he may claim not exceeding, in respect of each item of the capital cost thereof to him, the lesser of

(i) one-fifth of the capital cost thereof to him, or

(ii) the amount for the year obtained by apportioning the capital cost thereof to him equally over the period of the lease unexpired at the time the cost was incurred,

but the total of the amounts allowed under this paragraph shall not exceed the undepreciated capital cost to him as of the end of the taxation year (before making any deduction under this subsection for the taxation year) of property of the class;

Patent, Franchise, Concession or Licence

(c) such amount as he may claim in respect of property of class 14 in Schedule B not exceeding the lesser of

(i) the aggregate of the amounts for the year obtained by apportioning the capital cost to him of each property over the life of the property remaining at the time the cost was incurred, or

(ii) the undepreciated capital cost to him as of the end of the taxation year (before making any deduction under this subsection for the taxation year) of property of the class;

Classes 13 and 14 of Schedule B read as follows:

CLASS 13

Property that is a leasehold interest except

(a) an interest in minerals, petroleum, natural gas, other related hydrocarbons or timber and property relating thereto or in respect of a right to explore for, drill for, take or remove minerals, petroleum, natural gas, other related hydrocarbons or timber,

(b) that part of the leasehold interest that is included in another class by reason of subsection (5) of section 1102, and

(c) a property that is included in class 23.

CLASS 14

Property that is a patent, franchise, concession or licence for a limited period in respect of property but not including

(a) a franchise, concession or licence in respect of minerals, petroleum, natural gas, other related hydrocarbons or timber and property relating thereto (except a franchise for distributing gas to consumers) or in respect of a right to explore for, drill for, take or remove minerals, petroleum, natural gas, other related hydrocarbons or timber,

(b) a leasehold interest, or

(c) a property that is included in Class 23.

The appellant, in his income tax return for 1954, claimed that about 90 per cent of the capital cost of the business was expended on depreciable property, as defined in the Act, and that he was entitled to deductions accordingly, but the Minister, on reassessment, decided that only about 20 per cent of the assets acquired fell within the definition of depreciable property and that the balance represented goodwill, which was a non-depreciable asset; hence the present appeal.

As appears from the profit and loss statement which accompanied the aforesaid return dated April 30, 1955, the taxpayer elected to claim $7,500 as a capital cost allowance and by reassessment dated April 27, 1959 the Minister reduced it by $5,697.62.

By notice dated July 24, 1959 the appellant objected to the said reassessment and attached thereto a signed statement of facts in which he gave the undermentioned details as to the amount of the capital cost to him of the following items in respect of which he was allegedly entitled to allowances:

(mobilier)	
furniture and movables .... $	48,599
(enseigne)	
sign	3,500
(améliorations locatives)	
leasehold improvements	60,750
(bail)	
leasehold valuation	58,500
total: .... $	171,349

By notice dated October 27, 1961, the respondent advised the appellant that, after having reviewed the assessment and studied the facts and reasons set forth in the appellant's notice of objection, with the exception of $180 which he was

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prepared to allow in respect of capital cost allowances, he ratified and confirmed his previous reassessment; that the sums of $16,158.91 and $17,285.59, representing the capital cost of depreciable property consisting of movables and leasehold improvements, had been correctly determined and were the only amounts in regard to which deductions were allowable; and that the balance of the price paid by the appellant to Gérard Beaucage had not been expended for property susceptible of depreciation within the meaning of s-s. (5) of s. 20 of the *Income Tax Act*.

In a situation such as this, where the contract of sale includes tangibles and intangibles one or more of which may or may not constitute depreciable property as defined in s. 20 (5) (*a*) of the Act *supra* and where the parties have failed to set out in the deed of sale the amount expended on each of any of such items, in my opinion the Court is confronted with a special case such as described in s. 20 (6) (*g*) of the Act, which provides:

(6) [Special cases.] For the purpose of this section and regulations made under paragraph (*a*) of subsection (1) of section 11, the following rules apply:

(*g*) where an amount can reasonably be regarded as being in part the consideration for disposition of depreciable property of a taxpayer of a prescribed class and as being in part consideration for something else, the part of the amount that can reasonably be regarded as being the consideration for such disposition shall be deemed to be the proceeds of disposition of depreciable property of that class irrespective of the form or legal effect of the contract or agreement; and the person to whom the depreciable property was disposed of shall be deemed to have acquired the property at a capital cost to him equal to the same part of that amount;

The task of leading evidence which will serve to, figuratively, separate the wheat from the chaff and, also, determine what amount can be reasonably regarded as the sale price of the respective assets concerned is admittedly a difficult one. Nevertheless, I feel that the evidence offered on behalf of the parties was noticeably meagre.

The only evidence which might serve to establish the classification or purchase price of the respective tangible and intangible assets acquired consists of the record transmitted in pursuance of s. 100, c. 148, R.S.C. 1952, by the Minister under date of February 27, 1962, the testimony of the appellant, on his own behalf, and the evidence of Jules Dubois, a real estate agent, who was called on behalf of the respondent.

Before making further comment on the said evidence, I think the following extracts from the pleadings and opening declarations by counsel serve to bring the issues into focus and to narrow them considerably.

In a notice of appeal filed on January 25, 1962, the appellant alleged that the entire purchase price of $186,000 paid for the business was a capital expenditure on depreciable property apportioned as follows:

Mobilier	$ 48,599.00
Enseigne	3,500 00
Améliorations locatives	60,750 00
Bail	58,500 00
Permis Commission des Liqueurs	14,650.00
Achalandage	1.00
	$186,000.00

and allegedly made a return of income for the year in question on that basis.

By an amended notice of appeal filed on March 29, 1962 the appellant adopted a new position, as appears from the following extracts:

A—STATEMENT OF THE FACTS

. . . .

4. The respondent wrongly allocated this cost ($186,000) for purposes of the assessment as follows:

Furniture and fixtures (ameublement)	$ 16,158.91
Leasehold improvements (améliorations locatives)	17,285.59
Goodwill (achalandage)	152,555 50
Total purchase price:	$186,000.00

5. The principal error made by the respondent in the said allocation was in appropriating $152,555.50 of the purchase price to goodwill with the result that no capital cost allowance was allowed to the appellant on any part of this amount as a deduction from his income for the year in question.

C—THE REASONS

. . . .

6. The appellant's contention is that the proper division is as follows:

Furniture and moveables (Class 8)	$ 48,599
Electric Signs (Class 11)	3,500
Leasehold improvements (Class 13)	60,750
Leasehold interest (Class 13)	73,151
	$ 186,000

10. It is the appellant's contention that nothing was paid with respect to the liquor licence in that a liquor licence is, in the Province of Quebec,

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by its nature not assignable and the said licence was not assigned in the present case.

11. In the alternative, any value that should be placed on the liquor licence situation existing with respect to the lease and premises, should be allocated to Class 13 as part of the price paid for the leasehold interest in that this value was a value attached to the lease itself.

12. In the alternative any value given to the liquor licence situation is properly allocated to Class 14 as "...a franchise, concession or licence, for a limited time..."

The issues were further narrowed when counsel for the appellant in his opening statement declared that the appellant, in lieu of the $52,099 and $60,750 claimed for furniture and fixtures including the sign, and leasehold improvements respectively, was prepared to accept the amounts of $16,158.91 and $17,285.19 allowed by the Minister in respect thereof. Also that, with the consent of his learned opponent, a small sum in connection with "Des marchandises en magasin" or stock-in-trade referred to in item 30, p. 1, Ex. 1, had been settled out of court.

It would appear from the foregoing that apart from the questions raised by counsel for the appellant in his last two alternative submissions in respect of the liquor licence (paragraphs 11 and 12 *supra*) the issues are largely confined to the amount (if any) which should be apportioned to leasehold interests and goodwill respectively.

I shall outline the facts beginning with the deed of sale Exhibit 1 which gave rise to the instant action and the related deeds which preceded it.

It appears that some time prior to May 1949 Paul Lalonde, the owner of the premises, had procured in his own name, a licence from the Quebec Liquor Commission (hereinafter called "the Commission") for the sale of beer and had likewise obtained a permit to carry on this business at 72 Beaubien Street, and on May 17, 1949 Paul Lalonde, while retaining ownership of the premises, by notarial deed sold his tavern business for $90,000 to Albini Parent. On the signing of the aforesaid deed of sale—which was described in Exhibit 1 but not produced—Albini Parent paid $20,500 on account of the purchase price, leaving a balance due of $69,500. On the same date, the vendor granted a 15-year lease of the premises to the purchaser at a rental of $250 a month (Ex. 4). The lease contained a condition that in the event that the purchaser decided to sell the tavern business he would be free to transfer the lease to the new purchaser provided the latter undertook to fulfil all the obligations contained therein. On January 4, 1950 the abovementioned parties signed a new lease the only significant effect of which was to raise the rent from $250 a month to $300 a month and to reduce its duration from fifteen years to fourteen years and seven months (Ex. 3).

As appears by s. 3 (4) of the *Alcoholic Liquor Act*, R.S.Q., 1941, c. 255 (hereinafter sometimes referred to as "the Liquor Act"), the word "tavern" means an establishment situated in a city or town and specially adapted for the sale by the glass of beer to be consumed on the premises. The instant tavern was furnished with tables and chairs for the comfort of its patrons. It is admitted that during his tenancy Albini Parent, of his own volition and at his own expense, made alterations to the premises which increased its seating capacity by fifty.

On November 24, 1950, by notarial deed (Ex. 2) Albini Parent sold the tavern business to Gérard Beaucage for $161,000, on account of which the vendor acknowledged to have received $68,000 on the signing of the deed, leaving a balance due of $93,000, whereof $69,500 was payable to Paul Lalonde and the balance of $23,500 to Albini Parent, on terms and conditions which are repeated in Exhibit 1.

This deed which gave rise to the instant contestation contains the following description of the assets sold:

> Le fonds de commerce d'une taverne appartenant au vendeur et exploité par lui au n° 73 est rue Beaubien, à Montréal, et se composant:
>
> 1° De la clientèle ou achalandage.
>
> 2° Des objets mobiliers servant à l'exploitation de ladite taverne, tels que tables, chaises, comptoirs, réfrigérateurs, radios, coffre-fort, enseignes électriques, etc, et généralement tout ce qui se trouve dans la dite taverne et qui sert à son exploitation, sans aucune exception ni réserve, sauf un distributeur automatique de cigarettes, tel que vu par l'acquéreur qui s'en déclare satisfait et qui n'en demande pas plus ample désignation.
>
> 3° Des marchandises en magasin, dont le prix sera payé au vendeur, en sus du prix de vente ci-après mentionné, d'après un inventaire qui sera fait entre les parties aux présentes avant la prise de possession et au prix coûtant.
>
> 4° Du droit au permis ou licence émis par la Commission des Liqueurs de la Province de Québec.

In addition, the deed contains an assignment of the lease described in Exhibit 3 and recites that, commencing with the date of possession (June 1, 1951), the purchaser will

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be required to pay all business taxes and to pay the rent for the premises amounting to $300 a month.

In respect of the purchase price it is stated that the present sale is made for $186,000 on account of which the vendor acknowledged to have received from the purchaser $93,000 and that the purchaser undertook to pay the remaining $93,000, with interest at 5%, by semi-annual instalments payable to the exoneration of the vendor to Paul Lalonde and Albini T. Parent over the term of the lease (See Ex. 1, p. 3).

The deed also contains a resolutory clause whereby the whole transaction would become null and void in the event that the purchaser were unable to procure from the Quebec Liquor Commission (hereinafter referred to as "the Commission") a transfer of the liquor licence; the said clause is drawn in the following terms:

> Il est entendu entre les parties que la présente vente est sujette à l'acceptation, par la Commission des Liqueurs de Québec, du transfert du permis en faveur de l'acquéreur, et à défaut de telle acceptation, la présente vente sera considérée comme nulle et de nul effet, et tous montants versés par l'acquéreur au vendeur en acompte du dit prix de vente devront être retournés et remis à l'acquéreur, et les parties aux présentes seront dans le même état que si le présent acte n'eut jamais été exécuté.

At the conclusion of the deed there is an intervention by Paul Lalonde wherein he consents to the transfer by the vendor to the purchaser of the lease (Ex. 3) which he, as owner of the property, had granted to the vendor, the whole on condition that the latter undertakes to fulfil all clauses and conditions contained in the said lease which then had about thirteen years to run.

I shall now summarize the evidence given by the appellant and Jules Dubois respectively.

At the beginning of his testimony (Transcript, p. 1) the appellant was asked the following question and gave the following reply:

> Q. Prenant comme donnée que dans le prix que j'ai mentionné il y avait trente-trois mille, plus ou moins, et quelques dollars pour des items qu'on peut toucher, comme les meubles, pouvez-vous nous expliquer pourquoi vous avez payé un autre $153,000?
>
> R. C'est parce que je payais le loyer—à mon point de vue—bon marché, le loyer était bon marché et puis j'avais un treize ans à faire, ce qui me permettait de ne pas être ennuyé avec le propriétaire pour continuer à faire les paiements que je devais sur la taverne.

He also declared that he considered that he had acquired an advantageous lease at a low cost, particularly in view of the fact that a year and a half before he leased the property repairs and additions had been made to it which increased its seating capacity; also that his long-term lease brought with it extended and advantageous terms under which he could pay the balance of the purchase price, totalling $93,000, for which he was liable. In addition he was able to rent the upper storey of 72 Beaubien St. for $75 a month; that he took over from Mr. Beaucage a staff of three or four, including a manager, and that at the date of hearing only one of the waiters was still in his employ. He also stated that he removed the inscription "Gérard Beaucage, Prop." from the Neon sign on which the word "Taverne" appeared and replaced it with his own name. Speaking of the annual fees he paid to the Quebec Liquor Commission for his licence, he said he thought they amounted to about $300 or $400.

The witness, after stating that he was not interested in purchasing the property but only the business, was asked on cross-examination (p. 12):

> Q. Quand vous achetez un commerce de bière, est-ce que vous n'êtes pas pour vous informer si c'est un commerce prospère?...
>
> R. Comme je vous l'ai dit, j'ai été élevé sur la rue St-Dominique, tout près de la taverne, donc je connaissais la taverne et puis j'avais un bail à long terme qui me facilitait mes paiements et je payais bon marché de loyer, et j'avais des réparations de faites.
>
> Q. Est-ce que ce n'est pas le nombre de barils qui fait la valeur du commerce de bière? Le nombre de barils qui se vendent durant une année?
>
> R. Oui et non—j'ai tenu compte du loyer, ça dépend de la personne qui achète—j'ai tenu compte du loyer et du bail que j'avais à faire, quand j'ai acheté la taverne.

Counsel for the respondent asked the appellant to produce as Exhibit A an extract from the Montreal newspaper "La Presse", dated March 10, 1960, which contained advertisements announcing taverns for sale which, in addition to the sale price and terms of payment, refer to the number of barrels which were sold per annum in each of the premises as well as the rental payable and duration of the lease of the said taverns. The witness in doing so observed that following a change of Government (June 1960) a lot more permits were issued than theretofore, which had the effect of reducing the volume of beer sales. Subsequently, a new

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Liquor Act was passed whereby the *Alcoholic Liquor Act supra* was replaced by the *Quebec Liquor Board Act,* as appears by Statutes of Quebec, 1960-61 (9-10 Elizabeth II), c. 86.

Asked if he were obliged to see his local member in order to obtain the transfer of the liquor licence, he replied that he did not see any person in the government, neither did he have an interview with any official of the Liquor Commission before buying the business and that he had no assurance that he would obtain the transfer of the licence before he signed the deed of acquisition but he expected to obtain it because he had a good reputation insofar as the Commission was concerned; that neither Mr. Beaucage nor anybody else guaranteed the transfer of the licence.

The witness also stated that at the time of hearing he had a clientele about equal to the clientele that he had when he first acquired it. Some patrons moved away and others replaced them.

In his evidence, Jules Boire stated that he had experience from time to time in dealing with purchases and sales of taverns and that he knew the location of the instant tavern.

In his opinion, the purchase price of a tavern such as the appellant's varied a good deal depending on the amount payable by way of yearly rent, but the price which a prospective buyer would have to pay for it would be the equivalent of $120 to $125 for each barrel sold per year. He agreed with the appellant's statement that the rental of the tavern in issue was low and that the normal rental would have been around $350 a month instead of $300 as presently paid by him.

In cross-examination he stated that in buying the instant beer parlour business the purchaser was not buying a building but a tavern business and that the price of the business is established first on the quantity of beer sold in the tavern, secondly on the amount of the rent payable, and thirdly, the length of the lease.

In re-examination the witness explained that the difference between rental normally paid for a tavern and that paid in the instant case was $50, and this was excluding the $75 a month which the appellant obtained from rental of the second floor, which would make a difference of $125 per month, and that by multiplying this by the duration of the lease, which was thirteen years, the figure of $19,500 which he was prepared to allow was arrived at.

As earlier mentioned, the documentary proof contained in the transmitted record includes a signed statement dated July 24, 1959 which the appellant attached to his notice of objection to the Minister's reassessment dated April 27, 1959, in which he attributed the undermentioned amounts as constituting the capital cost to him of the following items on which he was claiming allowances:

(mobilier) furniture and movables	$ 48,599
(enseigne) electric sign	3,500
(améliorations locatives) leasehold improvements	60,750
(bail) leasehold valuation	58,500
total:	$ 171,349

The sum of the first three items totals $112,849, and, as previously mentioned, counsel for the appellant declared, at the opening of the case, that the taxpayer accepted, in settlement of this portion of his claim, the $33,444.50 which the respondent had allowed in respect thereof, and I consider that having thus agreed to withdraw the three aforesaid items they are no longer in issue before this Court.

Thus, if the appellant's aforesaid statement be accepted, the only remaining item requiring consideration is the reasonableness or otherwise of the capital cost of $58,500 which he attributed to his lease.

It is however to be noted that, notwithstanding the statement attached to his notice of objection, in his original notice of appeal he attributed an additional sum of $14,650 to the acquisition cost of his liquor licence and $1 as payment for goodwill, thus claiming $186,000, less $1, instead of the $171,349 claimed by his notice of objection as the amount of depreciable property on which he was allegedly entitled to allowances. Later, as appears by paragraph 10 of the reasons given in his amended notice of appeal, he denied having paid $14,650, or any other amount, with respect to the liquor licence, which was non-assignable and was never transferred, and sought in the alternative to add

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it to the $58,500 previously claimed as leasehold interest under Class 13 of Schedule B, thus making a total claim of $73,151 under Class 13; and as a further alternative the appellant submitted that to whatever extent the sum of $14,650, or any part thereof, was not payment for a leasehold interest it must be regarded as payment for a franchise, concession or licence in respect of which allowances are deductible under Class 14 of Schedule B.

I intend to deal immediately with the appellant's two above-mentioned alternative submissions.

I think it is very significant that, as appears by the appellant's original statement of July 24, 1959, he did not claim that he was entitled to capital cost deductions on the whole of the $186,000 which he paid for the business but restricted such a claim to $171,349. This, I believe, creates a presumption that the difference was expended on something in respect of which he was not entitled to any captial cost allowance. In the absence of convincing evidence to the contrary I can place little reliance on the appellant's attempt to add the difference amounting to $14,650 to his original apportionment for leasehold interest, thus raising it from $58,500 to $73,151.

Now, with respect to the concluding submission made by counsel for the appellant, namely, that to whatever extent the expenditure of $14,650 does not fall into the category of Class 13, then it was payment for a concession or licence for a "fixed period of time under Class 14" and is deductible accordingly.

In the first place I think my preceding observations are also applicable to the instant alternative submission, more particularly as the evidence indicates that the only amount expended on the liquor licence consisted of the fees and dues required to be paid by the Commission and which are not in issue.

Secondly, I do not think that the liquor licence issued to the appellant can be regarded as a licence "for a limited period" within the meaning of Class 14 by reason of s. 35 (1) of the *Liquor Act,* which reads as follows:

35. 1. Whatever be the date of issue of any permit granted by the Commision, such permit shall expire on the 30th of April following, unless it be cancelled by the Commission before such date, or unless the date at which it must expire be prior to the 30th of April following.

The Commission may cancel any permit at its discretion.

because the duration of the licence is neither fixed nor determinable, since it may be cancelled at the discretion of the Commission.

It was held in *The Minister of National Revenue* and *Kirby Maurice Co. Ltd.*[1] that a franchise was not a franchise within the meaning of Class 14 of Regulation 1100, if it contains a provision that it is cancellable by either party at any time on giving 30 days notice; Cameron J. at page 82 stated:

> But not all franchises are within Class 14; only those that are "for a limited period" are within the class. The intention of Parliament in using these words "for a limited period" seems to me to be quite clear. Unless the duration of the franchise is definitely ascertained and limited there is no yardstick by which the value of the franchise can be ascertained. Further, it would be impossible to ascertain the life of the property or franchise, a matter which must be known in order to make the computation required in para. (i) of s-s. (*c*) of s. 1 of Regulation 1100, namely:
>
> "By apportioning the capital cost to him of each property over the life of the property remaining at the time the cost was incurred."

Another possible explanation as to the reason for paying the sum of $14,650 was put forward in the cross-examination of the appellant by counsel for the respondent by a series of questions directed—but without positive results—to discovering whether the $14,650. or some other amount, was paid to third parties for political influence which would guarantee that he would obtain the licence in issue. If the respondent had been successful in establishing that such were the case, the expenditure would have been disallowed since it was made for personal services, which are non-deductible.

The appellant also denied that prior to the signing of the deed he paid anything for a transfer from Gérard Beaucage of the latter's liquor licence, which is not surprising in view of s. 36 (3) of the *Liquor Act*; it states:

> The Commission must cancel a permit:
>
> .....
>
> (3) If it appears that the permit-holder has, without the Commission's authorization, transferred, sold, pledged or otherwise alienated the rights conferred by the permit.

It was held in *Courey v. Dufresne*[2] that under the Quebec Civil Code any transfer thus made, being contrary to law,

[1] [1958] Ex. C.R. 77, 82. [2] [1956] R.J.Q., C.S. 369.

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was null and void and that the transferee could recover from the transferor the amount paid for the transfer.

It may well be said that nobody should know better than the appellant himself what amount he considered he paid for his leasehold interest, but in my opinion his initial valuation is more accurate and reliable than the above-mentioned tardy deviations therefrom—which were self-serving and made with the aid of hindsight—and his said initial valuation is to be preferred.

For the above reasons I consider that there is insufficient evidence before the Court to enable it to determine with any degree of certainty the purpose or object of the aforesaid expenditure of $14,650 and that the appellant who has the burden of proving that this additional sum represented the cost of depreciable property has failed to do so; *a fortiori* I consider that his previously referred to attempt at trial to raise the value of his leasehold interest to $153,000 is entirely unwarranted.

As regards the case for the respondent, I might here observe that the appellant is not alone in altering an original apportionment.

Although the parties are poles apart in respect of the item of goodwill they find some common ground in regard to leasehold interest valuation, since the respondent acknowledged that his original assumption was unjustified as it is admitted in his answer to plea that the lease in question constitutes depreciable property under the Regulations and Class 13 of Schedule B and in respect of which he was prepared to allow a deduction of $19,500. This amount is the equivalent of a premium of $125 per month capitalized over the duration of the lease and which has been previously denied to the appellant, which had the effect of reducing this item of goodwill from $152,555.50 to $133,055.50. The amount of $58,500 claimed under the same heading by the appellant is the equivalent of $375 a month capitalized over the term of the lease, so that the parties, in terms of monthly rental values, are $250 per month apart.

Whether the sum of $19,500, as submitted by the respondent, is a sufficient leasehold allowance in the circumstances gives rise to the *raison d'être* of the revised item of $133,055.50 which the respondent later attributed to goodwill.

Counsel were in agreement that two types of goodwill existed, one called "personal", which, in the instant case, would be attached to the vendor Gérard Beaucage and the personnel which he turned over to the appellant, and the other which is called "local" because it is attached to the premises, which, in this case, is the tavern.

Counsel do not dispute it and the evidence indicates that no appreciable amount of personal goodwill is involved in the instant case. Considerable argument, however, was devoted to the following question—

> "To what extent, if any, does goodwill which is attached to the premises, as opposed to personal goodwill, form part and parcel of a leasehold interest?"

It was stated in argument that this is the first time that the above-mentioned question has come before this Court. However, the attention of the Court was drawn to two cases heard before the Tax Appeal Board in which the facts were very similar to the case at bar. In the first of these cases, it was held that "goodwill cannot be made the subject of a capital cost allowance" (*Castellan* v. *Minister of National Revenue*[1]), and the presiding member of the Board, Mr. R.S.W. Fordham, owing to lack of evidence, referred the case back to the Minister for the purpose of ascertaining whether the existence of some goodwill was acknowledged by any of the parties to the transaction and, if so, the value to be assigned to it, and in the event of the parties failing to settle the issue that the record be referred back to the Board for further adjudication. In the other, a more recent decision (*Chartrand* v. *Minister of National Revenue*[2]), the taxpayer had purchased a hotel, including land, buildings, contents, merchandise on hand and goodwill and permit issued by the Quebec Liquor Commission, for $84,000. Mr. Maurice Boisvert held that the Minister erred in imputing $33,173 of the said purchase price to goodwill on the ground that the evidence established it was non-existent.

Section 11 (1) (*a*) states in effect that, in order to ascertain what is depreciable property, one must seek the answer

[1] (1957) 17 Tax A B C 42 at 44. [2] (1964) 35 Tax A B.C. 438

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in the Regulations. It is true that nowhere in the Regulations is any mention made of goodwill. On the other hand, goodwill is not included in the exceptions applicable to leasehold interests referred to in Class 13.

Although the above question raises an interesting issue, I think it will become unnecessary for me to make any finding concerning it if—as in the *Chartrand* case—there is sufficient evidence to justify the main submission of counsel for the appellant that if any goodwill exists, which he denies, its value is negligible.

As appears by a judgment of Noël J. in *Herb Payne Transport Ltd.* v. *Minister of National Revenue*[1], I think a well-recognized method of evaluating goodwill is to ascertain the net earnings of the business, allow a conservative rate of return on the capital cost of its acquisition and attribute any surplus to goodwill.

It sometimes happens that a purchaser pays too high a price for a property and in such cases goodwill is either diminished or extinguished.

In the instant case the notarial deeds filed disclose that on June 1, 1949 the business was sold for $90,000. Eighteen months later, to wit, on November 20, 1950, it was sold for $161,000 and six months later, namely, on June 1, 1951, it was sold for $186,000 (Exhibits 1 and 2).

In other words, the original sale price doubled within two years. True, Albini Parent, who purchased it for $161,000, during his occupancy effected some leasehold improvements. The evidence indicates that the appellant attributed $60,750 of the purchase price to such improvements but rather than attempt to prove such value he accepted $17,285.59 in settlement of this claim.

The next owner of the business, Gérard Beaucage, did nothing by way of improvement to the property, nor did he pay anything on account of the balance of the price owing to the previous owners, Paul Lalonde and Albini Parent, amounting to $93,000. Yet, having held the property for six months he sold it to the appellant for $25,000 more than he had paid for it.

The evidence given by Jules Boire also serves, I think, to establish that the appellant paid more than the going price for the business. As previously stated, he testified

[1] [1964] Ex. C.R. 1 at 10.

that the most important factor in determining a fair market price was the number of barrels sold per annum and that in terms of purchase price each barrel was worth $120 to $125. The witness also established that the number of barrels sold at the instant tavern was 1,400 per annum, which proves he paid the equivalent of over $130 a barrel for the business. Counsel for the respondent filed through the appellant a clipping from the newspaper "La Presse", dated March 10, 1960, and singled out three advertisements offering taverns for sale which he asked the appellant to identify by the letter "X". This exhibit set out the number of barrels sold, the length of the lease and the rent payable in each case, which, as hereunder indicated, showed an average price of less than the $120 to $125 per barrel mentioned by the witness:

Exhibit	*Barrels*	*Lease Terms*	*Rent*	*Per Barrel*	*Sale price*
X-1	925	long		$100	$ 95,000
X-2	1,200	10 yrs.	$250	110	135,000
X-3	1,150	10 yrs.	100	125	145,000
				$335	$ 375,000

AVERAGE PRICE: $112

In my opinion, the most pertinent evidence as to the existence or otherwise of goodwill is to be found in the profit and loss statements for the years 1954 to 1957, inclusive, which appear in the transmitted record and which indicate that, calculated to the nearest dollar, the net profits of the tavern before taking into account any capital cost allowance were as follows:

1954	$ 7,275
1955	9,829
1956	11,393
1957	14,268
total:	$ 42,765

AVERAGE: $10,691 per annum

If the method earlier indicated be applied, based on the average profit of $10,691 and 5 per cent be taken as a reasonable rate of return on the capital expended in acquiring the business, the resulting figure would amount to $9,300 per annum, which, when subtracted from $10,691 would leave an average per annum surplus profit of $1,391 which could be attributed to goodwill.

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As previously noted, the respondent concedes that the appellant is entitled on the undermentioned items to claim the following annual capital cost allowances:

	Value	C.C.A.
Furniture and fixtures (20%)—Class 8	$ 16,159	$ 3,232
Leasehold improvements (distributed over 13 yrs.) as per Class 13	17,286	1,329
Leasehold interest (distributed over 13 yrs.) as per Class 13	19,500	1,500
	$ 52,945	$ 6,061

It becomes apparent that the appellant, by electing to claim only a fraction of the capital cost deductions to which he admittedly is entitled, could wipe out the relatively small average yearly amount of $1,391 which could otherwise be attributed to goodwill.

If instead of the respondent's figure of $19,500 for leasehold interest the amount of $58,500—as originally claimed by the appellant—be substituted, this would result in an increased allowance, amounting in round figures to $3,000, to which he would be entitled.

For the above reasons I consider that the evidence is sufficient to substantiate the appellant's main contention that goodwill in the instant case is non-existent and that the assumption by the respondent that the goodwill of the business amounted to $133,000, or any lesser sum, is unrealistic, unwarranted and unreasonable in the circumstances.

Since it is not contested that the appellant, in a *bona fide* transaction entered into at arm's length, paid a global amount of $186,000, or its equivalent, for the tavern business, it should, I think, be borne in mind that Regulation 1100 (1) (*b*) clearly states that the taxpayer is entitled to deductions based on the *capital cost* to him of the leasehold interest which he acquired not from the owner of the property but from Gérard Beaucage, who sold him the business which included an assignment of the lease.

It goes without saying that if Exhibit 1 had stated that the premium price which the appellant paid Gérard Beaucage for the lease in question amounted to $58,500, it is unlikely that this case would ever have arisen, and in my opinion, if the purchaser and the vendor of the business were *ad idem* as to the amount allocated to leasehold interest and the latter had so testified, such corroboration would have been almost equally conclusive. Notwithstanding the absence of the aforesaid evidence, I am nevertheless convinced that the appellant's original statement as to its value is a reasonable amount in the circumstances, particularly in view of the fact that prior to applying for a permit to sell beer the appellant had the assurance of a lease of premises wherein under previous title-holders a tavern business had been carried on. The aforesaid assurance, I consider, was instrumental to a considerable degree in facilitating the obtainment of his personal licence, gave added value to his leasehold interest and justified a valuation of $58,500, which, in my opinion, must be deemed to be the capital cost to the appellant of the leasehold interest in issue. As previously stated, $58,500 is the equivalent of $375 a month capitalized over the term of the lease and I think this amount should be regarded as what is sometimes called "the premium" (See: Locke J. in *City Parking Ltd.* v. *Corporation of the City of Toronto*[1]) which the appellant was willing to pay rather than part with his lease and that the amount of $125 a month, as submitted by the respondent, is insufficient.

For the foregoing reasons I have come to the conclusion that the appellant is entitled to succeed for the difference between the $19,500 which, as stated in his reply, the respondent was willing to allow as a deduction for leasehold interest and the above-mentioned deduction of $58,500, and I will refer the matter back to the Minister for reassessment accordingly.

The appellant will be entitled to his costs.

Judgment accordingly.

[1] [1961] S.C.R. 336 at 347.

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Nov. 23-25

Dec. 8

BETWEEN:

SAINT JOHN SHIPBUILDING AND DRY DOCK CO. LTD. .... APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE, DOMINION BRIDGE LIMITED AND PROVINCIAL ENGINEERING LIMITED .... RESPONDENTS.

Revenue—Customs and Excise—Burden of proof in relation to Deputy Minister's decision—Deputy Minister to state case in support of his decision at outset of hearing—Limits of class or kind of goods made in Canada—Production of goods in substantial quantities—Effect of Governor-in-Council fixing percentage of normal Canadian consumption—Referral of case to Tariff Board for rehearing—Customs Act R.S.C. 1952, c. 58, s. 45 as amended by S. of C. 1958, c. 26, s. 2(1)—Customs Tariff, R.S C. 1952, c. 60, ss. 6(9) and (10), 6a(4), and items 427(1) and 427a, as amended by S. of C. 1959, c. 12, s. 4—Order in Council P.C. 1618.

The appellant imported into Canada in parts a custom made electrically driven level luffing jib type travelling crane for use in its dry dock at Saint John, New Brunswick. The crane was far larger and had far greater lifting capacity than any similar crane theretofore made in Canada. The Deputy Minister of National Revenue for Customs and Excise ruled that the crane was one of "a class or kind of shipyard cranes made in Canada by Dominion Bridge Company Limited and Provincial Engineering Limited" and that it was subject to customs duty under item 427(1) of the *Customs Tariff* as "machinery composed wholly or in part of iron or steel, n.o.p.; parts of the foregoing". The appellant had contended that the crane was classifiable under item 427*a* and thus entitled to entry free of duty as "machinery composed wholly or in part of iron or steel, n o p. of a class or kind not made in Canada; complete parts of the foregoing".

On an appeal to the Tariff Board from the Deputy Minister's ruling the Board found that "the capacities of these two jib type travelling gantry cranes (the imported crane and a crane made by Provincial Engineering Limited) are similar enough that it was not unreasonable for the respondent to include these two cranes in a class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more". The Board then found that if the class included only these two cranes the production of one crane in Canada was "substantial" within the meaning of s. 6(10) of the *Customs Tariff* and that if the class was enlarged to include cranes of lesser capacity, even as low as 6 tons, the percentage of Canadian production would be even more substantial and consequently be more than sufficient to classify the crane as being of a class or kind made in Canada. The appeal was accordingly dismissed.

On a further appeal to the Exchequer Court

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Held: That as the question of the limits of the class or kind of goods made in Canada into which a particular article may fall is one of fact to be resolved on such criteria appearing from the evidence as the Tariff Board regards as appropriate to the particular goods and as neither distinctions of size nor of capacity are necessarily conclusive on a question of this kind, it cannot be said that on the material before the Board in this case the Board was necessarily required to classify cranes by sizes or by particular lifting capacities; or that a finding that the crane in question was one of a "class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more" would be so unreasonable as to be not supportable in law.

2. That as the Board then proceeded to consider, for the purposes of making the finding required by s. 6(10) both the Canadian production of cranes falling within that class and the Canadian production of cranes of a larger class it is not clear that the Board made a finding of the scope of the class of crane made in Canada into which the crane fell and as a final determination of the appeal cannot be reached in the absence of such a finding by the Board, which is the body authorized by law to make it, the matter should be referred back to the Board.
3. That s. 6(10) of the *Customs Tariff* operates, not as a definition of when goods shall be deemed to be of a class or kind made in Canada but rather as a prescription of when they shall not be deemed to be of a class or kind made in Canada.
4. That s. 6(10) of the *Customs Tariff* does not authorize the Governor-in-Council to prescribe that quantities which are not "substantial quantities" within the ordinary meaning of that expression, shall be deemed to be substantial quantities for the purpose of the *Customs Act.*
5. That if in its review of the evidence, the Tariff Board referred to "the 10% of Canadian consumption fixed by Order-in-Council as sufficient to represent 'substantial' production in Canada within the meaning of s. 6(10) of the *Customs Tariff*" as meaning that the effect of the Order-in-Council is that production of 10% of the Canadian consumption is necessarily production of "substantial quantities" within the meaning of s. 6(10), they misdirected themselves on a material point of law.
6. That if the Tariff Board assumed or decided that production in Canada of one crane of the class in the course of the immediately preceding period of fifteen years was production in "substantial quantities" within the meaning of the first part of s. 6(10) of the *Customs Tariff* such an assumption or finding was erroneous in point of law as being one which if properly instructed as to the law and acting judicially the Board could not reach.

APPEAL from a declaration of the Tariff Board.

The appeal was heard by the Honourable Mr. Justice Thurlow of Ottawa.

E. Neil McKelvey, Q.C. and *K. E. Eaton* for appellant.

D. H. Aylen and *R. A. Wedge* for respondent, Deputy Minister of National Revenue for Customs and Excise.

Andre Forget, Q.C., for respondents, Dominion Bridge Limited and Provincial Engineering Limited.

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

THURLOW J. now (December 8, 1964) delivered the following judgment.

This is an appeal under s. 45 of the *Customs Act* R.S.C. 1952, c. 58 as amended by S. of C. 1958, c. 26, s. 2(1), from the declaration of the Tariff Board in appeal number 742 by which the Board upheld a ruling of the Deputy Minister that a crane imported by the appellant from Scotland in parts in 1961 and 1962 and erected at the appellant's dry dock at Saint John, New Brunswick, was to be classified under item 427(1) of the *Customs Tariff* R.S.C. 1952, c. 60 as amended by S. of C. 1959, c. 12, s. 4 and thus subjected to customs duty as "machinery composed wholly or in part of iron or steel, n.o.p.; parts of the foregoing.". In its appeal to the Board the position of the appellant was that the crane should be classified under item 427a of the tariff and thus be admitted free of duty as "machinery composed wholly or in part of iron or steel, n.o.p., of a class or kind not made in Canada; complete parts of the foregoing", and the issue for determination was whether or not the crane was "of a class or kind not made in Canada".

The crane in question is an electrically driven level luffing jib type travelling crane. It was designed for use in the appellant's shipbuilding and ship repairing operations and in particular for use beside the appellant's dry dock which is a very large one measuring 1,000 feet in length and 146 feet in width. The crane too is of respectable size. Its gantry alone rises 100 feet above the rails on which it moves and the total height of the structure is some 300 feet. It weighs 750 long tons. It has a lifting capacity of 75 long tons or 84 short tons at any radius between 50 and 115 feet. At its maximum extension it has a lifting capacity of 20 long tons at 160 feet and it is also equipped with an auxiliary hoist capable of lifting 10 long tons at 170 feet.

The material before the Board indicated that while various types of cranes have from time to time been manufactured in Canada, some of which, notably those of the overhead bridge type, had lifting capacities considerably in excess of 84 tons and though at least two Canadian manufacturers were at the material time capable of building a crane such as the one in question and were willing to undertake it, no jib type travelling crane of the capacity and dimensions of the crane in question had theretofore been manufactured in Canada. Prior to 1945 a number of electrically driven jib type travelling cranes had been built in Canada for use in shipbuilding and ship repair work some of which had lifting capacities up to 40 tons at a radius of 50 feet. What the capacity of these cranes would have been at radii of 115 and 160 feet does not appear. These cranes did not have the capacity of maintaining the level of the load when luffing. An electrically driven level luffing jib type travelling crane was, however, built in Canada by Provincial Engineering Limited in 1959 and was installed for use in shipbuilding and repair work at Port Weller, Ontario. It has a maximum lifting capacity of 55 tons at a radius of 47 feet which declines to 18 tons at 110 feet and to 5 tons at 115 feet. There was also evidence of the manufacture in Canada by Provincial Engineering Limited of cargo handling level luffing jib type travelling cranes of lifting capacities ranging from 5 to 12 tons. Cargo handling cranes were said to be designed differently from cranes used in shipyards because they operate constantly at maximum capacity and are subject to the effects of metal tiring. Within this group some measure of standardization of capacities is recognized in the industry for cranes of 3 to 5 tons lifting capacity but for greater lifting capacity both cargo handling and shipyard cranes are designed to meet the requirements of the particular customer. For ship construction and repair work as carried out in recent years a minimum lifting capacity of 15 tons would be required. One witness placed this minimum at 25 tons.

The Deputy Minister's ruling as to the classification of the crane in question was communicated in three letters to the appellant. In the first of these, which was dated September 11, 1962, it was stated:

> Your representations have received careful consideration but the Department considers the 75 ton electric travelling level luffing shipyard crane, per specifications submitted, to be of a class or kind made in Canada by Dominion Bridge Company Limited, Montreal and Provincial Engineering Limited, Niagara Falls.

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It is my understanding that these companies have manufactured and supplied cranes over the years for installation in various shipyards in Canada and are still very much interested in building such machines on receipt of firm orders.

In view of the foregoing, I have no alternative other than to rule this crane of a class or kind made in Canada and dutiable under tariff item 427(1), at 10% ad valorem, under the British Preferential Tariff.

This position was reiterated in the second letter which was dated May 22, 1963, and which stated:

The representations submitted by your General Manager, the late Mr. Kerr, were reviewed at great length. However, I must advise you that the decision of the Deputy Minister is that this crane is of a class or kind made in Canada by Dominion Bridge Company Limited, Montreal, and Provincial Engineering Limited, Niagara Falls.

As I pointed out to your company in my letter of September 11, 1962, these companies have produced cranes of a class or kind to the one imported and are prepared to fulfil orders at the present time on receipt of requests.

Such being the case, the parts of the 75 ton Level Luffing Crane imported under the Saint John entries listed on the attached sheet are dutiable under tariff item 427(1) at 10% ad valorem, under the British Preferential Tariff.

The third letter, written on July 15, 1963, applied to other customs entries and simply referred to the ruling of May 22, 1963.

I pause at this point to say that against the background of general facts with respect to cranes which I have summarized I should have thought that the basis of the Deputy Minister's ruling as expressed in these letters was his assumption or finding that the crane was one of a class or kind of shipyard cranes made in Canada by Dominion Bridge Company Limited and Provincial Engineering Limited. On the appeal from this ruling to the Tariff Board the onus accordingly rested on the appellant to establish that the Deputy Minister's basic assumption was wrong. *Johnston v. M.N.R.*[1]. It was not, however, incumbent on the appellant to establish that the crane was not one of any other conceivable class or kind of cranes made in Canada and while the Deputy Minister, if he saw fit to do so, might have endeavoured to support his ruling on some other basis the onus of establishing such basis would in that event have rested on him rather than on the appellant. In that event as well, if the proceeding was to be fair to the appellant, the Deputy Minister should

[1] [1948] S.C.R. 486.

have been required at the outset to state the case which he proposed to prove in support of his decision. *Vide Minister of National Revenue v. Pillsbury Holdings Limited*[1].

When the appeal came before the Tariff Board evidence was given by several witnesses who were or had been associated with one or the other of the two companies mentioned in the Deputy Minister's letters. This evidence indicated that no jib type travelling cranes with lifting capacity of 15 tons or more had been made by Dominion Bridge Limited, though between 10 and 20 such cranes had been made by a former subsidiary company during the war, and that the only jib type travelling crane with a lifting capacity of 15 tons or more manufactured by Provincial Engineering Limited was the one already mentioned as having been built in 1959 and installed at Port Weller. There was also confidential evidence offered by the Deputy Minister of a survey which he had carried out which, on this aspect of the case, adds nothing of material importance to what the witnesses stated.

In the declaration made by the majority of the members who heard the appeal, the Board, after reviewing the evidence and referring to a contention by counsel for the Deputy Minister that the crane was of a class of "jib type travelling gantry cranes with a lifting capacity of 15 tons or more" expressed its findings as follows:

> In the present case the Board finds that for the purposes of this appeal the capacities of these two jib type travelling gantry cranes are similar enough that it was not unreasonable for the respondent to include these two cranes in a class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more.
>
> The evidence of production and consumption, both confidential and public, may be summarized as follows. Were the class or kind to include only these two cranes, the 10 per cent of Canadian consumption fixed by Order in Council as sufficient to represent "substantial" production in Canada within the meaning of subsection (10) of Section 6 of the Customs Tariff would be exceeded; if the class were enlarged to include cranes of lesser capacity, even as low as 6 tons, the evidence reveals that, throughout, the percentage of Canadian production would be even more substantial and consequently be more than sufficient to classify the cranes as being of a class or kind made in Canada.
>
> The Board, therefore, declares that the imported crane is not "of a class or kind not made in Canada".

On the appeal to this Court the Board's declaration was attacked as being, on the principles expounded by Viscount

[1] [1964] C.T.C. 294 at 302; [1965] 1 Ex. C.R. 676.

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Simonds and Lord Radcliffe in *Edwards v. Bairstow*[1], not sustainable in point of law on the material which was before the Board. The case, it was argued, was one in which because of the very substantial differences between the only Canadian made crane even remotely comparable, viz., the Port Weller crane, and the crane in question the true and only reasonable determination open to the Board was that the crane was of a class or kind not made in Canada and as this determination contradicted the conclusion reached by the Board the Board's declaration should be reversed. Two further points argued were that the Board wrongly declined to require the Deputy Minister to give particulars of the limits of the class of cranes made in Canada in which he proposed to contend that the crane in question fell, and that the Board wrongly assumed that the Deputy Minister had found a class of jib type travelling cranes with a lifting capacity of 15 tons or more when the Deputy Minister had not disclosed any such finding.

As the question of the limits of the class or kind of goods made in Canada into which a particular article may fall is one of fact—*vide Dominion Engineering Works Ltd. v. D.M.N.R. et al.*[2]—to be resolved on such criteria appearing from the evidence as the Board regards as appropriate to the particular goods and as neither distinctions of size nor of capacity are necessarily conclusive on a question of this kind, I do not think that it can be said that on the material before the Board in this case the Board was necessarily required to classify cranes by sizes or by particular lifting capacities, or that a finding that the crane in question was one of a "class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more" would be so unreasonable as to be not supportable in law. But I have been unable to satisfy myself that the majority of the Board has so found. What the declaration says is that the Board finds that it was not unreasonable for the Deputy Minister to include the crane in such a class and in the following paragraph the majority of the Board proceeds to consider the ratio of Canadian production to Canadian consumption of cranes of that class (which would, of course, be relevant if such a finding had been made) and the ratio of Canadian production to Canadian consumption of a different class which could not be relevant if the finding had been made.

[1] [1955] 3 All E.R 48 at 53 and 57. [2] [1958] S.C.R. 652.

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On the other hand if this finding of a class has not been made there appears to me to be no finding in the declaration, of the class or kind of cranes in fact made in Canada into which the crane in question falls and in the absence of such a finding to establish the scope of the class or kind I am unable to see how the subsequent problems which arise on s. 6(10) could have been properly resolved.

This brings me to the remaining point argued, that is to say, that the Board erred in law in interpreting and applying s. 6(10) of the *Customs Tariff* as if the manufacture of one crane in Canada was sufficient to meet the requirements of that provision.

The subsection reads as follows:

> 6 (10) For the purpose of this Act goods shall not be deemed to be of a class or kind made or produced in Canada unless so made or produced in substantial quantities; and the Governor in Council may provide that such quantities, to be substantial, shall be sufficient to supply a certain percentage of the normal Canadian consumption and may fix such percentages.

This subsection, since it was first enacted in 1936, has formed part of a section which deals with the imposition of special or dumping duty on imported goods of a class or kind made in Canada which have been purchased abroad for less than their fair market value. The subsection operates, in my opinion, not as a definition of when goods shall be deemed to be of a class or kind made in Canada but rather as a prescription of when they shall not be deemed to be of a class or kind made in Canada. As such the subsection operates along with ss. 6(9) and 6A.(4) to limit the cases in which dumping duty and additional duty on subsidized goods is to apply. There is this difference, however, that while ss. 6(9) and 6A.(4) apply only to the special or additional duties imposed by ss. 6 and 6A. respectively, s.6(10) is of general application throughout the Act and thus applies as well to the ordinary customs duties imposed by the statute. It is, moreover, to be observed that the power conferred on the Governor-in-Council by the portion of the subsection which follows the semicolon is of the same nature and merely authorizes the Governor-in-Council to prescribe that to be substantial for the purposes of the rule in the first part of the subsection, quantities, which might otherwise readily fall within the ordinary meaning of "substantial quantities", must be sufficient to supply a certain

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percentage, which the Governor-in-Council is also authorized to fix, of the normal Canadian consumption. Nowhere, however, does the subsection authorize the Governor-in-Council to prescribe that quantities which are not "substantial quantities" within the ordinary meaning of that expression, shall be deemed to be substantial quantities for the purpose of the Act. Nor does the Order-in-Council P.C. 1618, of July 2, 1936, which provides that

> Articles shall not be deemed to be of a class or kind made or produced in Canada unless a quantity sufficient to supply ten per centum of the normal Canadian consumption of such article is so made or produced.

prescribe or purport to prescribe anything more than the kind of limitation which the section authorizes the Governor-in-Council to prescribe. Two questions therefore arise in applying s. 6(10), the first being whether goods of the class or kind made in Canada are so made in substantial quantities and the second, which arise only if the first is answered affirmatively, whether Canadian production of goods of the class or kind is sufficient to supply ten per centum of normal Canadian consumption thereof.

It will be observed from the paragraphs which I have quoted from the Board's declaration that the Board after purporting to confirm the Deputy Minister in including the crane in question and the Port Weller crane in a "class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more" did not discuss the primary question which arises under s. 6(10) whether at the material time cranes of that class or kind were made in Canada in "substantial quantities" but proceeded at once to the question whether the Canadian production of cranes of that class or kind was equal to 10 per cent. of the Canadian consumption thereof and in the course of its review of the evidence referred to "the 10 per cent of Canadian consumption fixed by Order-in-Council as sufficient to represent 'substantial' production in Canada within the meaning of subsection (10) of Section 6 of the Customs Tariff". If by this the majority of the Board meant, as I think they did, that the effect of the Order-in-Council is that production of 10 per cent. of the Canadian consumption is necessarily production of "substantial quantities" within the meaning of s. 6(10) I am, with respect, of the opinion that they misdirected themselves on a material point of law, and that their finding

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therefore cannot stand. On the other hand if the majority of the Board assumed or decided that production in Canada of one crane of the class in the course of the immediately preceding period of fifteen years was production in "substantial quantities" within the meaning of the first part of s. 6(10) I would also, with respect, have little difficulty in reaching the conclusion that such an assumption or finding was erroneous in point of law as being one which if properly instructed as to the law and acting judicially the Board could not reach. If therefore it were clear that the majority of the Board found that for the purposes of the *Customs Tariff* the crane in question should be classified as one of a class made in Canada of jib type travelling cranes with a lifting capacity of 15 tons or more I would allow the appeal and substitute for the finding of the Tariff Board a finding that the crane in question was to be classified under item 427a. However, on the wording of the declaration of the majority I am not satisfied that the Board made a finding as to the scope of the class made in Canada and as a final determination of the appeal cannot in my opinion, be reached in the absence of such a finding by the Board, which is the body authorized by law to make it, the proper course is to refer the matter back to the Board.

The appeal will therefore be allowed with costs, the declaration of the Tariff Board will be set aside and the matter will be referred back to the Tariff Board for rehearing.

Judgment accordingly.

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Oct. 26-30
Nov. 2, 3, 9-13

Dec. 14

BETWEEN:

CIMON LIMITED AND LUIGI TIENGO } PLAINTIFFS;

AND

BENCH MADE FURNITURE CORPORATION AND SAMUEL EDWARDS } DEFENDANTS.

Industrial designs—Registration—Infringement—Copyright—Liability of servant or agent for tort—Design registrable under Industrial Design and Union Label Act—Ornamenting of an article—Design not *limited to something applied to an article after it comes into existence—Design applied to ornamenting of an article—Design to be applied for the ornamenting of an article by making it in a particular shape or configuration—Registration of design to be applied by making an article in a particular shape or configuration not registration of article itself—Originality of design—Photograph of article as drawing required by s. 4 of Industrial Design and Union Label Act—Novelty of design—Reference from revised statute to form of legislation as enacted by Parliament—Sufficiency of proprietor's name on label as required by s. 14 of Industrial Design and Union Label Act—Fraudulent imitation of registered design—Injunction against infringement of registered design—Industrial Design and Union Label Act, R.S.C. 1952, c. 150, ss. 3-12, 14 and 15—Copyright Act, R.S.C. 1952, c. 55, s. 46—Exchequer Court Act, R.S.C. 1952, c. 98, s. 21.*

This is an action for infringement of a registered industrial design of which the plaintiff company is the owner and for infringement of copyright in a work the copyright of which was vested in either the plaintiff company or the individual plaintiff. The industrial design was for a chesterfield sofa and was registered by the plaintiff company on November 20, 1962 as No. 187, Folio 25140.

The plaintiff company has been in the business of manufacturing and selling upholstered furniture in Montreal since 1938. In 1960 it entered into an arrangement with the plaintiff, Tiengo, who had been employed until that time as a designer and illustrator by Cortini Furniture Manufacturing Limited, under the terms of which Tiengo designed upholstered furniture for the plaintiff company as an independent contractor, being paid a royalty on furniture designed by him and sold by the plaintiff company, which thereby was entitled to exclusive rights to and property in all such designs. In 1961 Tiengo designed a chesterfield sofa and a matching chair for the plaintiff company, prototypes of which were shown at the Toronto Furniture Show in January 1962, and of which the production and sale by the plaintiff company commenced in February 1962.

The defendant, Edwards, had been employed by Cortini Furniture Manufacturing Limited when Tiengo was also employed by it, but in 1960 he became associated with Furniture Craft Corporation, which company began manufacturing and selling a chesterfield sofa and chair very similar in design to the plaintiff company's sofa in March or April 1962, but ceased doing so in January 1963. Shortly thereafter the defendant, Edwards, left that company and became associated with the defendant company, which, early in 1963, began manufacturing and selling sofas and chairs of virtually the same design as those previously manufactured by Furniture Craft Corporation, and is continuing to do so.

Held: That it is no answer to a claim in tort that the tort feasor was acting as a servant or agent for some other person.

2. That the sort of design that can be registered under the *Industrial Design and Union Label Act* is a design to be "applied" to the "ornamenting" of an article; it is something that determines the appearance of an article, or some part of an article, because ornamenting relates to appearance, and it must have as its objective making the appearance of an article more attractive because that is the purpose of ornamenting. It cannot be something that determines the nature of an article as such (as opposed to mere appearance) and it cannot be something that determines how an article is to be created, that is, it cannot

create a monopoly in "a product" or "a process" such as can be acquired by a patent for an invention.

3. That there is nothing in the legislation that limits the type of design that may be registered to that providing for something that is applied to an article after the article comes into existence.
4. That s. 11 of the *Industrial Design and Union Label Act* contemplates a "design" being "applied" to the "ornamenting" of any article and is not restricted to a "design" being "applied" to an "article".
5. That when reference to the various classes of design as set out in s. 11 of the pre-Confederation Act of the Province of Canada, c. 21 of the Statutes of Canada, 1861, was omitted from the original industrial design legislation enacted by Parliament, c. 55 of the Statutes of Canada, 1868, which did not differ in its principal provisions from the present Act, that legislation applied to all the classes that were specified in the previous legislation as well as to any other class of "design" that is capable of being "applied" for the "purposes of ornamenting" any article, if any such other class there be.
6. That the design registered by the plaintiff company is not a design for sofas or for some particular kind of sofa but it is truly a "design" for the ornamentation of sofas that can be applied by making the sofas in certain shapes. The narrow but fundamental distinction is the difference between the shape of a thing and a thing of that shape.
7. That there can be registration under the Canadian Act of a design to be applied for the ornamenting of an article by making it in a particular shape or configuration.
8. That there can be no registration under the Canadian Act of an article of manufacture as such, but the registration of a design to be applied by making an article in a particular shape or configuration is not registration of the article itself.
9. That none of the authorities relied upon by the defendant establishes that a design applicable to the ornamenting of an article of manufacture by reference to shape or configuration is not good subject matter for design registration under the Canadian Act.
10. That the plaintiff company's design is a design applicable to the ornamenting of an article and is not a claim to an article itself within the meaning of the authorities.
11. That to be entitled to registration the "design" must be "original".
12 That there is some doubt as to whether a photograph of a sofa to the ornamenting of which the design has been applied is a "drawing" of the design as required by the first few sections of the *Industrial Design and Union Label Act*.
13 That the novelty of the sofa in the photograph filed with the plaintiff company's application for registration of the design in question is the peculiar shape or configuration of the back and the arms and the registered design, therefore, consists of a design applicable to the ornamenting of a four-legged sofa by creating its arms and back in the shape and configuration illustrated by the arms and back of the sofa in the photograph.
14. That the distinctive feature of the design in question is an oval-shaped back having the appearance of being free of the balance of the sofa, made to harmonize with the almost uninterrupted flow of the lines of the seat and arms, the arms having been constructed as slight curves at angles of about 60° from the line of the seat.

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15. That there is such a radical difference between the design in question and the design of any other previously existing furniture to which attention has been directed that the submission that the design was not original must be rejected.
16. That in the case of ambiguity in the provisions of a statute arising from the work of a statute revision commission it is legitimate to refer back to the form of the legislation in which it was enacted by Parliament.
17. That it is a sufficient compliance with the provisions of s. 14 of the *Industrial Design and Union Label Act* for the plaintiff company to use a name on the label required to be attached to the article such that it communicates to those who might be interested, who, in fact, the proprietor is, and, in furniture circles in Canada, the word "Cimon" would indicate the plaintiff company.
18. That while there are certain differences between the plaintiff company's registered design and the designs of the defendants' allegedly infringing articles, there is no doubt that the design of the sofas produced by the defendants is the plaintiff company's registered design and, if it is not, it is certainly "a fraudulent imitation thereof".
19. That under s. 15 of the *Industrial Design and Union Label Act* the plaintiff company, as proprietor of the registered design that has been infringed, is entitled to the damages that it has sustained by reason of the infringement.
20. That although there is no provision in the *Industrial Design and Union Label Act* for an injunction; this is a proper case for an injunction and the Court has jurisdiction to grant it under s. 21 of the *Exchequer Court Act*.
21. That in view of the determination that the plaintiff company's design is capable of being registered under the *Industrial Design and Union Label Act* and the plaintiffs' concession that if such were the case, they would have no cause of action for infringement of copyright because of s. 46 of the *Copyright Act,* the plaintiffs' claim for infringement of copyright is dismissed.

Practice—Rule 138 of General Rules and Orders—Use of examination for discovery of individual defendant as officer of co-defendant company against him personally—Use of examination for discovery of individual defendant as officer of co-defendant company under Rule 138.

Held: That while the answers given by the defendant, Edwards, on his examination for discovery as an officer of the defendant company could have been used as evidence against him personally, to the extent that they consisted of admissions against his interest, to constitute such evidence they had to be put in at the trial as part of the case against him and this could have been done by way of admissions obtained pursuant to a notice to admit facts or by way of evidence from the reporter or other person who was present at the examination for discovery.

2. That the use of the examination for discovery of the defendant, Edwards, as an officer of the defendant company, under Rule 138 binds only the defendant company.

ACTION for infringement of an industrial design and a copyright.

The action was tried by the Honourable Mr. Justice Jackett, President of the Court, at Ottawa.

J. D. Kokonis for plaintiffs.

J. C. Osborne, Q.C. and *R. G. McClenahan* for defendants.

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

JACKETT P. now (December 14, 1964) delivered the following judgment:

In this action, relief is sought in respect of two different causes of action, namely,

(*a*) infringement of a registered industrial design of which the plaintiff company is the owner, and

(*b*) infringement of copyright in a work the copyright of which was vested either in the plaintiff company or the individual plaintiff.

A third claim by the plaintiff company in respect of a breach of section 7 of the *Trade Marks Act* was abandoned by counsel for the plaintiffs at the commencement of the argument. He also conceded, at that time, that, if the plaintiff company's design is a design that was capable of being registered under the *Industrial Design and Union Label Act,* R.S.C. 1952 c. 150, the plaintiffs have no cause of action for infringement of copyright inasmuch as section 46 of the *Copyright Act,* R.S.C. 1952, c. 55, provides that that Act does not apply to designs capable of being registered under the *Industrial Design and Union Label Act.*

Certain facts would appear to be outside the realm of controversy in so far as the plaintiffs and the defendant company are concerned. Such facts may be stated in chronological order as follows:

(*a*) The plaintiff company has been in the business of manufacturing and selling upholstered furniture in Montreal since 1938.

(*b*) Prior to the bankruptcy some time in 1960 of Cortini Furniture Manufacturing Limited, a company in the business of manufacturing furniture in Montreal, the individual plaintiff, Tiengo, worked for that company as a designer and illustrator, the individual defendant, Edwards, worked for that company in a senior management capacity, and one John Salus was its president.

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(*c*) Commencing some time in 1960, Tiengo and the plaintiff company had an arrangement, which was still in existence at the time of the trial, under which Tiengo, as an independent contractor and not as an employee, designed upholstered furniture for the plaintiff company and under which the plaintiff company was bound to pay to Tiengo a royalty on all sales of furniture made in accordance with his designs and was entitled to exclusive rights to, and property in, all designs of upholstered furniture created by him.

(*d*) Shortly after the bankruptcy of the Cortini company, Edwards became associated with Furniture Craft Corporation, a company incorporated at that time to engage in the furniture manufacturing business in Montreal. Salus also found employment with that company.

(*e*) In September 1961, Salus left Furniture Craft Corporation and joined with others in promoting a new furniture manufacturing company known as Cortini Furniture Manufacturing (1961) Limited and stayed with that company until it went bankrupt in 1963.

(*f*) In or about October 1961, Tiengo produced to the plaintiff company under their agreement a sketch illustrating a design for a chesterfield sofa, which design the plaintiff company decided to use in its business. At the request of the plaintiff company, Tiengo produced working drawings for the application of such design to a sofa and a sketch of an imaginary sofa to which it had been applied; and the plaintiff company then, with Tiengo's aid and direction, produced, as a prototype, a sofa to which the design represented by the sketch and drawings had been applied. The plaintiff company also produced a prototype of a chesterfield chair to which a matching design, also produced by Tiengo, had been applied—there were certain differences between the design of the sofa and that of the chair, which differences Tiengo deemed necessary having regard to the difference between the proportions of a sofa and the proportions of a chair.

(*g*) When the plaintiff company had the prototypes—that is, the chesterfield sofa and the chesterfield chair—constructed to the satisfaction of the two plaintiffs, they were secreted away and brought out to be shown at the Toronto Furniture Show in January 1962. That show is the show of outstanding importance in the furniture business each year.

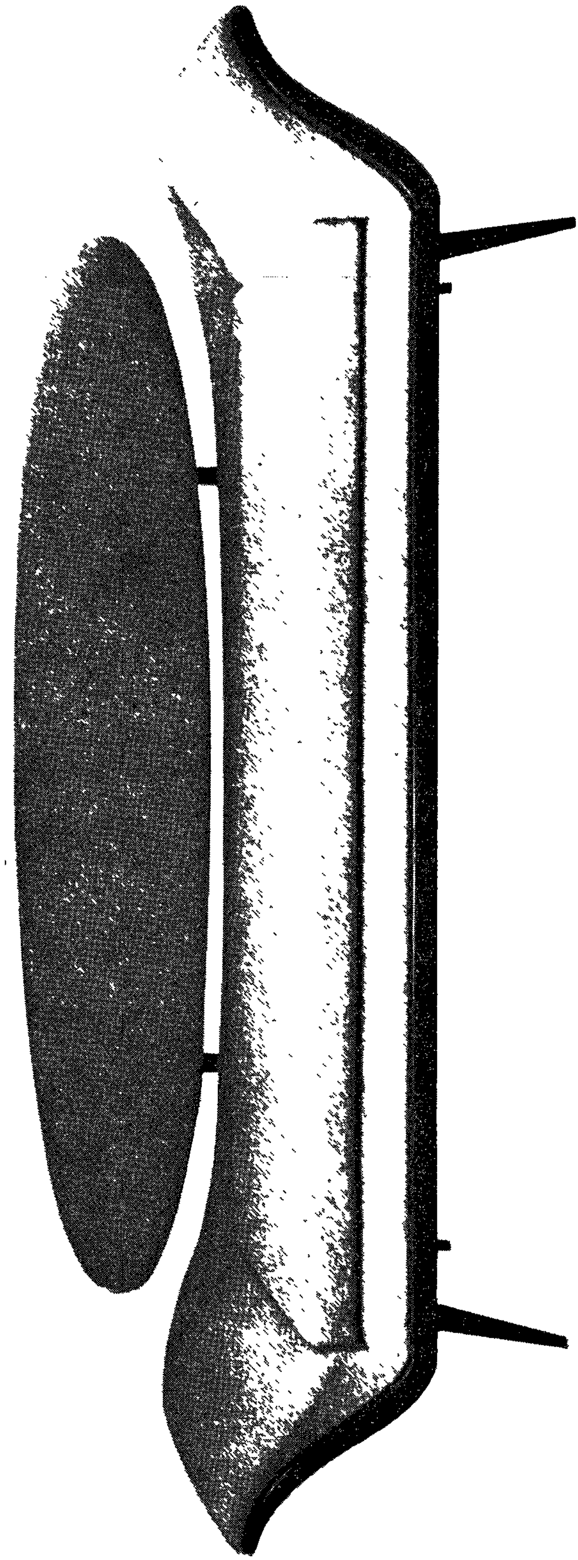
(*h*) After the prototypes were shown at the January 1962 Toronto Furniture Show, that is, in February 1962, the plaintiff company commenced production and sale of chesterfield sofas and chairs patterned on the prototypes. It found that they sold very well.

(*i*) Furniture Craft Corporation, in March or April 1962, inspired by the plaintiff company's new chesterfield line, commenced to manufacture and sell a chesterfield sofa to which had been applied a design that was very similar to the design applied to the plaintiffs' sofa. It also commenced at the same time to manufacture and sell a chesterfield chair to which had been applied a design that was like the design applied to the plaintiff company's sofa rather than the design applied to the plaintiff company's chair. The defendant Edwards was the officer of Furniture Craft Corporation who, more than anybody else, was responsible for the production and sale of this sofa and chair.

(*j*) On November 20, 1962, the plaintiff company registered under the *Industrial Design and Union Label Act,* as No. 187, Folio 25140, an industrial design for a "Chesterfield Sofa"

characterized by an elongated seat member, rectangular in form, having upwardly divergent, tapering, gently rounded arm members, a back consisting of a shallow portion and an elongated oval portion spaced thereabove, the upper edge of said shallow portion extending in a gentle downward curve from the top of one arm to the top of the other arm, said upper edge being nearly even with the top of the seat member at the middle of said shallow portion, and four downwardly depending legs as per the annexed pattern and application,

The annexed "pattern" is a photograph of a sofa, which I reproduce here:



(Counsel for both parties agreed that the photograph was a sufficient compliance with the requirement in sections 4 *et seq.* of the *Industrial Design and Union Label Act,* when read with the regulations, that there be a "drawing" of the "design". That question is not therefore in issue in this case although it does appear to me to raise a problem of some difficulty.) A copy of the "drawing" and description with the certificate provided for by subsection (1) of section 7 of the Act was put in evidence by the plaintiffs at the trial of this action.

(*k*) On or about December 3, 1962, the plaintiff company sent to every manufacturer of upholstered furniture in Canada, as listed in a publication known as "Furniture and Furnishings Directory", which included Furniture Craft Corporation, a circular dated December 3, 1962, reading as follows:

TO ALL FURNITURE MANUFACTURERS IN CANADA

Gentlemen:

We wish to advise that Canadian Design Registration No. 187/25140 covering the chesterfield sofa illustrated in the attached drawing (our style 2050/13) was granted to us by the Canadian Patent Office. By virtue of such registration, we have the exclusive right to manufacture and sell in Canada chesterfield sofas of the design illustrated.

We understand that chesterfield sofas which are copies of that illustrated in the attached drawing are being manufactured in Canada by furniture manufacturers other than ourselves and are being offered for sale to a number of furniture dealers in many parts of this country. The Manufacture and/or sale of such chesterfield sofa competes directly with and is detrimental to our business in this country, and accordingly, we believe you would want us to advise you of the existence of our aforesaid Registration as well as the fact that any such chesterfield sofas which have not originated with us constitutes an infringement of our registered design. We must of course protect our position in the trade in Canada and will take all steps necessary, including legal action, to prevent such infringement.

Yours very truly,
CIMON LIMITED.

(signed) René Cimon.

(*l*) On December 4, 1962, the plaintiff company also sent to the defendant Edwards a letter bearing date December 3, 1962 and reading as follows:

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Mr. Edwards,
Furniture Craft Corp
9697 St-Lawrence
Montreal,
Dear Mr. Edwards.

It has been brought to our attention that you have manufactured and sold copies of one of our sofas (our No. 2050/13 picture attached) which is registered with the Canadian Patent Office and carries Industrial Design Registration No. 187/25140.

As our firms always have been on a friendly basis, rather than take action that would be distasteful to both of us, we are requesting that you discontinue the sale of this sofa. Would you be kind enough to confirm this by return letter so that we can close our file on this.

It is our belief that you did not do this to hurt us deliberately but your action has caused us some embarrassment and loss of business and we are sure you will correct this.

For your information, it is our intention to register with the Canadian Patent Office all original designs of our manufacture.

Yours very truly
CIMON LIMITED

René Cimon

(*m*) At the furniture show in Toronto in January 1963, there was a meeting between René Cimon, an executive officer of the plaintiff company, and the defendant Edwards. Cimon accused Edwards of copying the plaintiff company's design and told Edwards that the design was registered. Edwards admitted receiving a letter from the plaintiff company, but said he had been too busy to answer the letter, which he regarded as unimportant. Edwards further said that the registered design did not mean anything and that his company's sofa was not like the plaintiff company's sofa because he had put buttons on his.

(*n*) One Peter Kerr, who had become president of Furniture Craft Corporation in May 1962, was present at the meeting between Edwards and René Cimon in January 1963 and, from that time on, Furniture Craft Corporation ceased producing sofas and chairs to which had been applied designs that were like the plaintiff company's registered design. Mr. Kerr agreed at that time that Furniture Craft Corporation would "stay away from the Cimon line".

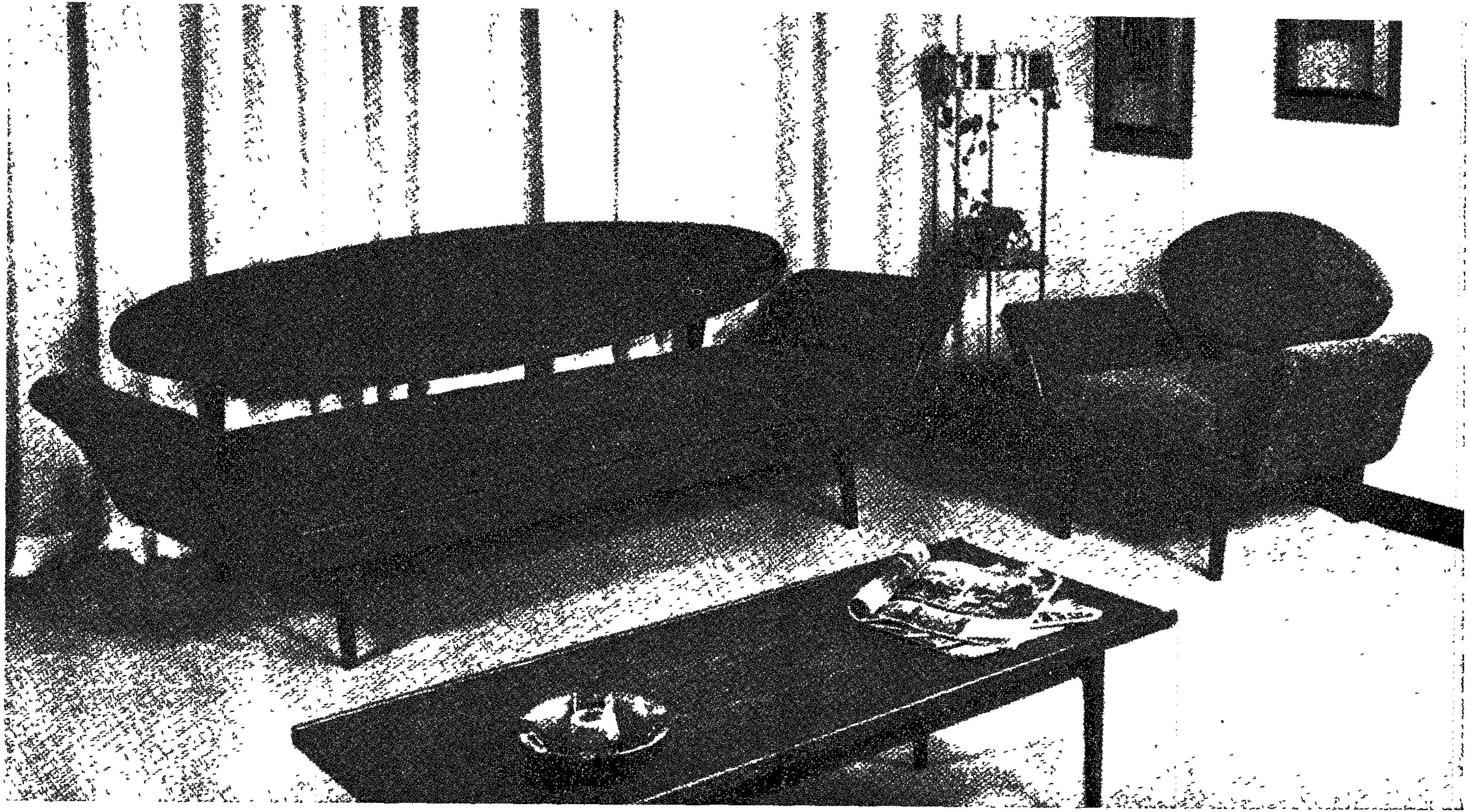
(*o*) Shortly after that decision was taken by Furniture Craft Corporation, the defendant Edwards left that company and became associated with the defendant company. The defendant company has been, since early 1963, manufacturing and selling sofas and chairs to which have been applied designs that are, for all practical purposes, the same as the designs that had been applied to the sofas and chairs that Furniture Craft Corporation had been manufacturing before it decided to "stay away from the Cimon line". The sofas and chairs in question are illustrated by a page of the defendant company's catalogue that I reproduce on the following page.

The defendant Edwards is general manager of the defendant company and has complete and exclusive authority in respect of all decisions as to what furniture the defendant company produces and sells.

(*p*) The defendant company has every intention of continuing to produce and sell the articles in question as long as there is a demand for them unless enjoined by judgment in this action against so doing.

As indicated earlier, the facts that I have just recited appear to me to be outside the realm of controversy in so far as the plaintiffs and the defendant company are concerned. They are equally outside the realm of controversy in so far as the plaintiffs and the defendant Edwards are concerned with the exception of the fact that the defendant company is producing and selling sofas and chairs to which the designs used by Furniture Craft Corporation have been applied, and intends to continue doing so, and the fact that the defendant Edwards is general manager of the defendant company and has complete and exclusive authority in respect of all decisions as to what furniture the defendant company produces and sells. These latter facts were established against the defendant company by an examination for discovery of the defendant Edwards as an officer of the defendant company, part of which was used by the plaintiffs as evidence under Rule 138 of the Exchequer Court Rules, which reads, in part, as follows:

Where any departmental or other officer of the Crown, or an officer of a corporation has been examined for the purpose of discovery, the whole or any part of the examination may be used as evidence by any party adverse in interest to the Crown or corporation; and if a part only be used



5006-SOFA—
Overall Length 96″
Height 33″
Depth 30½″
Seat Depth 22″

5007-CHAIR—
Overall length 36″
Depth 30½″
Height 33″
Seat depth 22″
Foam rubber seat over rubber slats

the Crown or corporation may put in and use the remainder of the examination of the officer, or any part thereof, as evidence on the part of the Crown or of the corporation.

While there can, in my view, be no doubt that the answers given by the defendant Edwards on his examination for discovery as an officer of the defendant company could have been used as evidence against him personally, to the extent that they consisted of admissions against his interest, to constitute such evidence against him they had to be put in at the trial by way of evidence that constituted part of the case against him. This could have been done by way of admissions obtained pursuant to a notice to admit facts or by way of evidence from the reporter or other person who was present at the examination for discovery. No such evidence was put in against Edwards, and, in my view, the use of the examination for discovery under Rule 138 only binds the defendant company. I am of opinion that it would be unfortunate if such an omission resulted in such an obvious miscarriage of justice as would result if it had the effect that the plaintiffs were to be deprived of success against Edwards for lack of proof of facts that, according to the record, have been established by the sworn testimony of Edwards himself. On the facts of this case, however, I do not think it can affect the outcome for, if there has been any infringement of any of the plaintiffs' rights, there was an infringement by Furniture Craft Corporation during the period from the time when Edwards became aware of the registration of the plaintiff company's industrial design on November 20, 1962, until that company ceased production of the sofas and chairs in question in January or February of 1963, the defendant Edwards was clearly a party to any such infringement and any such infringement falls within the allegations in the Statement of Claim. (I have carefully considered the written submission by counsel for the defendants on this point and I cannot agree that the Statement of Claim is so worded as to restrict the claim against Edwards to acts done by Edwards on behalf of the defendant company. The Statement of Claim is in perfectly general terms and the defendants were content to go to trial without requiring any particulars as to the time or place of alleged acts of infringement. Neither can I accept the argument that the Statement of Claim does not extend to Edwards' participation

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in manufacture and sale of the infringing articles by Furniture Craft Corporation. It is no answer to a claim in tort that the tort feasor was acting as a servant or agent for some other person.)

I come now to the attempt that was made to cast some doubt on the clear cut evidence given by Tiengo, as a witness for the plaintiffs, both in his evidence-in-chief and on cross-examination, that the design which was subsequently the subject matter of the registration was a new and original design created by him during the latter part of 1961 under his contractual arrangement with the plaintiff company. John Salus gave evidence for the defence that, in 1958, while he was president of Cortini Corporation, there was a meeting attended by Salus, Edwards and Tiengo, at which Edwards suggested a chesterfield with sweeping arms and a "cigar-shaped back" and that Tiengo, in sketching out this concept, had produced a sketch which was substantially the same as the plaintiff company's registered design. This evidence was given although, during a prolonged cross-examination of Tiengo, no suggestion was made that any such alleged sketch had been made in 1958 or at any time or place other than as stated in Tiengo's evidence-in-chief. No such sketch was produced and Salus did not persuade me that he really remembered this furniture design incident that, according to his evidence, had happened almost six years earlier. Furniture design was no part of his duties—his position as "President" having been a nominal one. His memory in connection with more recent incidents of direct concern to him was not nearly as clear as his evidence would suggest it was concerning this much earlier incident. I observed his demeanour very carefully, and, in my opinion, his evidence is not reliable. To the extent that his evidence is inconsistent with that given by Tiengo, I do not accept it. Furthermore, I cannot help commenting on the fact that there has been no evidence with regard to the alleged incident from Edwards, from whom the suggestion in question is supposed to have come. There was no suggestion that Edwards was not available to give evidence at the trial. I find, therefore, that the design in question was created by Tiengo during the latter part of 1961 and that it was created by him for the plaintiff company and not for Furniture Craft Corporation.

There is also a conflict between the evidence tendered by the plaintiffs and the evidence tendered by the defendants with respect to the circumstances surrounding the creation by Furniture Craft Corporation of a chesterfield sofa and a chesterfield chair to which had been applied designs that were similar to the design that was subsequently registered by the plaintiff company. One Bruno Gimber gave evidence that he is a cabinet maker who was employed by Furniture Craft Corporation in the fall of 1961 as a foreman and is still employed in the same position by that company although it has now changed its name. He swore that, in the spring of 1962, a chesterfield sofa that had been manufactured by the plaintiff company appeared in Furniture Craft Corporation's factory, that the defendant Edwards instructed him and his fellow employees to copy it as it was but "with a tight seat", and that he and his fellow employees carried out such instructions. (As I understand the evidence, the plaintiffs' sofa had a removeable cushion and the instructions to create a sofa with a "tight seat" involved building up the seat to take up the same volume without having a removeable cushion.) Gimber gave his evidence in a convincing manner and went into considerable detail as to the various modifications that were made in the design that had been applied to the Cimon sofa in the course of creating the copy with a "tight seat". In my view, his evidence was not shaken on cross-examination. Reference to an incident when his present employer thought that he had stolen some furniture strengthened, rather than shook, my confidence in his testimony. Peter Kerr, who it will be recalled was the president of Furniture Craft Corporation at that time, gave evidence that, to his knowledge, Furniture Craft Corporation created their sofa along the same lines as the Cimon sofa without having a sample of the Cimon sofa to copy and that the work was done by one Gartner, whom he described as being their production supervisor at that time. Kerr was not able to swear that Edwards had not instructed Gimber to copy an actual Cimon sofa but said that "to my knowledge Mr. Edwards never instructed Mr. Gimber to copy". Kerr is now in business as a manufacturer's agent and one of the principal "lines" that he handles is the defendant company's furniture. My impression was that he was striving to make his evidence as favourable to the

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defendants as possible. George Gartner gave evidence that he had been instructed to construct a sofa with a design similar to the plaintiff company's design by the defendant Edwards, who had given him a sketch from which to work. He said that Gimber had had nothing to do with it but that the upholstery department, whose foreman was one Bartl, had taken charge of the upholstering stage. Gartner has worked under the defendant Edwards at Cortini Corporation and Furniture Craft Corporation and is now working at the defendant company's plant. The plaintiffs called in rebuttal Arnold Bartl who, at all relevant times was, and still is, in charge of the upholstery department at Furniture Craft Corporation. He completely contradicted the story of the production of that company's copy of the Cimon sofa as told by Kerr and Gartner in so far as his part in that story is concerned and, incidentally, he corroborated Gimber's story in all important respects. Having observed the demeanor in the box of all four of these witnesses with care and anxiety, I accept the story as told by Gimber and Bartl and I reject the evidence of Kerr and Gartner in so far as it is inconsistent with that of Gimber and Bartl. Here, again, I cannot refrain from commenting on the fact that the defendant Edwards, who was the principal actor in the story, whichever version is true, did not give evidence. There was no suggestion that he was not available.

In any event, whether I accept the evidence of Gimber and Bartl or have regard only to the evidence of Kerr and Gartner, there is no doubt in my mind that Furniture Craft Corporation, acting under the control of the defendant, Edwards, inspired by the success of the new Cimon sofa, to which the registered design here in question had been applied, early in 1962 produced a line of sofas and of chairs calculated to look as much like the Cimon sofa as possible with a view to sharing in the Cimon success.

I might also say, at this point, that it is perfectly clear that Furniture Craft Corporation, acting under the direct control of Edwards, produced and sold sofas and chairs in accordance with the copies so developed until after the Toronto Furniture Show in January 1963. It is also clear, in so far as the defendant company is concerned, that, very shortly after Furniture Craft Corporation ceased to produce them, the defendant company, under the direction of the defendant Edwards, started producing sofas and chairs to which the same design had been applied, has been doing so ever since, and intends to do so as long as it is commercially advantageous to do so.

I shall deal first with the claim for infringement of the registered design because, as indicated above, it is conceded by the plaintiffs that, if the design in question is capable of being registered under the *Industrial Design and Union Label Act*, there is no cause of action for infringement of copyright. The claim for infringement of the registered design is a claim of the plaintiff company alone. Tiengo does not claim any interest in the registered design.

The relevant provisions of the *Industrial Design and Union Label Act* are

3. The Minister shall cause to be kept a book called the Register of Industrial Designs for the registration therein of industrial designs.

4. The proprietor applying for the registration of any design shall deposit with the Minister a drawing and description in duplicate of the same, together with a declaration that the same was not in use to his knowledge by any other person than himself at the time of his adoption thereof.

5. On receipt of the fee prescribed by this Act in that behalf, the Minister shall cause any design for which the proprietor has made application for registry to be examined to ascertain whether it resembles any other design already registered.

6. The Minister shall register the design if he finds that it is not identical with or does not so closely resemble any other design already registered as to be confounded therewith; and he shall return to the proprietor thereof one copy of the drawing and description with the certificate required by this Part; . . .

7. (1) On the copy of the drawing and description returned to the person registering, a certificate shall be given signed by the Minister or the Commissioner of Patents to the effect that such design has been duly registered in accordance with the provisions of this Act.

(2) Such certificate shall show the date of registration including the day, month and year of the entry thereof in the proper register, the name and address of the registered proprietor, the number of such design and the number or letter employed to denote or correspond to the registration.

(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.

8. Where the author of any design has, for a good and valuable consideration, executed the same for some other person, such other person is alone entitled to register.

9. An exclusive right for an industrial design may be acquired by registration of the same under this Part.

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10. (1) Such exclusive right is valid for the term of five years, but may be renewed, at or before the expiration of the said term of five years, for a further period of five years or less on payment of the fee in this Act prescribed for extension of time; but the whole duration of the exclusive right shall not exceed ten years in all.

* * *

11. During the existence of such exclusive right, whether of the entire or partial use of such design, no person shall without the licence in writing of the registered proprietor, or, if assigned, of his assignee, apply for the purposes of sale such design or a fraudulent imitation thereof to the ornamenting of any article of manufacture or other article to which an industrial design may be applied or attached, or publish, sell or expose for sale or use, any such article as aforesaid to which such design or fraudulent imitation thereof has been applied.

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.

* * *

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.

These provisions have been the subject of authoritative comment in *Clatworthy & Son, Limited v. Dale Display Fixtures Limited*[1], per Lamont J., at page 431:

No definition of a "design" is given in the Act. The word must, therefore, be taken in its ordinary signification which Lindley, L.J., in *In re Clarke's Design* [1896] 2 Ch. 38, at p. 43, stated means: "Something marked out—a plan or representation of something". A "design" is, therefore, a pattern or representation which the eye can see and which can be applied to a manufactured article. To be entitled to registration the "design" must be original. The Act does not expressly call for novelty, but s. 27(3) provides that the Minister's certificate of registration shall, in the absence of proof to the contrary, be sufficient evidence of the originality of the design. Just what is contemplated by "originality" the Act does not make clear. Under the English Act a design, to be registrable, must be "new or original." As that Act uses both words it has, in a number of cases, been sought to draw a distinction in meaning between them, and it has been held that "every design which is original is new, but every design which is new is not necessarily original." *In re Rollason's Design,* (1897) 14 R.P.C. 909.

In *Dover, Limited v. Nürnberger Celluloidwaren Fabrik Gebrüder Wolff,* [1910] 2 Ch. 25, at p. 29, Buckley, L.J., defines "original" as applied to designs, as follows:—

"The word 'original' contemplates that the person has originated something, that by the exercise of intellectual activity he has started an idea which had not occurred to any one before, that a particular pattern or shape or ornament may be rendered applicable to the particular article to which he suggests that it shall be applied. If that

[1] [1929] S.C.R. 429.

state of things be satisfied, then the design will be original although the actual picture or shape or whatever it is which is being considered is old in the sense that it has existed with reference to another article before."

And further on he says:—

"There must be the exercise of intellectual activity so as to originate, that is to say suggest for the first time, something which had not occurred to any one before as to applying by some manual, mechanical, or chemical means some pattern, shape, or ornament to some special subject-matter to which it had not been applied before."

The above quotations, in my opinion, set out what is called for by our Act.

The plaintiffs relied upon the certificate under subsection (1) of section 7 as sufficient evidence, in the absence of proof to the contrary, by virtue of subsection (3) of section 7, of, *inter alia,*

(*a*) the design,

(*b*) the originality of the design,

(*c*) the person named as proprietor being proprietor, and

(*d*) compliance with the provisions of the Act.

The position of the defendants, as I understand it, may be summarized as follows:

1. that, under the Act, there can be no registration of a design for shape or configuration of an article and the registered design was an attempt to register a design for the shape or configuration of an article;
2. that, under the Act, there can be no registration of an article of manufacture and the registered design lays claim to an article of manufacture;

(Counsel for the defendants indicated that he regarded these two contentions as being merely different ways of stating the same objection and that he preferred the second way of putting it.)

3. that, under the Act, a design cannot be registered unless it is original and the registered design is not original;
4. that it is a condition precedent to a registered design, such as this one, continuing to be valid that the "name of the proprietor" shall appear upon the article to which the design applies by being marked "with the letters Rd., and the year of registration at the edge or upon any convenient part thereof" and the mark here failed to comply with the requirement

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because the name shown upon the label relied upon as complying with the requirement was "Cimon" instead of the plaintiff company's full name of "Cimon Limited"; and

5. that the defendants did not infringe the plaintiff company's registered design because the design applied to the sofas and chairs produced by the defendants was neither the registered design nor an imitation or fraudulent imitation of it.

Put another way, the defendants have five defences to the action for infringement of registered design. They make three attacks on the validity of the plaintiff company's registered design based on contentions that there was not proper subject matter for registration, they make an attack on the validity of the registered design based on the contention that the statutory provisions about marking have not been complied with, and they deny that what the defendant has done constitutes infringement of the design. The attacks based on lack of subject matter are

(a) that the registration is for a design for shape or configuration of an article,
(b) that the registration is for a design for an article, and
(c) that the registered design lacks originality.

The contentions concerning designs for shape or configuration and concerning designs for an article itself raise difficult questions as to the effect of the Canadian legislation calling for a careful examination of the relevant provisions and of the cases that have been decided thereunder.

Looking first at the statutes, without reference to any decision, I find that sections 3 to 6, inclusive, confer on the proprietor of "any design" a right to have "the design" registered in the Register of Industrial Designs kept pursuant to section 3. The only indication in these sections of the right to registration being limited to a particular class of designs is the fact that section 3 says that the Register of Industrial Designs is to be kept for the registration therein of "industrial" designs. There is, however, a fairly definite indication in other sections as to just what class of design is intended. It is sufficient to refer to section 11 which, in effect, defines the ambit of the monopoly conferred by registration of a design by providing that no person (during the existence of the exclusive right and without a licence) shall for purposes of sale "apply" the design or a fraudulent imitation thereof "to the ornamenting" of "any article of manufacture..." The sort of design that can be registered is therefore a design to be "applied" to "the ornamenting" of an article. It must therefore be something that determines the appearance of an article, or some part of an article, because ornamenting relates to appearance. And it must have as its objective making the appearance of an article more attractive because that is the purpose of ornamenting. It cannot be something that determines the nature of an article as such (as opposed to mere appearance) and it cannot be something that determines how an article is to be created. In other words, it cannot create a monopoly in "a product" or "a process" such as can be acquired by a patent for an invention. There is, moreover, nothing in the legislation that limits the type of design that may be registered (as was suggested in argument) to those providing for something that is applied to an article after the article comes into existence. Section 11 contemplates a "design" being "applied" to the "ornamenting" of any article. It is not restricted to a "design" being "applied" to an "article". This is borne out by the fact that, in Ontario and Quebec, the original industrial design legislation enacted by Parliament, chapter 55 of 1868, which did not differ in its principal provisions from our present Act, replaced a pre-Confederation Act of the old Province of Canada, chapter 21 of the Statutes of Canada, 1861, which provided (section 11) for the registration of new and original designs

> "whether such designs be applicable to the ornamenting of any article of manufacture, or of any substance..."

and that

> "whether such design be so applicable for the pattern, or for the shape, or for the configuration, or for the ornament thereof, or for any two or more such purposes"

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and

> "by whatever means such design may be so applicable, whether by printing or by painting, or by embroidery, or by weaving, or by sewing, or by modelling, or by casting, or by embossing, or by engraving, or by staining, or by any other means whatsoever, manual, mechanical, or chemical, separate or combined."

(I take it that the word "ornamenting" where it appears in the first of these three quotations, inasmuch as it must comprehend all four cases detailed in the second quotation, has the general meaning of improving appearance and that "ornament" in the second quotation has, by reason of the context in which it appears, the more particular meaning of something that is applied physically to something else to improve its appearance.) The object of that part of section 11 of the 1861 statute set out in the second quotation, *supra,* was to make it clear that the statute extended to "everything which would ordinarily fall within the word 'design' ". See *In the Matter of Rollason's Registered Design*[1] per Lord Herschell at page 446. Had Parliament intended to exclude from the word "design" as adopted in 1868 anything included in the pre-existing legislation, I should have thought that it would have done so specifically. The various classes of design spelled out in the second quotation from the 1861 legislation, *supra,* are, it seems to me, exhaustive and are therefore calculated to limit the ambit of that legislation. When references to various classes of design were omitted in 1868 from the Canadian legislation, that legislation, in my view, applied to all the classes that were previously spelled out as well as to any other class of "design" that is capable of being "applied" for the "purposes of ornamenting" any article, if any such other class there be.

If, therefore, my understanding of the ambit of the Act is to be determined by my reading of the statutes without reference to the cases decided thereunder, I have no difficulty in concluding that the Cimon design is not objectionable as being a design for shape or configuration and is not objectionable as being a claim for an article or product. The fact that a design relates to shape or

[1] (1898) 15 R.P.C. 441.

configuration of an article is not, in itself, an objection to its registration. As long as it is a design to be applied "to the ornamenting" of an article, it is eligible for registration even though it requires that its purpose of "ornamenting" be accomplished in whole or in part by constructing the article, or parts of it, in a certain shape or shapes[1]. (This is quite a different thing from claiming the shape or configuration that an article necessarily assumes if it is to serve a certain purpose or if it has been constructed in accordance with a certain process.) The Cimon design is furthermore not a design for an article. It is not a design for sofas or for some particular kind of sofa. It is truly a "design" for the ornamentation of sofas that can be applied by making the sofas in certain shapes. The distinction was expressed in *In re Clarke's Design*[2] by Lindley L.J. at page 43, as being "the difference between the shape of a thing and a thing of that shape". The distinction is narrow but is fundamental.

To summarize as to my view of the effect of the Canadian legislation on this branch of the case, my conclusion, from an examination of the legislation without reference to the cases, is that

(a) the defendant's contention that, under the Canadian Act, there can be no registration for shape or configuration of an article is unsound inasmuch as there can be registration of a design to be applied for the ornamenting of an article by making it in a particular shape or configuration; and

(b) the defendants' contention that, under the Canadian Act, there can be no registration of an article of manufacture as such is sound.

It follows that I do not agree with the defendants' contention that registration of a design to be applied by making an article in a particular shape or configuration is registration of the article itself.

I come now to examine the decisions that, according to counsel for the defendants, require me to reach a conclusion on these two objections to the subject matter of

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[1] See *In re Clarke's Design* [1896] 2 Ch. 38 at p. 43 per Lindley L.J., "A design applicable to a thing for its shape can only be applied to a thing by making it in that shape."

[2] [1896] 2 Ch. 38.

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the plaintiff company's registered design contrary to that reached upon an examination of the statute.

While I restrict myself generally to Canadian decisions, I wish to express the warning that decisions under the United Kingdom Statute on this point must be looked at with caution because the words "to the ornamenting" do not appear in the United Kingdom legislation since 1883. Nevertheless, in my view, the United Kingdom legislation is not dissimilar in its general effect. While the words "to the ornamenting" do not appear in it, nevertheless, its protection is restricted to "cases where the object is to please the eye". See "Copyright in Industrial Designs" by Russell Clark, quoted with approval in *Stenor, Ld. v. Whitesides (Clitheroe), Ld.*[1] per Lord Porter at page 126.

The earliest case that has been drawn to my attention of an action under the Canadian Act for infringement of a registered industrial design is *Findlay v. The Ottawa Furnace and Foundry Company (Limited)*[2]. In that case the plaintiffs had registered an industrial design for a cooking stove of a distinctive shape and with extensive scroll-work ornamenting its various side panels. The defendants procured a stove made by the plaintiffs according to their registered design, took it apart and made a set of patterns of the parts. From these patterns, the defendants made a stove but they made alterations in the ornamental scroll-work and adopted a different medallion. They also made minor alternations in the interior construction. Counsel for the defendants argued that the plaintiffs could not prevent the defendants from manufacturing a cook stove when all they had registered was an ornamental design for a cook stove. He put his contention in these words, "If we differentiate the ornamentation, we have a clear right to manufacture a stove of the shape and dimensions of that of the plaintiffs". Burbidge J., it is true, did not discuss this submission. He disposed of the case by finding that it was clear that the plaintiffs had a registered design in respect of which they were entitled to protection and that it had been infringed.

[1] [1948] A C 107. [2] (1902) 7 Ex C R 338.

The first case upon which counsel for the defendants placed reliance in connection with his contention that shape or configuration cannot be subject matter is *Kaufmann Rubber Company Limited v. Miner Rubber Company Limited*[1]. That was an action for infringement of registered industrial designs. The design was the usual outline or representation of an overshoe and the means of fastening the flaps of the overshoe, the means being the usual metal buckle arrangement on the lower part, and cross straps on the upper part, to which dome fasteners, well known in gloves, were applied. The only description of the design was a statement that the design consisted of "the novel configuration of overshoes or galoshes as shown". After reviewing the provisions in the legislation, Mr. Justice Maclean said that they would seem to indicate that

(a) in the statute, "industrial designs" is intended to mean some design or mark which is to be attached to a manufactured article,

(b) the use of the word "ornamenting" would indicate that a design might be adapted to purposes of ornamentation,

(c) dealing with designs, the legislature had primarily before it the idea of "shape or ornamentation" involving artistic considerations,

(d) a design cannot be an article of manufacture but "something to be applied to an article of manufacture, or other article to which an industrial design may be applied, and capable of existence outside the article itself",

(e) the registration of a design would afford no protection for any mechanical principle or contrivance, process or method of manufacture, or principle of construction, and

(f) there must be something original in a registered design.

He summarized by saying that "A design to be registrable must therefore be some conception or suggestion as to shape, pattern or ornament applied to any article, and is judged solely by the eye, and does not include any mode or principle of construction." After reviewing the legal effect of the legislation, Mr. Justice Maclean said that the design

[1] [1926] Ex. C.R. 26.

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before him covered the shape or configuration of the whole overshoe "together with the buckles and straps, the means of fastening" and said that it was not to be seriously considered that this was a registrable design within the contemplation of the statute. Having said that, he gave his reasons as follows: "The registrations are but an attempt to protect a mode of construction" and "There is nothing original or novel in the configuration of an overshoe as shewn by the plaintiff's designs, or any part of them". Nowhere, in this judgment, as far as I can find, does Maclean J. reject the idea that a design may be applied to the ornamenting of an article by requiring that the article be constructed in whole or in part in accordance with a shape dictated by the design. On the contrary, he says that a design "must be some conception or suggestion as to shape, pattern or ornament applied to any article". It is clear, therefore, that this case does not establish that a design is not registrable merely because it relates to the shape or configuration of an article.

The next case upon which counsel for the defendants relied was *Clatworthy & Son, Limited v. Dale Display Fixtures Limited*[1]. In this case, there was a claim for infringement of a registered design for a display stand. The registered design related to a rack or stand consisting of a straight horizontal bar so supported at its extremities that garments could be hung on it on ordinary coat or garment hangars. Each of the side supports consisted of a vertical bar the lower end of which was fitted into a base or footing which rested upon the floor, and these footings were connected by another horizontal bar which held the rack firm. The footing at each side where it connected with the bar was ornamented so that, in conjunction with an ornamented boss which encircled the upright at the lower end and rested on the footing, the effect produced was pleasing to the eye. The junction of each upright with the top horizontal bar was also ornamented. At page 162 of the Exchequer Court report, Maclean J. said, "The Act is not clear when the design is merely for the shape of a thing, and it may be doubtful if a design for shape or configuration, which can only be applied to a thing by making it in that shape, comes within the Act. In the corresponding English Act,

[1] [1928] Ex. C.R. 159; [1929] S.C.R. 429.

1907, it does, but the statute there states that 'Design' means any design applicable to any article, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, etc., and the same was true of the English Act of 1883." Having raised this question, Mr. Justice Maclean did not pursue it but said that for the purposes of that case, he was going to assume that under the Act the design was applicable for the shape or configuration. He then proceeded to hold that the plaintiff's registered design was invalid because the design was not original. (The superficial distinction between the Canadian legislation and the English legislation of 1883 and 1907 was the fact that the Canadian legislation was expressly restricted to designs to be applied "to the ornamenting" of any article whereas, under the English Act of 1883, and also the Act of 1907, the legislation did not contain such words and did expressly refer to any "design" that was "applicable to any article of manufacture... whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof".) In the Supreme Court of Canada, Mr. Justice Maclean's decision in the *Clathworthy* case was upheld on the anticipation point. [Reference to "Canadian Law of Trade Marks and Industrial Designs" by Harold G. Fox, (1940) page 454, shows that, during the argument of the case in the Supreme Court of Canada, Duff J., as he then was, expressed the view that a design may be registered for the external shape or configuration of an article.] It is worthy of note that in the course of the judgment of Lamont J., who delivered the judgment of the Supreme Court of Canada, he makes reference to the "shape" feature of design without any indication that it had no validity under the Canadian Act. At page 431 of the Supreme Court report, he said that "It is upon the shape of the base or footing and the character of the ornamentation that the appellant relies to justify the conclusion that the combination is artistic, new and original." Again, at page 433, he said: "It must be remembered, however, that to constitute an original design there must be some substantial difference between the new design and what had theretofore existed. A slight change of outline or configuration, or an unsubstantial variation is not sufficient to enable the author to obtain registration."

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The next case cited by counsel for the defendants as being in line with the position which he took about designs for shape or configuration not constituting good subject matter is *Canadian William Rodgers Limited v. International Silver Company of Canada, Limited*[1]. The design registered in that case was described as follows:

> The said industrial design consists of a knife wherein the handle is substantially three-fifths and the blade substantially the remaining two-fifths of the total length of the knife, the whole being of a shape substantially as shown.

The drawings accompanying the application simply indicated the outlines of the table knife and the only feature peculiar to the design of the knife was that the handle and blade respectively were in the proportions, relative to the whole length of the knife, stated in the application for registration. Maclean J. said at page 65 "... the sole question for determination is whether the outline of a table knife, distinguished only by having the length of the handle and blade in the proportions mentioned, constitutes a registrable design, under the provisions of The Trade Mark and Design Act." He referred to his discussion of the provisions of the Act in the *Kaufmann Rubber Company* case and said that in that case he had expressed the opinion ". . . that an 'industrial design,' under the Act, was intended only to imply some ornamental design applied to an article of manufacture, that is to say, it is the design, drawing, or engraving, applied to the ornamentation of an article of manufacture, which is protected, and not the article of manufacture itself." He pointed out that, in the earlier English Design Acts, this same principle had been applied and that, in his view, the Canadian legislation still adhered to it inasmuch as, while the words "for the ornamentation of" had been omitted from the English Act in later years, they are still in the Canadian Act. Mr. Justice Maclean said further that, even if the statute did not confine the registration of design to ornamental designs applied to an article of manufacture, he was of opinion that the dimensions of the handle and blade of a table knife do not constitute subject matter for a design, and are not properly registrable as a design. He rejected the idea that "the shape or configuration of the knife" was claimed as a design, saying that "it is only a knife in

[1] [1932] Ex. C.R. 63.

which the handle is one-fifth longer than the blade, that is claimed as the design; any reference to 'shape' in the application was merely to indicate this fact." He said that "It is true that a knife constructed in this fashion produces an effect, but an effect is not a design". He does comment that the words "shape or configuration" as employed in the present English Design Act are not to be found in our Act and expresses the opinion that English decisions based upon those words are not applicable here. This is a different thing, however, from saying that, in his opinion, a design applicable for shape or configuration cannot be applicable "to the ornamenting of any article". I do not understand Mr. Justice Maclean as having expressed any such opinion.

Next in the line of the defendants' authorities is *Allaire v. Hobbs Glass Ltd.*[1]. In this case, there was a registration of an industrial design described as "A device For Covering a Wall In The Vicinity of A Switch, composed of a flat plate of elliptical configuration having a central aperture disposed to register with the front plate of an electrical switch, . . ." The defendant does not appear to have raised the objection that this particular registration lacked subject matter because the design was for a utilitarian purpose rather than for ornamentation and Mr. Justice Angers did not deal with this objection. The defence did raise the objection that the design was invalid because it did not require any ingenuity and, at page 182, Mr. Justice Angers rejected this argument holding that, in his opinion, the design did constitute an innovation in electrical switch plates which merited protection under the statute. However, he dismissed the action in any event because he found that there was a failure to comply with the requirements of the marking provisions. In my view, this decision is no authority either for or against the submissions made by the defence in this case concerning designs for shape or configuration.

Counsel for the defendants placed greatest reliance on the decision of Mr. Justice Cameron in *Renwal Manufacturing Company, Inc. v. Reliable Toy Company, Limited*[2]. This was an action for infringement of a registered industrial design and Mr. Justice Cameron was able to dismiss the action on more than one ground. The only ground that is

[1] [1948] Ex. C.R. 171. [2] [1949] Ex. C.R. 188.

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of interest here is that which was dealt with at pages 196 to 198 inclusive. In this part of his judgment, he explains his reasons for holding that the design that had been registered in that case was not a design to be applied to the ornamentation of an article of manufacture but was, indeed, a design of the article itself. On this ground, he held that the registration was invalid. Mr. Justice Cameron does refer to the doubt raised by Maclean J. in the *Clatworthy* case "as to whether a design for shape or configuration which can only be applied to a thing by making it in that shape comes within the Canadian Act" and points out that, according to the statute, the design must be something capable of application to the article "for the ornamentation thereof". Counsel for the defendants placed considerable stress on these comments by Cameron J. and sought even greater support for his proposition from a passage from the learned Judge's reasons where, after referring to some of the provisions of the Act, he said:

> I have been unable to find in the Act anything which would indicate that the shape or configuration of an article of manufacture may itself be the subject of a registered design. As I have stated above, all the registered designs here in question are for the articles of manufacture themselves.

and upon a subsequent passage where, after referring to the terms of the certificate of registration of one of the designs in question he said:

> I think there can be no question whatever that the certificate in question was for "a toy sink", which is an article of manufacture, and not for any design for the ornamenting of a toy sink. The description of the toy sink contained in the certificate is a description of every part of the toy sink itself, and that description indicates the very shape or configuration of an article of manufacture. There is no suggestion of any particular ornamentation, decoration, pattern, engraving, or anything of that nature to be applied or attached "to the ornamenting of any article of manufacture".

Read by themselves, these passages might appear to tend towards the proposition urged by counsel for the defendants that a claim for a design to be applied by reference to shape or configuration is a claim for the article of manufacture itself. However, the passages must be read in relation to the issue before Cameron J., which was whether "shape or configuration of an article of manufacture" may "itself" be the subject of a registered design, and with due regard to his repeated emphasis on the necessity of the design being something applied to the "ornamenting" of the article. There was no suggestion on the facts before him that the object of the design was "ornamenting". He was dealing with a design that described "every part of the toy sink itself" and not merely what is apparent "to the eye". There was no need for him to consider whether a design for the shape or for the configuration applicable "to the ornamenting" of an article was good subject matter and, clearly, in my view, what he says was not addressed to that question at all.

Angelstone Limited v. Artistic Stone Limited[1] was the next case relied upon by counsel for the defendants. This was a decision of Fournier J., holding that a registered design for a building block was invalid because it was a design for an article of manufacture, because it lacked novelty and because it was not a design for the ornamenting of an article. At page 293, Fournier J. said: ". . . what was desired to be protected by the registration was the building block itself". On the next page, he referred to a judgment in an English case where it was said, ". . . A registered design is not in any way a minor type of patent. It is something that is protected in respect of its appearance or form alone. It is for this reason that all attempts to make registered designs cover modes of manufacture have rightly failed . . ." At page 295, Mr. Justice Fournier said, "I have come to the conclusion that this description is that of an article of manufacture, to wit the building block in respect of which the certificate of registration of the design was issued. It has been held on many occasions that an industrial design may be protected only when it is applicable to the ornamentation of any article and not to the article of manufacture itself." Fournier J. refers to the decisions of Maclean J. and Cameron J. in the *Clatworthy* case and the *Renwal* case, respectively, and adopts the position taken by them with reference to designs that are for shape or configuration and are not applicable to the ornamenting of an article of manufacture.

Mr. Justice Kearney's decision in *Ribbons (Montreal) Limited v. Belding Corticelli Limited*[2] was also mentioned by counsel for the defendants but he rightly indicated that that decision has no bearing on the matter either way inasmuch as no attack had been made upon the registrability of the design that had been registered there by

[1] [1960] Ex. C.R. 286. [2] [1961] Ex C.R. 388.

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reason of the fact that it had to do with shape or configuration. In that case, the industrial design was known as a "transparent acetate blister" used for the ornamental display of its contents consisting of bows and ribbons for tying and decorating wrapped articles. As the question that I am considering did not arise in that case, the decision is not of assistance. However, it is fair comment that that was an obvious case in which to attack the validity of the registration if there is any basis for the defendants' contention.

Finally, reference was made to a judgment of Chief Justice McRuer of the Ontario High Court delivered on May 25 of this year in *Eldon Industries Inc., et al. v. Reliable Toy Company, Ltd., et al.* (unreported). This was an action for the copying of the design of the plaintiffs' toy trucks. There was no registered design and no action for infringement of registered design but an argument had been put forward that the plaintiffs were entitled to recover for infringement of copyright. Chief Justice McRuer held that the claim in copyright was not open to the plaintiffs on the pleadings but held, in any event, that an action for infringement of copyright would have been barred by section 46 of the *Copyright Act* as the drawings for the truck would have been registrable as an industrial design under the *Industrial Design and Union Label Act.* After referring to section 11 of the *Industrial Designs Act,* Chief Justice McRuer referred to the fact that there had been observations in cases that have indicated a judicial view (although not a finding) that an industrial design does not include mere configuration although configuration is included under the definition of "industrial design" in the English Act, and he said: "There is considerable strength lent to the argument that configuration is not within the Canadian Act by the confused language used in section 11". Chief Justice McRuer then said, "However, I do not see much difficulty in interpreting section 11 in such a way that the Act would include a charming design, to take the illustration of a vase. The design has to be created; it may be distinctive and charming, and it is intended to be put on the market commercially by multiple production. It is hard for me to believe that that could not be registered as an industrial design that has been applied to the manufacture of that article. First you have a design, and in order to manufacture an article you must apply the design to the article. It seems to me strange to suggest that the *Industrial Design Act* merely applies to some form of ornamentation applied to an article, that is, to the exterior of the article in the manufacture or after it has been manufactured—for example, if you ornamented the handle of a pitcher, that design might be registered but you could not register the graceful handle of the pitcher as a design; or if you had a scroll or etching that was to be applied to a beautiful vase, you could register the etching but you could not register the design of the vase. That may be the interpretation of it, but I hesitate so to find."

I have now examined all of the authorities upon which counsel for the defendants relied in support of his first two attacks upon the registrability of the plaintiff company's design and, as I have indicated, I am satisfied that none has established that a design applicable to the ornamenting of an article of manufacture by reference to shape or configuration is not good subject matter for design registration under the Canadian Act. As indicated before I started the review of the Canadian authorities, I am satisfied that the plaintiff company's design is a design applicable to the ornamenting of an article and is not a claim to an article itself within the meaning of the authorities. I therefore reject the first two attacks made by the defendants upon the validity of the plaintiff company's registered design.

The defendants' third attack on the validity of the plaintiff company's design registration is the contention that the design was not original.

It has, of course, been established that "To be entitled to registration the 'design' must be original". See *Clatworthy & Son, Limited v. Dale Display Fixtures Limited*[1].

The plaintiff company's registered design is described in the Certificate of Registration as being an "industrial design" for a "Chesterfield Sofa" characterized by

(a) an elongated seat member, rectangular in form, having upwardly divergent, tapering, gently rounded arm members,

(b) a back consisting of

    (i) a shallow portion, and

[1] [1929] S.C.R. 429 at 431.

(ii) an elongated oval portion spaced thereabove, the upper edge of the shallow portion extending in a gentle downward curve from the top of one arm to the top of the other arm, said upper edge being nearly even with the top of the seat member at the middle of the said shallow portion, and

(c) four downwardly depending legs.

This description is followed by the words "as per the annexed pattern and application" and the "pattern" annexed is the photograph of a chesterfield a copy of which is reproduced earlier in these reasons.

As indicated earlier in this judgment, I have some doubt as to whether a photograph of a sofa to the ornamenting of which the design has been applied is a "drawing" of the design as required by the first few sections of the *Industrial Design and Union Label Act*. If there had been a proper drawing of the design, it would probably have been a little more informative as to precisely what the design consisted of. Nevertheless, the parties, as well as the Commissioner of Patents, have accepted such a photograph as being an adequate "drawing" in this case and I must therefore do the best I can in the circumstances. Obviously, the sofa reproduced in the photograph is not the "design". It is a sofa to the ornamenting of which the design has been applied. I must therefore use my common sense and general knowledge to determine, when reading the description and looking at the photograph, just what the design consists of.

Obviously, a sofa has existed for many years as a piece of furniture having a bench for sitting on, a back for leaning against, two arms, and legs. There is, therefore, nothing original about the fact that this particular piece of furniture has all those component parts. Furthermore, one glance at the legs of the sofa in the photograph makes it quite clear that there is nothing original about the legs of the particular sofa. Indeed, there would appear to be no doubt that the novelty of the sofa in the photograph is the peculiar shape or configuration of the back and the arms. The registered design therefore, in my view, consists of a design applicable to the ornamenting of a four-legged sofa by creating its arms and back in the shape and configuration illustrated by the arms and back of the sofa in the photograph. In my judgment, the distinctive feature

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of the design is an oval-shaped back (having the appearance of being "free" of the balance of the sofa, or "floating", although it is, of course, attached) made to harmonize with the "almost uninterrupted flow" of the lines of the seat and arms, the arms having been constructed as slight curves at angles of about 60 degrees from the line of the seat.

The defendants' counsel based his submission that the design was not original upon a comparison of the plaintiff company's design with the design of furniture which was in existence at some time prior to the registration of the plaintiff company's design, pictures of which were introduced as evidence, and the submission that the plaintiff company's design was a mere modification or development from the design of some one or more of such earlier pieces of furniture. While I am not prepared to reject the opinion of one of the expert witnesses that the design in question had its origin in certain furniture known as "Empire" furniture (although I must confess that it is not apparent to my eye), after giving the matter the most anxious consideration, and utilizing the assistance that was given to me by expert witnesses appearing for both sides, it still seems obvious to me that there is such a radical difference between the design that is the subject matter of the registration and the design of any of the other furniture to which my attention was drawn that I have no alternative but to reject the submission that the design was not original.

The one remaining ground upon which the defendants base an attack on the plaintiff company's monopoly rights under the statute is their contention that the plaintiff company has failed to comply with the marking requirements of section 14 of the Act, 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.
>
> (2) The mark may be put upon the manufacture by making it on the material itself, or by attaching thereto a label with the proper marks thereon.

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In the absence of some authority on the subject, I should have had some doubt as to whether section 14 attaches to the failure to comply with the marking provisions contained therein, in respect of every single article manufactured in accordance with the design, the somewhat drastic consequence of automatic forfeiture of all rights in respect of the registered design. The section does not so state in so many words unless the words at the beginning of the section, "In order that any design may be protected", are applicable not only to the requirements that the design "be registered within one year from the publication thereof in Canada" but also to the marking provisions to be found in the rest of subsection (1). I should, myself, have doubted that the subsection bears that interpretation and, in this connection, I refer to section 23 of chapter 22 of the Statutes of Canada of 1879, which, subject to an immaterial amendment made by chapter 28 of the Statutes of 1923, would appear to be the form in which the section was last enacted by Parliament (as opposed to having been reconstructed by a statute revision commission). Section 23 read as follows:

> 23. Every design to be protected must be registered before publication; and, after registration, the name of the proprietor, who must be a resident of Canada, shall appear upon the article to which his design applies; if the manufacture be a woven fabric, by printing upon one end; if another substance, at the edge or upon any convenient part, the letters Rd., with the mention of the year of the registration; the mark may be put upon the manufacture by making it on the material itself, or by attaching thereto a label containing the proper marks.

In case of ambiguity arising from the work of a statute revision commission, I should myself have thought that it is legitimate to refer back to the form of the legislation in which it was enacted by Parliament. I am, however, aware that in *Allaire v. Hobbs*[1], this Court held, without discussing this question, that failure to comply with the marking provisions of section 14 terminates the rights of the proprietor of the registered design.

I come, therefore, to the contention of the defendants under section 14 upon the facts of this case. It is established by the evidence that the plaintiff company did attach to every sofa made in accordance with the registered design a label reading as follows:

[1] [1948] Ex. C.R. 171.

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DESIGN
Rd 1962

In addition, the plaintiff attached to each of the sofas at two different places a label which, among other things, had printed on it "Cimon Limited". These latter labels were attached to an entirely different part of the sofa than the part of the sofa where the label quoted above was attached. The defendants' counsel submitted that the label quoted above did not comply with section 14 because the proprietor's name was "Cimon Limited" and not "Cimon". Having regard to the evidence that the plaintiff company was generally known in trade circles as "Cimon", I am of the view that the label quoted above is a sufficient compliance with section 14. The obvious reason for the requirement in section 14 is to warn a person who might be thinking of using the design of an article bearing the label that it is registered and to inform him of the name of the proprietor of the design. Knowing the name of the proprietor, such a person might check the validity of the claim that the sofa was registered and might, if so inclined, negotiate with the proprietor for a licence. Whether that be the purpose for requiring that the name of the proprietor be attached to the article or not, it must be sufficient that the name be such that it communicates to those who might be interested, who, in fact, the proprietor is. I am satisfied that, in furniture circles in Canada, the word "Cimon" would indicate the plaintiff company and that, therefore, there was compliance with the requirements of the section. I reject the contention that section 14 was not complied with.

With regard to infringement, there is no doubt that each of the defendants has been a party to the manufacture or sale of one or more chesterfield sofas and chesterfield chairs, the designs of which had their origins in a deliberate act of copying the design of the Cimon sofa that is the subject matter of the registered design. It is true that there are certain differences between the registered design and the designs of the alleged infringing articles. In my view, however, comparing the articles as best I can with the aid of the expert testimony, there is no doubt that the design of the sofas produced by the defendants is the plaintiff

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company's registered design and, if it is not, it is certainly "a fraudulent imitation thereof". No matter how often my attention was drawn to the many differences between the construction of the alleged infringing sofas and the construction of the sofa created by the plaintiff company pursuant to its design, there has never been any doubt in my mind that the sofas produced by the defendants were designed to look as much like the plaintiff company's sofa as possible. From the point of view of appearance, the fact that the one sofa was made with a tight seat and the other with a removeable cushion is quite irrelevant. The fact that that difference led to the omission of the shallow back, in my view, merely gave the defendants' sofa the appearance of a rather awkward effort to do the same thing as was accomplished by making the plaintiff company's sofa. The addition of buttons to the upholstery, the enlarging of the walnut applique on the front and the use of somewhat different legs and back support structure do not in any way detract from the fact that the one sofa is a rather cheap looking edition of the other. I need say nothing with reference to the design of the defendants' chesterfield chairs as, during argument, counsel for the plaintiffs abandoned the claim that the defendants' chairs constituted infringement of the registered industrial design.

During argument, counsel for the plaintiff company made it clear also that, in the event that the plaintiff company is successful in its claim for infringement of its registered design, the only relief that it is seeking is damages, the amount of which is to be determined upon a reference, and an injunction. Under section 15 of the *Industrial Design and Union Label Act* the plaintiff company, as proprietor of the registered design that has been infringed, is entitled to the damages that it has sustained by reason of the infringement. There is no provision in the statute for an injunction but I am satisfied that this is a proper case for an injunction and that the Court has jurisdiction to grant it under section 21 of the *Exchequer Court Act*. See *Findlay v. The Ottawa Furnace and Foundry Company*[1]. In respect of the claim for infringement of the registered industrial design, there will be judgment for the plaintiff company against both defendants for an injunction

[1] (1902) 7 Ex. C.R. 338 at 349.

and damages. The amount of the damages is to be determined upon a reference. If there is any difficulty in settling the terms of the judgment, the matter may be spoken to.

In view of my determination that the plaintiff company's design was capable of being registered under the *Industrial Design and Union Label Act* and the plaintiffs' concession concerning the operation of section 46 of the *Copyright Act,* the plaintiffs' claim for infringement of copyright is dismissed.

The plaintiff company's claim under section 7 of the *Trade Marks Act,* which was abandoned at the commencement of the argument, is dismissed.

The plaintiffs will have the costs of the action except that portion thereof attributable exclusively to the claim under the *Trade Marks Act.* The defendants will have the costs of that portion of the action attributable exclusively to the claim under the *Trade Marks Act.* To facilitate the taxation of costs, I may say that I am of opinion that the portion of the trial that was attributable exclusively to the claim under the *Trade Marks Act* amounted in all to one-half day.

Judgment accordingly.

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Feb. 22
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Dec. 30

BETWEEN:

DAVID ROTHENBERG .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Purchase and subsequent sale of unimproved land—Taxpayer member of partnership or syndicate—Determination of intent of partnership—Previous trading operations of members of partnership—Scheme of profit making—Income Tax Act, R.S.C. 1952, c. 148, s. 139(1)(e).

This is an appeal from a reassessment of the income of the appellant for the taxation years 1955 and 1956 by which amounts of $3,484.14 and $15,106.14 were added to his taxable income, the said amounts being the profit realized by the appellant, as a member of a partnership or syndicate, on the sale of two parcels of vacant land.

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On November 19, 1953 the appellant, one Rubin Cobrin and one Herbert Ludman purchased the two parcels of land consisting of a fifty or sixty acre part of lot No. 93 and a part of lot No. 88, both in the Parish of Montreal, the purchasers acquiring an undivided interest of 28%, 50% and 22% respectively. No money was paid to the vendor at the time of the sale but the deed provided for payment of $13,228 66 on November 19, 1954 and the balance of $88,228.66 on November 19, 1954 and the balance of $88,228.66 on November 19, 1958.

The appellant is a chartered accountant and Rubin Cobrin, a merchant, was one of his clients. The appellant's 28% interest in the property was divided, 40% being held by the appellant, 20% by each of two nephews, 10% by his accounting partner and 10% by one Rosen. The appellant participated in the purchase of the property in question as a result of an invitation from Rubin Cobrin to join him and his two sons in the transaction.

Over the past several years the appellant and his two nephews had jointly invested in apartment buildings, the value of such buildings owned by them being about $1,300,000 at the time of trial. Between 1951 and 1955 Cobrin and his sons had purchased ten parcels of land, seven of which were vacant land and all were sold after being held for relatively short periods of time.

The appellant and his associates alleged that they purchased the land in question with the intention of developing it as a shopping centre and the evidence of the appellant was that the management of the project was left to Rubin Cobrin. Later, difficulties arose with respect to the servicing of the property and then the appellant and his associates learned that Steinberg's Ltd. were to build a shopping centre just south of the land in question. At this point the appellant and his associates abandoned their shopping centre plans and eventually sold the lands. However, an extract from the minutes of the meeting of the Council of the Town of Cote St Luc held on January 20, 1955 indicated clearly that Cobrin intended to develop the land in lot 93 as a residential subdivision.

Held: That knowledgeable men such as the appellant and Cobrin and their associates, with long experience in the real estate field, cannot have acquired the lands in question with the intention of building a shopping centre and retaining it as an investment to the exclusion of all other possible uses of the property regardless of the many obvious possible developments which would make some other use of the land of greater financial advantage to them.

2. That it is clear that although the Cobrins owned a large number of revenue-producing properties they were, in addition, engaged as traders in real estate.

3. That the *mens rea* of a partnership should be determined by ascertaining the intention of the person or persons who in fact controlled its operations and decisions.

4. That the evidence establishes that, if other more preferred alternatives did not materialize, the partnership intended to take advantage of the boom which prevailed by selling the property in its unimproved state.

5. That the balance of probability is that the partnership was aware from the beginning that there were other ways in which the instant property might be disposed of—and the main concern, particularly of the Cobrins, was the sale of the property at a profit.

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6. That the sale of the property at a profit and not its retention as an investment was uppermost in the minds of those in charge of the enterprise and, in disposing of it as they did, they were carrying out the scheme of profit-making pursuant to which the property was acquired.
7. That the appeal is dismissed.

APPEAL from a decision of the Tax Appeal Board.

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

P. F. Vineberg, Q.C. for appellant.

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

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

KEARNEY J. now (December 30, 1964) delivered the following judgment:

We are here concerned with an appeal from a decision of the Income Tax Appeal Board[1], which dismissed appeals from income tax reassessments for the 1955 and 1956 taxation years, which added to the appellant's otherwise taxable income the sums of $3,484.14 and $15,106.14 for the said taxation years respectively.

The issue is whether the aforesaid sums, which the appellant, as a member of a partnership or syndicate, realized on two sales of vacant parcels of land, constitute capital gains or whether they constitute profits from a business, as that word is defined in s. 139(1)(*e*) of the *Income Tax Act,* R.S.C. 1952.

The land was acquired by the appellant and his partners by a notarial deed of sale (Ex. A-4) executed on November 19, 1953. As that deed shows, the vendor, Victoria Doris Wener-Cummings, wife of a realty consultant, sold to Rubin Cobrin, merchant, of the city of Montreal, David Rothenberg, Chartered Accountant, of the city of Outremont, and Herbert Ludman, merchant, of the city of Calgary, province of Alberta, therein referred to as "the purchasers", two parcels of vacant land located in the Town of Cote St. Luc, which is contiguous to the city of Montreal, each of the purchasers acquiring an undivided share and interest in the proportions of 50%, 28% and 22% respectively. The first parcel, consisting of over 600 lots, each bearing its own

[1] 28 Tax A.B.C. 53.

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separate number, is described as forming part of original lot No. 93 of the Official Plan and Book of Reference of the Parish of Montreal; the second parcel, which lies close to the first, consists of 89 lots and is described as forming part of original lot No. 88 on the Plan and Book of Reference above described. For brevity's sake, these two parcels will be hereinafter referred to as "lot 93" and "lot 88" respectively.

The purchase price of the aforesaid properties is described in the deed as follows:

> The present Sale has been thus made for the sum of ONE DOLLAR ($1 00) and other good and valuable considerations which the Vendor acknowledges to have received from the Purchasers to her satisfaction, whereof quit for so much.
>
> And for the further consideration of the payment by the Purchasers to the Vendor in the proportion of their respective shares hereinabove mentioned, the sum of ONE HUNDRED AND ONE THOUSAND FOUR HUNDRED AND FIFTY-SEVEN DOLLARS AND THIRTY-THREE CENTS ($101,457 33) the whole without interest, as follows.
>
> (a) The sum of THIRTEEN THOUSAND TWO HUNDRED AND TWENTY-EIGHT DOLLARS AND SIXTY-SIX CENTS ($13,228 66) on the Nineteenth day of November Nineteen hundred and fifty-four; and
> (b) The sum of EIGHTY-EIGHT THOUSAND TWO HUNDRED AND TWENTY-EIGHT DOLLARS AND SIXTY-SIX CENTS ($88,228 66) on the Nineteenth day of November Nineteen hundred and fifty-eight.

Subsequently, on the same day as the aforesaid deed was executed, as appears by Exhibit A-5, Rubin Cobrin purchased the 28% interest in lot No. 88 that David Rothenberg had just acquired, and the 22% interest in lot No. 88 that Herbert Ludman had just acquired, for the sum of $10,484.49 paid in cash. As a result of this transaction, Rubin Cobrin became the apparent sole owner of the said parcel.

The original purchase transaction calls for some explanation. Although it would appear from Exhibit A-4 that Rubin Cobrin was the only member of his family who acquired any interest in the properties under the deed, such was not the case, as appears from the testimony of Simon Cobrin, who testified on behalf of the appellant (pp. 52 and 53). Similarly with respect to the Rothenberg group, the appellant testified that Rubin Cobrin, who had been a client of long-standing with the appellant's accounting firm and in whom the appellant had great confidence, asked him if he would be in a position to make an investment in a shopping centre that would be built in Cote St. Luc and would require considerable financing. Not wishing

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to assume a too burdensome committment alone, the appellant approached his two nephews, Sam and Joseph Vasilevsky, who were in the butcher business and with whom he had previously purchased many apartment houses, his accounting partner, David Luterman, and Hyman Rosen, who was a pharmacist. These four persons agreed to participate with him in the undertaking and the appellant, when signing the deed, was therefore acting on behalf of himself and these four others, as appears from the following extract from his testimony, which indicates the interest of the aforesaid parties (p. 21):

> Q Will you explain the proportion you had in this venture in relation to Mr Rosen, the Vasilevskys and your partner?
>
> A. The entire percentage for the five of us was twenty-eight percent, in which twenty-eight percent I held forty percent, Sam Vasilevsky twenty percent, Joseph Vasilevsky twenty percent, David Luterman ten percent and Hyman Rosen ten percent . .

I shall hereinafter sometimes refer to the five above mentioned parties as "the Rothenberg group".

There is no dispute as to the amount of the gains made by the appellant and the other members of his group. The only dispute is whether or not such gains constitute taxable income. Counsel for the parties informed the Court that any judgment rendered in the present case (No. A-388) would be applicable to cases Nos. A-389-90-91 and A-392, in which the appellants are Joseph Vasilevsky, Sam Vasilevsky, David Luterman and Hyman Rosen, respectively.

As already indicated, the appellant testified that he was a chartered accountant by profession and that he was invited, late in 1953, by Rubin Cobrin to join him and his two sons Frank and Simon, who were among the appellant's numerous clients, in acquiring vacant lands in the Town of Cote St. Luc on the Island of Montreal, for the purpose of constructing thereon a shopping centre. According to the appellant, he considered this a favourable opportunity to make a property purchase which would be a safer and sounder investment than acquiring, as had been his custom theretofore, ready-built apartment houses. The appellant testified that he and his two nephews, Joseph and Sam Vasilevsky, had over the years, made joint investments by purchasing revenue-producing properties on a fixed percentage basis (50 per cent being subscribed by the appellant and 25 per cent by each of his nephews) and that, by 1953,

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the appellant's yearly revenue from such investments exceeded his profits from his accounting business. In the present instance, according to the appellant's evidence, it was estimated that to finance a shopping centre would require $700,000 to $800,000 and the appellant therefore decided to include for the first time in the Rothenberg group, in addition to his two nephews, Luterman and Rosen.

The appellant emphasized that this was the first case in which he had ever purchased unimproved lands, the same being true of his two nephews and of his partner Luterman. He said that on all prior occasions his nephews and himself confined their investments to holding apartment buildings and that, at the time of the trial, the appraisal value of such accumulated holdings would amount to perhaps One Million Three Hundred Thousand dollars ($1,300,000). With the exception of two apartment buildings, one of which he sold at a profit of $40,650 and the other at a profit of between $60,000 and $70,000 (which sums he considered as capital gains and reported as such), he said that he and his associates had retained ownership of all the apartment buildings that they had acquired. He said that he had left the management of the instant undertaking to Rubin Cobrin, who, he knew, was in negotiation with the officials of the Town of Cote St. Luc "in relation to shopping centres, and so on", and that he did not often receive reports of what was going on as he was kept busy with his own practice. He further said that, apart from his financial contribution, the only service he rendered was to interview three or four prospective tenants for the proposed shopping centre and to refer them to Cobrin (see Exhibits A-1, 2 and 3).

Speaking of the difficulties encountered in the working out of the shopping centre plan, the appellant stated that, after a lapse of about a year or two, Cobrin informed him that municipal services were not forthcoming as quickly as he was given to understand by the town officials at the beginning, but that the major blow to the project occurred when the group learned that Steinberg's Ltd. were building a shopping centre south of the site which Cobrin had selected.

The appellant stated that he did not know about the Steinberg project until actual digging operations had commenced. His testimony reads in part (p. 23):

> Q. Were you aware at that time that Steinberg's generally were venturing into shopping centres?
>
> A. Yes, we knew they had shopping centres in various parts of the city, but I did not think they would come into Cote St. Luc so quickly. I thought that we would put ours first and that nobody would want to compete.

The appellant stated that he and his associates did not think the area was large enough to support two shopping centres and that they therefore abandoned their idea of building their intended shopping centre.

The appellant described Frank Cobrin and his sons Rubin and Simon as old clients who, he knew, were heavily engaged in various kinds of real estate transactions, as well as having, like himself, extensive apartment building holdings in the province. He said that he had audited their books for many years and that he believed that one or more of them were owners of a corporation engaged in the real estate business known as Frank Cobrin & Sons. He also stated he himself had a nominal interest in that company, consisting of a director's qualifying share, and that he held a similar qualifying share in others of the Cobrin enterprises.

The appellant declared that, at the time he put his money into the proposed shopping centre project, he did not foresee that it might not go ahead and that he had no purpose in mind other than to invest in the proposed shopping centre. He added that, if it had proved successful, he and Cobrin might have built a few apartments as an investment.

In cross-examination, the appellant was unable to identify the precise part of lot 93 on which the intended shopping centre was to be built but he knew that the entire parcel was located north of the C.P.R. tracks, that direct access to the lot from the south was blocked by the C.P.R. tracks (hereinafter referred to as "the tracks"), that the only way to reach the property was by Westminster Avenue, which was about half a mile from lot 93, and that, at the time of purchase, there were no roads or streets north of the tracks. The appellant was not sure how many

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stores the group intended to build, but said that it probably would have been 25 or 35. Asked why they bought so much land, he stated that he had been informed by Cobrin that they could not buy less because the vendor would only sell the entire parcel. The appellant said that they never advertised the property for sale nor listed it with an agent and that insofar as securing water and sewage on lot 93 was concerned the town officials had told Cobrin that "in the near future we would be getting services". Asked: "What do you mean by near future", the appellant said :"A year or two, or at the most, three, not a 10-year period".

Rubin Cobrin, who said he was a wholesaler, was called as a witness by the appellant. He described his extensive real estate holdings in the city of Montreal and surrounding area and stated that the Cobrin interests own 240 dwellings or apartments in Quebec city, in the Ste. Foy area. He described how he was approached by a real estate agent who had the property in question for sale and said that he brought in the Rothenberg group to help finance and procure tenants. The property having been purchased in November, 1953, he said that, on October 12, 1954, he had a prospectus prepared for the shopping centre by Fred Lebensold, an architect. He said that he discussed the building of it for at least two years and that he called frequently on the mayor to try to procure services because there was no sewage or other facilities north of the C.P.R. tracks. Cobrin testified that originally he was told that services would be forthcoming perhaps in a year or a year and a half. He said that he would call upon the town authorities every month or two and that, although they were anxious to give services, they "always seem to be stymied in some way".

Cobrin said that he did not know that Steinberg's had intended to build a shopping centre. He said that Steinberg's had first purchased a smaller lot on the main highway, Cote St. Luc Road, which is south of the railway tracks, and had later purchased a larger one further west on the same road (See Ex. R-8). He said that Mr. Charles-Edouard Campeau, whom he consulted, thought that the area shown on the aforesaid exhibit for an intended shopping center on lot 93 was all right, and that he believed that Mr. Campeau had recommended it. He said that he did not believe that they advertised the property for sale and that he was first approached by Louis Bloom and later by Alcona Investments, and, after negotiating with them, the partnership, by two separate transactions, disposed of lot 93. The reason for so doing was because taxes were high and that, by the way the town officials were then speaking they did not think that services would be forthcoming for several years.

In addition to the evidence of the appellant and Cobrin, there was some corroborative evidence from non-interested parties. Thus Silvatore Carbone, Manager of the City of St. Laurent Branch of the Provincial Bank of Canada, stated that, in 1954, the appellant asked him if it were possible to secure loans up to $75,000 for a shopping centre project and that he informed him that it would be forthcoming upon the usual security being furnished. Produced as Exhibit 6 were two drawings, numbered 1 and 3 respectively, of a shopping centre prepared by D. F. Lebensold, architect, for Rubin Cobrin, dated October 1, 1954. Three letters, signed in 1958 by Berke's Pharmacy, Kitty Kelly, Shoe and Handbag Stylists, and Miller Clothing Mfg. Co. Ltd., were filed as Exhibits A-1, A-2 and A-3, stating that, in late 1953 or some time in 1954, the signatories of the letters had held discussion with R. Cobrin in respect of renting space in his proposed shopping centre in Cote St. Luc and that subsequently they were informed by Mr. Cobrin that, due to unforeseen difficulties, he had to abandon its project.

The appellant was able to establish to the satisfaction of the Court that his previous investments had been confined to the purchase of a large number of already-erected apartments in all of which, with two exceptions, he has retained his original interest. It should be noted, however, that it is the first time that he had gone into a real estate transaction with partners other than the Vasilevskys and never before did it occur that he did not hold the largest share in any partnership or syndicate in which he entered. More important still, the appellant testified that he left the direction and management of the undertaking to the Cobrins.

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There is evidence that the appellant and associates did not act as a group which was solely interested in a shopping centre alone.

The main artery in the Town of Cote St. Luc district is Cote St. Luc Road and for a considerable distance it constitutes the north-south boundary line between it and the city of Montreal. Exhibit R-8 shows that Steinberg's first purchased a smaller property lying on the north side of Cote St. Luc Road and later, on December 23, 1953, purchased a larger piece of property (lot 95) on the same Road for a proposed shopping centre; and, in 1955, they announced by advertisements that they were about to commence construction thereof.

In answer to the question "why the partnership purchased such large tracts of land when so little was required for a shopping centre", Cobrin stated that the owner would not sell lot 93 unless at the same time the purchaser was willing to buy lot 88. This answer omits to take into account the dimensions of lot 93.

It is somewhat difficult to make even a rough estimate of the size of lot 93, because the deed of sale Exhibit A-4 does not give its dimensions in terms of acres or square feet. The boundaries of lot 93, however, are clearly reproduced on Exhibit R-8, but, unfortunately, the scale of this map is missing; however, by transposing the said boundaries to Exhibit 3 and making use of the scale which this last mentioned map provides, reckoned very roughly, the area of lot 93 would be somewhere between 50 and 60 acres. Exhibit R-8 plainly indicates that the part of lot 93 chosen by the Cobrins for a shopping centre consisted of a lot bounded by three projected streets, located in the sector zoned for commercial purposes, measuring $200 \times 150'$, and that lot 93 contains two and a half other lots of equal size located in the said commercial sector, making the equivalent of four lots in all collectively measuring about $2\frac{3}{4}$ acres out of a total area of some 50 to 60 acres. As also appears by Exhibit R-8, the balance of lot 93 has been set aside and zoned for multi-family dwellings, duplexes, cottages and bungalows.

I might add that Exhibit R-1 indicates that the total purchase price paid for lot 93 was $176,457.33 and that Frank Cobrin had made an original payment of $2,000 on account thereof on September 17, 1953 which antedated by three months the purchase made by Steinberg's Ltd. previously referred to. Neither the appellant nor his associates brought forward any evidence that equally advantageous locations for a shopping centre were not available when they purchased lot 93.

In my opinion, knowledgeable men such as the Cobrin and Rothenberg groups, who have had long experience in the real estate field, cannot have acquired lot 93 with the intention of building a shopping centre and retaining it as an investment to the exclusion of all other possible uses of the property regardless of the many obvious possible developments which would make the carrying out of such a plan uneconomic and regardless of the many obvious possible developments which would make some other use of the land of greater financial advantage to them.

There are in addition other circumstances that cannot be overlooked.

The appellant and his associates declared that they were guided, a good deal, by the advice of Charles-Edouard Campeau in selecting a site for a shopping centre; but Campeau stated that when Cobrin first consulted him it was with reference to a contemplated purchase of two or three farms and he desired advice as to which among them would be most suitable for re-sale. Exhibit R-1 indicates that the Cobrins, apart from their interests in lots 93 and 88, had also purchased, as members of an entirely different syndicate, another undeveloped lot (lot 86) located north of the tracks and which they also sold, in whole or in part, as vacant land.

Exhibit R-1 includes statements of real estate transactions entered into by the Cobrins prior to, during and after the transactions described in Exhibits A-4 and A-5, which were prepared by Rothenberg, Luterman & Co., Chartered Accountants, under date of June 25, 1956. These statements disclose that during the period of July 18, 1951 to December 27, 1955, ten purchases of real estate were effected by the Cobrins, seven of which were concerned with vacant lands and three with land and buildings, all having been sold after being held for relatively short

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periods. The average net profits thus realized by the Cobrins amounted to about $5,000 per transaction.

From the above evidence, I think it is clear that although the Cobrins owned in Montreal and Quebec districts a large number of revenue-producing properties they were, in addition, engaged as traders in real estate. Indeed counsel for the appellant, after making it clear that he was not the legal representative of any of the Cobrin group, conceded that the aforesaid purchases and sales can be regarded as trading transactions and endeavoured to dissociate the appellant from the Cobrin group. He submitted, in effect, that the Court should analyse individually the intention of each of the members of the partnership and determine their liability to tax or otherwise separately. In my opinion, the *mens rea* of a partnership should be determined by ascertaining the intention of the person or persons who in fact controlled its operations and decisions and I have not the slightest doubt that the operations and decisions of the partnership in question were controlled by the Cobrin group.

In respect of the responsibility of a silent partner in a partnership or syndicate, I think the following quotation from a judgment of Noël J. in *Minister of National Revenue v. Lane*[1] is apposite:

> It would appear from this that the Syndicate's non-active members were quite content to leave the handling of the Syndicate's activities to the executive committee who had *carte blanche* to handle the business of the Syndicate as they thought best and because of this situation, the passive members here would be in no different position than that of the active members. Indeed, if the transactions are business transactions, any profit derived therefrom from any of the members would be taxable.

If the record did not disclose any contradictory evidence, more reliance could have been placed on the repeated assertions of the appellant and Simon Cobrin that at no time did they have any intention except to build and retain for investment a shopping centre and later, perhaps, if things went well, to build a few apartments for revenue. The record does, however, disclose contradictory evidence.

In my opinion, the most conclusive and uncontradicted piece of evidence of alternative intentions is to be found in a document produced by Mrs. Irene Jean Wilcken, city clerk of the Town of Cote St. Luc, as Exhibit R-6, which reads as follows:

[1] [1964] C.T.C. 81 at 91.

City of Côte Saint-Luc
Province of Quebec

EXTRACT FROM THE MINUTES OF AN ADJOURNED REGULAR MEETING OF COUNCIL OF THE TOWN OF COTE ST. LUC HELD AT THE TOWN HALL, 8100 COTE ST. LUC ROAD, ON JANUARY 20th, 1955

MINUTES BOOK No. 9—PAGE 208
COBRINS LIMITED RE DEVELOPMENT OF CADASTRE 93

Mayor Paris submitted letter of date January 17th from Messrs. F. S. & R. Cobrin making application for the building of 300 houses on Cadastre 93, the proposal being to build split-level bungalows to sell at $16,000.00 each, the total cost of the project being approximately $5,000,000.00. They request that services for this development should be provided immediately.

They also refer to a large tract of land, Cadastre 86, which they own and enclose a letter from the Dominion Bank of Canada introducing Mr. Frank Cobrin.

The Secretary-Treasurer was directed to advise the applicants that the Mayor and Aldermen are interested in their proposal to build and will give the matter their careful consideration and that in the meantime the Town's Consulting Engineer has been instructed to prepare estimates of the probable cost of extending the sewer on Guelph Road with a view to providing services in the part of Lot 93 referred to.

Carried Unanimously.

CERTIFIED A TRUE EXTRACT,
(signature) I. G. WILCKEN
I. G. Wilcken, Mrs.
City Clerk.

This evidence tends to discredit statements made by the appellant and Cobrin to the effect that they never gave a thought to the possibility of further alternatives to the project of a shopping centre. Simon Cobrin's testimony is not such as to inspire confidence in his candour. For example, as the man in charge of the undertaking, he testified:

Q. Did you at any time advertize this property for sale?

A. No, I don't believe we did.

Q. Did you list it with any agent or broker?

A. No, I don't believe we did.

Q. Did you put up a sign that it was for sale or anything of that nature?

A. To the best of my knowledge, no.

It is worth noting that the same witness stated that he did not "think" that he held any shares in Cobrin Realty Co. Limited but, as appears at page 6 of Schedule A of Exhibit R-1 *supra*—which is an analysis of income of the Cobrin group, prepared by Rothenberg & Luterman, for the years

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1953, 1954 and 1955—, his withdrawals from Cobrin Realty Co. Ltd. amounted to $12,540.88. The above observations also apply to Simon Cobrin's declaration that it never occurred to him that lot 93 might be disposed of at a profit without further development. This statement is almost unbelievable when Cobrin's experience in real estate matters is borne in mind and the situation in Cote St. Luc is appreciated. Testifying as to the rapid growth of Cote St. Luc, during this period, Mrs. Wilcken, at page 112 of the transcript, stated:

A. . . . The growth started booming in 1952 with purchasing of land.

Q. You use the expression "booming". So you consider that from 1952 onwards Cote St. Luc has been a booming town?

A. Yes.

Q. Would you say it has attracted investors and people interested in construction and development from 1952 onwards?

A. Yes.

Q. What is the present size of the municipality of Cote St. Luc?

A. A little over 12,000.

Q. So in this period from 1953 to date it has grown 6-fold?

A. Yes.

Q. And those who prognosticated an increase were correct in their prognostication?

A. Yes.

Mr. Campeau, as appears at pp. 18 and 53 of the transcript, stated that "in 1953 there were many promoters and speculaters in the area." All this was well known, particularly to the Cobrins.

I consider that the immediately preceding evidence furnishes fertile ground for the assumption that, if other more preferred alternatives did not materialize, the partnership intended to take advantage of the boom which prevailed by selling the property in its unimproved state. By so doing, the appellant was able to make a nice profit of $18,590.20, representing 135% on his outlay, which, as indicated in Exhibit 1 at trial, amounted to $13,557.68.

In my opinion, the balance of probability on the foregoing evidence, is that the partnership was aware from the beginning that there were other ways in which the instant property might be disposed of—and the main concern, particularly of the Cobrins, was the sale of the property at a profit. I find it hard to resist the conclusion that the sale of the property for a profit, and not its retention as an investment, was uppermost in the mind of those in charge of the enterprise, and, in disposing of it as they did, they were carrying out the scheme of profit-making pursuant to which the property was acquired.

For the above reasons the appeal is dismissed with costs.

Judgment accordingly.

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Jan. 5

BETWEEN:

HARMONY INVESTMENTS LIMITED ...APPELLANT,

AND

THE MINISTER OF NATIONAL REVENUE ....RESPONDENT.

Revenue—Income—Income tax—Business—Profit from a business—Adventure or concern in the nature of trade—Investment—Disposition of capital asset—Exclusive intention of taxpayer—Construction and sale of apartment building—Income Tax Act, R S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e).

The appellant, a company incorporated under the laws of the Province of Ontario by letters patent dated May 20, 1955, undertook the construction of two similar apartment buildings, one on Balliol Street and the other on Keewatin Street, both in the City of Toronto. The construction of both buildings was commenced in March 1956 and the total estimated cost of the projects was $860,110, including the cost of the land. During the period of construction a strike occurred in the steel industry and delivery of structural steel to the projects was delayed for about three months. When that strike ended a strike occurred in the ready mix concrete business, resulting in a further delay in construction of one month. The actual construction cost was about $125,000 more than the total estimated cost. In September 1957 the appellant company was without funds to pay about $90,000 in outstanding and overdue liabilities. At this time the Balliol apartment was fully rented and the Keewatin apartment was partly rented. During and after construction of the two apartment buildings the appellant had received unsolicited offers to purchase them and in September 1957 the appellant's shareholders accepted one of the offers and the purchaser was given the choice of apartment buildings. The purchaser chose to buy the Balliol property because it was fully rented.

On the sale the appellant realized a gain of $59,627.71, which was assessed by the respondent as income, which assessment was upheld on appeal to the Tax Appeal Board. The question for determination is whether the profit realized by the appellant on the sale of the Balliol property is profit from a business or whether the lands were acquired and the apartment buildings constructed thereon as an investment for the pur-

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pose of receiving rental income therefrom and such plan became impossible of fruition because of the financial difficulties encountered by the appellant which necessitated the sale of the Balliol property.

Held: That if the appellant's exclusive intention was to construct and operate both apartment buildings and derive income therefrom it follows that the profit from the sale of one of the buildings would not be profit from a business or an adventure in the nature of trade, but if such was not its exclusive purpose at the time the enterprise was begun, there can, in such circumstances, be no doubt that the acquisition of the lands and the construction of apartment buildings thereon had for its purpose, or one of its possible purposes, subsequent disposition of one or other of the buildings at a profit, and the resulting profit is taxable.

2. That it is apparent from the evidence that the project was embarked upon with borderline financing and without due regard for the hazards of the construction trade such as difficulties and delays in procuring materials and skilled tradesmen, whether occasioned by strikes or otherwise, and that Mr Stone, a building contractor, and a shareholder and director of the appellant, had estimated the cost of the two apartment buildings at about $935,000, i.e. slightly more than the actual cost, and the inference naturally follows that the appellant's sole intention was not the retention of both apartment buildings for the purpose of producing rental income.
3. That the possibility of retrenchment by the appellant, by the sale of one of the buildings to secure the retention of the other, must have been present from the outset and the financing, while ample to finance the building and retention of one apartment building, was inadequate for both.
4. That the evidence does not establish that the two apartment buildings had been constructed with the sole intention of retaining and operating them as revenue producing properties, and the appellant contemplated from the outset the possibility of a profit made by disposing of one or other or both of the apartment buildings.
5. That the appeal is dismissed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Cattanach at Toronto.

S. Thom, Q.C. for appellant.

T. Z. Boles and *E. Campbell* for respondent.

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

CATTANACH J. now (January 5, 1965) delivered the following judgment:

This is an appeal from a judgment of the Tax Appeal Board,[1] dated July 22, 1963 dismissing the appeal of the appellant from its tax assessments under the *Income Tax*

[1] 32 Tax A.B.C. 421.

Act, 1952, R.S.C., c. 148 for the taxation years 1958 and 1959.

The appellant is a corporation incorporated pursuant to the laws of the Province of Ontario by letters patent dated May 20, 1955, one of its objects being "to purchase, lease, construct or otherwise acquire, hold, enjoy, manage, improve and assist in improving lands, water lots, docks, warehouses, sheds, elevators, offices, apartments, dwellings, restaurants, parks and buildings of every description and to sell, mortgage or otherwise dispose of the same".

The applicants for incorporation and first directors of the appellant were Norman Sky, Samuel Stone and William Lohuara.

The authorized capital is $40,000 divided into 30,000 preference shares and 10,000 common shares, all of the par value of $1.00.

Samuel Stone is a building contractor and president of Stone Building Company, Limited, which company together with Norman Sky and William Lohuara had acquired lands and premises municipally known as numbers 161, 167 and 171 Balliol Street, in the City of Toronto (hereinafter referred to as the Balliol property), as trustees for a company to be incorporated, for the purpose of demolishing the existing buildings thereon and erecting a 48-suite apartment building. An application for a building permit, dated February 22, 1955 was made to and approved by the Municipal authorities, the information contained therein being inserted and the application being signed by E. I. Richmond, an architect who had been consulted by Mr. Stone and had prepared the plans for the apartment building. The probable cost of the building, exclusive of land, was therein estimated at $384,000 which was revised upwards by the Municipal authorities to $425,000. The figure of $8,000 per suite was used by the municipality for initial estimation purposes which initial estimate is subject to revision based on a unit cost per cubic foot ranging between 90c. and $1.25.

A commitment was arranged with the Ontario Loan and Debenture Company to advance by way of first mortgage upon the security of the above land and premises, the sum of $315,000 for a term of 10 years repayable by

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monthly payments of $2,725 including principal and interest at 5¾ percent.

By instrument dated June 27, 1955 and recorded in the Toronto Land Title office on July 21, 1955, Stone Building Company, Limited, Norman Sky and William Lohuara transferred the Balliol property to the appellant.

Before the appellant took any steps to build an apartment building on the Balliol property, and quite independently, four other individuals, Harry Barkin, Jack Barkin, Robert Patton and Percy Singer, over the period between November 1955 to January 1956 acquired three contiguous parcels of land on Keewatin Avenue in the City of Toronto (hereinafter referred to as the Keewatin property) as a site for an apartment building pursuant to an agreement among them dated November 10, 1955. In this agreement it was contemplated that a private company be formed for the purpose of erecting and operating the apartment building when completed and that the four individuals' share holdings in the Company, would be commensurate with their prior respective financial contributions to the enterprise. They envisaged a building with a minimum of 44 suites at a cost not to exceed $8,000 per suite to be financed by a first mortgage to be arranged on the basis of $6,500 per suite.

The land was acquired through J. Z. Verina, a real estate broker, with whom Patton was associated in his real estate business and it was also agreed that Verina would supervise the erection of the building and direct its subsequent management.

However the group, particularly Harry Barkin, entertained reservations as to the method of construction contemplated by the plans obtained by Verina and, by coincidence, sought the advice of E. I. Richmond, the architect who had prepared for Stone and his associates, the plans for the building to be erected on the Balliol site. Mr. Richmond agreed with Harry Barkin that the construction method contemplated was novel and might be expensive and suggested that the plans he had prepared for the Balliol property using conventional construction methods, were eminently suitable and could be used for the Keewatin property with slight modification to include 52 suites, being four more suites than proposed for the Balliol property, because Mr. Barkin and his associates were anxious to include some bachelor suites. It was known to Mr. Richmond that Mr. Stone's two associates, Sky and Lohuara, were doubtful that they could provide the necessary capital and, because economies could be effected by the contemporaneous construction of the two apartment buildings, he arranged a meeting between the two groups.

As a result of this meeting Messrs. Sky and Lohuara sold the 50 percent interest that they had in the appellant company (Mr. Stone had the remaining 50 percent interest) to Messrs. Harry and Jack Barkin for the sum of $13,000 by agreement dated December 21, 1955. It was also agreed that the plans which Messrs. Barkin, together with Robert Patton and Percy Singer, had made for erecting an apartment building on the Keewatin property would be merged with the plans for the erection of the apartment building on the Balliol property. The architect's plans prepared for the building on the Balliol property were to be used for the building on the Keewatin property subject to a minor modification to include four bachelor suites. In short the undertaking of the four associates, Harry Barkin, Jack Barkin, Patton and Singer was merged with that of the appellant company and each of them and Mr. Stone acquired four common shares in the capital stock of the appellant and the wife of each man also acquired two common shares making a total of thirty shares which were issued for the total amount of $30.

On February 12, 1956 the five principals met to consider the cost of the apartment house projects and the manner in which such projects would be financed.

The land had been acquired at a total cost of $107,050 being $50,050 for the Balliol site and $57,000 for the Keewatin site.

A rough estimate of the probable cost of the buildings and appliances was made upon the basis of $8,000, per suite a total of $800,000, there being 100 suites.

In the applications for building permits there was inserted, in the case of the Balliol Street apartment, a probable cost of $384,000, based on 48 suites at $8,000 per suite which estimate, as mentioned before, was increased by the municipal authorities to $425,000, and in the case of the Keewatin Street apartment, the probable cost was

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inserted at $416,000 based on 52 suites at $8,000 per suite, which estimate was not varied by the Municipality. (The Municipal estimate is fixed at $8,000 per suite for the purpose of computing the fee upon the issue of a permit and is exclusive of land, and regardless of the type of construction, although that basis of computation may be revised upwards on a cubic content basis, but it is never revised downwards.)

Because of Mr. Stone's experience as a builder, it is obvious that the other principals and shareholders would place great reliance on his knowledge. At the meeting in February 1956 a rough estimate of the cost of the apartment building was prepared by what were then described as "members of the syndicate". This schedule was prepared, in the main, by Mr. Stone and comprised 56 items, some of which were based on firm contract prices and others were estimates. This estimate was in the total amount of $350,530 per building exclusive of bricks and cement blocks and land. The estimate for both buildings was $701,060. It subsequently transpired that the cost of the bricks and cement blocks was $52,000 so that the estimate when increased by that amount would have been $753,060. The cost of the land added to this figure of $753,060 would bring the total estimated cost to $860,110. Mr. Stone in giving evidence stated that the actual costs of construction almost invariably exceed the estimated cost by 10 percent and that it is wise to make provision for such increase. This was not done. If it had been done, the estimated cost would have been approximately $935,000.

The two projects, which had now become a single project for the erection of two apartment buildings was financed by means of two first mortgages. It will be recalled that before the merger of the two enterprises, the appellant had arranged for a first mortgage from Ontario Loan and Debenture Company in the amount of $315,000 secured on the Balliol property. A first mortgage in the amount of $336,000 was arranged with Manufacturers Life Assurance Company secured on the Keewatin property. The two mortgages were assigned to the Bank of Nova Scotia, Spadina and Dundas Branch, Toronto, in order to obtain a loan of $200,000 which was used for interim construction financing, the loan to be repayable from advances under the mortgages. The loan from the bank was arranged by Harry

Barkin, whose personal business was conducted with this particular bank branch. The difference between the estimated cost which the "members of the syndicate" put at that time at approximately $800,000 and the total of the two first mortgages of $651,000 being $149,000 was, according to the evidence, to be made up by advances of $30,000 by way of loans to the appellant from each of the five principals.

By two instruments, both dated March 9, 1956, the five principals, namely, Harry Barkin, Jack Barkin, Stone, Patton and Singer, who held title, as trustees, to the Balliol property (by virtue of a transfer under the merger arrangement) and to the Keewatin property, by virtue of the terms of the original purchase deed, transferred these properties to the appellant.

Construction of the building on the Balliol property was begun on March 18, 1956 and construction of the building on the Keewatin property was begun on March 20, 1956. It was expected that construction would be completed and that the buidings would be ready for occupancy within six months, that is in September 1956.

However, a strike in the steel industry, which resulted in delays in the delivery of steel joists and structural steel, halted construction for approximately three months. Simultaneously with the end of the steel strike, a strike occurred in the ready mix concrete business, which resulted in a further delay of one month in construction. The buildings were completed in January 1957 although some interior work was still required before they would be ready for rental to tenants.

The delays in construction did result in an increase in the cost of construction which the appellant estimated in its pleadings to have been $125,000, but no adequate evidence was adduced as to the increase in cost attributable to the delay in construction caused by the strikes. The amount of $125,000 was arrived at by subtracting the estimated cost of construction, i.e. $800,000, from the actual cost thereof.

Conceivably the cost of steel was increased somewhat and rental income was lost by reason of the apartments not being ready for tenants at the traditional fall moving dates. The appellant was obliged to heat the buildings during the winter months when they were not producing

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revenue and was obliged to employ watchmen during the period when no construction work was being done. The Ontario Loan and Debenture Company cancelled its original mortgage loan commitment on the Balliol property in September 1956 which was renegotiated at an interest rate of 6 percent rather than $5\frac{3}{4}$ percent.

The five principal shareholders had each advanced $30,000 to the appellant by way of loan pursuant to their agreement and in June 1957 each shareholder advanced a further $8,000 with the exception of Mr. Stone who was able to advance $4,000 only. The total advances by the shareholders were $184,000.

Even after this second round of advances, the appellant during September 1957 found itself faced with liabilities, which it was without funds to discharge. The final mortgage advance had been received prior to this time. There was an outstanding liability to the bank of $68,000, the payment of which the bank was pressing for, as well as approximately $22,000 in outstanding trade accounts. The principal shareholders were either unwilling or unable to make any further advances.

The Balliol apartment was partially rented as early as February 1957 and was fully rented during the fall of 1957, at which latter time the Keewatin apartment was partly rented. The gross rental revenue from both apartments when fully rented was estimated at $150,000 which, less an estimated operating cost of $80,000, would result in an approximate net annual revenue of $70,000 which, in the opinion of the shareholders of the appellant, was not sufficient to discharge its liabilities.

As mentioned before the loan from the bank was arranged by Harry Barkin who was anxious that this liability should be fully paid forthwith.

During the construction of the buildings and after their completion, the appellant received several unsolicited offers to purchase. At a meeting of the shareholders in August 1957 the possibility of the sale of one of the buildings was discussed.

In September 1957, the shareholders decided to accept one of the offers so received and negotiated the sale. The purchaser was given the choice of which apartment building it wished to purchase and selected the Balliol property because it was fully rented. The Balliol property was sold on October 1, 1957 at a price of $525,000 from which sale the appellant realized a gain of $59,627.71.

The proceeds of the sale were used to discharge the bank loan and the outstanding trade liabilities. On October 31, 1957 an amount of $36,000 was divided among the five principal shareholders in partial repayment of their advances, being $8,000 to each except Mr. Stone who received $4,000 because his second advance had been $4,000 less than the others. Between November 1957 and August 1958 further distributions in the approximate amount of $16,000 were made to each shareholder.

By notices of re-assessment dated May 19, 1961 the Minister added to the net declared income of the appellant for its taxation years 1958 and 1959 the sum of $59,627.71, which sum was therein described as profit on sale of the Balliol property.

The appellant, by notices dated August 1, 1961, objected to the assessments. The amounts were not disputed but only the taxability thereof. The Minister confirmed the assessments and an appeal was taken to the Tax Appeal Board which dismissed the appeal.

It is from that decision that the appellant now appeals to this Court.

The question for determination on the facts as recited is, therefore, whether the profit realized from the sale of the Balliol property is profit from a business within the meaning of ss. 3 and 4 of the *Income Tax Act* and the extended meaning of "business" as defined by s. 139(1)(*e*) to include an adventure or concern in the nature of trade or, as submitted by the appellant, the lands were acquired and the apartment buildings constructed thereon as an investment for the purpose of receiving rental income therefrom and that such plan became impossible of fruition because of the financial difficulties encountered by the appellant, which necessitated the sale of the Balliol property giving rise to a profit by way of the disposition of a capital asset and consequently a non-taxable capital gain.

If it was the appellant's exclusive intention to construct and operate both apartment buildings and derive rental income therefrom, it follows that the profit from the sale of one of the buildings would not be profit from a business

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or an adventure in the nature of trade. If that was not its exclusive purpose at the time the enterprise was begun, there can, in such circumstance, be no doubt that the acquisition of the lands and the construction of apartment buildings thereon had for its purpose, or one of its possible purposes, subsequent disposition of one or the other of the buildings at a profit, and the resulting profit is taxable.

One thing that is apparent from the evidence is that the project was embarked upon with borderline financing and without due regard for the hazards of the construction trade such as difficulties and delays in procuring materials and skilled tradesmen, whether occasioned by strikes or otherwise. The appellant could not have been oblivious to such possibilities, since Mr. Stone was an experienced building contractor whose knowledge must have been communicated to his fellow shareholders and directors and thereby to the appellant and who testified that actual costs of construction invariably exceed the estimated costs for which increase provision should be made, normally to the extent of 10 percent, which was not done in the present instance. As previously indicated, a more realistic estimate, according to Mr. Stone's evidence, would have been $935,000, which would have been slightly higher than the actual cost of the buildings. The inference naturally follows that the appellant's sole intention was not the retention of both apartment buildings for the purpose of producing rental income. The possibility of retrenchment, by the sale of one building to secure the retention of the other building, must have been present from the outset. While the financing was amply adequate to finance the building and retention of one apartment, it was, regarded realistically, inadequate for both.

The evidence does not, in my opinion, establish that the two apartments had been constructed with the sole intention of retaining and operating them as revenue producing properties. Against the background of the facts as established, I am of the view that the appellant contemplated from the outset the possibility of a profit made by disposing of one or other or both of the apartment buildings.

The appeal is, therefore, dismissed with costs.

Judgment accordingly.

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2.—*Common carrier—Contract of carriage of goods—Destruction of goods—Derailment of train—Act of God—Duty to take precautions against extraordinary events—Duty of railway company to guard against landslides when tracks pass through mountainous terrain—Burden of proof on party alleging act of God.* The plaintiff's claim is for the recovery of the value of wheat which the defendant as a public carrier had contracted with the Canadian Wheat Board, a Crown company, as agent for the plaintiff, to carry in conformity with the terms of bills of lading to Vancouver, British Columbia from various points in midwestern Canada. As the defendant's train carrying the wheat was travelling through the Rocky Mountains, between Revelstoke and Kamloops, it came in contact with a landslide which covered the tracks to a depth of from two to four feet for a distance of about one hundred feet and

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was derailed, most of the wheat in question being spilled out of the freight cars and lost. The defendant realized $2,700 by way of salvage of some of the wheat. The defendant denied liability on the ground that the loss was due to an act of God, which was one of the exculpatory provisions of the contract of carriage between the parties It was established by the evidence that weathering or rotting of the face of Squilax Mountain caused rock and rock dust to fall onto the 45° sloping mountainside below where it accumulated and formed a "talus" or "talus slope" at the foot of which a gully led down through an area of stones, earth and trees just above the defendant's tracks. Following a hot dry spell a heavy downpour of rain dislodged a large amount of the debris at the foot of the cliff, which gathered mud and stones as it flowed, with the consistency of a sloppy concrete mix, through the trees below and over the defendant's track. It was not disputed that the slide was due to natural causes without human intervention. *Held:* That although the landslide, considered by itself, was an act of God, it does not necessarily follow that the cause of the accident was an act of God. 2. That whether there is a duty to take precautions against extraordinary events depends on the facts in each case. 3 That it was entirely reasonable to expect the defendant to ascertain the existence and condition of all potentially dangerous talus slopes, such as the one on Squilax, since for a relatively moderate sum such information was obtainable and, if obtained, it would probably have enabled the defendant, especially when climatic conditions were such as prevailed on the day of the accident, to take appropriate precautions to avoid a collision with a likely landslide. 4 That the defendant's employees failed in their duty to locate potentially dangerous talus slopes such as existed on Squilax Mountain and then to be on the lookout for a sudden termination of any long hot dry spell followed by a heavy rainstorm or cloudburst and to report such occurrences immediately, so as to enable despatchers to issue appropriate warnings to train crews. 5. That the evidence offered by the defendant fails to exculpate it from liability because it has not succeeded in discharging the double burden which rested on it of proving beyond reasonable doubt that the damages suffered were solely attributable to an act of God and that it could not have foreseen and guarded against the slide by employment of such amount of care and foresight as might reasonably be expected of it in the circumstances. 6 That the plaintiff's claim is allowed. HER MAJESTY THE QUEEN v. CANADIAN PACIFIC RAILWAY COMPANY 145

3.—*Petition of Right—Crown Liability Act, S. of C. 1952-53, c. 30, s. 3(1)(a) and 4(2)—Negligence of prison authorities—Duty owed to prison inmates—Inmate injured through unforeseeable independent act of violence of fellow prisoner.* The suppliant claims compensation for personal injuries sustained by him when, as an inmate of the Federal Penitentiary at Kingston, Ontario, he fell from an open truck to the roadway while being transported under guard as one of a work party, from the penitentiary to a nearby quarry The suppliant alleged that the servants of the Crown were negligent in requiring him to ride on the truck in circumstances which they should have realized to have been dangerous, in failing to provide adequate supervision during the journey to the quarry and in failing to deny access to a scrap pile to the prisoner, Mallette, from which he obtained an iron bar with which he struck the suppliant, thereby causing him to fall from the truck. The evidence established that the truck was being driven carefully and at a moderate rate of speed when the suppliant fell out and that a blow delivered by the prisoner, Mallette, to the suppliant's head with an iron bar was the cause of his fall *Held*: That the duty the prison authorities owe to the suppliant is to take reasonable care for his safety as a person in their custody and it is only if the prison authorities failed to do so that the Crown may be held liable. 2. That while the prisoner, Mallette, had a long record of convictions for crimes, including robbery with violence, his conduct in the penitentiary was not such that the prison authorities would have had any reason to believe that he had extraordinarily violent propensities over and above those of ordinary prison inmates, so that there was no reason for them to segregate him or to subject him to constant rigorous observation or special precautions and it was reasonable for him to be included in a working party under routine conditions and supervision. There was likewise no reason for the authorities to suspect that Mallette would arm himself to perpetrate an act of violence. 3. That the Petition is dismissed. MARCEL TIMM v. HER MAJESTY THE QUEEN......... ... 174

4.—*Petition of Right—Claim for repayment of money paid to Crown under Group Annuity Contract—Authorization and execution of contract by municipal corporation—Lack of knowledge of suppliant of terms of annuity plan—Government Annuities Act, if valid, not subject to Ontario Insurance Act—Conflict between federal and provincial legislation—Object of legislation—Pith and substance of legislation—Federal legislation in the public interest—Declaration of Parliament as to object of legislation—Civil rights—Government Annuities Act, R S.C. 1952, c. 132, ss 4 and 6(3)—Municipal Act, R.S.O. 1937, c. 266, s. 404(41a)—British North America Act, 1867, ss. 91 and 92.* This is a Petition of Right of a former member of the Police Department of the City of Sudbury, Ontario, for a declaration that the *Government Annuities Act*, R.S.C 1952, c. 132 is *ultra vires* and that the suppliant is entitled

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to repayment of the contributions made by him under a Group Annuity Contract between the Crown and the City of Sudbury. The suppliant joined the Sudbury Police Department and applied for participation in the Group Annuity Plan in 1953. In 1960 he left the Police Department, and, in due course, received a Statement of Benefits under the Group Annuity Contract showing that he was entitled to a life annuity of $378.57 commencing October 1, 1990, and guaranteed for five years. *Held:* That the suppliant has no right against the Crown by reason of the fact that no copy of the Bylaw pursuant to which application was made by the City of Sudbury for a Group Annuity Contract under the *Government Annuities Act* was given to him because paragraph 4 of Article IV thereof, requiring a copy of the By-law to be given to every employee, has no reference to persons becoming employees after the commencement date of the Plan, paragraph 4 of Article IV is directory only, a breach of the By-law by City officials does not confer any rights against the Crown and the Group Annuity Contract provides that the Government shall have no responsibility for the Plan except as expressly provided in the Contract. 2. That the Group Annuity Contract was duly authorized and executed. 3. That the suppliant's participation in the plan was properly made a condition to his employment as a police constable. 4. That any lack of knowledge on the suppliant's part of the terms of the plan was not such as to affect the validity of his status as a registered member of the plan. 5. That failure to give the suppliant a copy of the By-law cannot operate to vitiate his participation in the plan when such failure is first raised after he left the employment of the City. 6. That if the *Government Annuities Act* is a valid exercise of Parliament's legislative authority, the Crown, in exercising the authority conferred thereby, is not subject to the provisions of the *Ontario Insurance Act.* 7. That when a valid federal enactment comes in conflict with provincial legislation, the federal enactment prevails. 8. That the operations under the *Government Annuities Act* differ from those of a person in private business selling annuities in two respects only, viz. the object of the operations under the *Government Annuities Act* is not to make a profit but to promote thrift o that provision may be made for old ages, and the annuities sold under the *Government Annuities Act* cannot be rescinded by agreement between the purchaser and the seller as they could be if the transaction were one between subject and subject. 9. That while the operations authorized by the *Government Annuities Act* are operations that are the ordinary activities of persons engaged in a business that is subject to the legislative jurisdiction of the provincial legislatures, the objective is quite different from that pursued by private business and, rather than being one of profit, it is to provide further facilities for the promotion of habits of thrift among the people of Canada so that provision may be made for old age. 10. That whether the "pith and substance" of the *Government Annuities Act* be the authorization of annuity contracts between the Crown and the subject or the provision of further facilities for the promotion of thrift among the Canadian people so that provision may be made for old age, it does not fall under s. 91(1A) of the *British North America Act* nor is it an Act, the pith and substance of which is to enable the Government of Canada to carry on business of a class that is subject to regulation exclusively by the provincial legislatures. 11. That Parliament may employ monies raised by taxation "for making contributions in the public interest to individuals, corporations or public authorities" provided that the law enacted for that purpose is not so framed as to "encroach upon the classes of subjects which are reserved to provincial competence" and it follows that Parliament may authorize the Crown to enter into contracts with individuals in circumstances that do not necessarily involve the expenditure of monies raised by taxation where the dominating reason for the scheme is the "public interest". 12. That the *Government Annuities Act* expressly declares the scheme to be "in the public interest" and there are no circumstances that would constrain the Courts to hold that that declaration is colourable. 13. That the *Government Annuities Act* does not affect the civil rights of any person, nor does it encroach on any of the classes of subjects reserved to the provincial legislatures. 14. That the *Government Annuities Act* is *intra vires* and there is no basis for the suppliant's claim that the Crown holds monies received from him otherwise than subject to and in accordance with the Group Annuity Contract between the Crown and the City of Sudbury. 15. That the suppliant is not entitled to any of the relief sought by the Petition of Right. SHELDON IRWIN PORTER v. HER MAJESTY THE QUEEN........................**200**

5.—*Collision d'automobiles—Membres des forces armées canadiennes blessés au cours de la collision—Recours par la Couronne pour recouvrer les dommages encourus—Application des lois de la province où la faute est commise—Action directe sous l'art. 1053 du Code Civil de Québec—Action «per quod servitium amisit»—Droit commun anglais—Telle action irrécevable dans le Québec—Enrêchissement sans cause—Subrogation conventionnelle—Action récursoire—Arts. 1075, 1154 et 1155 du Code Civil de Québec.* Entendant fonder sa réclamation sur l'article 1053 du Code Civil de Québec, la Couronne cherche à recouvrer des dommages-intérêts qu'elle aurait subis à la suite d'une collision entre la voiture dans laquelle se trouvaient des membres des forces armées canadiennes et celle appartenant à l'un des défendeurs, alors conduite par son fils mineur, et au

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cours de laquelle ces militaires furent blessés. Par son action la demanderesse réclame les dépenses encourues représentant les frais médicaux déboursés pour et les soldes versées aux accidentés. Au début de l'instruction, la défense, tout en admettant sa responsabilité quant à la collision et quant au montant des dommages réclamés, concluait au rejet de l'action pour le motif de l'absence de tout lien de droit entre les parties, une, entre autres, des défenses soulevées dans l'instance *The Queen v. Poudrier et Boulet Ltd.* [1960] Ex. C.R. 261. *Jugé:* De l'admission par la demanderesse que l'action *per quod servitium amisit* n'existe pas sous le Code Civil de Québec il s'ensuit, bien que cette admission ne lie pas nécessairement la Cour, que la jurisprudence (*Attorney General of Canada v. Jackson* [1946] S.C.R. 489; *The King v. Richardson* [1948] S.C.R. 57; et *Nykorak v. Attorney General of Canada* [1962] S.C.R. 331) invoquée par la demanderesse devrait être ignorée exception faite de l'énonciation de principe dans l'instance *Jackson* (*supra*) à la page 493. 2° C'est donc la législation de la province où la faute aura été commise qui, seule, doit décider de la responsabilité. 3° L'article 1053 du Code Civil de Québec ne peut recevoir un sens d'extensibilité presque indéfinie comme l'interpréta la Cour Suprême du Canada dans l'instance *Regent Taxi v. Frères Maristes* [1929] S.C.R. 650. 4° La notion de l'enréchissement sans cause doit être écartée puisque la demanderesse disposait d'une action récursoire au moyen de la subrogation, si elle l'eût adoptée en temps utile. Telle action est d'autant plus indiquée en l'espèce que les dommages postulés par la Couronne ne procéderaient pas du quasi-délit incriminé selon la liaison de causalité directe exigé par l'art. 1075 du Code Civil. *Regent Taxi* (*supra*) aux pages 681 et 682. 5° Il est impossible d'attribuer à l'acte matériel intervenu entre la demanderesse et ses employés une autre interprétation que celle de paiement effectué par une tierce personne aux créanciers d'une obligation de dommages-intérêts prévue à l'article 1154 du Code Civil. SA MAJESTÉ LA REINE v. DR. J. L. SYLVAIN *et al*.............**261**

6.—*Petitions of Right—Forfeiture of goods under the Customs Act—Unlawful importation of goods—Tax on imported goods under the Excise Tax Act—Burden of proof that Crown has no right to retain possession of goods seized under Customs Act—Goods taxable although not sold—Goods need not be dutiable to be taxable—Meaning of "jewellery" and "including diamonds for personal use or for adornment of the person"—Taxability of goods re-imported after having been previously imported then exported—Obligation of person bringing goods into Canada—Goods may be forfeited although not found in custody of importer—Forfeiture of goods automatic upon unlawful importation—Title to unlawfully imported goods—"Unusual treatment" within meaning of s. 2(b) of the Canadian Bill of Rights—Old Age Security Act, R.S.C. 1952, c. 200, s. 10—Customs Act, R.S.C. 1952, c. 58, ss. 2(1)(g), 18, 20, 21, 22, 36, 47, 160, 178(1) and (2), 183, 190(1)(a) and (c), 203, 248—Excise Tax Act R.S.C. 1952, c. 100, ss. 23, 29(1)(a) and (f), 30, 33, 35, 44, 46, 56 and Schedule I, s. 9(c)—Canadian Bill of Rights, S. of C. 1960, c. 44, s. 2(b).* The petitioners pray for the return of certain diamonds which are in the possession of the Crown as having been forfeited under the provisions of the *Customs Act*, on the ground that they had been unlawfully imported into Canada, and for other relief. The respondent counterclaimed for taxes alleged to be payable by the suppliants under the *Excise Tax Act* and the *Old Age Security Act. Held:* That by virtue of s. 248 of the *Customs Act*, the burden is on the suppliants to prove that the Crown has no right, under any provision of the *Customs Act*, to retain the goods in its possession. 2. That the two large diamonds are subject to tax at the rate of 21 per cent of their value, payable upon importation, and the tax is payable on the sale price although the goods do not have to be sold to be taxable. 3. That the goods do not have to be subject to any duty imposed by the customs tariff to be taxable. 4. That the words "including diamonds for personal use or for adornment of the person" as used in Schedule I, s. 9(*c*) of the *Excise Tax Act*, are an extension of the meaning of the word "jewellery" and refer to a kind of goods. 5. That the two large diamonds in question are of gem quality and fall within the meaning of the words in Schedule I of the *Excise Tax Act*. 6. That because the diamond had been previously imported into Canada under license with no tax being paid, then exported, it cannot be subsequently reimported, either in identical or altered form, without tax becoming payable. 7. That there is a threefold obligation on any person bringing goods into Canada, (1) to report the goods to Customs, (2) to make due entry of them, and (3) to pay the taxes. 8. That it was not established that the Customs officials have adopted an accepted practice of permitting persons not to declare items such as the diamonds in question, nor can Customs officials waive compliance with statutory obligations upon an importer, nor is an importer so relieved from the consequences of his failure to comply with these obligations. 9. That the fact that the suppliant, Marun, was acquitted by a police magistrate of a charge that, without lawful excuse, he was in possession of goods unlawfully imported into Canada, contrary to s 203 of the *Customs Act*, which acquittal was sustained on appeal, is not *res judicata* in his favour of the fact that the goods had not been illegally imported and cannot be invoked by him in the present case. 10. That since no application for refund of any tax paid under the *Excise Tax Act* was ever made by the suppliant, Marun, as required by s. 46 thereof as a condition precedent thereto,

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it follows, without the necessity of deciding the questions whether the goods were properly taxable and whether the tax was paid in error, that the suppliant is not entitled to a refund of the tax. 11. That the suppliant, Marun, by his failure to comply with the positive duties imposed by s. 18 of the *Customs Act* falls precisely within the language of s. 183 of the *Customs Act*. 12. That if the person importing goods fails to comply with s. 18 of the *Customs Act*, the goods are forfeited if found and it matters not where they are found. The language of the section does not require that the goods be found in the custody of that particular person. 13. That forfeiture under ss. 178 and 183 of the *Customs Act* is automatic and occurs immediately upon the unlawful importation by virtue of s. 2(1)(*q*) of the *Customs Act*, and the goods thereupon become the property of the Crown and no act by any officer of the Crown can undo that forfeiture. Therefore any defect, if such existed, in the notifications and procedure adopted by the Department of National Revenue under ss. 150 and 158 of the *Customs Act* is not material. 14. That s. 203 of the *Customs Act* does not mean that if a possessor of goods unlawfully imported has a lawful excuse, then the goods are not forfeited under other provisions of the *Customs Act*, and the suppliant, Marun, could not divest the property in the Crown by delivering one of the diamonds to Minogue no matter how innocent Minogue was. 15 That s. 203 of the *Customs Act* is clearly to protect a person who innocently comes into possession of unlawfully imported goods and without means of knowing they were unlawfully imported, from prosecution and possible liability to a penalty equal to the value of the goods and imprisonment, but certainly not to vest title to unlawfully imported goods in such person. 16. That the fact that the *Customs Act* provides that goods unlawfully imported are forfeit to the Crown without power of remission and that the person who unlawfully imported such goods is liable for the tax payable thereon does not constitute "unusual treatment" within the meaning of s. 2(*b*) of the *Canadian Bill of Rights*. 17. That neither suppliant is entitled to the relief sought in his Petition of Right. TVRTKO HARDY MARUN v. HER MAJESTY THE QUEEN........ .... **280**

REGINALD JAMES MINOGUE v. HER MAJESTY THE QUEEN.................. **280**

7.—*Petition of Right—Action for damages—Negligence—Apportionment of negligence—Assessment of damages—Crown Liability Act, S. of C. 1952-53, c. 30, s. 3(1)(a).* The suppliant claims compensation for damages suffered by it when one of its cement mixer trucks was damaged because of the collapse of a wooden ramp up which the truck was being driven during delivery of a load of cement to the "Garden of the Provinces", a public work being built by the National Capital Commission on Wellington Street in the City of Ottawa. The National Capital Commission was at all material times an agent of Her Majesty the Queen in right of Canada. *Held:* That since the ramp was not meant or built for the use of cement mixer trucks, it became the duty of the respondent's employees to prevent such use. 2. That the driver of suppliant's truck assumed the risk of driving his truck up the ramp without first inspecting it and despite the fact that he did not trust the ramp. 3. That the respondent is responsible for two-thirds of the damages and the suppliant for one-third. OTTAWA PRE-MIXED CONCRETE LIMITED v. HER MAJESTY THE QUEEN. **331**

8.—*Petition of Right—Claim against the Crown for damages for personal injuries—Crown as occupier of premises—Licensees claiming against Crown as occupier—Notice required by s. 4(4) of Crown Liability Act—Failure of suppliants to give notice of claim to Crown—Negligence of licensee—Members of Her Majesty's forces acting in personal capacity—Occupancy and control of Sergeants' Mess—Duty of occupier to licensee at common law—Danger concealed or obvious—Proper lookout—The National Defense Act, R.S.C. 1952, c. 184, s. 39—The Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3(1)(a) and (b), 4(2), (4) and (5)—Exchequer Court Act, R.S.C. 1952, c. 98, s. 50—General Rules and Orders of the Exchequer Court, Rule 138.* The suppliants are husband and wife and on February 17, 1962, were attending a social function at the Sergeants' Mess, No. 10 Repair Depot of the R.C.A.F. at Calgary, Alberta as guests of an associate member of the Mess. On the completion of a bingo game the suppliants and the other guests partook of a buffet supper which was laid out on a billiard table in the billiard room in the Mess. When the female suppliant approached the table for a second time to obtain coffee and a roll for her husband and herself she fell and broke her right hip. She was wearing high-heeled shoes with metal clips on the toes and heels at the time she fell. The evidence established that there was a small amount of cole slaw or cabbage salad on the floor near the billiard table at the place where the suppliant fell. *Held:* That the failure to give the notice required by s. 4(4) of the *Crown Liability Act*, or its insufficiency, is not a bar to the proceedings because the respondent in its defence was not prejudiced by such want or insufficiency of notice and to bar the proceedings would be an injustice. 2. That there was no tort committed as envisaged by s. 3(1)(*a*) of the *Crown Liability Act*, by the members of Her Majesty's forces who were present at the material time because they ran this function in their personal capacities and not in their capacities *qua* members of the said forces. 3. That the respondent had occupancy and control of the premises in question at the material time and the Sergeants' Mess, i.e., the third party, were mere licensees of the respondent in respect to these premises and not tenants

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of the respondent. 4. That the suppliants were licensees at common law on the premises in question and the only duty at common law owed to them by the respondent was to warn them of any concealed danger actually known to the respondent and which was not known to the suppliants or which was not obvious to them. 5. That the fall of the female suppliant was caused by a small amount of cole slaw or cabbage salad on the floor of the billiard room and the steel clips on the high-heeled shoes worn by her, together with inadequate or no lookout by her when she turned from the billiard table. 6. That the presence of the small amount of cole slaw or cabbage salad on the floor by the billiard table was not a concealed danger, nor was it a danger that was not obvious or to be expected by the female suppliant under the circumstances. 7. That the damages complained of by the suppliants were the result of the female suppliant's failure to keep a proper lookout while walking in the billiard room and her failure to take reasonable care for her own safety, especially when she was wearing the shoes already described. 8. That the suppliants' petition of right is dismissed and the action by the respondent against the third party is also dismissed. JEAN MILLAR HENDRY *et al* v. HER MAJESTY THE QUEEN............................**392**

9.—*Petition of Right—Motor vehicle collision—Negligence—Apportionment of liability—Excessive speed—Failure to keep proper lookout—Motor vehicle on left side of highway center line—Removal of stop sign shortly before date of collision—Assessment of damages—Compensation for expense of operating suppliant's business during his incapacity—Damages for pain and suffering, inconvenience and loss of enjoyment of life—Damages for permanent incapacity—Apportionment of costs—Quebec Highway Code, S. of Q. 1959-60, c. 67, s. 41(1).* This action arises out of a collision between a motor vehicle owned and operated by the suppliant and one owned by the respondent and operated by one Robert Monier, a constable of the R.C.M.P. The collision occurred at about 8:00 p.m. on June 4, 1961 in the Province of Quebec at the intersection of Highway 11, running north and south between Hull and Masham Village and a section of Highway 11 leading to Wakefield, Quebec. The suppliant, who had been proceeding south-westerly on the Wakefield spur of Highway 11, had entered its intersection with the main section of Highway 11 without coming to a stop and had just turned to his left to proceed in a southerly direction toward Hull when his motor vehicle collided head-on with that of the respondent which had been proceeding northerly on the said main section of Highway 11 on its left side of the double white line marking the center line of the said Highway. The evidence established that immediately prior to the collision both motor vehicles were travelling at about forty miles per hour, that there had been a stop sign so situated as to require vehicles approaching the main section of Highway 11 along the Wakefield spur thereof to come to a stop before entering the intersection, that the operator of the respondent's motor vehicle had seen the sign many times before and had seen it in position on May 28 or 29, 1961, and that the sign was not there at the time of the collision but was replaced two or three weeks later. In addition to claiming damages for the loss of his motor vehicle, the suppliant also claimed damages for personal injury, loss of personal effects, medical and hospital expenses and loss of income during his period of disability and expense incurred in paying his brother to manage and operate his restaurant business during his disability. The respondent counterclaimed for damages for loss of her motor vehicle. *Held:* That the suppliant was negligent in not looking to his left before entering the intersection and in not reducing his speed before doing so. 2. That the operator of the respondent's motor vehicle was negligent in driving his motor vehicle on the left side of the double white center line of the highway and for continuing to do so even after noticing the suppliant's omission to slow down on approaching the intersection. 3. That the responsibility for the collision is assessed as two-thirds against the respondent and one-third against the suppliant. 4. That the remuneration of $175 per week claimed to have been paid by the suppliant to his brother for managing the suppliant's restaurant during his period of diability is excessive and an amount of $100 per week for the period of twenty-three weeks will be allowed. 5. That compensation for pain and suffering, inconvenience and loss of enjoyment of life during the period of total incapacity and convalescence is assessed at $1,500. 6. That damages for permanent incapacity, although it is doubtful whether such was established, are assessed at $1,000- 7. That the costs, after taxation, are two. thirds recoverable by the suppliant on the petition of right and the cross demand, and one-third by the respondent in connection with both proceedings. GEORGE LAHAM v. HER MAJESTY THE QUEEN........ **440**

10.—*Petition of Right—Motor vehicle collision—Negligence—Apportionment of liability—Injury to passengers in motor vehicle—Assessment of damages—Compensation for pain and suffering, inconvenience and loss of enjoyment of life, permanent incapacity, future medical expenses and disfigurement and scars—Claim over by respondent against third party—Apportionment of costs.* The claims by the suppliants arise out of the collision of a motor vehicle owned and operated by the third party with one owned by the respondent. The circumstances surrounding the collision are described in detail in the reasons for judgment in *George Laham v. Her Majesty the Queen,*

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ante, p. 440. In that case the suppliant, who is the third party herein, was found to be one-third responsible for the collision and Her Majesty the Queen, the respondent in both cases, was held to be two-thirds responsible. The suppliants' claims all arise out of personal injuries received by them while riding as passengers in the motor vehicle owned and operated by the third party herein at the time of the collision. *Held:* That the suppliant, George Nesrallah, is entitled to, in addition to his special damages as proved, the sum of $1,000 for pain and suffering and inconvenience and loss of enjoyment of life during total incapacity and convalescence, the sum of $1,000 for possible permanent partial incapacity or continuing inconvenience and $500 for future medical expenses. 2. That the suppliant, Elaine Nesrallah, is entitled to special damages as proved, and to $3,000 for inconvenience and loss of enjoyment of life during total incapacity and convalescence, $1,200 for disfigurement and scars and for loss of or damage to teeth, and $1,000 for possible permanent partial incapacity. 3. That the suppliant, Sandra Nesrallah, is entitled to special damages as proved, and to the sum of $2,500 for pain and suffering, inconvenience and loss of enjoyment of life during total incapacity and convalescence and $1,000 for possible permanent partial incapacity. 4. That the third party will indemnify the respondent to the extent of one-third of the pecuniary damages accorded to the three suppliants. 5. That the suppliants are entitled to recover their costs after taxation from the respondent and the respondent will be allowed one-third of the costs after taxation as against the third party. GEORGE NESRALLAH *et al* v. HER MAJESTY THE QUEEN................**448**

11.—*Indian Act, R.S.C. 1952, c. 149, ss. 18(1), 20, 24, 25(2), 28(1), 31(1), 37, 45(1), 48, 49, 50, 58(1)(c) and (3)—Indian Act, R.S.C. 1927, c. 98, s. 34(2)—Indian Act, S. of C. 1951, c. 29, s. 18(1)—Right of Indian Band to possession of Reserve Land—Right of Band to possession of Reserve Land suspended or terminated in certain cases—Right to possession lawfully acquired by individual member of band is assignable and transmissable subject to the provisions of the Statute—Right to possession vested in band or in individual Indian but not in both at same time.* In this action the Crown claims on behalf of the Six Nations Band of Indians possession of a farm forming part of the Six Nations Indian Reserve near Brantford, Ontario, on which the defendant has resided since 1934, at which time it was lawfully in the possession of Rachel Ann Davis, the widow of a member of the Six Nations Band. The defendant worked the farm under a leasing agreement with Mrs. Davis from 1934 to 1951, when, at the request of Mrs. Davis and the defendant, a lease of the farm was granted by the Crown to the defendant for a term of ten years. The defendant purchased the livestock and farming implements belonging to Mrs. Davis and took possession of the farm although Mrs. Davis continued to reside there until her death in 1958. She devised her rights in the farm to the defendant, who continued in possession for the balance of the term of the lease and, for the terms of two subsequent one-year permits granted by the Crown and was still in possession at the time of the trial. After the termination of the Crown lease in 1961 the Crown advertised for tenders for the farm from members of the Six Nations Indian Band and four tenders were received, the highest one, submitted by one Clause, being accepted. The Administrator of Indian Estates, purporting to act as the administrator of the estate of Mrs. Davis, executed an agreement to sell the said lands to Clause. By agreement between the defendant and the Crown and on the application of Clause and the defendant, the defendant was granted the right to use and occupy the property for one year ending November 30, 1961 and by a similar agreement the said rights of the defendant were continued until November 30, 1962, these two agreements being the two one-year permits referred to earlier. Clause agreed with the defendant to apply for a five-year lease of the farm to the defendant and for renewals thereof until the purchase price should be paid but the application was opposed by the Band Council and it was not approved by the Minister. In May 1962 Arnold and Gladys Hill, who knew of the arrangements between Clause and the defendant, purchased from Clause his right in the property, the assignment of Clause's rights to them being approved by the Administrator of Indian Estates as Administrator of the Davis estate. In November 1962 the Council of the Band notified the defendant to vacate the property at the expiration of the second one-year Crown permit and took other steps to force the defendant to leave the property, culminating in this action. The resolution by which the Band Council instructed the Attorney General of Canada to institute this action was an assertion by the Council of a right of the Band as a whole and not of any right of Arnold and Gladys Hill. There was no evidence adduced of any transfer or assignment to the Band of the right of possession of the property either from the executor of the Davis estate or from the Administrator of Indian Estates, or from Clause, or from the Hills. *Held:* That the main issue in the action is not whether the defendant has any right to remain in possession of the land in question, but whether the Six Nations Indian Band, on whose behalf the action has been brought, is entitled to the possession claimed on its behalf. 2. That s. 31(1) of the *Indian Act* confers no new substantive right but simply provides a procedure for the enforcement of existing

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rights of an individual Indian or of a Band. 3. That in this case the action is to enforce a right of possession asserted by the Band and on the facts it has not been established that the Band has any such right in the land in question. 4. That the action is dismissed. HER MAJESTY THE QUEEN v. HARRY S. DEVEREUX............. **602**

12.—*Pétition de droit—Expropriation—Lois sur les expropriations, S.R.C. 1952, ch. 106, art. 9—Avis d'expropriation—Validité de l'avis—Vices de forme—Loi sur l'Administration de la Voie Maritime du St-Laurent, R.S.C. 1952, ch. 242, art. 18(1)—Lots de grève non sub-divisés en bordure du fleuve St-Laurent—«Bastures»—Plan cadastral—Erreurs dans le plan cadastral—Code Civil de Québec, art. 2174—Droit de propriété—Prescription trentenaire—Prescription décennale—Code Civil de Québec, art. 2206 et 2242.* L'avis d'expropriation affectant, entre autres lots, les terrains des deux requérants, et se lisant, en partie, comme suit: «. . . is a plan and description of a certain beach and deep water lot, being a part of the St. Lawrence River in the Montreal Harbour area, shown within edged green lines, situated in the cadastral Parish of St. Antoine de Longueuil, registration division of Chambly, Province of Quebec, taken, including therein reefs and islets but excluding thereof and therefrom mines and minerals, . . .» est attaqué parce qu'il serait insuffisant en ce qu'il ne donne que des indications astronomiques, sans mensurations topographiques, ni la moindre mention du numéro cadastral des lots expropriés; le tout contrairement aux dispositions de la *Loi sur les Expropriations*, S.R.C. 1952, ch. 106, art. 9. En outre, les requérants se plaignent de l'expropriation du fait que l'approbation du gouverneur en conseil n'aurait pas été obtenue, au préalable; tel que le prescrit la *Loi sur l'Administration de la Voie Maritime du St-Laurent*, S.R.C. 1952, ch 242, art. 18(1). La défense, soutenant la régularité de l'expropriation, conteste le titre de propriété des requérants aux lots affectés ajoutant que les lots n'apparaissent même pas au plan cadastral officiel. Sur la preuve quant à l'indemnité la Cour accordait la somme de $6,000.00 à l'un des requérants et, à l'autre, celle de $1,000.00 avec intérêt et dépens dans chaque cas. *Jugé*: Ayant reçu antérieurement à la date de l'expropriation une indication assez précise des intentions de l'État, les pétitionnaires ne peuvent guère prétendre que l'omission des numéros de lots dans l'avis et la description d'emprise ait pu les induire en erreur. Quant aux tiers, dans l'intérêt desquels l'enregistrement des droits réels est aussi exigé, la vue de certains travaux exécutés sur ces terrains, les inciterait à faire les recherches requises au bureau d'enregistrement. Ainsi, l'objectif précisé dans l'instance *Eugène Lamontagne v. His Majesty the King* (1917) 16 R.C. de l'E. 203, substantiellement confirmée par *The King v. Crawford* [1960] R.C.S. 527, est suffisamment atteint dans la présente cause. 2° Quant au second grief, l'arrêté ministériel, P.C. 1955-696 daté le 12 mai 1955 et se lisant, en partie, comme suit: His Excellency the Governor General in

> Council, on the recommendation of the Minister of Transport, is pleased . . . to approve The St. Lawrence Seaway Authority taking or acquiring without the consent of the owner or owners, pursuant to section 18 of The St. Lawrence Seaway Authority Act, such part of the lands described in the schedule hereto required for the Lachine Section of the St. Lawrence Seaway as are not the property of Her Majesty in right of Canada.

défère en tout point à l'obligation préalable édictée par la loi. 3° L'irrégularité consistant dans le fait que la nomenclature des terrains expropriés n'apparaît pas au plan cadastral de la paroisse St-Antoine de Longueuil, est sans importance dès que des indices suffisants font légalement présumer le droit de propriété des requérants. Du reste, l'art. 2174 du Code Civil de la Province de Québec, dernier alinéa, applicable ici puisqu'il s'agit des droits civils des parties, stipule que: «Le droit de propriété ne peut être affecté par les erreurs qui se recontrent dans le plan ou le livre de renvoi; . . . 4° Les terrains sont des lots de grève et l'expression «bastures» était cette mention expresse et spéciale exigée par une jurisprudence constante pour en conférer la propriété absolue au Seigneur de Longueuil, à ses hoirs et ayant cause, à la réserve près de ce qui était indispensable à l'usage public des eaux de fleuve (Cf. *Dumas vs Migneault* (1898) 15 C S.Q. 276). Les requérants ont donc acquis, en qualité de propriétaires incommutables, ces étendues de grève, tant par prescription trentenaire et même décennale au gré des articles 2246 et 2206 du Code Civil. DAME MÉDORA FAUBERT v. SA MAJESTÉ LA REINE ET ÉDOUARD BÉLANGER v. SA MAJESTÉ LA REINE **689**

13.—*Collision entre véhicules moteurs—Action pour recouvrer dommages encourus par la Couronne—Action directe fondée sur l'article 1053 du Code civil de Québec—Action per quod servitium amisit—Provinces anglaises de la Common Law—Action directe en indemnité au profit de la Couronne irrécevable dans le Québec—Action rejetée.* La demanderesse réclame, à titre de dommages-intérêts, les déboursés qu'elle a encourus pour le compte de son employé, un soldat, blessé au cours d'une collision entre véhicules-moteurs, ces déboursés représentant le coût des soins médicaux prodigués ainsi que les salaire et allocation versés à ce soldat. Les défendeurs ont admis, en fait, leur responsabilité au sujet de l'accident, laissant seulement la question de décider si la Couronne pouvait justifier son recours en le basant uniquement sur l'article 1053 du Code civil de Québec pour le préjudice

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que l'auteur du délit lui a causé directement. *Jugé*: L'action *per quod servitium amisit* reconnue dans les provinces anglaises de la Common Law, savoir, une action directe en indemnité au profit de la Couronne, n'existe pas dans la province de Québec. (Cf. *Sa Majesté la Reine vs. Sylvain et al. ante* p. 261, confirmée par la Cour suprême du Canada, [1965] R.C.S. 164.) 2° Que dans les circonstances de la cause la demanderesse n'a pas réussi à justifier son recours en le basant uniquement sur l'article 1053 du Code civil. SA MAJESTÉ LA REINE v. GUY PLAMONDON ET HICKS ORIENTAL RUGS LIMITED.... 778

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CROWN LIABILITY ACT, S. of C. 1952-53, c. 30, s. 3(1)(a).
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CROWN LIABILITY ACT, S. of C. 1952-53, c. 30, ss. 3(1)(a) and (b), 4(2), (4) and (5).
See CROWN, No. 8.

CROWN LIABILITY ACT, S. of C. 1952-53, c. 30, s. 3(1)(a) and 4(2).
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CUSTOMS ACT, R.S.C. 1952, c. 58, ss. 35(8) and 45 AS AMENDED.
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CUSTOMS ACT, R.S.C. 1952, c. 58, s. 45 AS AMENDED by S. of C. 1958, c. 26, s. 2(1).
See REVENUE, No. 35.

CUSTOMS ACT, R.S.C. 1952, c. 58, AS AMENDED, s. 45.
See REVENUE, No. 6.

CUSTOMS AND EXCISE.
See REVENUE, No. 35.

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CUSTOMS TARIFF, R.S.C 1952, c. 60, ss. 6(9) and (10), 6a(4), AND ITEMS 427(1) and 427a, AS AMENDED BY S. OF C. 1959, c. 12, s. 4.
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2. Determination of amount of compensation. No. 1.
3. Determination of compensation. No. 2.
4. Determination of market value of land expropriated. No. 2.
5. Determining extent of injurious affection. No. 2.
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7. Expropriation Act, R.S.C. 1952, c. 106, ss. 31 and 32. No. 2.
8. Interest on amount of compensation. No. 2.
9. National Capital Act, S. of C. 1958, c. 37. No. 1.
10. Only economic and pecuniary aspects to be considered. No. 1.
11. Sentimental and emotional factors to be ignored. No. 1.
12. Witnesses giving opinion evidence of land values must have practical experience operating in market as broker or dealer. No. 2.

EXPROPRIATION—*National Capital Act, S. of C. 1958, c. 37—Determination of amount of compensation—Factors to be considered in determining compensation—Sentimental and emotional factors to be ignored—Only economic and pecuniary aspects to be considered.* This is an action to determine the compensation payable to the defendant for the expropriation by the plaintiff of residential property owned by her, which consists of a house and lot of about 3.5 acres and which has a frontage of 400 feet on Woodroffe Avenue at a point 2.3 miles south of the southerly boundary of the City of Ottawa. The property was in an area that had been zoned for commercial and institutional purposes as well as for residential purposes and which was subject to a subdivision control by-law. *Held:* That in determining the value of the expropriated property to the owner at the time of expropriation it must be assumed that the owner is a sensible, prudent person, interested only in the economic and pecuniary aspects of the matter and that any sentimental or emotional elements that might have some bearing on the particular owner's attitude towards the expropriated property must be ignored. 2. That the correct amount of compensation is what a reasonably prudent person in the defendant's position on the

EXPROPRIATION—Concluded—Fin

date of the expropriation, finding herself in possession but without title, would have paid for the property sooner than be ejected. In determining this amount the defendant would have to consider that if she moved from the property in question she would have to acquire equivalent premises, pay for temporary accommodation and storage of her furniture unless permitted to stay in the expropriated property until she acquired possession of other property and pay for moving expenses. In addition, her rugs, drapes and other furnishings almost certainly could not be fully utilized in another property and there would be the inconvenience and personal effort, miscellaneous expenses and general disruption of family life that are necessarily incidental to moving a family from one residence and neighbourhood to another. NATIONAL CAPITAL COMMISSION v. MARION MILLEN............49

2.—*Expropriation Act, R.S.C. 1952, c. 106, ss. 31 and 32; Exchequer Court Act, R S.C. 1952, c. 98, s. 49; General Rules and Orders, Rules 104 and 105—Determination of compensation—Determination of market value of land expropriated—Witnesses giving opinion evidence of land values must have practical experience operating in market as broker or dealer—Determining extent of injurious affection—Any increase in value of remaining lands to be considered in determining amount of injurious affection—Interest on amount of compensation.* The plaintiffs claim compensation for the expropriation by the defendant of about ten acres of land in two parcels, both of which were part of a tract of about three hundred acres of land owned by the plaintiffs in the Township of Vaughan, in the County of York, near Toronto, the defendant proposing to use the said lands for a new railway line in connection with the construction of a marshalling yard. The evidence established that the plaintiffs were holding the lands for possible future residential development although at the time of expropriation no actual steps had been taken toward such development. There were no water or sewer services available and there were no plans that would provide any assurance that any such services would be available for these lands at any time in the foreseeable future. In addition, the Township of Vaughan had adopted a policy of discouraging residential development in areas including the three hundred acres owned by the plaintiffs until industrial development in the township became such as to provide tax revenues sufficient to bear the cost of servicing such residential development. The only use that could be made of these lands immediately prior to the expropriation was for agricultural purposes, but it was agreed that the land had a higher value as a speculative holding for potential residential use some time in the future. *Held:* That the compensation payable may be correctly determined by deducting from the market value of the lands belonging to the plaintiffs immediately before the expropriation the market value of the lands remaining to them immediately after the expropriation. 2. That in determining the market value of the land expropriated a determination must be made concerning the speculative market in residential land at the time of expropriation on the assumption that buyers and sellers knew the facts that were available at that time to those who conducted reasonably careful investigations and not on the assumption that such buyers and sellers had the benefit of the expert opinions given at trial. 3. That a witness has no status to be expressing opinions as an expert on land values unless he has had practical experience operating in the market as a broker or dealer, as opposed to academic training and experience as a valuator or appraiser. 4. That witnesses testifying as real estate experts should not take into account the opinions given by other expert witnesses in determining market values at the time of expropriation except where it has been shown that such opinions were actually factors in the market at that time. 5. That s. 49 of the *Exchequer Court Act* refers only to the advantage or benefit likely to accrue as a result of the expropriation in respect of any lands held by the plaintiffs *with* the lands injuriously affected and there were no such lands in this case. 6. That in estimating the extent of the injurious affection to the lands remaining to the plaintiffs, the deleterious influence of the railway on the potential value of the immediately adjoining land for residential purposes and the possible diminution in the value for subdivision purposes of the remaining lands must be appraised and from this must be deducted the amount by which the prospect of the coming of the railway increased the market value of the remaining lands. 7. That the practice of not allowing interest under s. 32 of the *Expropriation Act* to a former owner who was permitted to remain in possession after the expropriation in respect of the period for which he was permitted to remain in possession has no application in this case because it appears from the evidence that the lands expropriated were not being used at the time of expropriation, nor can the practice have any application to an award for injurious affection since the right to possession of land injuriously affected is not affected by the expropriation. MOLLY JAMES *et al* v. CANADIAN NATIONAL RAILWAY COMPANY 71

EXPROPRIATION.

Voir COURONNE, N° 12.

EXPROPRIATION ACT, R.S.C. 1952, c. 106, s. 9.

See REVENUE, No. 25.

EXPROPRIATION ACT, R.S.C. 1952, c. 106, ss. 31 and 32.

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EXPROPRIATION AND SALE OF LANDS OWNED BY PARTNERSHIP.
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EXPROPRIATION AND SALE OF REAL PROPERTY.
See REVENUE, No. 25.

FAILURE OF SUPPLIANTS TO GIVE NOTICE OF CLAIM TO CROWN.
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FAILURE TO KEEP PROPER LOOK-OUT.
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FEES ASSIGNED BY PHYSICIAN TO CORPORATION PURPORTEDLY EMPLOYING HIM ARE INCOME OF PHYSICIAN.
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FORFEITURE OF GOODS AUTOMATIC UPON UNLAWFUL IMPORTATION.
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See CROWN, No. 6.

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GOODS MAY BE FORFEITED ALTHOUGH NOT FOUND IN CUSTODY OF IMPORTER.
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GOODS NEED NOT BE DUTIABLE TO BE TAXABLE.
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GOODS TAXABLE ALTHOUGH NOT SOLD.
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GOODWILL OF COMPANY AND OF TRADE MARK INSEPARABLE WHERE TRADE NAME INCLUDES THE TRADE MARK.
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GOODWILL OF TRADE MARK IDENTICAL TO AND INSEPARABLE FROM THAT OF TRADE NAME WHERE TRADE MARK IS PART OF TRADE NAME.
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GOODWILL SEVERABLE FROM TRADE MARK
See TRADE MARKS, No. 4.

GOVERNMENT ANNUITIES ACT, IF VALID, NOT SUBJECT TO ONTARIO INSURANCE ACT.
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IMMATERIAL THAT APPELLANT MAY HAVE ARTIFICIALLY INFLATED STOCK EXCHANGE PRICE OF SHARES.
See REVENUE, No. 9.

IMMATERIAL WHETHER OFFENDING DEVICE BETTER OR WORSE THAN PATENTED INVENTION.
See PATENTS, No. 3.

INCOME.
See REVENUE, Nos. 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 31, 32, 33, 34, 36 and 37.

INCOME—Continued—Suite

INCOME FROM PROPERTY TRANSFERRED BY TAXPAYER TO WIFE.
See REVENUE, No. 29.

INCOME OR CAPITAL GAIN.
See REVENUE, Nos. 1, 3, 4, 7, 11, 13 and 18.

INCOME TAX.
See REVENUE, Nos. 1, 2, 3, 4, 5, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 36 and 37.

INCOME TAX ACT, R.S.C. 1952, c. 148.
See REVENUE, Nos. 1 and 11.

INCOME TAX ACT, R.S.C. 1952, c. 148, s. 3.
See REVENUE, No. 23.

INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 3 and 4.
See REVENUE, No. 13.

INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 3, 4, 6 and 139(1)(e).
See REVENUE, No. 26.

INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 3, 4, 12(1)(e) and 85B(1)(a) and (b).
See REVENUE, No. 30.

INCOME TAX ACT, R.S.C. 1952, c. 148. ss. 3, 4 and 139(1)(e).
See REVENUE, Nos. 10, 18, 21, 22, 24, 36 and 37.

INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 4, 46(4) and 58(3); S. of C. 1956, c. 39, s. 11.
See REVENUE, No. 17.

INCOME TAX ACT, R.S.C. 1952, c. 148, s. 5(1).
See REVENUE, No. 12.

INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 6(1)(b) and 139(1)(e).
See REVENUE, No. 27.

INCOME TAX ACT, R.S.C. 1952, c. 148, s. 8(1).
See REVENUE, No. 31.

INCOME TAX ACT, R.S.C. 1952, c. 148, s. 11(1)(a), REGULATION 1100(1)(c) and SCHEDULE B of CLASS 14.
See REVENUE, No. 32.

INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 11(1)(a), 20(5)(a) and (6)(g); REGULATION 1100(1)(a), (b) and (c) and SCHEDULE B, Clauses 13 and 14.
See REVENUE, No. 34.

INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 12(1)(a), 44, 46 and 56.
See REVENUE, No. 33.

INCOME TAX ACT, R.S.C. 1952, c. 148, s. 14(2).
See REVENUE, No. 9.

INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 16(1) and 23.
See REVENUE, No. 2.

INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 21(1) and (4) and 139(1)(e).
See REVENUE, No. 29.

INCOME TAX ACT, R.S.C. 1952, c. 148, s. 21(2).
See REVENUE, No. 20.

INCOME TAX ACT, R.S.C. 1952, c. 148, s. 39(1), (2) and (4).
See REVENUE, No. 19.

INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 46(1) and (4)(a) and (b), 139(1)(e) and 139(2)(b).
See REVENUE, No. 25.

INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 62(1)(s) and 76(1).
See REVENUE, No. 16.

INCOME TAX ACT, R.S.C. 1952, c. 148, s. 79.
See REVENUE, No. 15.

INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 85D, 85F(4) and 139(1)(w).
See REVENUE, No. 4.

INCOME TAX ACT, R.S.C. 1952, c. 148, s. 85E.
See REVENUE, No. 14.

INCOME TAX ACT, R.S.C. 1952, c. 148, ss. 85E, 85F(4) and 139(1)(w).
See REVENUE, No. 3.

INCOME TAX ACT, S. of C. 1948, c. 52, s. 12(1)(a).
See REVENUE, No. 5.

INCOME TAX ACT, S. of C. 1948, c. 52, s. 69(1).
See REVENUE, No. 16.

INCOME TAX ACT, S. of C. 1958, c. 32, s. 26(2).
See REVENUE, No. 16.

INCOME WAR TAX ACT, R.S.C. 1927, c. 97, s. 55, as amended by S. of C. 1944-45, c. 43, s. 15.
See REVENUE, No. 17.

INDIAN ACT, R.S.C. 1927, c. 98, s. 34(2).
See CROWN, No. 11.

INDIAN ACT, R.S.C. 1952, c. 149, ss. 18(1), 20, 24, 25(2), 28(1), 31(1), 37, 45(1), 48, 49, 50, 58(1)(c) and (3).
See CROWN, No. 11.

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INDIAN ACT, R.S.C. 1952, c. 149, ss. 34, 35 and 39 to 41.
See CROWN, No. 1.

INDIAN ACT, S. of C. 1951, c. 29, s. 18(1).
See CROWN, No. 11.

INDUSTRIAL DESIGN AND UNION LABEL ACT, R.S.C. 1952, c. 150, ss. 3-12, 14 and 15.
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INDUSTRIAL DESIGNS—
1. Copyright. No. 1.
2. Copyright Act, R.S.C. 1952, c. 55, s. 46. No. 1.
3. Design applied to ornamenting of an article. No. 1.
4. Design not limited to something applied to an article after it comes into existence. No. 1.
5. Design registrable under Industrial Design and Union Label Act. No. 1.
6. Design to be applied for the ornamenting of an article by making it in a particular shape or configuration. No. 1.
7. Exchequer Court Act, R.S.C. 1952, c. 98, s. 21. No. 1.
8. Fraudulent imitation of registered design. No. 1.
9. Industrial Design and Union Label Act, R S C. 1952, c. 150, ss. 3-12, 14 and 15. No. 1.
10. Infringement. No. 1.
11. Injunction against infringement of registered design. No. 1.
12. Liability of servant or agent for tort. No 1.
13. Novelty of design No. 1.
14. Originality of design. No. 1.
15. Ornamenting of an article. No. 1.
16. Photograph of article as drawing required by s. 4 of Industrial Design and Union Label Act. No. 1.
17. Reference from revised statute to form of legislation as enacted by Parliament. No. 1.
18. Registration. No. 1.
19. Registration of design to be applied by making an article in a particular shape or configuration not registration of article itself.
20. Sufficiency of proprietor's name on label as required by s. 14 of Industrial Design and Union Label Act. No. 1.

INDUSTRIAL DESIGNS—*Registration—Infringement—Copyright—Liability of servant or agent for tort—Design registrable under Industrial Design and Union Label Act—Ornamenting of an article—Design not limited to something applied to an article after it comes into existence—Design applied to ornamenting of an article—Design to be applied for the ornamenting of an article by making it in a particular shape or configuration—Registration of design to be applied by making an article in a particular shape or configuration not registration of article itself—Originality of design—Photograph of article as drawing required by s. 4 of Industrial Design and Union Label Act—Novelty of design—Reference from revised statute to form of legislation as enacted by Parliament—Sufficiency of proprietor's name on label as required by s. 14 of Industrial Design and Union Label Act—Fraudulent imitation of registered design—Injunction against infringement of registered design—Industrial Design and Union Label Act, R.S.C. 1952, c. 150, ss. 3-12, 14 and 15—Copyright Act, R.S.C. 1952, c. 55, s. 46—Exchequer Court Act, R.S.C. 1952, c. 98, s. 21.* This is an action for infringement of a registered industrial design of which the plaintiff company is the owner and for infringement of copyright in a work the copyright of which was vested in either the plaintiff company or the individual plaintiff. The industrial design was for a chesterfield sofa and was registered by the plaintiff company on November 20, 1962 as No. 187, Folio 25140. The plaintiff company has been in the business of manufacturing and selling upholstered furniture in Montreal since 1938 In 1960 it entered into an arrangement with the plaintiff, Tiengo, who had been employed until that time as a designer and illustrator by Cortini Furniture Manufacturing Limited, under the terms of which Tiengo designed upholstered furniture for the plaintiff company as an independent contractor, being paid a royalty on furniture designed by him and sold by the plaintiff company, which thereby was entitled to exclusive rights to and property in all such designs. In 1961 Tiengo designed a chesterfield sofa and a matching chair for the plaintiff company, prototypes of which were shown at the Toronto Furniture Show in January 1962, and of which the production and sale by the plaintiff company commenced in February 1962. The defendant, Edwards, had been employed by Cortini Furniture Manufacturing Limited when Tiengo was also employed by it, but in 1960 he became associated with Furniture Craft Corporation, which company began manufacturing and selling a chesterfield sofa and chair very similar in design to the plaintiff company's sofa in March or April 1962, but ceased doing so in January 1963. Shortly thereafter the defendant, Edwards, left that company and became associated with the defendant company, which, early in 1963, began manufacturing and selling sofas and chairs of virtually the same design as those previously manufactured by Furniture Craft Corporation, and is continuing to do so. *Held:* That it is no answer to a claim in tort that the tort feasor was acting as a servant or agent for some other person. 2. That the sort of design that can be registered under the *Industrial Design and Union Label Act* is a design to be "applied" to the "ornamenting" of an article; it is something that determines the appearance of an article,

INDUSTRIAL DESIGNS—Continued—Suite

or some part of an article, because ornamenting relates to appearance, and it must have as its objective making the appearance of an article more attractive because that is the purpose of ornamenting. It cannot be something that determines the nature of an article as such (as opposed to mere appearance) and it cannot be something that determines how an article is to be created, that is, it cannot create a monopoly in "a product" or "a process" such as can be acquired by a patent for an invention. 3. That there is nothing in the legislation that limits the type of design that may be registered to that providing for something that is applied to an article after the article comes into existence. 4. That s. 11 of the *Industrial Design and Union Label Act* contemplates a "design" being "applied" to the "ornamenting" of any article and is not restricted to a "design" being "applied" to an "article". 5. That when reference to the various classes of design as set out in s. 11 of the pre-Confederation Act of the Province of Canada, c. 21 of the Statutes of Canada, 1861, was omitted from the original industrial design legislation enacted by Parliament, c. 55 of the Statutes of Canada, 1868, which did not differ in its principal provisions from the present Act, that legislation applied to all the classes that were specified in the previous legislation as well as to any other class of "design" that is capable of being "applied" for the "purposes of ornamenting" any article, if any such other class there be. 6. That the design registered by the plaintiff company is not a design for sofas or for some particular kind of sofa but it is truly a "design" for the ornamentation of sofas that can be applied by making the sofas in certain shapes. The narrow but fundamental distinction is the difference between the shape of a thing and a thing of that shape. 7. That there can be registration under the Canadian Act of a design to be applied for the ornamenting of an article by making it in a particular shape or configuration. 8. That there can be no registration under the Canadian Act of an article of manufacture as such, but the registration of a design to be applied by making an article in a particular shape or configuration is not registration of the article itself. 9. That none of the authorities relied upon by the defendant establishes that a design applicable to the ornamenting of an article of manufacture by reference to shape or configuration is not good subject matter for design registration under the Canadian Act. 10. That the plaintiff company's design is a design applicable to the ornamenting of an article and is not a claim to an article itself within the meaning of the authorities. 11. That to be entitled to registration the "design" must be "original". 12. That there is some doubt as to whether a photograph of a sofa to the ornamenting of which the design has been applied is a "drawing" of the design as required by the first few sections of the *Industrial Design and Union Label Act*. 13. That the novelty of the sofa in the photograph filed with the plaintiff company's application for registration of the design in question is the peculiar shape or configuration of the back and the arms and the registered design, therefore, consists of a design applicable to the ornamenting of a four-legged sofa by creating its arms and back in the shape and configuration illustrated by the arms and back of the sofa in the photograph. 14. That the distinctive feature of the design in question is an oval-shaped back having the appearance of being free of the balance of the sofa, made to harmonize with the almost uninterrupted flow of the lines of the seat and arms, the arms having been constructed as slight curves at angles of about 60° from the line of the seat. 15. That there is such a radical difference between the design in question and the design of any other previously existing furniture to which attention has been directed that the submission that the design was not original must be rejected. 16. That in the case of ambiguity in the provisions of a statute arising from the work of a statute revision commission it is legitimate to refer back to the form of the legislation in which it was enacted by Parliament. 17. That it is a sufficient compliance with the provisions of s. 14 of the *Industrial Design and Union Label Act* for the plaintiff company to use a name on the label required to be attached to the article such that it communicates to those who might be interested, who, in fact, the proprietor is, and, in furniture circles in Canada, the word "Cimon" would indicate the plaintiff company. 18. That while there are certain differences between the plaintiff company's registered design and the designs of the defendants' allegedly infringing articles, there is no doubt that the design of the sofas produced by the defendants is the plaintiff company's registered design and, if it is not, it is certainly "a fraudulent imitation thereof". 19. That under s. 15 of the *Industrial Design and Union Label Act* the plaintiff company, as proprietor of the registered design that has been infringed, is entitled to the damages that it has sustained by reason of the infringement. 20. That although there is no provision in the *Industrial Design and Union Label Act* for an injunction, this is a proper case for an injunction and the Court has jurisdiction to grant it under s. 21 of the *Exchequer Court Act*. 21. That in view of the determination that the plaintiff company's design is capable of being registered under the *Industrial Design and Union Label Act* and the plaintiffs' concession that if such were the case, they would have no cause of action for infringement of copyright because of s. 46 of the *Copyright Act*, the plaintiff's

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to the defendant's brassière frames such that the minute difference is undeserving of the privileged level of monopoly. 2. That a scrutiny of the Pons Patent of 1931 discloses to any one skilled in the art, information comprehensive enough to relegate the claims of the defendant's patent to the status of workshop improvements. 3. That the defendant's Letters Patent No. 525-962 issued June 5, 1956 by the Canadian Patent Office are null and void. ROSS F. ROWELL v. S. & S. INDUSTRIES, INC. . 118

2.—*Practice—Patent Act, R.S.C. 1952, c. 203, s. 41(3)—Compulsory licence—Appeal under s. 41(3)—Application to suspend operation of licence pending appeal—Authority of Court to affect operation of Order of Commissioner of Patents pending appeal therefrom.* This is an application by the appellant to stay proceedings in relation to the grant of a compulsory licence under s. 41(3) of the *Patent Act* by suspending the operation of the licence pending the disposition of an appeal to this Court from the decision of the Commissioner of Patents to grant the licence. *Held:* That it cannot be concluded that there is a probability that this Court will dispose of the appeal upon the ground that the Commissioner erred in not forming the opinion that the risk of danger to the public inherent in permitting the respondent to manufacture the patented substance was good reason for refusing the licence, and this is the only ground advanced by the appellant upon which the Court would consider granting a stay, if it has authority do do so. 2. That it is not established that this Court, in an appeal under s. 41(3), has any authority to affect the operation of the Commissioner's Order prior to disposition of the appeal. 3 That the application is dismissed. HOFFMAN-LA ROCHE LTD. v. BELL CRAIG PHARMACEUTICALS DIVISION OF L. D. CRAIG LTD. 179

3.—*Infringement—Validity—Significance of commercial success of patented invention with respect to validity—Range of approximation afforded a patentee—Definition of monopoly in claims of patent—Duty imposed on patentee by s. 36(2) is heavy one—Theory of substance or pith and marrow—Determining meaning of claims—Construing the claims of a patent—Comparison of allegedly infringing article to be with the claims of the patent not with plaintiff's product—Verification of plaintiff's product as embodying the claims of the patent—Prior art to be compared with claims of the patent, not with plaintiff's product—Novelty—Anticipation—Obviousness—Lack of invention—Variation from strict wording of claims—Interpretation of meaning of specific words in claims—Object invented may be considered at time subsequent to its manufacture in certain cases—Presumption of validity—Prior use or knowledge available to public—Prior invention genuinely given to Public—prima facie validity of patent does not extend beyond application date—Burden of proving earlier date of invention—Certified copy of prior application for U.S. patent as evidence of earlier date of invention—Documents as evidence of anticipation—Prior use as evidence of anticipation—Experimental use as prior use—Nature of prior use required to defeat patent enjoying great commercial success—Interpretation of claims of combination patent—Combination patent—Textual infringement—Infringement where variations in offending article do not affect substance of the patent—Mechanical or chemical equivalency—Doctrine of taking the substance of a patent—Immaterial whether offending device better or worse than patented invention—Liability of director of company for its infringing acts.* This is an action brought by the plaintiff as owner by assignment of Canadian patent No. 468,826 issued on October 17, 1950 for infringement thereof by the defendants, all of the defendants save Gouger Saw Chain Co. having been added as parties defendant by order under Rule 228 of the Rules of this Court. The defendants claim no infringement and that the patent in suit is invalid because it has been anticipated, lacks inventiveness and the claims are so worded that they describe an inoperable device. The invention relates to the shape or configuration of the tooth of a saw chain particularly adapted for cutting wood. The evidence established that the plaintiff's saw chain, referred to as the "chipper chain", is superior to any saw chain previously available and that because of its cutting effectiveness and ease of maintenance in the field it has practically swept the other types of saw chain off the market and has attained tremendous commercial success in Canada as well as in the United States. *Held:* That it now appears to be accepted in patent matters that a director of a company can be held liable in some cases with and for the company for its infringing acts 2. That the commercial success of a patented invention has significance with respect to the validity of the patent only if it is shown that the success is due to the invention and not to extraneous matters 3. That the law affords a patentee a certain range of approximation providing the language of the claims of the patent and the use to which the invention is adapted so permit. 4. That the claim or claims in a patent alone define the monopoly where the patentee has a statutory duty and an obligation to state what is the invention he desires to protect. 5. That although the duty placed on the patentee by s. 36(2) of the *Patent Act*, to claim clearly, distinctly and explicitly that which he claims is his exclusive property, is a heavy one to discharge and should not be allowed to be obscured by the theory of substance or pith and marrow, it must be tempered by adding that the approach of the Court must be to look at what the inventor did and

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what his invention achieved. 6. That although the claims define the monopoly, in determining what these claims mean, the specifications at large must be considered and the whole document read. 7. That when construing the claims of the patent one must divorce one's mind from the prior art and look at what the claims mean by their words and to determine whether there is infringement or not one must compare the defendant's allegedly infringing article not with the disclosure nor with what the plaintiff is doing in the market place but with the claims of the patent. It is an illegitimate approach to compare the defendant's article with the plaintiff's article, unless the latter has been verified as embodying the claims of the patent. 8. That when considering validity, either from the standpoint of novelty, which is anticipation, or obviousness, which is lack of invention, it is necessary to construe the claims to see what invention, if any, they define, and then the prior art put forward should be considered, but when looking at the prior art one should not compare it with the plaintiff's structure as made and sold in the market place but with the claims of the patent unless the plaintiff's structure has been verified as being in accordance with the claims of the patent. 9. That the words "substantially at right angles" as used in claim I of the patent in suit must be read in the light of the disclosure and the drawings as they appear in the patent and if that is done it becomes apparent that they cannot mean precisely at right angles, and the evidence that variation in this respect would have no effect on the operation of the saw chain confirms that a relatively wide interpretation should be given to the word "substantially". 10. That applying the ordinary rules of interpretation as to the meaning of the word "balance" as used in claim I and looking at it from the viewpoint of the competent skilled workman in the art at the date of the patent and the meaning ascribed to that word in the prior art it can be seen that it is a relative term which means that the tooth is so constructed that it gives stability and smoothness as well as all those things which enable the tooth during the whole of its working life to give a satisfactory performance. 11. That the proposition that the object invented should be considered in its condition at the time of manufacture and not at some later time after it has been used has no application in this case because the saw tooth in question was conceived and described bearing in mind that it was to have a working life during which constant and repeated sharpening would be required, and because of this the condition in which this tooth becomes after use is a very important consideration of the invention. The character of the device at the time of manufacture must be considered in this case having regard to the object and the use of the invention during its existence. 12. That the saw teeth produced by the plaintiff and sold in the market embody the invention as claimed in the patent in suit, so that the saw tooth manufactured by the defendants may now be compared with what the plaintiff has been selling in the market. 13. That the defendants not only have the burden of setting aside the presumption of validity of the plaintiff's patent as set out in s. 48 of the *Patent Act* and which covers all the requirements of a patent such as novelty, utility and inventiveness, but also, when they allege prior use or knowledge under s. 28(1)(*a*) of the Act, they must not only establish this prior use or knowledge but also that it was made available to the public as required by s. 63(1)(*a*) of the Act. 14. That it is not sufficient for one to invoke s. 63(1)(*a*) of the *Patent Act* to defeat a Canadian patent by alleging prior invention. He must establish that such invention was genuinely given to the public before the application for the patent in suit was filed. 15. That if the patentee seeks to bring his date of invention earlier than the date which appears on the face of his patent and to which he is entitled by the words of the Patent Office he has the burden of so doing and the *prima facie* validity of his patent does not go beyond the application date unless an earlier date is proven by cogent evidence. 16. That when the plaintiff seeks to establish a date of invention earlier than the date of application for the patent in suit, it is sufficient for this purpose for him to introduce in evidence a certified copy of a prior application for a United States patent where such application identifies the inventor by name and address as the same person as the inventor in the Canadian application and both applications deal with the same invention. If the certified copy of the prior U.S. application is not contradicted by evidence, the plaintiff will have succeeded in establishing the date of the U.S. application as the date of first invention. 17. That when documents are brought forward as anticipations, they must be read singly and must in no way be combined together to form a mosaic of extracts. 18. That with respect to evidence of prior use as anticipation, the test should be even stricter than in the case of written publications because in the latter case there is something concrete to go on, a document or a writing, but when dealing with prior use, one is concerned with memory. 19. That fortuitous or experimental use which does not lead to the invention going to the public cannot be accepted as prior use. 20. That in the case of an invention which has realized great commercial success, the evidence of prior use must be of such a character as to leave no doubt in the mind of the Court that it was the invention as invented that was used and no other, and any difference, even of a minor nature, would not be a prior use sufficient to defeat a valuable patent.

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21. That in the case of a combination patent the claims should be given a reasonably restrictive interpretation allowing them to encompass a reasonable manifestation of the invention, so that it may be possible to find that the invention has not been anticipated without having to limit the substantiality of the invention in protecting it against infringers. 22. That in a combination patent it is not permissible to characterize the invention as a series of parts because the invention lies in the fact that they were put together and in the present case, the invention may well reside in the very idea of arranging a saw tooth so that its configuration will allow not only ease of filing and maintenance but also will give excellent cutting. 23. That the apparently trifling change from the prior art which led to the solution of the problems of filing the saw teeth in the field while permitting the saw chain to cut satisfactorily and the considerable commercial success resulting therefrom confirms that the invention in suit was a forward step of great importance in the trade and definitely stamps it as being an invention of great importance. 24. That the claims must be looked at by the competent skilled workman at the date of the patent with "a mind willing to understand, not by a mind desirous of misunderstanding". 25. That the matter of infringement can be considered from two standpoints. The claims having been properly construed according to the canons of construction, is the offending device within the text of the claims. If so, this is called textual infringement and this is the end of the matter. However, if the device is not within the precise wording of the claims, it may nevertheless still be an infringement if the substance or pith and marrow of the invention has been taken on the basis that the property in a patent is not to be taken away by someone making variations which do not affect the substance. 26. That the doctrine of mechanical or chemical equivalency is only one facet of the larger doctrine of taking the substance of an invention and it therefore appears that the substance may be taken when the infringer, using small variations of dimensional details only to distinguish his device from that of the plaintiff, produces a device which performs exactly the same function. 27. That it is immaterial whether a device is better or worse than the invention of the plaintiff, but if there is nothing functionally different, it is an infringement. 28. That the defendant's device will infringe the plaintiff's patent where they both work satisfactorily, there is no difference in the main elements of the structures, none in the operation and both perform the same function in the same way. 29. That the defendants have infringed the plaintiff's rights under the claims in suit.

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4.—*Patent Act, R.S.C. 1952, c. 203, s. 41—Compulsory licence—S.41(3) aims at freeing new process from absolute control of patentee—Applicant for licence required by Patent Act to prove competence to produce food or medicine in question—Good reason for refusing licence—Limits to discretion of Commissioner of Patents under s. 41(3)—Public interest and interests of patentee—Patentee not to challenge the adequacy of the teaching of his specification—No duty on Commissioner to investigate questions of public safety—Procedure on applications under s. 41(3) to be established by Commissioner—Commissioner not required to hold oral hearing or hear oral argument—Amount of royalty.* The appellant appealed from a decision of the Commissioner of Patents granting to the respondent a licence under s. 41(3) of the *Patent Act* to use for the preparation or production of certain sedative drugs an invention patented by the appellant. The royalty to be paid by the respondent was fixed by the Commissioner at 12½ per cent of the net selling price of the crude product before processing for patients' consumption. The grounds of appeal were that the Commissioner's decision was made without proper investigation of the relevant facts and without granting the appellant's demands for an opportunity to cross-examine a deponent whose affidavits accompanied the respondent's application and reply and for a hearing at which oral evidence might be offered and oral argument presented. The appellant alleged that the respondent was not capable of using the invention and manufacturing the product safely and of producing a medicine that was safe for the public. *Held:* That the problem posed for the Commissioner when dealing with an application under s. 41(3) of the *Patent Act* is whether the public interest in having the food or medicine available at the lowest possible price consistent with due reward to the inventor and the public interest in affording to interested persons the opportunity to devise improvements in the patented process and to use them immediately will be better served by refusing the licence than by granting it. 2. That apart from the question of the public interest, the interest of the patentee is a proper matter to be taken into account in the sense that the Commissioner may think that the patentee should be entitled to assurance that the royalty or other consideration for the licence will be paid and where the circumstances indicate the need for it, the unwillingness of the applicant to secure the payment may also be good reason for refusing an application. 3. That in this case the patentee's counterstatement contained nothing which the Commissioner was under any necessity to regard as good reason for instituting an inquiry or for refusing a licence. 4. That the substantial requirements of justice have not been violated by the Commissioner's refusal in the circumstances to accede to the appellant's demand for an

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oral hearing and that the appellant's submission that in the circumstances it was incumbent on the Commissioner in the public interest to grant the appellant's demand for an oral hearing or for an opportunity to cross-examine on the applicant's affidavit is unfounded. 5. That there was no legal necessity for the Commissioner to satisfy himself of the immediate competence of the applicant to manufacture and store the product and the capability of the applicant to do at once everything necessary to meet such standards as the patentee may wish to see observed in the use of its invention is beside the point, such matters being governed not by the patentee but by the law of the land including the provisions of s. 41 of the *Patent Act*. 5. That as there is nothing in the record upon which to base or justify a finding as to the amount of royalty to be paid by the licensee, this matter will be referred back to the Commissioner. HOFFMAN-LA ROCHE LTD. v. DELMAR CHEMICALS LTD..... 611

5.—*Infringement—Validity—Process claim—Utility—Specification of patent—Inventiveness of application of known methods to known materials—Must be both new and useful to support invention—Product claim depending on process claim—Validity of process claim dependent on all or substantially all of products of class produced thereby possessing previously unknown usefulness—Utility of products of process claim consisting of application of known method to known material—Application of known method to limitless class of known materials to produce limitless class of expected products some of which may possess utility—Inventiveness where unexpected utility of certain tested members of the class of products produced forms foundation for sound prediction that all or substantially all members of class possess the utility—Invalidity of patent claim for process for making whole class of substances when no such broad invention has been made despite utility of some of products of class—Distinction between utility of products of invention and utility of specific substances of the class—Burden of proving that processes claimed would not produce whole class of useful substances where class composed of limitless number of substances—Pleading objections to patent—Patent Act, R.S.C. 1952, c. 203, s. 41(1).* The plaintiffs are respectively the exclusive licensee and the owner of ten patents, the first of which issued on a parent and the remainder on divisional applications for patents in respect of an invention entitled "Manufacture of New Sulphonyl Ureas". They allege infringement on the part of the defendants of claim 10 in the first nine patents and claim 13 in the last one, the alleged acts of infringement being the sale and use by the defendants of the substance known generically as "tolbutamide", which is the compound claimed by the said claims. The defendants admit the alleged use and sale of the compound "tolbutamide" but they deny infringement and they also plead that claim 1 in each patent is invalid because *inter alia* not all products produced by the process have utility as claimed, and claim 10 in the case of each patent (13 in the last patent) is invalid because *inter alia* claim 1 was necessary to support it. *Held:* That the specifications of the patents in issue should be regarded as purporting to disclose several different inventions, one or more pertaining to a class or classes of substances, another to the single substance known as tolbutamide and several others to the particular substances claimed in claims 11 to 19 inclusive (14 to 21 in the last patent). This is so because the disclosure does not purport to be one of an invention of tolbutamide alone or of it and a process or processes for its preparation but on the contrary purports to relate to a class of sulphonyl ureas of which tolbutamide is one member, and it proceeds to outline in general terms methods by which ureas of the class may be produced and to assert utility for the substances of the class. 2. That there is nothing inventive in applying known methods to known materials or kinds of materials even if no one has previously applied the methods to the particular materials and even if the result is a new product. To have a patentable invention the products in such a case besides being new must be useful in the patent sense and only if they are both new and useful can they and the process for producing them be the subject of a patent. 3. That in the case of each patent the claim sued on is a claim for the substance known as tolbutamide when made by the process of claim 1 or an obvious chemical equivalent. In each case this is a claim to which s. 41(1) of the *Patent Act* applies and assuming validity in other respects such a claim can be valid only if it is accompanied by a valid process claim and is limited to the substance when produced by that process or by an obvious chemical equivalent. Accordingly, in the case of each patent the validity of the claim sued on depends on the validity of claim 1. 4. That claim 1 in each of the patents cannot be supported as a valid claim unless all, or substantially all, members of the class of sulphonyl ureas defined in them possess some previously unknown usefulness. 5. That even if claim 1 in each of the patents were read as embracing only those members of the class which as a matter of practical chemistry or of commercial manufacture could be made, it would still be necessary to the validity of the claim for all, or substantially all, of such members to possess some previously unknown usefulness. If this utility is not common to all, or substantially all, of the members of the class, the process claimed in claim 1, consisting as it does of the application of a known method to known materials or to materials having known chemical features, does not represent an invention of a process

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at all, let alone a patentable invention of a process. 6. That a patent claim in respect of an invention, the embodiments of which are stated to include a process for the making of a whole class of substances, when no such broad invention has been made, will purport to confer an exclusive property in something which the inventor has not invented, and since the *Patent Act* authorizes the grant of a patent only for an invention which the inventor has made, such a claim will be invalid. Nor can the utility of some of the products of the class save the claim. 7. That in considering the evidence with respect to the question of the utility of the sulphonyl ureas of the class defined in claim 1 of the patents, it is important to distinguish between the utility of "the products of the invention", that is to say, insofar as claim 1 is concerned, the whole group of sulphonyl ureas included in the definition of the claim, and the utility of the specific substances of the class, including tolbutamide, which are cited as examples in the specifications or are described in the evidence. 8. That it is highly improbable that all, or substantially all, of the members of the infinitely large class defined in claim 1 of the ten patents have either the blood sugar lowering activity to a useful extent or the freedom from toxicity or harmful side effects necessary to render them useful and that there was accordingly no invention as claimed in claim 1 of each of the patents and claim 1 is therefore invalid. 9. That because claim 1 of each of the patents is invalid claim 10 of the first nine patents and claim 13 of the last patent are invalid as well. 10. That while the objections to the patent are pleaded in a confusing manner, the objection which has been sustained is raised, and is thus open to the defendants, by the plea that claims 1 and 10 of the first nine patents and claims 1 and 13 of the last patent are invalid because there was no invention having regard to the common knowledge of the art. 11. That the action is dismissed. HOECHST PHARMACEUTICALS OF CANADA LIMITED *et al* v. GILBERT & COMPANY *et al* 710

PAYMENT MADE TO OBTAIN FRANCHISE OR PURCHASE GOODWILL.
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PERMITTED USE OF TRADE MARK BY REGISTERED USER DEEMED TO BE USED BY OWNER THEREOF.
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PHONETIC SIMILARITY BETWEEN TRADE MARKS.
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PHOTOGRAPH OF ARTICLE AS DRAWING REQUIRED BY s. 4 OF INDUSTRIAL DESIGN AND UNION LABEL ACT.
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PHYSICIAN ENTERING INTO CONTRACT OF EMPLOYMENT WITH LIMITED COMPANY.
See REVENUE, No. 20.

PHYSICIAN PRECLUDED FROM PRACTICING MEDICINE AS AGENT OF A BODY CORPORATE.
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PIRACY OF TRADE MARK MAY RESULT IN ITS LOSS TO OWNER.
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PITH AND SUBSTANCE OF LEGISLATION.
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PRACTICE—

1. Application for issue of Writ of Attachment. No. 2.
2. Application to commit. No. 2.
3. Breach of injunction. No. 2.
4. Certiorari. No. 1.
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6. Degree of proof required on contempt application. No. 2.
7. Earliest date of invention relied on by plaintiff includes all dates earlier than application date on which plaintiff to rely. No. 3.
8. Exchequer Court Act, R.S.C. 1952, c. 98, s. 29(c). No. 1.

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9. Injunction binding only on defendants in action. No. 2.
10. Joinder of parties defendant. No. 3.
11. Jurisdiction of Exchequer Court. No. 1.
12. Meaning of "officer of the Crown" as used in s. 29(c) of the Exchequer Court Act. No. 1.
13. Multiplicity of proceedings. No. 3.
14. Practice of this Court regarding evidence of tests and experiments conducted *pendente lite* or *ex parte*. No. 3.
15. Rule 22A of Rules of Court. No. 3.
16. Rule 138 of General Rules and Orders. No. 4.
17. Rule 228 of Rules of Court. No. 3.
18. Use of examination for discovery of individual defendant as officer of co-defendant company against him personally. No. 4.
19. Use of examination for discovery of individual defendant as officer of co-defendant company under Rule 138. No. 4.
20. Validity of patents open to attack by persons not parties to action despite judgment. No. 2.
21. Writ of certiorari. No. 1.

PRACTICE.—*Certiorari—Writ of certiorari—Jurisdiction of Exchequer Court—Meaning of "officer of the Crown" as used in s. 29(c) of the Exchequer Court Act—Exchequer Court Act, R.S.C. 1952, c. 98, s. 29(c).* This is an application for a writ of certiorari addressed to the Minister of Transport. *Held:* That this Court is a statutory Court and has no jurisdiction to grant an order for a writ of certiorari unless such jurisdiction has been conferred upon it by statute. 2. That a Minister of the Crown is not an officer of the Crown within the meaning of s. 29(c) of the *Exchequer Court Act*. 3. That the application is dismissed. JOSEPH EMILE POULIOT v. MINISTER OF TRANSPORT...**330**

2.—*Application for issue of Writ of Attachment—Application to commit—Breach of injunction—Contempt of order of Court—Injunction binding only on defendants in action—Validity of patents open to attack by persons not parties to action despite judgment—Degree of proof required on contempt application.* This is an application for an order giving leave to issue a Writ of Attachment against Raymond Payer or, in the alternative, to commit the said Raymond Payer, on the grounds that he is in breach of an injunction granted by this Court or, in the alternative, that he has acted in contempt of an order thereof. The injunction in question was part of a consent judgment delivered in a patent infringement action in which the applicant was one of the plaintiffs but to which the said Raymond Payer was not a party. The applicant contended that R. Leo Payer, one of the defendants in the patent infringement action, committed a breach of the injunction and that the respondent, Raymond Payer, aided and abetted him therein and is therefore in contempt of Court or, in the alternative, that the respondent, Raymond Payer, is in contempt of Court in that he assisted or aided in carrying on activities which would have been an infringement of the invention had they been carried on by the said defendant, R. Leo Payer. *Held:* That, notwithstanding the form of the injunction it is clear that it is binding only on the defendants in the action. 2. That, having regard to the nature of the applicant's contentions, the defendant in the infringement action, R. Leo Payer, should have been advised of the substance of the contentions and have been given an opportunity of being heard. 3. That the validity of the patents referred to in the judgment in this case is, notwithstanding that judgment, open to attack by any person other than the parties bound by that judgment, and the respondent, Raymond Payer, is therefore entitled to make such an attack. 4. That even if it had been established that R. Leo Payer had aided the respondent, Raymond Payer, in carrying on the manufacture and sale of products embodying the patented inventions mentioned in the judgment, it does not follow that Raymond Payer would have been guilty of contempt. 5. That the application is dismissed. PREFORMED LINE PRODUCTS CO. *et al* v. PAYER ELECTRICAL FITTINGS CO. LTD. *et al*.................. ..**371**

3.—*Rule 228 of Rules of Court—Joinder of parties defendant—Multiplicity of proceedings—Rule 22A of Rules of Court—Earliest date of invention relied on by plaintiff includes all dates earlier than application date on which plaintiff to rely—Practice of this Court regarding evidence of tests and experiments conducted pendente lite or ex parte. Held:* That it is in the interests of justice that multiplicity of proceedings be avoided particularly when the subject matter is a wasting asset such as a patent. 2. That the purpose of Rule 22A of the Rules of this Court is to allow the opposite party to know not only the earliest date of invention upon which his opponent intends to rely, but also all the dates upon which he intends to rely, together with "the nature of the acts upon which he intends to rely for the purpose of establishing the same", and this is so in order that he may be fully informed so as to be able to decide whether or not he should contest the proceeding and also to insure that he will not be taken by surprise. 3. That the practice in this Court seems to have been that evidence of tests and experiments conducted *pendente lite* without notice to the other side and an opportunity being given to attend should not be considered, and this is a salutary rule. In any event, tests and experiments conducted even before trial in the presence of the other party are much more probative than if conducted *ex parte*. OMARK INDUSTRIES (1960) LTD. v. GOUGER SAW CHAIN CO. *et al*..........**457**

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4.—*Rule 138 of General Rules and Orders—Use of examination for discovery of individual defendant as officer of co-defendant company against him personally—Use of examination for discovery of individual defendant as officer of co-defendant company under Rule 138. Held*· That while the answers given by the defendant, Edwards, on his examination for discovery as an officer of the defendant company could have been used as evidence against him personally, to the extent that they consisted of admissions against his interest, to constitute such evidence they had to be put in at the trial as part of the case against him and this could have been done by way of admissions obtained pursuant to a notice to admit facts or by way of evidence from the reporter or other person who was present at the examination for discovery. 2. That the use of the examination for discovery of the defendant, Edwards, as an officer of the defendant company, under Rule 138 binds only the defendant company. CIMON LTD. *et al* v. BENCH MADE FURNITURE CORP. *et al*...811

PRACTICE OF MEDICINE.
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PRIOR USE OR KNOWLEDGE AVAILABLE TO PUBLIC.
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PURCHASE AND SUBSEQUENT SALE OF UNIMPROVED LAND.
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PURCHASE OF A BUSINESS.
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PURCHASE OF ASSET A SPECULATION LOOKING TO RESALE.
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PURCHASE OF ASSET TO CREATE AN INVESTMENT.
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REVENUE—*Income tax—Income Tax Act, R S.C. 1952, c. 148—Income or capital gain—Purchase of second mortgages at a discount and held to maturity—Whether purchased in course of a business or as investment—Whether profit realized on maturity income from a business.* The appellant, a solicitor practising in Toronto, Ontario, was during the years 1957 to 1960 a silent partner in Power Investments and Mortgage Company, which carried on business as a mortgage broker next door to the appellant's law office in a building owned by the appellant. The appellant also had an interest in Gledhill Investment Company, a partnership of three limited companies, namely, Sandbill Investments Limited, all of the shares of which were owned by the appellant, Trebwall Investments Limited, all of the shares of which were owned by the appellant's brother-in-law, and Sepal Investments Limited, all of the shares of which were owned by the appellant's brother. During the years 1957 to 1960 inclusive the appellant purchased fifty-seven second mortgages at discounts as high as fifty per cent, all of which he held until maturity. The evidence disclosed that a substantial part of the appellant's income was derived from sources other than his law practice. The respondent assessed the gain made by the appellant on the second mortgages as income. *Held:* That the second mortgages were purchased by the appellant as a means of income, in the course of a business, and were not purchased as investments. 2. That the appeal is dismissed. DAVID WALFISH v. MINISTER OF NATIONAL REVENUE........ 8

2.—*Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 16(1) and 23—Transfer of rights to income by taxpayer to company.* In 1959 the appellant made an arrangement between Luria Bros., Inc., a large U.S. scrap metal dealer, and International Iron & Metal Co., Limited, a company owned by the Goldblatt family and in which the appellant was a small shareholder, which resulted in substantially improved business operations for International Iron & Metal Co., Limited. The arrangement also led to the payment by Luria Bros. Inc. of a finder's fee or middleman's commission to Cosmopolitan Import & Export Limited, a wholly owned subsidiary of Cosmopolitan Scrap Metal Brokers (Bahamas) Limited, the shares in the latter company being listed as owned by persons in the accounting firm of Peat, Marwick, Mitchell & Company. Cosmopolitan Import & Export Limited had been incorporated in 1946 but had remained inactive until 1958, shortly before payment of the said commissions to it commenced. Cosmopolitan Scrap Metal Brokers (Bahamas) Limited had invested certain of its monies in oil paintings which were stored in the appellant's home. Cosmopolitan Import & Export Limited had no regular employees, except the appellant, who, although employed full time as General Manager of International Iron & Metal Co , Limited, alleged that he did the work resulting in the payment of the commissions in his free or leisure time during which he was working for Cosmopolitan Import & Export Limited and not for himself. Cosmopolitan Import & Export Limited had no office of its own other than the address of the office of the lawyers of the appellant. The appellant alleged that the part of the commissions received and kept by Cosmopolitan Import & Export Limited was income of that Company and not income of himself. *Held·* That Cosmopolitan Import & Export Limited was activated in 1958 for the express purpose of receiving the commissions from Luria Bros. Inc. and it was not actively engaged in a business, except incidentally, which had nothing to do with the earning of the commissions. 2. That the commissions paid to Cosmopolitan Import & Export Limited were income in the hands of the appellant under either s. 16(1) or s. 23 of the *Income Tax Act* 3. That the appeal dismissed. MARVIN E. GOLDBLATT v. MINISTER OF NATIONAL REVENUE... ..12

3.—*Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 85E, 85F(4) and 139(1)(w)—Income or capital gain—Sale of chattel mortgages to another finance company—Inventory—Receivables—Right to receive a receivable not in itself a receivable.* The appellant had been carrying on the business of lending money on the security of chattel mortgages, when, in 1958, it sold all its chattel mortgages to Industrial Acceptance Corporation Ltd. for the total amount owing thereon at the date of sale plus $8,000. The appellant then surrendered its small loan licence and took steps to surrender its charter but could not do so because it could not obtain an income tax clearance. The appellant later

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commenced business again for an entirely different purpose and with certain new shareholders and new financing. The issue on appeal was whether the above mentioned sum of $8,000 was capital profit or income of the appellant. *Held:* That the sale of chattel mortgages was not made for any other purpose than to enable the appellant to go out of the finance business. 2. That s. 85F(4) of the *Income Tax Act* is not applicable to the transaction in question because part of what was sold by the appellant was the right to receive a receivable, and the right to receive a receivable is not in itself a receivable. 3. That notwithstanding the definition contained in s. 139(1)(*w*) of the *Income Tax Act* the chattel mortgages sold by the appellant were not, for the purpose of the *Income Tax Act*, inventory. 4. That section 85E of the *Income Tax Act* has no application to the facts of this case. 5. That the sum of $8,000 is capital profit and not income. 6. That the appeal is allowed. DON FINANCE CO., LTD. v. MINISTER OF NATIONAL REVENUE.................. 17

4.—*Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 85D, 85F(4) and 139(1)(w)—Income or capital gain—Realization sale—Sale of chattel mortgages and conditional sales contracts to another finance company—Inventory—Receivables—Whether sale of receivables or right to receivables.* In 1958 the appellant, which had been carrying on the business of purchasing conditional sales contracts from motor vehicle and appliance dealers and of lending money to individuals on the security of chattel mortgages, sold the majority of its conditional sales contracts and chattel mortgages to Industrial Acceptance Corporation Ltd. under a contract by the terms of which the sale was with recourse to the appellant in case of default. The evidence established that there was a *bona fide* intention on the part of the appellant to go out of the conditional sales and chattel mortgage business because of the conditions then obtaining which made it no longer a financially satisfactory business for the appellant. The issue on appeal was whether the net gain obtained by the appellant on the sale was capital profit or income. *Held:* That the sale in question was a realization sale and not a sale in the ordinary course of the appellant's business. 2. That the net excess proceeds of the sale were capital receipts, it being a sale of a right to receivables and not a sale of receivables. 3. That s. 85F(4) of the *Income Tax Act* refers only to cash basis taxpayers and not accrual basis taxpayers and is accordingly inapplicable insofar as the conditional sales contracts are concerned. 4. That s. 85D of the *Income Tax Act* deals with the sales of receivables by accrual basis taxpayers. 5. That s. 85F(4) deals only with income receivables and not with receivables representing capital loans repayable. 6. That what was sold in this case was not inventory within the meaning of s. 139(1)(*w*) of the *Income Tax Act*, and the definition of inventory in that section should not be given the broadest meaning that could be attached to it but the whole Act should be looked at to give it a reasonable and practical meaning, especially when there are other sections of the Act which in themselves constitute a complete code and which override the definition contained in s. 139(1)(*w*) insofar as it is repugnant to them. 7. That the appeal is allowed. TED DAVY FINANCE CO. LTD. v. MINISTER OF NATIONAL REVENUE.... 20

5.—*Income tax—Income Tax Act, S. of C. 1948, c. 52, s. 12(1)(a)—Sales Agency—Sales commissions—Written contracts to be given their plain ordinary meaning—Whether money paid to third party under contract a current business expense or a capital outlay—Whether legal costs incurred in resisting claim of foreign Government to tax a deductible expense—Dispute as to taxability as opposed to quantum of tax claimed.* In 1943 the respondent entered into a contract with Steep Rock Iron Mines Limited, by the terms of which it became the exclusive sales agent to sell all the ore mined by Steep Rock, for which it was to receive a commission of two per cent of the value thereof. The agreement also provided for the respondent to purchase shares of Steep Rock and to lend it money under certain conditions. In 1944 the respondent entered into an agreement with Transcontinental Resources Limited, in which reference was made to the 1943 agreement with Steep Rock, and by the terms of which Transcontinental agreed that upon the respondent purchasing a certain number of Steep Rock shares at a specified price, Transcontinental would buy a certain number of them from the respondent at a specified price. By the terms of this agreement the respondent agreed to pay Transcontinental a sum equal to twenty per cent of all monies paid to the respondent by Steep Rock during each year of the agency under the agency contract. The appellant assessed the payments made by the respondent to Transcontinental under the second agreement, which amounted to twenty per cent of the commissions received by the respondent from Steep Rock, as income of the respondent, whereas the respondent alleged that the execution of the two contracts and the circumstances leading thereto established the relationship of partnership or joint venture between the respondent and Transcontinental, or that the monies received by the respondent from Steep Rock were impressed with a trust to the extent of twenty per cent thereof in favour of Transcontinental or, finally, that the payments to Transcontinental by the respondent were an outlay or expense made by it for the purpose of gaining or producing income from its business. By way of cross-appeal the respondent claimed expenses incurred in successfully resisting payment of United States income

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and capital gains tax as an allowable deduction in computing its taxable income. *Held:* That the two contracts under review must be given their plain, ordinary meaning and there is nothing in the language thereof from which a partnership relationship, a joint venture or a trust can be inferred. 2. That the purchase by the respondent of Steep Rock shares was an investment of capital and the money paid to Transcontinental by the respondent in consideration of Transcontinental buying some of these shares from the respondent was equally a capital outlay and cannot be regarded as a current expense of the respondent's business. 3. That legal costs incurred in disputing a claim for income tax are not an allowable deduction in computing business profits and this is so whether the dispute relates to the amount of the taxable profit or to the taxability of the profit at all, and whether the dispute arises out of a domestic or foreign tax imposition. 4. That the appeal is allowed and cross appeal dismissed. MINISTER OF NATIONAL REVENUE v. PREMIUM IRON ORES LTD.........................**25**

6.—*Customs Tariff—Customs Act, R.S.C. 1952, c. 58, as amended, s. 45—Tariff items 409m(1) and 427a—Whether Tariff Board erred in law.* This is an appeal from a declaration of the Tariff Board that a machine described as a tree crusher be classified as a tractor under tariff item 409m (1) and not a specialized machine under tariff item 427a. *Held:* That reasonable men, properly understanding the applicable law, could reasonably come to different conclusions in this matter. 2. That while a different conclusion of fact might have been reached because of the greater weight that could have been given to the evidence of the actual use of the machine as opposed to the evidence of its possible uses, the Board did not have to come irresistibly to a different conclusion or determination than it did. 3. That the appeal is dismissed. DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE v. J. M. E. FORTIN, INC...............................**31**

7.—*Income tax—Purchase and sale of discounted second mortgages by association of which appellant a member—Whether association a partnership—Sale of appellant's interest in association—Income or capital gain—The Partnerships Act, R.S.O. 1960, c. 288.* In 1949 the appellant, a Toronto businessman, entered into an association with a Mr. Minden, a lawyer, and three other persons for the purpose of buying second mortgages at a discount. Each member contributed capital to the association but Minden purchased the mortgages and the accounting for the mortgages was done in his law office. The appellant took no part in selecting the mortgages to be purchased or in the allocation of funds and most of the mortgages were registered in Minden's name. There was no written document to indicate the nature of the association or the relationship existing between the members thereof. In December 1956 the appellant withdrew from the association and in January 1957 he received payment from Minden in the amount of $32,200 for his interest therein. Of this amount it was agreed by appellant and respondent that $10,916.08 represented the actual accrued entitlement of the appellant to bonuses on the mortgages on a *pro rata* basis in respect of the second mortgages held by the association at the time the appellant withdrew therefrom. The respondent reassessed appellant's 1957 taxable income by adding thereto the sum of $10,916.08. *Held:* That the arrangement between the appellant, Mr. Minden, and the three other persons was not in law a partnership, Mr. Minden being merely the agent for each of the other parties to the arrangement. 2. That what the appellant sold in December 1956 to the two remaining members of the association was not a capital asset. 3. That the appeal is dismissed. ALEXANDER COLE v. MINISTER OF NATIONAL REVENUE........................**35**

8.—*Customs Act, R.S.C. 1952, c. 58, ss. 35(8) and 45 as amended—Limitation on right of appeal to Exchequer Court—Conclusions of Tariff Board supported by evidence.* The appellant appeals from the declaration of the Tariff Board confirming the decision of the respondent whereby the value for duty of certain goods imported from Japan was reappraised to include amounts described as handling commission and financial charges in determining the amount for which the goods were sold by the vendor abroad to the purchaser in Canada. *Held:* That the right of appeal to this Court under s. 45 of the *Customs Act* is limited to a question of law and the record before the Tariff Board. 2. That the conclusions reached by the Tariff Board were open to the Board on the evidence before it. 3. That the appeal is dismissed. POPULAR FABRICS INC. v. DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE............................**59**

9.—*Income tax—Income Tax Act, R.S.C. 1952, c. 148, s. 14(2)—Inventory—Valuation of closing inventory—Cost to taxpayer or fair market value—Whether Stock Exchange price of stock represents its market value—Immaterial that appellant may have artificially inflated Stock Exchange price of shares—FIFO basis for evaluating inventory no better than average cost basis where no evidence of tendency to use oldest share certificates first.* The appellant carried on business under the name of W. J. Lawson & Company and during the 1955 taxation year he traded in shares of Maneast Uranium Corporation Ltd. He purchased 1,609,860 of the shares during the year and sold 1,040,960, leaving himself with an inventory of 568,900 shares at the end of the taxation year. The appellant did not include any amount in respect

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of his profit from trading in the shares when completing his income tax return. The respondent, in reassessing the appellant's income, computed his profit from trading in the said shares by deducting from the amount realized on the sale of 1,040,960 of them the cost to the appellant of the total of 1,609,860 shares less the value of the 568,900 shares owned by the appellant at the end of the taxation year calculated on the average cost basis. *Held:* That market value is the amount being paid for the shares by those who buy and sell at arm's length in the open market and no evidence was introduced to rebut the presumption or to establish that the prices listed on the Toronto Stock Exchange did not fairly represent that price. 2. That evidence that members of the general public were being incited to buy the shares of this Company in an operation of gambling at prices far in excess of any sensible valuation, by the appellant's carefully planned programme of direct and indirect publicity and market operations, does not make the amount paid by them any less the market price of the shares that they were buying. 3. That since the evidence does not disclose a tendency to use the oldest stock certificates first, it cannot be concluded that the calculation of the cost of the closing inventory on the first in first out (FIFO) basis represents a more realistic assumption than the averaging basis adopted by the respondent. 4. That costing of the closing inventory on the specific identification basis is inapplicable in this case because, although a large proportion of the shares could be traced, some 40,000 of them could not be specifically identified and their cost would have to be fixed by adopting one of the assumptions, so that evidence is not sufficiently precise to permit the costing of the closing inventory, on that basis. 5. That the appeal is allowed in part. WILFRID JOSEPH LAWSON v. MINISTER OF NATIONAL REVENUE......64

10.—*Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—Civil Code of Quebec, Article 1851—Sale of real estate—Partnership formed to subdivide vacant land and build houses thereon—Respondent virtually a silent partner—Intent of taxpayer—No intention to sell vacant lots at profit—Partnership had only conditional right to acquire land purchased and owned by respondent—Land not stock-in-trade or inventory of partnership—Not an extraordinary occurrence for taxpayer to be engaged in business in one year but not the next—Profit from sale a capital accretion.* In 1954 the respondent entered into an equal partnership with one Vézina, who claimed wide experience in house building and the ability to secure the funds required to finance the construction of houses. He showed the respondent a tract of some thirteen acres of vacant land in the Parish of Pointe-aux-Trembles on the Island of Montreal which could be purchased for $31,000. The respondent raised the required money, in part by mortgaging her rooming house for $25,000, and purchased the said lands, which, by the terms of the partnership agreement she entered into with Vézina, she agreed to conditionally transfer to the partnership and to sell to it progressively a few lots at a time at cost, when Vézina had carried out his obligations under the agreement which included managing the undertaking, subdividing the property, procuring the necessary credit and finances including building mortgages, constructing the houses and selling them. Vézina was unable to secure building mortgage loans due to his poor credit rating and no houses were built although a total of nine lots were sold by the respondent in 1954 and 1955. In 1955 Vézina sued the respondent in Superior Court, claiming dissolution of the partnership, and accounting and damages. The respondent counterclaimed for annulment of the partnership agreement and other relief. Vézina's action was dismissed but the partnership agreement was declared to be null and void. In 1956 the respondent sold practically all the remainder of the land, consisting of nearly ten acres, to Coté & Lavigueur Construction Ltée, thereby realizing a profit which, the parties hereto have agreed, amounted to $18,000. The appellant reassessed the respondent's income to include this amount as being profit from a business but the Tax Appeal Board upheld the respondent's appeal against the reassessment. *Held:* That although the respondent took no part in the management of the partnership and was little if anything more than a silent partner, Vézina was actively managing the business with her knowledge and consent and under the rules of partnership of the Civil Code of Quebec she is presumed to have given him a mandate for the management of the business and his acts are binding on her. 2. That the respondent, on joining the partnership, had no notion of selling vacant lots as such at a profit and indeed she did everything she could do to prevent such an occurrence. 3. That at no time could the land, as it existed in 1956, be regarded as stock-in-trade or inventory of the partnership because the partnership had nothing more than a conditional right to acquire it, and in 1956 the conditions were no longer capable of being performed. 4. That it is no extraordinary occurrence for a taxpayer to be engaged in business in one taxation year and cease to be so engaged in the next, and indeed it would be rather surprising if the respondent did not desire to completely withdraw from business activities, in the face of the reverses which beset her prior to 1956. 5. That the evidence establishes that the respondent had ceased to be engaged in business, within the meaning of the *Income Tax Act*, six months prior to the date of sale of the residue of the property and the profit therefrom had

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the attributes of a capital accretion and did not constitute income from a business. 6. That the appeal is dismissed. MINISTER OF NATIONAL REVENUE v. CORINNE M. THIBAULT.................... . . **88**

11.—*Income tax—Income Tax Act, R.S.C. 1952, c. 148—Profit on sale and expropriation of real estate—Income or capital gain—Onus on taxpayer to disprove basis of assessment—Evidence given by taxpayer at trial of purpose of acquisition of property not conclusive of his true purpose at time of acquisition.* In 1952 and 1953 the appellant purchased two farms about one-half mile apart in the Township of Cornwall on the outskirts of the City of Cornwall, the first being of one hundred acres and the second of eighty-five acres. At no time did he make any attempt to farm either property nor had either property been worked intensively by its previous owner. The houses on both properties were rented by the appellant, who also arranged to have the tenants on the one hundred acre property operate it as a farm, the appellant supplying stock and equipment. In 1955 the Hydro Electric Power Commission of Ontario expropriated a part of each of the properties for relocation of railway lines resulting from the St. Lawrence Seaway development. The Ontario Hydro also purchased thirty-two acres of the one hundred acre property between the proposed new railway line and an existing line. The appellant sold the eighty-one acres remaining of the eighty-five acre property after the expropriation to land speculators, realizing a substantial profit on that sale, as well as on the sale to the Ontario Hydro of part of the one hundred acre property. The respondent assessed the profit on the sales as income of the appellant. The evidence established that the appellant had been engaged in speculative real estate transactions immediately before acquiring the two farm properties and went into a speculative real estate business in a comprehensive way very shortly afterwards. *Held* That the onus of disproving the respondent's assumption, when assessing, that the acquisition of the two farms had for its purpose or one of its possible purposes, their subsequent disposition at a profit, was on the appellant. 2. That the appellant's evidence at the trial that his purpose was to farm the properties, although given in all sincerity, still may not reflect the true purpose at the time of acquisition, and must be considered along with the objective facts. 3. That the appellant has not established on a balance of probability that he had acquired the two properties for the purpose of farming them to the exclusion of any purpose of disposition at a profit. 4. That the appeal is dismissed. JOSEPH A. VILLENEUVE v. MINISTER OF NATIONAL REVENUE. **110**

12.—*Income tax—Income Tax Act, R.S.C. 1952, c. 148, s. 5(1)—Employee benefits—Insurance premiums paid for taxpayer by employer—Whether properly included in taxpayer's income—Meaning of "Group Insurance Plan".* This appeal results from the inclusion by the respondent in the appellant's income, for the purpose of computing his income tax, of amounts equal to the premiums paid by the Company of which he was an officer and employee for two policies of ordinary life under a scheme of insurance. The scheme of insurance included group insurance coverage available to officers, employees and licencees, for which the Company was reimbursed for payment of premiums on behalf of the licencees but not for those paid on behalf of its officers and employees. The benefit derived by officers and employees was admittedly not taxable in respect of the group insurance coverage. In addition to such group insurance coverage the scheme of insurance also permitted the senior executives, the appellant and his father, and the junior executives, the appellant's wife and mother, to obtain ordinary life insurance policies in amounts of $50,000 and $10,000 respectively. The appellant became insured under the latter part of the plan and the premiums were paid by the Company. The issue was whether coverage under these two ordinary life policies, as part of an overall scheme arranged between the Company and the insurer was pursuant to a "group insurance plan" within the meaning of s. 5(1)(*a*) and therefore a non-taxable benefit. *Held:* That the words "group insurance" have an ordinary and popular meaning which involves a contract that provides for the insurance of a number of persons individually, such as a contract between an insurer and an employer providing for the insurance of employees of the employer and the premiums here in question were not paid under such a contract. 2. That the appeal is dismissed. DONALD J. PLUMB v. MINISTER OF NATIONAL REVENUE............ **170**

13.—*Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3 and 4—Discounts on mortgages purchased by taxpayer—Income or capital gain—Whether purchase of such mortgages an investment.* The appellants, who are brothers, appealed from the assessment of the respondent as income of amounts realized as discounts on mortgages purchased individually by them at the rate of about one mortgage per year by each appellant during the period 1951 to 1956. The face value of the mortgages ranged from $30,000 to $160,000 and all provided for interest to be paid at or below the prevailing rate for prime first mortgages, although part or all of several of the mortgages in question were second or third mortgages. All were for terms of not more than five years and all were held by the appellants until maturity or payment before maturity. The mortgages were of a highly speculative nature. *Held:* That the determination of this issue must depend on the totality of the facts and surrounding circumstances of the case, because

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no single criterion has been laid down upon which to decide whether the transactions were investments or adventures in the nature of trade. 2. That the multiplicity of transactions may be an important factor when considered in the light of surrounding circumstances and the purchase of one mortgage per year by each of the appellants does not necessarily lead to the conclusion that the transactions were not numerous having regard to the large amount of each purchase. 3. That the mortgages purchased by the appellants were not the kind that would be considered for investment purposes by a person who was primarily concerned with a return on his money by way of interest. 4. That the appeal is dismissed.

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14.—*Income tax—Income Tax Act, R.S.C. 1952, c. 148, s. 85E—Expropriation and sale of lands owned by partnership—Objective in partnership acquiring lands—Partnership not limited to dealing in lands subsequently expropriated and sold—Partnership business not terminated by expropriation and sale—Negotiation of compensation for expropriation an integral part of partnership business—Compensation for expropriated land forming part of assets of a business must be included in profits of business—Whether collection of compensation for lands expropriated and sold took place in course of partnership business.* In 1952 Malton Subdivisions Limited, in which the appellant was a shareholder, purchased 150 acres of land adjoining Malton Airport, near Toronto, Ontario and caused a subdivision plan thereof to be registered. In 1953 a partnership known as Bel-Air Builders, in which the appellant was a partner, acquired an agreement with Malton Subdivisions Limited under which it was entitled to purchase the lots shown on the subdivision plan. On February 12, 1954 a substantial portion of the 150-acre subdivision was expropriated by the Government of Canada but, on March 30, 1954 a large part of the expropriated land was abandoned by the Government and reverted to its former owners. By an agreement dated July 8, 1958 between Her Majesty in right of Canada, Malton Subdivisions Limited and the partners of Bel-Air Builders, Her Majesty agreed to pay $725,000 for a release of all claims arising out of the expropriation and for a conveyance of substantially all the unexpropriated lands in the subdivision. Of this amount $100,000 had been paid in 1954, $610,000 was paid in the latter part of 1955 and the balance was paid in 1958. The appellant appealed from the re-assessment of his income for 1956 by which his share of the profit from the disposal of the subdivision lands by Bel-Air Builders was included in his taxable income, claiming, *inter alia*, that Bel-Air Builders ceased to carry on business from the time of the expropriation on February 12, 1954 and that the sale giving rise to the profit was governed by s. 85E of the *Income Tax Act*, which required the sale to be deemed to have taken place in the last taxation year in which the appellant carried on business through Bel-Air Builders, which was 1954, and that, accordingly, the assessment under appeal must be vacated because it purports to assess the gain on the said sale in the 1956 taxation year of the appellant. He claimed in the alternative that the gain resulting from the said sale was non-taxable capital gain. *Held:* That the objective of the partnership, Bel-Air Builders, in acquiring the rights to buy the subdivision lots was the usual one of making a profit in such a way as might appear from time to time to be most advantageous. 2. That under whatever agreement associated the partners of Bel-Air Builders together when they acquired the subdivision from Malton Subdivisions Limited, there is no doubt that they would have felt quite free to deal with any lands that they could acquire in any way that was calculated to produce a profit, and that being the scope of the partnership business, there is no basis for a finding that the business had ceased at the time of the expropriation or at any time before all the property had been disposed of and the proceeds therefrom had been collected and distributed. 3. That the business of acquiring land for disposition at a profit includes all operations essential to the successful completion of the project, including not only sale or other disposition but collection of the proceeds of disposition. 4. That negotiations leading to settlement of compensation for expropriation of part of the inventory of a business are an integral part of the carrying on of the business. 5. That compensation for land that was part of the assets of such a business and that has been expropriated must be included in computing the profits from the business. 6. That the collection of compensation for the lands expropriated and the sale of the other lands took place in the course of the partnership business. 7. That the appeal is dismissed. SAM SORBARA v. MINISTER OF NATIONAL REVENUE........... 191

15.—*Income—Income tax—General rule of taxation—Employees profit-sharing plan—Meaning of "Employees profit-sharing plan"—Meaning of "computed by reference to profits"—Meaning of "profits from his business"—Income Tax Act, R.S.C. 1952, c. 148, s. 79.* The appellant in 1959 was an employee of the Richfield Oil Corporation,

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an American corporation, and, as such, was a participant in the company's stock purchase plan under which both he and the company made contributions to a trustee who was required by the terms of the plan to purchase stock in the company on behalf of the appellant. In 1959 the appellant paid to the trustee of the plan the sum of $630.00 by way of payroll deduction and the company paid to the trustee the sum of $315.00 on behalf of the appellant and the sum of $3.24 as a dividend in respect of stock which had been allocated to the appellant's member account. The question to be determined is whether or not the stock purchase plan is an employees profit-sharing plan as defined in s. 79(1) of the *Income Tax Act*. *Held:* That because s. 79 of the *Income Tax Act* allows a deduction of the employees' contributions, exempts the income from the trust investments, creates a shift in the income tax burden and includes in the employee's income amounts allocated which amounts, however, he has not received and may never receive but on which he is called upon to pay taxes, which also is a departure from the general rule that taxation is based on "receivability", it must be strictly contrued. 2. That the definition in s. 79(1) of the *Income Tax Act* of an employees' profit-sharing plan as "an arrangement under which payments computed by reference to profits . . . are made by an employer to a trustee" restricts the ordinary meaning of an employees' profit-sharing plan, being one under which employees are given a share in the profits of their employer if and when such profits are realized, by limiting the plan to one only where the payments of the employer are computed by reference to profits and paid into trust. 3. That the exclusion by s. 79(1) of a plan based merely on the employees' contributions being made "out of profits" points out that something else than a mere contribution out of profits is required to qualify a plan under the section. 4. That the words in parenthesis in s. 79(1) "(whether or not payments are also made to the trustee by the officers or employees)" go beyond the ordinary concept of an employees' profit-sharing plan, extend the meaning of the heading of the section, as well as the definition contained in s. 79(1) by allowing officers and employees to contribute, and have the effect of not only confirming that the ordinary meaning of a profit-sharing plan was contemplated by the legislators but also support the view that if these words had not been mentioned then a plan where the employees contributed would not have been considered as a profit-sharing plan under the *Income Tax Act;* and the definition of a profit-sharing plan under the Act is, therefore, except to the extent it is or may be affected by what has been pointed out, to be taken to mean what it says, which is that a set formula is worked out by reference to the employer's profits whereby a total amount of profits to be distributed to the employees or shared by the employer with them is determined and must be paid to a trustee when there is such a profit. 5. That what is required is a binding obligation by the employer to make payments in accordance with a formula which refers to profits and which must be paid in the event of profits. It is in this sense only that it can be "computed by reference to profits" and paid as required under this section. 6. That the words "computed by reference to profits" cannot mean that profits must be used only as a means of calculating the employer's contributions which is only a mathematical calculation, but they must also mean that the amount so calculated or computed must be paid under the plan when the profit is realized which is how the employer shares his profits with his employees. 7. That "payments computed by reference to profits . . . and make . . . to a trustee" cannot mean a plan such as here where the contributions of the employer are predicated upon payments being made by the employees as a prerequisite to the employer contributing a percentage of the contributions of the employees even if such percentage will increase with an increase of the ratio of profits to the capital invested. 8. That while employees' contributions are permitted under s. 79(1) there is nothing which permits them to be made a "*sine qua non*" of the contributions of the employer. 9. That although the contribution of the employer in this case is computed in one sense by reference to profits, there is no predetermined proportion necessarily shared with the employees and paid to them in the event of profits as it is dependent upon the employees' contributions and not upon profits, and the plan involved here cannot therefore be said to be an "employees' profit-sharing plan" under the *Income Tax Act*. 10. That a plan would not fail to qualify under s. 79(1) merely because the employer made a contribution from funds other than profits or made a contribution in a year when there was no profit provided that under the plan the payments be computed by reference to profits and the proportions so calculated be paid into the trust in the event of profits. 11. That the words in s. 79(1) "profits from his business" should be given a wide interpretation and would go so far as to include therein at least in the case of a corporation, the latter's net income after taxes. 12. That the appeal is allowed. GORDON WILLIAM LADE v. MINISTER OF NATIONAL REVENUE **214**

16.—*Income—Income tax—Special payments by employer on account of employees' superannuation or pension fund—Deductibility of special payments in computing employer's income—Special payments on account of employees' superannuation fund in year when employer's income exempt from taxation—Income Tax Act, S. of C. 1948, c. 52,* s.

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69(1)—Income Tax Act, R.S.C. 1952, c. 148, ss. 62(1)(s) and 76(1)—Income Tax Act, S. of C. 1958, c. 32, s. 26(2). This is an appeal from a decision of the Tax Appeal Board allowing an appeal by the respondent from its assessment under the *Income Tax Act* for the 1958 taxation year. The only question involved in the appeal is whether the deduction allowed by s. 26(2) of c. 32 of S. of C. 1958 in computing the respondent's income by reason of a special payment made in a previous year in respect of an employees' superannuation fund or plan should be calculated as an amount equal to the special payment less amounts actually deducted under s. 76 of the *Income Tax Act* in determining taxable income in respect of which the taxpayer was liable to pay income tax in previous years, or whether it is an amount equal to the special payment less amounts the deduction of which was permitted by s. 76 of the *Income Tax Act* in determining the income or loss of the taxpayer for previous years whether or not the taxpayer was liable to pay income tax for any or all of those years and whether or not the taxpayer actually claimed and was allowed to take such deduction in computing its income for any or all of those years. *Held:* That under s. 76(1) of the *Income Tax Act*, R.S.C. 1952, the amount that could be deducted for any year, in the case of a single special payment, being the amount that was recommended by the actuary, was one-tenth of the amount of the payment or the amount of the payment less amounts deductible for previous years, whichever was the lesser, and the deduction was permitted only in computing incomes for the ten years commencing with the year during which the special payment was made. 2. That there is nothing in the language of s. 62(1) of the *Income Tax Act* that negatives the deductibility of the amounts referred to in s. 76 or any other amounts in computing the respondent's income for a year merely because the taxable income for that year or some portion of that year is exempt. 3. That the deduction of such an amount for a year of exemption is not necessarily academic because for a particular "exempt" year, it may well result in a loss that will be deductible in computing the taxable income for some other year in respect of which the respondent is not exempt under s. 62. 4. That the conclusion as to what was "deductible" under s. 76 in computing income for a particular year is supported by the fact that when Parliament intended that amounts should not be regarded as "deductible" to such an extent as to create a loss, it went to some pains to define the amount deductible as not exceeding what the income for the year would be if the deduction in question were not allowed. 5. That the appeal is allowed. MINISTER OF NATIONAL REVENUE v. THE PORTAGE LA PRAIRIE MUTUAL INSURANCE CO. 234

17.—*Income—Income tax—Misrepresentation or fraud on part of taxpayer—Meaning of "with all due despatch" as used in s. 58(3) of the Income Tax Act—Income War Tax Act, R.S.C. 1927, c. 97, s. 55 as amended by S. of C. 1944-45, c. 43, s. 15—Income Tax Act, R.S.C. 1952, c. 148, ss. 4, 46(4) and 58(3); S. of C. 1956, c. 39, s. 11.* The appellant is a general surgeon who has practiced in Vancouver, B.C. since 1924, by himself until 1947, in partnership from 1947 to 1954, and by himself again since 1954. His taxable income for the years 1941 to 1954 inclusive was reassessed, the notices of reassessment being dated November 20, 1957. The notices of objection were received by the appellant on January 10, 1958 and confirmations of the reassessments were dated November 4, 1959, some twenty-two months later. The reassessments were made under s. 46(4) of the *Income Tax Act*, R.S.C. 1952, c. 148, which authorizes the appellant to reassess the tax payable by a taxpayer at any time in the event of misrepresentation or commission of fraud by the taxpayer in filing his return or supplying information under the *Income Tax Act. Held:* That it has been shown that wilful misrepresentation occurred repeatedly throughout the fourteen material years, not only, as would suffice, according to the balance of probability, but beyond a reasonable doubt. 2. That if misrepresentation on the part of the taxpayer is established, as it has been in this case, the Minister's right to ascertain the true situation becomes coextensive with the origin of the misrepresentation. 3. That although the lapse of twenty-two months between the receipt by the Minister of the notices of objection and the delivery of the confirmation of the reassessment exceeds even a very liberal interpretation of the words "all due despatch" as used in s. 58(3) of the *Income Tax Act*, the otherwise unwarrantable delay can be overlooked because of the period of fourteen years that had to be gone over, the piles of accountancy records, deposit slips and clients' cards and the extensive dealings in ranching and horse races that had to be investigated, sorted and classified before the definite confirmation of the reassessments could be made. 4. That the appeal is allowed. MINISTER OF NATIONAL REVENUE v. LYON HENRY APPLEBY............. 244

18.—*Income—Income tax—Income or capital gain—Promoter of oil and natural gas company—Promotional techniques focused upon profit-making—Long term investment belied by appellant's small cash payment to company—Customary pattern and style of profit-making schemes—Profit-seeking venture—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e).* This is an appeal from the income tax assessments of the appellant for the taxation years 1951, 1952, 1953, 1955 and 1956. The appellant, who at the time, was a senior official of British Columbia Electric Company, joined in 1949 with George H. Cloakey, Stanley E. Slipper,

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Alexander Bruce Robertson, the appellant in *Robertson v. Minister of National Revenue* [1964] Ex. C.R. 444 and Robert H. B. Ker, the appellant in *Ker v. Minister of National Revenue*, (unreported) to form a company called Britalta Petroleums Limited, incorporated as a private company under the laws of the Province of British Columbia. The appellant entered into an agreement with his colleagues, by the terms of which he agreed to subscribe to 41,667 shares in the capital stock of the company at (½) one-half cent per share, with an option to purchase additional shares at the same price in accordance with the terms of the agreement. Subsequently, during the years 1951 to 1956, the appellant sold some of his shares in many different transactions and his profits thereon were assessed as income by the respondent. The evidence established that throughout the entire period under review the appellant devoted constant and diligent attention to the financial requirements of Britalta Petroleums Limited. *Held*: That sufficient evidence had been adduced to legally and factually consider each of the original subscribers to the memorandum of association and particularly the appellant as the promoters of the oil drilling engaged in by the company. 2. That the inceptive stages undergone by Britalta Petroleums Limited and its subsequent successful evolution were in all aspects identical to the promotional technique of similar enterprises, focused upon profit making. 3. That the appellant's admission that the only cash he ever paid for his shares in Britalta Petroleums Limited was the original disbursement of $200 or $300 hardly connotes a notion of a long term investment. 4. That the whole record of transactions, dealings, allotments and pooling of shares, the more or less complex incentives devised to obtain underwriting assistance, consistently adopted the customary pattern and style of profit-making schemes. 5. That the analogy between the facts of this case and those of *Alexander Bruce Robertson v. Minister of National Revenue* [1964] Ex. C.R. 444 is absolute. 6. That the appellant's relationship with Britalta Petroleums Limited was similar to that of an ordinary dealer and it appears clearly that the appellant and his partners had in mind, as a set objective, the pursuit of a profit-seeking venture envisaged by s. 139(1)(*e*) of the *Income Tax Act*. 7. That the appeal is dismissed. WILLIAM C. MAINWARING v. MINISTER OF NATIONAL REVENUE .... .271

19.—*Income—Income tax—Associated companies—Control of corporation within meaning of s. 39(4)(b) of the Income Tax Act—Meaning of "group of persons" as used in s. 39(4) of the Income Tax Act—Income Tax Act, R.S.C. 1952, c. 148, s. 39(1),(2) and (4).* In 1961 two companies, Pioneer Grain Company Limited and Federal Grain Company, each owned one-half of the issued shares of the appellant companies, Buckerfield's Limited and Green Valley Fertilizer & Chemical Co. Ltd. Federal Grain Company also held one-third of the shares of Westland Elevators Limited and The Alberta Pacific Grain Company (1943) Limited, a wholly owned subsidiary of Federal Grain Company, owned one-third of the shares of Burrard Terminals Limited. Searle Grain Company Limited held one-third of the shares of Westland Elevators Limited and Burrard Terminals Limited and Pioneer Grain Company Limited held the remaining one-third of the shares of these two companies. The question to be decided is whether the appellants, Buckerfield's Limited and Green Valley Fertilizer & Chemical Co. Ltd., in the one case, and Westland Elevators Limited and Burrard Terminals Limited in the other, are "controlled by the same . . . group of persons" within the meaning of those words in s. 39(4)(*b*) of the *Income Tax Act*. *Held*: That the word "controlled" as used in s. 39 of the *Income Tax Act* contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors. 2. That where, in the application of s. 39(4) of the *Income Tax Act*, a single person does not own sufficient shares to have control in the sense indicated in s. 39, it becomes a question of fact as to whether any "group of persons" does own such a number of shares. 3. That the phrase "group of persons", as used in s. 39(4)(*b*) of the *Income Tax Act*, is apt to encompass the companies holding the shares of Buckerfield's Limited and Green Valley Fertilizer & Chemical Co. Ltd. and the companies holding the shares of Westland Elevators Limited and Burrard Terminals Limited. 4. That the appeals are dismissed. BUCKERFIELD'S LIMITED, *et al* v. MINISTER OF NATIONAL REVENUE......... **299**

20.—*Income—Income tax—Practice of medicine—Physician entering into contract of employment with limited company—Corporation holding itself out as authorized to practice medicine—Physician precluded from practicing medicine as agent of a body corporate—Fees received by corporation for professional services performed by physician not earned income of corporation—Fees assigned by physician to corporation purportedly employing him are income of physician—Income Tax Act, R.S.C. 1952, c. 148, s. 21(2)—Medical Act, R.S.B.C. 1960, c. 239, s. 71.* The appellant, a medical doctor practicing in the Village of Squamish, British Columbia, incorporated a Company called Squamish Holdings Limited which employed the appellant as a doctor and appellant's wife as a nurse and which company also entered into contracts of employment with a succession of doctors who assisted the appellant in the practice of medicine. The evidence established that there was no real change in the manner in

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which the appellant's practice was conducted after the incorporation of the Company from the manner in which it was conducted prior thereto insofar as the supplying of medical attention to patients was concerned. The respondent assessed the appellant for income tax on the income credited to the Company over the percentage thereof to which the appellant and the other doctors in the clinic were entitled by virtue of the respective contracts into which they had entered with the Company, on the ground that such revenue represents income of the appellant and not of the Company. *Held:* That Squamish Holdings Limited was not entered in The British Columbia Medical Register maintained by The College of Physicians and Surgeons of British Columbia in accordance with the *Medical Act*, 1960, R.S.B.C., c. 239 and could not be so registered, and, by s. 71 of that Act any person not so registered is prohibited from engaging in the practice of medicine, surgery or midwifery, so that it is clear that a corporation cannot hold itself out as being authorized to practice medicine in any way whatever. 2. That the appellant is precluded in fact and in law and as a matter of public policy from practicing the profession of medicine in any of its forms as agent of a body corporate and the document purporting to be a contract of employment between the appellant and the Company did not establish an employer-employee relationship; and, similarly, the documents purporting to be contracts of employment between the other doctors and the Company did not establish an employer-employee relationship as between them and the Company but rather such relationship subsisted between them and the appellant. 3. That the monies received by the Company for services rendered by the appellant and the other doctors were fees already earned by him either personally or through the doctors employed by him, and the Company was merely the assignee of these fees which the Company did not and could not earn and to which it had no right other than as assignee of the appellant's earnings. 4. That since the monies in the hands of the Company are income of the appellant which his wife, by her services, assisted him in earning, it follows that sums paid by the Company to the appellant's wife were remuneration received by her as an employee of her spouse and as such are not properly deductible in computing the appellant's income. 5. That the appeal is dismissed. LAVERNE CLIFFORD KINDREE v. MINISTER OF NATIONAL REVENUE....... ....**305**

21.—*Income—Income tax—Adventure or concern in nature of trade—Intention or motive of taxpayer—Preferred and secondary intention in purchase of asset—Purchase of asset to create an investment—Purchase of asset a speculation looking to resale—Onus of proving assessment wrong—Determination of market value of asset when purchased—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—British Columbia Companies Act, R.S.B.C. 1960, c. 67, s. 23(1).* The appellant, a mining company incorporated under the laws of British Columbia on March 28, 1951, acquired a mining property known as Hat Creek Coal Mine in British Columbia from St. Eugene Mining Corporation Ltd., which had purchased it for $19,000 in 1944. The appellant agreed to issue 900,000 fully paid and non-assessable shares of $1.00 par value to St. Eugene Mining Corporation Ltd. for the property, and by the same agreement Wilson Mining Corporation Ltd. agreed to underwrite or arrange a firm underwriting to provide the sum of $34,000 to appellant for the purchase of 400,000 shares of appellant company to yield 8½ cents per share to appellant. By the same agreement, Wilson Mining Corporation Ltd. obtained an option from St. Eugene Mining Corporation Ltd. to purchase 450,000 of the 900,000 shares issued by appellant to St. Eugene for the cost of such shares to St. Eugene, 7.4 cents per share. There was no development of the Hat Creek property from 1951 until 1956, when negotiations were instituted with B.C. Electric Co. Ltd., which led to an option agreement being executed by the appellant and Western Development and Power Ltd., a wholly owned subsidiary of B.C. Electric Co. Ltd. This agreement led to the sale of the property by the appellant to Western Development and Power Co. Ltd. in 1960 for $1,570,000 and 320,000 shares of Van-Tor Oil and Explorations Ltd. The respondent reassessed the appellant for income tax on the profit realized from the sale, calculated as the selling price of $1,570,000, plus the market value of the Van-Tor Oil shares of $163,200, less the initial cost of the mining property calculated at $110,499.83 (being the value of 300,000 shares at 8½ cents per share) plus $13,504.49, being the development and carrying expenses borne by the appellant. It was found on the evidence that at the time the option to purchase the property was given to Western Development and Power Ltd. the estimate of the size of the ore body was less than 100,000,000 tons. Later, but before the property was purchased by Western Development and Power Ltd., that company determined that the ore body was probably of about 700,000,000 tons. The evidence also disclosed that Wilson Mining Corporation Ltd. had considerable coal mining experience, and its officers and employees knew that in 1947 and 1951 it would be most difficult to successfully market lignite coal from the Hat Creek property; that they were fully aware of the fact that the oil and gas industry was developing in Alberta and British Columbia and would be competing and that the market for coal was dwindling. *Held:* That in this type of

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case the test of whether there is an adventure or concern in the nature of trade is objective and the intention or motive of the taxpayer, although relevant, cannot alone determine what the acts amounted to and in some cases may be given very little weight. 2. That whether the alternative taken by the taxpayer in the event that his preferred intention becomes for some reason unrealizable, is taxable or not depends on whether the evidence discloses that this chosen alternative is or is not the operation of a trade, and this situation arises in all cases where assets such as those under review in this case are purchased for the alleged purpose of using the same to create an investment and there is a secondary alternative intention which by proper evidence can be inferred. 3. That the evidence in a case such as this must of necessity detail all the surrounding circumstances including the knowledge and skill of the taxpayer and any other facts or circumstances sufficient to indicate whether or not the purchasing of assets was a speculation looking to resale which must have been in contemplation in the event that the preferred intention could not be carried out. 4. That although the intention of the appellant may have been incidentally to develop the Hat Creek property as a mine its main intent was to sell the asset either outright or on some royalty basis along some other contractual arrangement of substantially the same category of transaction; and this constitutes an adventure or concern in the nature of trade within the meaning of the *Income Tax Act* and the profit therefrom is income within the meaning of the Act. 5. That the onus is on the appellant to prove on the balance of probabilities that the respondent's assessment is wrong and in this case that has been done. 6. That the most cogent evidence available in the determination of the fair market value in 1951 of the Hat Creek property was the actual price paid for it by Western Development and Power Ltd. in 1960. 7. That the fair market value of the Hat Creek property in 1951 was $1,300,000, which was the value placed on this mine by the directors of the appellant at the material time. 8. That the appeal is allowed in part. INLAND RESOURCES CO. LTD. v. MINISTER OF NATIONAL REVENUE 313

22.—*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—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 irresistible 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

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was a trader in securities and not an investor. 8. That the appeal is dismissed. NORMAN R. WHITTALL v. MINISTER OF NATIONAL REVENUE..........................342

23.—*Income—Income tax—Acquisition and sale of shares—Ordinary investment—Adventure or concern in the nature of trade—Fiduciary position of company director—Profits from a business—Income Tax Act, R.S.C. 1952, c. 148, s. 3.* This is an appeal from the re-assessment by the respondent in respect of the income of the appellant for the taxation years 1952, 1953 and 1954 arising out of the acquisition and disposal of shares in Inland Natural Gas Co. Ltd., Yankee Princess Oils Ltd., Canadian Collieries (Dunsmuir) Ltd. and St. John's Trust Syndicate. At all material times the appellant was vice-president and a director of Norman R. Whittall Ltd., an investment dealer, stockbroker and underwriter carrying on business in Vancouver, British Columbia. The development of the appellant's interests in the companies in question and his acquisition of shares therein is more particularly set out in the reasons for judgment in *Norman R. Whittall v. Minister of National Revenue, ante, p.* 342. *Held:* That for the reasons given in *Norman R. Whittall v. Minister of National Revenue, ante,* p. 342, the transactions under review are trading operations as part of the business of the appellant. 2. That because of the particular fiduciary relationships of the appellant with certain of the companies in question and their shareholders, in his capacity of director thereof, the transactions under review did not constitute ordinary investments and the profits realized from the sales of the securities were profits from a business within the meaning of s. 3 of the *Income Tax Act.* 3. That the appeal is dismissed. H. RICHARD WHITTALL v. MINISTER OF NATIONAL REVENUE.......................... 367

24.—*Income—Income tax—Acquisition and sale of carried interest in oil lands—Sale of potential income producing assets—Adventure or concern in the nature of trade—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 income of the appellant for the taxation year 1957 wherein the respondent included therein a sum representing the appellant's profit resulting from its acquisition and sale of certain petroleum interests in Western Canada. The appellant was incorporated in July 1954 under the Alberta *Companies Act* and had as its objects to prospect, explore, drill, produce and accumulate petroleum, natural gas and related hydrocarbons and to open, drill, develop, improve, maintain and manage petroleum and natural gas wells and natural gas property generally. All the issued shares of the company were held by one Harris Cox and his wife and son, Harris Cox being its president and major shareholder. Before incorporating the appellant company Cox was employed for many years in seismographic work in connection with the discovery of oil, in Canada and other countries. The appellant entered into three agreements, each with a different oil company, and one agreement with the Province of Saskatchewan, the appellant agreeing in each case to drill for oil on the lands described in the agreements at its own expense, in return for which it was given an interest in the said lands. In each case the appellant arranged for other companies or individuals, including one Ross H. Chamberlain, with respect to all four drilling agreements, to finance the full cost of drilling in return for which the appellant's interest in the properties was transferred to them subject to a carried interest, usually of 15% being reserved to the appellant. When Humber Oils Ltd. offered to buy Chamberlain's interests in the lands in question, the offer included the carried interests held by the appellant. The appellant's carried interests were sold to Humber Oils Ltd. along with Chamberlain's interests in the said lands. The issue to be decided is whether the purchase or acquisition in 1954 of the carried interests of the appellant from Chamberlain and their sale in conjunction with the interests of Chamberlain in 1957, was an adventure or concern in the nature of trade so that the profit therefrom constituted taxable income, or whether what was done was the realization at an enhanced price of capital assets or investments and as a consequence did not constitute an adventure or concern in the nature of trade. *Held:* That it is a fair inference from the evidence to conclude that Chamberlain wished to sell his interests to Humber Oils Ltd. and that while there may not have been too great reluctance on the part of the appellant to sell its carried interests, nevertheless, because of the history of the assistance given to the appellant by Chamberlain it would have been impractical and unrealistic for the appellant not to have concurred in the decision made by Chamberlain to sell. 2. That what Humber Oils Ltd. acquired was in effect a business as a going concern, and it acquired it by way of purchasing the investment interests of Chamberlain and the appellant in the properties affected by the first two drilling agreements executed by the appellant. 3. That the carried interests in question were acquired by the appellant as potential income-producing assets. 4. That the acquisition and sale of the carried interests of the appellant were transactions in capital assets and were not adventures or concerns in the nature of trade within the meaning of s. 139(1)(*e*) of the *Income Tax Act.* 5. That the appeal is allowed. TALON EXPLORATION LTD. v. MINISTER OF NATIONAL REVENUE........ 376

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25.—*Income—Income tax—Expropriation and sale of real property—Real property acquired for long-term investment or as an adventure or concern in nature of trade—Meaning of "taxation year"—Date of creation of obligation to pay in relation to date of payment—Reassessment within six years of original assessment—Income Tax Act, R.S.C. 1952, c. 148, ss. 46(1) and (4)(a) and (b), 139(1)(e) and 139(2)(b)—Expropriation Act, R.S.C. 1952, c. 106, s. 9.* The appellant is a Montreal wholesale jeweller who has invested considerable sums in real estate partnerships and as a leading shareholder of Benaby Realties Co. and in his own private name and capacity. In 1952 he purchased lot 507 in the Parish of St. Laurent, district of Montreal. On April 13, 1953 he sold a parcel comprising about ten per cent of lot 507 to Canadian Aviation Electronics Limited. Later a portion of the part of lot 507 still owned by the appellant was expropriated by the Crown in right of Canada, the expropriation being effective from January 7, 1954, and a few months later the appellant was notified that additional parts of lot 507 would be required by the Canadian Government. As a consequence the appellant sold to the Crown in right of Canada those parts of lot 507 required by it, after which sale the appellant retained about twenty-five per cent of the said lot. This remaining part of lot 507 owned by the appellant was disposed of by him in 1956. The evidence disclosed that the sale by the appellant to the Canadian Government of the already expropriated part of lot 507, together with the additional part of the lot required by the Government was effected no later than July 1954. The appellant received a notice of assessment dated March 15, 1962 which declared that certain sums of money were land profits arising out of lot 507. *Held:* That the acquisition of lot 507 by the appellant, the initial sale to Canadian Aviation Electronics Limited and the 1954 expropriation by the Crown and the subsequent disposal of the remainder of lot 507 is really more germane than alien to the oft stated assessable pursuit included in s. 139(1)(*e*) of the *Income Tax Act*, "an adventure or concern in the nature of trade". 2. That the appellant may have entered upon the transactions in question on his own, without any company affiliation or partnership connections, and, nonetheless, have pursued a profit making scheme which the law renders liable to income taxation. 3. That the relevant taxation year must coincide with that during which a debt or an obligation to pay, legally enforceable, originated between the Crown and the appellant. 4. That the Treasury Board's authorization of payment of the sum agreed upon between the Crown and the appellant for the lands sold to the Crown did not create a debt but merely authorized payment of a pre-existing one. 5. That the respondent's notification of reassessment to the appellant, dated March 15, 1962, alleging no misrepresentation or fraud falls well beyond the prohibitory limit of six years and is illegal. 6. That the appeal is allowed. BEN LECHTER v. MINISTER OF NATIONAL REVENUE...... **413**

26.—*Income—Income tax—Adventure or concern in the nature of trade—Meaning of "trade" and "adventure in the nature of trade"—Usual badges of trade—Lump sum payment or premium as interest or profit from property—Fixed amount included in repayment of loan in addition to principal and interest—Loan as an investment—Bonus or discount as a profit from a trade or adventure in the nature of trade—Effect of circumstances surrounding loan transaction—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6 and 139(1)(e).* This appeal is from an assessment of the appellant for its 1958 taxation year under which the sum of $56,000 received by the appellant as a bonus upon a loan was assessed as income. The appellant, a company incorporated under the laws of the Province of British Columbia, is one of a group of seven very closely related companies, basically all the shares of six of them being owned by the seventh, Transport Finance Ltd., the shares of which were owned by members of the Ferguson family. All the companies shared a common office, a common accounting staff and a common board of directors, the members of which were members of the Ferguson family. The funds of all companies except Transport Finance Ltd. were deposited in a common bank account in the name of one of the companies, although each company kept its own book of accounts. All the companies except Transport Finance Ltd., which dealt in commercial paper and one other which was dormant, were engaged in the sale and distribution of, the repair and maintenance of, or the supply of parts for Kenworth motor trucks. At the material time, the appellant was in the process of gradually liquidating its assets, having sold its inventory of parts to a subsidiary of the manufacturer of the Kenworth trucks, which had undertaken the distribution of its own parts. One of the assets of the appellant was the amount of its funds on deposit in the common bank account. By agreement dated February 22, 1957 the appellant agreed to lend $125,000 to a group of companies, known as the Lions Equipment group, to enable them to purchase the equipment required to fulfil a contract for testing a gas pipeline for leaks for West Coast Transmission Ltd. The agreement provided that the loan was to be repaid by payment to the appellant of $115,000 on November 1, 1957 on account of principal, and the principal balance of $10,000 on November 1, 1958, with a premium of $56,000, together with interest at 10 per cent per annum on the monies advanced from the date of the advances to date of repayment. The loan was made

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and subsequently repaid in 1958 with the premium and interest as set out in the agreement. *Held:* That "trade" is not the same thing as "an adventure in the nature of trade" and a single transaction may well be the latter without being the former, provided it is essentially commercial. 2. That the absence of one or all of the usual badges of trade does not negative the existence of an adventure in the nature of trade. 3. That when a person enters into a contract whereby he advances money to another person on terms that it is to be repaid at a fixed time together with an additional amount, if that additional amount is described as interest there is no problem, for interest is income from property within s. 3 of the *Income Tax Act*, but when such a contract requires repayment with such an additional amount, but does not describe it as interest, it becomes a question of fact as to whether the additional payment is or is not interest or, in any event, a profit from property in the sense of revenue derived from the money advanced, but if the additional payment is the sole consideration for the use of the money, there would appear to be a very strong probability that it is interest or a payment in lieu of interest. 4. That the lump sum payment, as provided for by the agreement under consideration, not being payment merely for the use of the money, is, in the absence of very special circumstances, a profit from an adventure in the nature of trade. 5. That a money lender who advances money in the course of an established business on terms whereby he charges interest as such plus a fixed amount determined by reference to the special risk involved would count as profits from his "trade" not only the interest but the additional amount, and it follows that when a person who is not a money lender enters into such a contract and thus embarks on an adventure in the nature of the money lender's trade and earns a similar profit, he acquires a profit from an adventure in the nature of trade. 6. That it would be unrealistic to consider a transaction such as that undertaken by the appellant an investment of a prudent investor looking to a fair and safe return by way of interest. 7. That the question whether the additional amount is a payment in respect of what is referred to as "capital risk involved" is immaterial to the question whether it is profit from a money lender's trade or from an adventure in the nature of such trade. Even if such a payment can be classified as a bonus or discount rather than interest, such classification does not negative its character as a profit from a trade or adventure, even though it might negative its character as interest on money lent. Once it is established that it is not a simple case of investment, such as a purchase of a debenture at a discount, but is an adventure in the nature of trade, such distinction becomes irrelevant. 8. That the transaction entered into by the appellant, by reason of the cumulative effect of the surrounding circumstances, was an adventure in the nature of trade within the meaning of s. 139(1)(*e*) of the *Income Tax Act*. 9. That the appeal is dismissed. WEST COAST PARTS CO. LTD. v. MINISTER OF NATIONAL REVENUE 422

27.—*Income—Income tax—Profit-making scheme—Purchase and resale of Government of Canada bonds—Ownership of bonds—Intent of taxpayer—Investment of surplus capital—Income Tax Act, R.S.C. 1952, c. 148, ss. 6(1)(b) and 139(1)(e).* This is an appeal from the reassessment of the appellant's income for the taxation years 1956, 1957, 1958 and 1959, under which the respondent added to the appellant's income the amount received by the appellant in addition to interest on certain short term transactions in which the appellant claims it invested its surplus capital in the purchase and subsequent resale of Government of Canada bonds. The evidence established that although the usual contract between the appellant and its broker purported to provide for the purchase by the appellant from the broker of short term Government of Canada bonds, and for the resale of the said bonds to the broker, effective thirty days after the purchase, the appellant, as purchaser, acquired no right to cut off the interest coupons during the thirty-day period it held the bonds, such right being an essential characteristic of ownership. *Held:* That the buying and reselling of the bonds are simultaneous to such a degree that, in fact and in law, none of the contracts ever took place, and the transactions under review were merely a thinly disguised form of short term loan between the appellant and the broker. 2. That the investing intent, in its customary connotation, is lacking in the transactions in question, which exhibit all the ear-marks pertaining to pursuits of profit-making schemes within the scope of s. 139(1)(*e*) of the *Income Tax Act*. 3. That the appeal is dismissed. J. & R. WEIR LTD. v. MINISTER OF NATIONAL REVENUE . 434

28.—*Estate tax—"Successive approximations" and "algebraic" methods of calculating deduction under s. 7(1)(d) of Estate Tax Act—Estate tax and succession duty principles—Computation of aggregate taxable value of estate—Computation of estate tax where gift to charity—Computation of estate tax where estate tax and provincial succession duty payable out of charitable gift—Estate Tax Act, R.S.C. 1958, c. 29, ss. 7(1)(d) and 8(1)(w).* This is an appeal from an assessment of the respondent for tax under the *Estate Tax Act* on the assets of the Estate of Edward William Bickle. By his will the deceased had set aside 50% of his estate to provide for his wife for life, and, after making certain other provisions, he had left the balance of his estate, after payment of all succession duties and estate taxes, to

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the E. W. Bickle Foundation. It was not disputed that the Foundation is an organization, a gift to which, in computing the aggregate taxable value of property passing on death, gives rise to a deduction from the aggregate net value of the property by virtue of s. 7(1)(*d*) of the *Estate Tax Act.* The sole question in issue is the computation of the amount of the "aggregate taxable value" within the meaning of the *Estate Tax Act*, and the sole difficulty in arriving at this figure arises from a dispute as to how the deduction envisaged by s. 7(1)(*d*) of the *Estate Tax Act* should be computed. *Held:* That the assessment based on the computation of the deduction under s. 7(1)(*d*) of the *Estate Tax Act* by the "successive approximations" and the "algebraic" methods is wrong in law, firstly because succession duty principles were applied in making the calculation whereas estate tax principles should have been applied, and secondly because the first calculation, in any event, is wrong in law in that the amount of the Ontario succession duty calculated on the exempt portion of the estate was deducted from the aggregate net value in determining the aggregate taxable value of the estate, whereas s. 7(1)(*d*) authorizes the deduction from the exempt portion of the estate of only the "combination" of Ontario duty and estate tax, and until the figures for both Ontario duty and estate tax have been computed it is not correct to make a deduction at all. 2. That in the case of succession duty, the tax is on the disposition or devolution from the deceased to the successor who is called upon to pay the tax, and the amount is dependent on the total value of the estate, the value of the particular succession and the relationship of the beneficiary to the deceased; however, under the *Estate Tax Act*, the tax is in no way affected by the relationship of the beneficiary to the deceased or by the size of the individual bequest, but is determined by the size of the taxable estate, which is the value thereof after gifts to charity and other permissible deductions have been made. 3. That under the *Estate Tax Act* the tax falls upon the property passing on the death of the deceased and is therefore, in the main, an indirect tax falling primarily on the executor who passes the burden on to the persons who pay, whereas succession duty is essentially a direct tax falling on the successors. 4. That the deduction under s. 7(1)(*d*) of the *Estate Tax Act* should be computed by deducting from the "aggregate net value" of the estate the amount of the exempt gift to charity without regard to the special provisions for estate tax by reason of s. 7(1)(*d*) of the Act, thereby obtaining the net value of the estate. From this figure the deduction of the basic and survivor exemptions produces the tentative "aggregate taxable value" of the estate. The gross tax should then be computed from the "aggregate taxable value" by using the table set out in s. 8(1)(*w*) of the Act. The appropriate Ontario Tax Credit (on the assets which qualify) should then be deducted from the gross tax, and the resulting figure is the estate tax payable (except for the situation envisaged by s. 7(1)(*d*) where the charity is to bear the costs of the succession duty and estate tax). 5. That because of s. 7(1)(*d*) of the *Estate Tax Act* there is not a full exemption of the gift to charity in cases where the cost of estate tax and Ontario succession duty is payable out of the charitable bequest and it is therefore necessary to make one more calculation which is the same as the first calculation except that the computation of net value of the estate is made by subtracting from the "aggregate net value" the amount of the exempt gift to charity less the Ontario succession duty and also less the estate tax found in the first calculation. 6. That the appeal is allowed. HELEN RYRIE BICKLE *et al* v. MINISTER OF NATIONAL REVENUE **664**

29.—*Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 21(1) and (4) and 139(1)(e)—Transfer of property from husband to wife—Whether execution of pre-nuptial contract and marriage effects transfer within meaning of s. 21(1)—S. 21(1) applicable whether or not transferor resident in Canada at time of transfer—Income from property substituted for property transferred by taxpayer to wife—No part of money borrowed jointly by taxpayer and wife or raised on their joint credit is property transferred within s. 21(1)—Rentals for apartment building accrued to owners as owners, not as traders—Whether operation of apartment building to be regarded as mere rental of property or operation of business—Taxpayer occupied full-time in management of apartment building.* The appellant and his wife were married in Poland in 1938 where they were then domiciled, and came to Canada in 1949, settling in Vancouver, B.C. While in Poland, before the war, the appellant converted as much of his property as possible into gold or other precious metal and hid it. After the war he and his wife moved to Munich where they lived for three years before coming to Canada. He took with him to Munich his cache of coin and United States currency, which he deposited in two Swiss banks. To this he added the caches of his deceased brothers and sister which he had later removed from Poland. The appellant and his wife had executed a pre-nuptial contract which provided for a general community of all the property of both spouses whether held at the time of marriage or acquired subsequently during the marriage. In 1949 funds in excess of $100,000 were transferred from the Swiss banks to the appellant's account in Vancouver and this money was used by the appellant to purchase a parcel of real estate in Vancouver, title to which was taken in the names of the appellant and

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his wife, upon which they constructed an apartment building containing forty-nine apartments. On its completion the building represented a total investment of about $415,000, of which $122,500 was brought by the appellant from Europe, $13,000 was invested by the appellant's son and the balance of about $280,000 was borrowed by the appellant and his wife, virtually all of it through two mortgages on the property. The appellant devoted his full time to the management of the apartment building. For the year 1956 the appellant declared 45 per cent of the net income from the apartment building as his income and the respondent in re-assessing added thereto the 45 per cent thereof which the appellant had treated as income of his wife. There was no dispute as to the 10 per cent of the net income treated as income of the appellant's son. *Held:* That there is nothing in the evidence of the pre-nuptial contract and of its effect under the law of Poland which would serve to dispel the *prima facie* conclusion arising from the fact of ownership of the apartment building by the appellant and his wife and the law of British Columbia that the income from their 90 per cent interest in the property belonged to them in equal shares, and accordingly, the whole of the income from the 90 per cent interest is not taxable as income of the appellant by reason of any right of his thereto under the pre-nuptial contract. 2. That there is no element of retroactivity involved in applying s. 21(1) of the *Income Tax Act* to transactions which occurred before the appellant and his wife came to Canada. The section applies to residents and non-residents and there is no reason why its application should be confined to situations in which the transfer was made when the transferor was resident in Canada. 3. That on the facts whatever interest the appellant's wife had in the funds in the Swiss banks must for the purposes of this case be regarded as property transferred to her by the appellant within the meaning of s. 21(1) and insofar as the income from the apartment building can be regarded as income from property substituted for those funds, her share thereof was properly included in the computation of the appellant's income pursuant to s. 21(1). 4. That no part of the money raised jointly by the appellant and his wife and used to finance construction of the apartment building can be regarded as having been property transferred by the appellant to his wife and to the extent of her share in the investment of these funds her interest in the apartment building cannot be regarded as property to which s. 21(1) applies. 5. That there is nothing in the situation which affects the rentals with a trading character as distinct from mere income receipts from property and the operation of the apartment building was not a business in which the appellant and his wife were partners within the meaning of s. 21(4) of the Act. HENRY WERTMAN v. MINISTER OF NATIONAL REVENUE....**629**

30.—*Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 12(1)(e) and 85B(1)(a) and (b)—Sales of rebuilt engines for cash and rebuildable engines—Deposit to secure delivery of rebuildable engine to taxpayer—Whether deposits are receipts of income or revenue nature—Taxpayer entitled to deduction for liability to refund deposits—Liability to refund deposits a presently existing trading obligation.* The appellant rebuilds worn engines and other motor vehicle parts and distributes them to car and truck dealers in the Atlantic provinces. The great bulk of the used engines and parts obtained by the appellant for rebuilding comes from the dealers to whom the appellant delivers the rebuilt products. During 1958, the year in question, the appellant delivered its rebuilt products under an agreement by which the purchasing dealer paid a certain price and undertook to deliver to the appellant a rebuildable engine or part of the same model as that delivered to him, and in addition, he was required to pay a core deposit, the whole of which was refundable to the dealer on delivery of the rebuildable engine or part. The agreement contained no time limit for the delivery of the rebuildable engine or part to the appellant and no provision for forfeiture of the core deposit in the event of non-delivery. In general the core deposits were set at amounts greatly in excess of the value of the rebuildable engines or parts required to be delivered by the dealer. In computing its income for 1958 the appellant included the amount of the core deposits charged in respect of engines or parts more than seven months before the end of the year. These were brought into income on the assumption that they were no longer likely to be redeemed. The appellant also credited the value of engines the delivery of which was secured by the remaining deposits but it did not include such remaining deposits or the amount by which they exceeded the value of the engines the delivery of which was secured by them. The respondent added the latter amount to the appellant's income and assessed tax accordingly. *Held:* That the deposits here in question were receipts of an income nature because they arose from the appellant's trading transactions of which in each case the deposit formed a part. 2. That the deposits as well as the value of the rebuildable engines to which the appellant became entitled as a result of the transactions should have been included in the receipts for the year. 3. That the appellant in computing the profit from its business was entitled to a deduction in respect of the liability to refund the deposits which arose on their receipt, such liability not being contingent and the amount necessary to provide for its retirement when due not being a reserve or contingent account or sinking fund within the prohibition of s. 12(1)(*e*) of the *Income Tax Act.* 4. That although the appellant may in effect have

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understated its revenue by omitting the core deposits unredeemed at the end of 1958, it has in that event also understated to the same extent its liabilities incurred in the same transactions. It follows that the Minister could not properly add the deposits to the appellant's income without at the same time allowing an equivalent amount as a deduction. 5. That the appeal is allowed. ATLANTIC ENGINE REBUILDERS LTD. v. MINISTER OF NATIONAL REVENUE **647**

31.—*Income—Income tax—Appeal from income tax assessment—Payments or benefits flowing from corporation to shareholder—Waiver of interest on loan to shareholder—Whether corporation and shareholder dealing at arm's length—Transaction not within s. 8(1)(c) if bona fide—Transactions which are devices or arrangements for conferring benefit or advantage on shareholder qua shareholder—Onus of proof with respect to assumptions alleged to have been made in assessing taxpayer—Allegations made by Minister in notice of appeal—Onus of proof in appeals from income tax assessment—Income Tax Act, R.S.C. 1952, c. 48, s. 8(1).* The respondent was the majority shareholder in each of two subsidiary companies, Renown Mills Limited and Copeland Flour Mills Limited. In 1952 it borrowed $500,000 from Renown and $560,000 from Copeland which it used to purchase shares in these two companies, giving in respect of each loan a demand promissory note bearing interest at 4½% payable semi-annually. In June 1953, in response to a request from the respondent, Renown and Copeland waived payment of interest for the first six-month period which ended on May 31, 1953. In May 1954 Renown and Copeland each accepted payment of its loan to the respondent and waived payment of interest thereon from May 31, 1953 to the date of payment. The sole question in issue is whether the amounts payable by the respondent to the two subsidiary companies as interest on the loans, payment of which was waived by them, are required to be included in computing the respondent's income under s. 8(1) of the *Income Tax Act. Held:* That s. 8(1) of the *Income Tax Act* is aimed at payments, distributions, benefits and advantages flowing from a corporation to a shareholder other than dividends during the lifetime of the corporation; payments and distributions in respect of reductions in capital during the lifetime of the corporation and payments and distributions on the occasion of the winding-up of the corporation. 2. That Parliament intended, by s. 8 of the *Income Tax Act,* to sweep into income, payments, distributions, benefits and advantages that flow from a corporation to a shareholder by some route other than the dividend route and that might be expected to reach the shareholder by the more orthodox dividend route if the corporation and the shareholder were dealing at arm's length. 3. That there can be no conferring of a benefit or advantage within the meaning of s. 8(1)(*c*) where a corporation enters into a *bona fide* transaction with a shareholder. 4. That s. 8(1)(*c*) clearly applies to transactions between closely held corporations and their shareholders that are devices or arrangements for conferring benefits or advantages on shareholders *qua* shareholders and it is a question of fact whether a transaction that purports, on its face, to be an ordinary business transaction is such a device or arrangement. 5. That even where a corporation has resolved formally to give a special privilege or status to shareholders, it is a question of fact whether the corporation's purpose was to confer a benefit or advantage on the shareholders or was some purpose having to do with the corporation's business such as inducing the shareholders to patronize the corporation. 6. That when the Minister sets forth in his Notice of Appeal the assumptions on which the assessment appealed from is based the taxpayer can meet this pleading by (*a*) challenging the Minister's allegation that he did assume those facts, (*b*) assuming the onus of showing that one or more of the assumptions was wrong or (*c*) contending that, even if the assumptions were justified, they do not of themselves support the assessment. 7. That, as an alternative to relying on the assumptions on which the assessment was based, the Minister may allege by his Notice of Appeal further and other facts that would support or help in supporting the assessment but the onus would presumably be on the Minister to establish such facts. 8. That the waiver of interest payable by a borrower who is a shareholder of the lender is not a transaction to which s. 8(1)(*c*) applies unless it is also an arrangement or device whereby the corporation confers a benefit or advantage on the shareholder *qua* shareholder, and the Minister not having alleged that in making his assessment he assumed that to be so in this case, there is no onus on the respondent to disprove that fact which is essential to its being taxable. 9. That since the Minister has made no allegation that either the first or second round of waivers of interest constituted a device or arrangement for conferring a benefit or advantage on the borrower *qua* shareholder, the assessment cannot stand. 10. That the appeal is dismissed. MINISTER OF NATIONAL REVENUE v. PILLSBURY HOLDINGS LTD. **676**

32.—*Income—Income tax—Disallowance of capital cost allowance in respect of payment for franchise—Legal and accounting expense incurred in obtaining franchise—Payment made to obtain franchise or purchase goodwill—Deduction of amount in respect of cost of purchasing goodwill—Income Tax Act, R.S.C. 1952, c. 148, s. 11(1)(a), Regulation 1100(1)(c) and Schedule B of Class 14.* This is an appeal from the income tax assessment of the appellant for 1961 by which the respondent disallowed the appellant's claim

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for capital cost allowance in respect of cost of a franchise or concession for which it had paid the capital sum of $18,000, and added to the appellant's income a sum of $200 for legal expense. The appellant also claimed the sums of $225 and $200 paid to accountants and solicitors in connection with the acquisition of the franchise or concession. It was agreed by the parties that what the appellant claimed to be a franchise is a franchise within the meaning of the *Income Tax Act.* The appellant had for about seven years bottled and sold Seven-Up beverages throughout South Vancouver Island under a sub-franchise agreement between it and Seven-Up Vancouver Ltd., the holder of the franchise for that area from The Dominion Seven-Up Co. Ltd. During this period the appellant had purchased assets in Victoria, B.C. from Seven-Up Vancouver Ltd. and had substantially developed sales of Seven-Up in South Vancouver Island. Because the sub-franchise agreement with Seven-Up Vancouver Ltd. was terminable by either party on 60 days' notice the appellant attempted to obtain a direct franchise for the same area from The Dominion Seven-Up Co. Ltd. The appellant was informed that The Dominion Seven-Up Co. Ltd. would not consider granting it a franchise while Seven-Up Vancouver Ltd. held a franchise for the South Vancouver Island area. Consequently, after negotiation, the appellant paid $18,000 to Seven-Up Vancouver Ltd. in consideration of its relinquishing its franchise for the South Vancouver Island area. The appellant then obtained a franchise from The Dominion Seven-Up Co. Ltd. for the area of South Vancouver Island for a term of five years, renewable for an additional five years. The issue is whether the $18,000 paid by the appellant to Seven-Up Vancouver Ltd. is money paid for a franchise or, in other words, is part of the capital cost to the appellant of the franchise. The evidence established that the appellant would not have received the franchise from The Dominion Seven-Up Co. Ltd. if it had not caused Seven-Up Vancouver Ltd. to relinquish its franchise rights and that Seven-Up Vancouver Ltd. would not have relinquished its franchise without the payment to it of $18,000 by the appellant. *Held:* That there is a direct causal connection between the issuance of the franchise to the appellant and the payment of $18,000 by the appellant to Seven-Up Vancouver Ltd. The appellant paid this sum for the purpose of earning income and the capital cost of this payment should be allowed pursuant to s. 11(1)(*a*), Regulation 1100(1)(*c*) and Schedule B of Class 14 of the *Income Tax Act.* 2. That the payment of $18,000 was not for the purchase of goodwill of Seven-Up Vancouver Ltd. because all that Company had to give was control of the right to market Seven-Up in the territory of South Vancouver Island. 3. That the appeal is allowed. Crystal Spring Beverage Co. Ltd. v. Minister of National Revenue **702**

33.—*Income—Income tax—Taxability of earnings from illegal operation or illicit business—Business expenses—Deductibility of expense laid out for purpose of gaining income—Deductibility of expense of account of employee incurred as result of terms of employment—Arbitrary assessment—Onus of proof when arbitrary assessment has been made—Income Tax Act, R.S.C. 1952, c. 148, ss. 12(1)(a), 44, 46 and 56.* The respondent operated a call girl business in Vancouver, British Columbia, for several years until she and her nine employees were arrested in November 1960, charged with conspiring to live on the avails of prostitution, and, after pleading guilty, were sentenced to varying terms of imprisonment. After the arrest of the respondent, police seized a voluminous amount of documents at her home, all of which were turned over to the Taxation Division of the Department of National Revenue in answer to a requirement dated March 20, 1961. The respondent had filed net worth returns for the years 1958 and 1959 and an incomplete net worth return for 1960, accepted by the Taxation Division in the belief that she had no records of her business operations. After reviewing the documents turned over to them by the Vancouver police, the officers of the Taxation Division delivered Notices of Assessment for the years 1959 and 1960 which indicated revised taxable incomes for the two years of $22,046.75 and $19,103.77 respectively. The respondent did not object to the gross revenues calculated by the Taxation Division but objected to the assessments on the ground that substantial operating expenses were not allowed. Her appeal to the Tax Appeal Board was allowed in part and the appellant appeals from that decision. The main expenses in issue are for rent for various premises in which to carry on her business, legal fees in connection with the charges against her and her employees and fees for bail bonds, telephone inspection fees to ensure against wire tapping, payments for assistance to her employees in the performance of their duties protection fees, cost of liquor and the cost of buying up an entire issue of Flash newspaper. *Held:* That it is abundantly clear from the decided cases that earnings from illegal operations or illicit businesses are subject to tax. 2. That all the items of expenses in issue, with the possible exception of the legal fees, the cost of the purchase of Flash newspaper and the fees paid for bail bonds, are of such a nature that, if proven to have been disbursed, would be proper deductions. 3. That it must be assumed that the law enforcement officers are conscientious in the exercise of their duties and are incorruptible and such assumption can be rebutted only by convincing evidence to the contrary. 4. That the

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legal fees paid by the respondent for the defence of one of the call girls charged under the *Criminal Code* in 1959 is properly deductible for the twofold reason that it was laid out for the purpose of gaining income, the girl upon her acquittal returned to work, which she could not have done if sentenced to imprisonment, and it was part of the girl's arrangement with the respondent that in the event of criminal prosecution as a result of the activities, the respondent would assume the cost of the girl's defence. 5. That although the fee paid to counsel for one of the girls arrested with the respondent in November 1960 cannot be justified as a legal expense laid out for the purpose of gaining income from the business since the business had been brought to an end by the wholesale arrests, it is properly deductible because it was a term of the call girl's engagement with respondent that the respondent would assume responsibility for legal expenses as part of the girl's remuneration. 6. That the commission paid for procuring bail bonds for the respondent's employees was a responsibility assumed by the respondent as a term of the engagement of the call girls and the cost thereof is therefore properly deductible, but not the commission paid for procuring the bail bond for the respondent. 7. That the Minister of National Revenue is not bound by a return or information supplied by or on behalf of a taxpayer and may make what has been termed an "arbitrary" assessment under s. 46 of the *Income Tax Act*. In that event, the onus is on the taxpayer to show that the amount determined by the Minister is erroneous. 8. That the appeal is allowed. MINISTER OF NATIONAL REVENUE v. OLVA DIANA ELDRIDGE....... 758

34 —*Income tax—Income—Purchase of a business—Capital cost allowance—Licence for a limited period—Effect of claiming different amounts for capital cost allowance in notice of objection, notice of appeal and amended notice of appeal—Valuation of leasehold interest—Evaluation of goodwill—Leasehold interest as capitalization over term of lease of premium lessee willing to pay—Income Tax Act, R.S.C. 1952, c. 148, ss. 11(1)(a), 20(5)(a) and (6)(g); Regulation 1100(1)(a), (b) and (c) and Schedule B, Clauses 13 and 14—Alchoholic Liquor Act, R.S.Q. 1941, c. 255, ss. 3(4), 35(1) and 36(3).* This action arises out of the purchase by the appellant of a tavern business in Montreal in June 1951 for $186,000, the business sold consisting of goodwill, all existing moveables used for its exploitation, certain merchandise, or stock-in-trade and the vendor's right in a liquor licence or permit, as well as an assignment of a sub-lease of the premises which was held by the vendor. The main issue turns on whether or not and to what extent the expenditure of $186,000 by the appellant constitutes the capital cost of property in respect of which deductions are allowed under ss. 11(1)(*a*) and 20(5)(*a*) of the *Income Tax Act*. The appellant, in his return for 1954 claimed that about 90 percent of the capital cost of the business was expended on depreciable property but the respondent, on reassessment decided that only about 20 per cent of the assets acquired fell within the definition of depreciable property and that the balance represented goodwill, which was a non-depreciable asset. In his notice of objection to the reassessment the plaintiff included a statement showing that of the total purchase price, $48,599 was for furniture and moveables, $3,500 for the sign, $60,750 for leashold improvements and $58,500 for leasehold valuation. In his notice of appeal the appellant alleged that the total price of $186,000 was paid for depreciable property adding to the statement included with his notice of objection $14,650 for the liquor permit and $1.00 for goodwill. The appellant then delivered an amended notice of appeal wherein he alleged that he had paid $58,599 for furniture and moveables, $3,500 for the sign, $60,750 for leasehold improvements and $73,151 for leasehold interest. At the trial the appellant agreed to accept the respondent's allowances of $16,158.91 for furniture and fixtures (including the sign) and $17,285.19 for leasehold improvements, and the only question remaining to be decided, apart from those raised with respect to the liquor licence, is in relation to the amounts, if any, to be apportioned to leasehold interest and goodwill. *Held:* that the appellant having claimed in the statement delivered with his notice of objection to the reassessment capital cost deductions on only $171,349 of the total of $186,000 he paid for the business, which creates a presumption that the difference was expended on something in respect of which he was not entitled to any capital cost allowance, the appellant's attempt to add the difference to his original apportionment for leasehold interest cannot succeed in the absence of convincing evidence in support thereof. 2. That the liquor licence issued to the appellant cannot be regarded as a licence "for a limited period" within the meaning of Class 14, Schedule B of Regulation 1100 of the *Income Tax Act* because, by virtue of s. 35(1) of the *Alcoholic Liquor Act*, R.S.Q. 1941, c. 255, the duration of the licence is neither fixed nor determinable, since it may be cancelled at the discretion of the Commission. 3. That although it may be said that nobody should know better than the appellant himself what amount he considered he paid for his leasehold interest, his initial valuation is more accurate and reliable than his subsequent tardy deviations therefrom, which were self-serving and made with the aid of hindsight. 4. That a well-recognized method of evaluating goodwill is to ascertain the net earnings of the business, allow a con-

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servative rate of return on the capital cost of its acquisition and attribute any surplus to goodwill. 5. That in this case the most pertinent evidence as to the existence or otherwise of goodwill is to be found in the profit and loss statements of the business for the taxation years under review which indicate an average annual net profit of $10,691 and an average surplus profit after allowing a 5 per cent rate of return on capital, of $1,391, which could be attributed to goodwill. 6. That since by electing to claim only a fraction of the capital cost allowance to which he is admittedly entitled the appellant could wipe out the relatively small average annual amount of $1,391, which should otherwise be attributed to goodwill, there is sufficient evidence to substantiate the appellant's main contention that goodwill in this case is non-existent. 7. That the apportionment of the purchase price of the business that should be allocated to leasehold interest should be a sum equivalent to the premium which the appellant would be willing to pay rather than part with his lease, capitalized over the term of the lease. That the appeal is allowed in part. ARMAND PLOUFFE v. MINISTER OF NATIONAL REVENUE . . **781**

35.—*Customs and Excise—Burden of proof in relation to Deputy Minister's decision—Deputy Minister to state case in support of his decision at outset of hearing—Limits of class or kind of goods made in Canada—Production of goods in substantial quantities—Effect of Governor-in-Council fixing percentage of normal Canadian consumption—Referral of case to Tariff Board for rehearing—Customs Act, R.S.C. 1952, c. 58, s. 45 as amended by S. of C. 1958, c. 26, s. 2(1)—Customs Tariff, R.S.C. 1952, c. 60, ss. 6(9) and (10), 6a(4), and items 427(1) and 427a, as amended by S. of C. 1959, c. 12, s. 4—Order in Council P.C. 1618.* The appellant imported into Canada in parts a custom made electrically driven level luffing jib type travelling crane for use in its dry dock at Saint John, New Brunswick. The crane was far larger and had far greater lifting capacity than any similar crane theretofore made in Canada. The Deputy Minister of National Revenue for Customs and Excise ruled that the crane was one of "a class or kind of shipyard cranes made in Canada by Dominion Bridge Company Limited and Provincial Engineering Limited" and that it was subject to customs duty under item 427(1) of the Customs Tariff as "machinery composed wholly or in part of iron or steel, n.o.p.; parts of the foregoing". The appellant had contended that the crane was classifiable under item 427*a* and thus entitled to entry free of duty as "machinery composed wholly or in part of iron or steel, n.o.p. of a class or kind not made in Canada; complete parts of the foregoing". On an appeal to the Tariff Board from the Deputy Minister's ruling the Board found that "the capacities of these two jib type travelling gantry cranes (the imported crane and a crane made by Provincial Engineering Limited) are similar enough that it was not unreasonable for the respondent to include these two cranes in a class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more". The Board then found that if the class included only these two cranes the production of one crane in Canada was "substantial" within the meaning of s. 6(10) of the *Customs Act* and that if the class was enlarged to include cranes of lesser capacity, even as low as 6 tons, the percentage of Canadian production would be even more substantial and consequently be more than sufficient to classify the crane as being of a class or kind made in Canada. The appeal was accordingly dismissed. On a further appeal to the Exchequer Court *Held:* That as the question of the limits of the class or kind of goods made in Canada into which a particular article may fall is one of fact to be resolved on such criteria appearing from the evidence as the Tariff Board regards as appropriate to the particular goods and as neither distinctions of size nor of capacity are necessarily conclusive on a question of this kind, it cannot be said that on the material before the Board in this case the Board was necessarily required to classify cranes by sizes or by particular lifting capacities; or that a finding that the crane in question was one of a "class of jib type travelling gantry cranes with a lifting capacity of 15 tons or more" would be so unreasonable as to be not supportable in law. 2. That as the Board then proceeded to consider, for the purposes of making the finding required by s. 6(10) both the Canadian production of cranes falling within that class and the Canadian production of cranes of a larger class it is not clear that the Board made a finding of the scope of the class of crane made in Canada into which the crane fell and as a final determination of the appeal cannot be reached in the absence of such a finding by the Board, which is the body authorized by law to make it, the matter should be referred back to the Board. 3. That s. 6(10) of the *Customs Tariff* operates, not as a definition of when goods shall be deemed to be of a class or kind made in Canada but rather as a prescription of when they shall not be deemed to be of a class or kind made in Canada. 4. That s. 6(10) of the *Customs Tariff* does not authorize the Governor-in-Council to prescribe that quantities which are not "substantial quantities" within the ordinary meaning of that expression, shall be deemed to be substantial quantities for the purpose of the *Customs Act*. 5. That if in its review of the evidence, the Tariff Board referred to "the 10% of Canadian consumption fixed by Order-in-Council as sufficient to represent 'substantial' production in Canada within the meaning of s. 6(10) of the *Customs Tariff*" as meaning that the effect of the Order-in-Council is that production of 10% of the

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Canadian consumption is necessarily production of "substantial quantities" within the meaning of s. 6(10), they misdirected themselves on a material point of law. 6. That if the Tariff Board assumed or decided that production in Canada of one crane of the class in the course of the immediately preceding period of fifteen years was production in "substantial quantities" within the meaning of the first part of s. 6(10) of the *Customs Tariff* such an assumption or finding was erroneous in point of law as being one which is properly instructed as to the law and acting judicially the Board could not reach. SAINT JOHN SHIPBUILDING AND DRY DOCK CO. LTD. v. DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE *et al*............ **802**

36.—*Income—Income tax—Purchase and subsequent sale of unimproved land—Taxpayer member of partnership or syndicate—Determination of intent of partnership—Previous trading operations of members of partnership—Scheme of profit making—Income Tax Act, R.S.C. 1952, c. 148, s. 139(1)(e).* This is an appeal from a reassessment of the income of the appellant for the taxation years 1955 and 1956 by which amounts of $3,484.14 and $15,106.14 were added to his taxable income, the said amounts being the profit realized by the appellant, as a member of a partnership or syndicate, on the sale of two parcels of vacant land. On November 19, 1953 the appellant, one Rubin Cobrin and one Herbert Ludman purchased the two parcels of land consisting of a fifty or sixty acre part of lot No. 93 and a part of lot No. 88, both in the Parish of Montreal, the purchasers acquiring an undivided interest of 28%, 50% and 22% respectively. No money was paid to the vendor at the time of the sale but the deed provided for payment of $13,228.66 on November 19, 1954 and the balance of $88,228.66 on November 19, 1958. The appellant is a chartered accountant and Rubin Cobrin, a merchant, was one of his clients. The appellant's 28% interest in the property was divided, 40% being held by the appellant, 20% by each of two nephews, 10% by his accounting partner and 10% by one Rosen. The appellant participated in the purchase of the property in question as a result of an invitation from Rubin Cobrin to join him and his two sons in the transaction. Over the past several years the appellant and his two nephews had jointly invested in apartment buildings, the value of such buildings owned by them being about $1,300,000 at the time of trial. Between 1951 and 1955 Cobrin and his sons had purchased ten parcels of land, seven of which were vacant land and all were sold after being held for relatively short periods of time. The appellant and his associates alleged that they purchased the land in question with the intention of developing it as a shopping centre and the evidence of the appellant was that the management of the project was left to Rubin Cobrin. Later, difficulties arose with respect to the servicing of the property and then the appellant and his associates learned that Steinberg's Ltd. were to build a shopping centre just south of the land in question. At this point the appellant and his associates abandoned their shopping centre plans and eventually sold the lands. However, an extract from the minutes of the meeting of the Council of the Town of Cote St Luc held on January 20, 1955 indicated clearly that Cobrin intended to develop the land in lot 93 as a residential subdivision. *Held:* That knowledgeable men such as the appellant and Cobrin and their associates, with long experience in the real estate field, cannot have acquired the lands in question with the intention of building a shopping centre and retaining it as an investment to the exclusion of all other possible uses of the property regardless of the many obvious possible developments which would make some other use of the land of greater financial advantage to them. 2. That it is clear that although the Cobrins owned a large number of revenue-producing properties they were, in addition, engaged as traders in real estate. 3. That the *mens rea* of a partnership should be determined by ascertaining the intention of the person or persons who in fact controlled its operations and decisions. 4. That the evidence establishes that, if other more preferred alternatives did not materialize, the partnership intended to take advantage of the boom which prevailed by selling the property in its unimproved state. 5. That the balance of probability is that the partnership was aware from the beginning that there were other ways in which the instant property might be disposed of—and the main concern, particularly of the Cobrins, was the sale of the property at a profit. 6. That the sale of the property at a profit and not its retention as an investment was uppermost in the minds of those in charge of the enterprise and, in disposing of it as they did, they were carrying out the scheme of profit-making pursuant to which the property was acquired. 7. That the appeal is dismissed. DAVID ROTHENBERG v. MINISTER OF NATIONAL REVENUE............. **849**

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37.—*Income—Income tax—Business—Profit from a business—Adventure or concern in the nature of trade—Investment—Disposition of capital asset—Exclusive intention of taxpayer—Construction and sale of apartment building—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e).* The appellant, a company incorporated under the laws of the Province of Ontario by letters patent dated May 20, 1955, undertook the construction of two similar apartment buildings, one on Balliol Street and the other on Keewatin Street, both in the City of Toronto. The construction of both buildings was commenced in March 1956 and the total estimated cost of the projects was $860,110, including the cost of the land. During the period of construction a strike occurred in the steel industry and delivery of structural steel to the projects was delayed for about three months. When that strike ended a strike occurred in the ready mix concrete business, resulting in a further delay in construction of one month. The actual construction cost was about $125,000 more than the total estimated cost. In September 1957 the appellant company was without funds to pay about $90,000 in outstanding and overdue liabilities. At this time the Balliol apartment was fully rented and the Keewatin apartment was partly rented. During and after construction of the two apartment buildings the appellant had received unsolicited offers to purchase them and in September 1957 the appellant's shareholders accepted one of the offers and the purchaser was given the choice of apartment buildings. The purchaser chose to buy the Balliol property because it was fully rented. On the sale the appellant realized a gain of $59,627.71, which was assessed by the respondent as income, which assessment was upheld on appeal to the Tax Appeal Board. The question for determination is whether the profit realized by the appellant on the sale of the Balliol property is profit from a business or whether the lands were acquired and the apartment buildings constructed thereon as an investment for the purpose of receiving rental income therefrom and such plan became impossible of fruition because of the financial difficulties encountered by the appellant which necessitated the sale of the Balliol property. *Held:* That if the appellant's exclusive intention was to construct and operate both apartment buildings and derive income therefrom it follows that the profit from the sale of one of the buildings would not be profit from a business or an adventure in the nature of trade, but if such was not its exclusive purpose at the time the enterprise was begun, there can, in such circumstances, be no doubt that the acquisition of the lands and the construction of apartment buildings thereon had for its purpose, or one of its possible purposes, subsequent disposition of one or other of the buildings at a profit, and the resulting profit is taxable. 2. That it is apparent from the evidence that the project was embarked upon with borderline financing and without due regard for the hazards of the construction trade such as difficulties and delays in procuring materials and skilled tradesmen, whether occasioned by strikes or otherwise, and that Mr. Stone, a building contractor, and a shareholder and director of the appellant, had estimated the cost of the two apartment buildings at about $935,000, i.e. slightly more than the actual cost, and the inference naturally follows that the appellant's sole intention was not the retention of both apartment buildings for the purpose of producing rental income. 3. That the possibility of retrenchment by the appellant, by the sale of one of the buildings to secure the retention of the other, must have been present from the outset and the financing, while ample to finance the building and retention of one apartment building, was inadequate for both. 4. That the evidence does not establish that the two apartment buildings had been constructed with the sole intention of retaining and operating them as revenue producing properties, and the appellant contemplated from the outset the possibility of a profit made by disposing of one or other or both of the apartment buildings. 5. That the appeal is dismissed. HARMONY INVESTMENTS LIMITED v. MINISTER OF NATIONAL REVENUE.................863

RIGHT OF BAND TO POSSESSION OF RESERVE LAND SUSPENDED OR TERMINATED IN CERTAIN CASES.
See CROWN, No. 11.

RIGHT OF INDIAN BAND TO POSSESSION OF RESERVE LAND.
See CROWN, No. 11.

RIGHT TO RECEIVE A RECEIVABLE NOT IN ITSELF A RECEIVABLE.
See REVENUE, No. 3.

RIGHT TO POSSESSION LAWFULLY ACQUIRED BY INDIVIDUAL MEMBER OF BAND IS ASSIGNABLE AND TRANSMISSABLE SUBJECT TO THE STATUTE.
See CROWN, No. 11.

RIGHT TO POSSESSION VESTED IN BAND OR IN INDIVIDUAL INDIAN BUT NOT IN BOTH AT THE SAME TIME.
See CROWN, No. 11.

RULE 22A OF RULES OF COURT.
See PRACTICE, No. 3.

RULE 228 OF RULES OF COURT.
See PRACTICE, No. 3.

SALE OF APPELLANT'S INTEREST IN ASSOCIATION.
See REVENUE, No. 7.

SALE OF CHATTEL MORTGAGES AND CONDITIONAL SALES CONTRACTS TO ANOTHER FINANCE COMPANY.
See REVENUE, No. 4.

SALE OF CHATTEL MORTGAGES TO ANOTHER FINANCE COMPANY.
See REVENUE, No. 3.

SALE OF POTENTIAL INCOME PRODUCING ASSETS.
See REVENUE, No. 24.

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See REVENUE, No. 10.

SALES AGENCY.
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SALES COMMISSIONS.
See REVENUE, No. 5.

SALES OF REBUILT ENGINES FOR CASH AND REBUILDABLE ENGINES.
See REVENUE, No. 30.

SCHEME OF PROFIT MAKING.
See REVENUE, No. 36.

SECTION 21(1) APPLICABLE WHETHER OR NOT TRANSFEROR RESIDENT IN CANADA AT TIME OF TRANSFER.
See REVENUE, No. 29.

SECTION 41(3) AIMS AT FREEING NEW PROCESS FROM ABSOLUTE CONTROL OF PATENTEE.
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SENTIMENTAL AND EMOTIONAL FACTORS TO BE IGNORED.
See EXPROPRIATION, No. 1.

SHIPPING—
1. Admiralty Act, R.S.C. 1952, c. 1, ss. 2(1) and 18(2). No. 1.
2. Apportionment of liability. No. 3.
3. Arrest. No. 1.
4. Canada Shipping Act, R.S.C. 1952, c. 29, ss. 2(52), 657-659 and Amendment, S. of C. 1961, c. 32, No. 3.
5. Collision between two fishing vessels. No. 3.
6. Collision in Welland Ship Canal. No. 2.
7. Failure to keep proper lookout. No. 3.
8. Failure to warn Canal authorities of approaching ships of mooring difficulties. No. 2.
9. Faulty mooring procedure. No. 2.
10. Interest on damages. No. 3.
11. International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957, Art. VI. No. 3.
12. Jurisdiction of Court. No. 1.
13. Limitation of liability. No. 3.
14. Meaning of "Towage". No. 1.
15. Negligence. No. 3.
16. No negligence of ship's Masters and officers. No. 2.
17. Owner-master sued as owner. No. 3.
18. Practice. No. 1.
19. Regulations for preventing collisions at sea, 1954, Rules 1, 9, 10, 24 and 29. No. 3.
20. Stern of ship drifting across channel while ship being moored. No. 2.
21. Unlawful arrest a nullity. No. 1.
22. Whether parts of day to be considered with regard to time of institution of action. No. 1.

SHIPPING—*Practice—Admiralty Act, R.S.C. 1952, c. 1, ss. 2(1) and 18(2)—Meaning of "Towage"—Arrest—Jurisdiction of Court—Unlawful arrest a nullity—Whether parts of day to be considered with regard to time of institution of action.* This is a motion on behalf of the defendant ship and its owner to set aside the writ of summons and warrant of arrest issued in this action on the ground that this Court is without jurisdiction to entertain the action on two grounds, viz. that at the time of the issue of the writ herein and the arrest of the ship, the *Audrey S* was not a ship within the meaning of the *Admiralty Act* and that the ship was not under arrest at the time this action was instituted. The evidence established that the incomplete hull of the ship was taken by truck from its place of construction to Toronto harbour and shortly thereafter the trucker caused an action to be commenced and the ship to be arrested for non-payment of his claim for "towage charges". The ship was arrested in the present action by the sheriff on the same day as but more than two hours after it had been released from arrest in the first action. *Held:* That the claim in the first action for towage services was without the jurisdiction of this Court because there had been no towing but transportation by truck, and the arrest of the ship in that action was an unlawful exercise of the power of the Court and was a nullity. 2. That there was no arrest of the ship at the time this action was instituted. 3. That even if parts of the day cannot be considered, then because the arrest in the first action was unlawful, it cannot afford a basis by which this action can be supported. 4. Order to go setting aside writ and warrant of arrest in this action and service of same. TORONTO WINDOW MFG. CO. LTD. v. THE SHIP *Audrey S*......................83

2.—*Collision in Welland Ship Canal—Stern of ship drifting across channel while ship being moored—Faulty mooring procedure—Failure to warn Canal authorities of approaching ships of mooring difficulties—Negligence of ship's Master and officers.* This action arises out of a collision which occurred in the Welland Ship Canal at about or slightly after midnight on the night of June 15-16, 1962, when the ship, *B. A. Peerless*, owned by the plaintiff, while proceeding upbound in a southerly direction in the canal,

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collided with the defendant ship which had been proceeding down-bound and was then in the process of tying up to a wharf on the east side of the canal. The evidence disclosed that at the point of collision the canal was about 215 feet wide and that the length of the defendant ship was 420 feet and its maximum width was 60 feet. It was also established that the defendant ship was moored by the bow and that before the stern could be moored it swung out into the canal under the influence of the current in the canal and the propeller action used in stopping the defendant ship. The Captain of the defendant ship, when directed to tie up, was told that a large and deep tanker was coming up-bound and would pass him. It was disclosed by the evidence that the Captain of the defendant ship took no steps to warn anybody connected with the operation of the canal of the plight he was in, nor did he signal by whistle or in any other way that he was in difficulty. *Held:* That it could be fairly said that the situation in which the stern of the defendant ship drifted across the canal was caused by attempting to tie up the defendant ship bow first with the current coming from astern and in the presence of the effect of the propeller action and that this fact was one of which both the Master and the pilot of the defendant ship must have been aware. 2. That the radio officer of the defendant ship was guilty of irresponsible conduct which was shared by some of his fellow officers, when in face of the fact that the defendant ship was tying up to let a large ship pass and a query was received by radio as to whether they were in trouble, he took no steps to find out who was calling or to communicate with the Master or one of the mates of his ship. 3. That once those on the *B. A. Peerless* became aware of the danger of collision, their actions were the best possible ones that could have been taken in the circumstances considering the width of their ship and the sea room available. 4. That the Master of the *B. A. Peerless* was alert to the situation and when he realized the danger, which the defendant ship should have advised him of earlier, he did his best to prevent the collision which followed, using all the means which, practically speaking, were open to him. 5. That the Master of the defendant ship did nothing to cope with the effect of the propeller action he took to stop his ship and of the current in the canal which would tend to throw his stern out, which, when combined with the lack of enough men ashore to take the stern lines, led directly to the drifting of the stern of the defendant ship across the canal and made the collision inevitable. 6. That the plaintiff's action for damages succeeds and defendant's counterclaim is dismissed. BRITISH AMERICAN TRANSPORTATION CO. LTD., THE v. THE SHIP *Extavia* 403

3.—*Collision between two fishing vessels—Negligence—Failure to keep proper lookout—Apportionment of liability—Owner-master sued as owner—Limitation of liability—Interest on damages—Regulations for preventing collisions at sea, 1954, Rules 1, 9, 10, 24 and 29—Canada Shipping Act, R.S.C. 1952, c. 29, ss. 2(52), 657-659 and Amendment, S. of C. 1961, c. 32—International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957, Art. VI.* This is an action for damages arising out of a collision between two fishing draggers in the Gulf of St. Lawrence at about 2:30 a.m. on September 7, 1961. The vessel *Donald Helene,* which was drifting with its engine stopped when it was rammed by the vessel *Gloucester No. 26,* later sank while it was being towed to port. It was found on the evidence that at the time of the collision the weather was fine and clear, the visibility was about twenty miles, the tide was about half-ebb, there was a northerly wind of about force 1, but there was no sea or swell. It was also found on the evidence that the *Donald Helene* was stopped in the water but under command at the time of the collision, that she was showing fore and aft navigation lights and that there were other draggers two or three miles away, of which some were stationary and others were moving. *Held:* That the risk of there being another dragger or any vessel ahead of the *Gloucester No. 26* in its track was not reasonably improbable since any dragger might have pulled away from the fishing fleet to let its crew have a rest or to work as the crew of the *Gloucester No. 26* was doing. 2. That whether the *Donald Helene* was moving or not, or showing navigation lights or not, the owner-master of the *Gloucester No. 26* was at fault in not keeping the lookout required by the ordinary practice of seamen. 3. That since the *Gloucester No. 26* was well lighted, having in addition to her navigation lights, two spotlights where her crew were working, and since she could not have been more than a mile astern of the *Donald Helene* and approaching her directly when the mate of the *Donald Helene* made his last turn around his vessel, the mate was at fault in not seeing her at all. 4. That, there being no evidence to the contrary, it may be taken that the plaintiff is responsible for the conduct of the mate of the *Donald Helene* placed on duty as watchman. 5. That Rule 24 of the Regulations for Preventing Collisions at Sea, 1954, does not apply to vessels one of which has ceased to go ahead. 6. That the fault in each vessel was practically concurrent in time and identical in character and, accordingly, the parties were equally to blame for the collision. 7. That the defendant, Captain Noel, was the owner of the *Gloucester No. 26* and at the material time was navigating his vessel as its master and that he was sued and appeared in his capacity as owner and not as master. 8. That although the action is *in rem,* the judgment is a personal judgment

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against Captain Noel without reference to the *res* as such, subject, however, to any privilege of limiting his liability which the *Canada Shipping Act* may accord him. 9. That where an owner-master negligently navigates his ship as master and is sued in the capacity of owner, s. 657 of the *Canada Shipping Act* alone applies and he does not have the legislative privilege of limiting his liability. If such owner-master were sued in his capacity of master, s. 659 of the *Canada Shipping Act* would apply and he would have that privilege. 10. That the plaintiff is entitled to interest from the date of the collision to the date of payment on the moiety of damages recoverable under this judgment. LAPIERRE, ARTHUR v. *The M/V Gloucester No. 26 et al.* **586**

SIGNIFICANCE OF COMMERCIAL SUCCESS OF PATENTED INVENTION WITH RESPECT TO VALIDITY.
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SIMILAR TRADE MARKS.
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SIMILAR WARES
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SPECIAL PAYMENTS BY EMPLOYER ON ACCOUNT OF EMPLOYEES' SUPERANNUATION OR PENSION FUND.
See REVENUE, No. 16.

SPECIAL PAYMENTS ON ACCOUNT OF EMPLOYEES' SUPERANNUATION FUND IN YEAR WHEN EMPLOYER'S INCOME EXEMPT FROM TAXATION.
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SPECIFICATION OF PATENT.
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STATE OF TRADE MARKS REGISTER.
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STERN OF SHIP DRIFTING ACROSS CHANNEL WHILE SHIP BEING MOORED.
See SHIPPING, No. 2.

SUBROGATION CONVENTIONNELLE.
Voir COURONNE, N° 5.

"SUCCESSIVE APPROXIMATION" AND "ALGEBRAIC" METHODS OF CALCULATING DEDUCTION UNDER s. 7(1)(d) of ESTATE TAX ACT.
See REVENUE, No. 28.

SUFFICIENCY OF PROPRIETOR'S NAME ON LABEL AS REQUIRED BY s. 14 OF INDUSTRIAL DESIGN AND UNION LABEL ACT.
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TARIFF ITEMS 409m(1) AND 427a.
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TAX ON IMPORTED GOODS UNDER THE EXCISE TAX ACT.
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TAXABILITY OF EARNINGS FROM ILLEGAL OPERATION OR ILLICIT BUSINESS.
See REVENUE, No. 33.

TAXABILITY OF GOODS RE-IMPORTED AFTER HAVING BEEN PREVIOUSLY IMPORTED THEN EXPORTED.
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TAXPAYER ENTITLED TO DEDUCTION FOR LIABILITY TO REFUND DEPOSITS.
See REVENUE, No. 30.

TAXPAYER MEMBER OF PARTNERSHIP OR SYNDICATE.
See REVENUE, No. 36.

TAXPAYER OCCUPIED FULL-TIME IN MANAGEMENT OF APARTMENT BUILDING.
See REVENUE, No. 29.

TAXPAYER'S ACCESS TO INFORMATION OBTAINED THROUGH FIDUCIARY POSITION OF COMPANY DIRECTOR AND OFFICER.
See REVENUE, No. 2.

TELLE ACTION IRRECEVABLE DANS LE QUÉBEC.
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THEORY OF SUBSTANCE OR PITH AND MARROW.
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TRADE MARK OF WARES SOLD WHOLESALE CONFUSING WITH TRADE MARK OF WARES SOLD RETAIL.
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TRADE MARK MAY BE NAME UNDER WHICH BUSINESS IS CARRIED ON.
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TRADE MARK WHICH IS NOT "DESCRIPTIVE" IS NOT "MISDESCRIPTIVE".
See TRADE MARKS, No. 7.

TRADE MARKS—
1. Abandonment of trade mark. No. 4.
2. Appeal from decision of Registrar of Trade Marks. No. 5.
3. Application for registered user. No. 5.
4. Application for registered user to be refused if it would cause deception or confusion beyond that necessarily from registered user provisions of Trade Marks Act. No. 4.
5. Application to strike out entry in register. No. 1.
6. Assignment agreement acted upon by both parties cannot be objected to by them although improperly authorized and executed by the party objecting to it. No. 4.
7. Assignor of trade mark cannot retain equitable ownership thereof consideration given for assignment. No. 4.
8. Assignment of trade mark need not include goodwill of assignor. No. 4.
9. Confusion. No. 2.
10. Confusion between plaintiff's business and that of defendant. No. 6.
11. Confusion of public. No. 7.
12. Confusion where plaintiff and defendant dealing in identical wares. No. 6.
13. Connotation of trade mark one of impression and not to be based on research into meaning of words. No. 3.
14. Corporate name used as trade mark. No. 4.
15. Descriptive of character or quality of wares No. 7.
16. Descriptiveness and distinctiveness not necessarily incompatible qualities. No. 4.
17. Distinctive or adapted to distinguish. No. 7.
18. Functional use or characteristic. No. 1.
19. Goodwill of company and of trade mark inseparable where trade name includes the trade mark. No 6.
20 Goodwill of trade identical to and inseparable from that of trade name where trade mark is part of trade name. No. 4.
21. Goodwill severable from trade mark. No. 4.
22. Infringement. Nos. 4 and 7.
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25. Length of time trade marks have been in use. No. 7.
26. Loss of distinctiveness. No. 4.
27. Misstatements in application for registration of trade mark. No. 7.
28. Nature of the trade. No. 7.
29. Nature of the wares. No. 7.
30. Non-distinctive trade mark. No. 4.
31. Opposition to application of word trade mark. No. 3.
32. Ownership of trade mark not divisible into legal and equitable title between registered owner and registered user. No. 4.
33. Passing off. No. 6.
34. Permitted use controlled by registered owner. No. 4.
35. Permitted use of trade mark by registered user deemed to be use by owner thereof. No. 4.
36. Permitted use terminated by breach of registered user agreement. No. 4.
37. Phonetic similarity between trade marks. No. 2.
38. Piracy of trade mark may result in its loss to owner. No. 4.
39. "Public" included only those members of public who would probably buy the wares. No. 2.
40. Registered user agreement. No. 4.
41. Registrability. No. 2.
42. Registration. Nos. 3 and 7.
43. Similar trade marks. No. 7.
44. Similar wares. No. 7.
45. State of trade marks register. No. 2.
46. Trade mark of wares sold wholesale confusing with trade mark of wares sold retail. No. 2.
47. Trade mark may be name under which business is carried on. No. 4.
48. Trade mark which is not "descriptive" is not "misdescriptive". No. 7.
49. Trade Marks Act, S. of C. 1952-53, c. 49, ss. 2(b), 6(1), (2) and (5), 7(b), 12(1), 18(1), 19, 20, 22, 26(1) and (3), 29(b), 40(1)(c) and (2) and 47(1) No. 7.
50. Trade Marks Act, S. of C. 1952-53, c. 49, ss. 2(f), (t), (u), (v), 4, 18(b), 20, 47(1) and (2), 49 and 53(2). No. 4.
51. Trade Marks Act, c. 49, S. of C. 1953, ss. 2(t), 7(d), 12(1)(b), 55 and 58(3). No. 3.
52. Trade Marks Act, S. of C. 1952-53, c. 49, ss. 2(t), 29(h) and 56. No. 1.
53. Trade Marks Act. S. of C. 1952-53, c. 49, s. 6. No. 2.
54. Trade Marks Act, S of C. 1952-53, c. 49, ss. 7, 47(1) and 49(4) and 10(c). No. 6.
55. Trade Marks Act, S. of C. 1952-53, c. 49, ss. 49(11) and (12) and 55. No. 5.
56. Trade marks for wares in same category. No. 2.
57. Trade names can be transferred only with goodwill attached to them. No. 4.
58. Unfair competition. No. 6.
59. Unfair Competition Act, R.S.C. 1952, c. 274, ss. 2(1) and (m), 22(1), 26(1) and 30(1)(a). No. 7.
60. Unfair Competition Act, R.S.C. 1952, c. 274, s. 2(m). No. 4.
61. Use of non-registered trade mark. No. 6.
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63. Use of trade mark by permitted user after breach of user agreement constitutes infringement. No. 4.
64. User agreement not to be registered if not in the public interest. No. 4.
65. User of trade marks in same area. No. 7.
66. Validity. No. 7.
67. Wares not distinguished by trade mark when trade name also used as trade mark. No. 4.
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69. Whether appellant must be registered user of trade mark in question. No. 5.
70. Whether consequence of functional process can be a trade mark. No. 1.
71. Whether decision of Registrar of Trade Marks adverse to appellant as required by s. 49(12) of Trade Marks Act. No. 5.
72. Whether distinctiveness of trade mark lost through use by affiliated or related companies. No. 6.
73. Whether goodwill assigned with trade mark or trade name. No. 6.
74. Whether permitted use of trade mark distinguishes user's wares sufficiently to support a passing off action. No. 6.
75. Whether trade mark one of impression or misdescriptive. No. 3.
76. Whether trade marks have become generic. No. 4.
77. Who may appeal decision of Registrar of Trade Marks granting application for registered user. No. 5.

TRADE MARKS—*Trade Marks Act, S. of C. 1952-53, c. 49, ss. 2(t), 29(h) and 56—Application to strike out entry in register—Functional use or characteristic—Whether consequence of functional process can be a trade mark.* This is an application made by way of originating notice of motion for an order that the entry in the register of the respondent's trade mark relating to fire hardened wooden tool handles be struck out on the grounds, *inter alia*, that the subject matter of the entry is not a trade mark within the statutory definition. *Held:* That section 56 of the *Trade Marks Act* confers jurisdiction on the Court to make an order that an entry in the register be struck out on the ground that what is registered is not a trade mark. 2. That since the description of the "mark" included in the entry in the register describes the "mark" as consisting "of the accentuation in darker colouring of the grain of the wood of tool handles the surface of which has been fire hardened to accomplish such purpose", the "mark" is not the tool handle but the accentuation in darker colouring of the grain of the wood of the handle when such is accomplished by the process of fire hardening. 3. That a process that is believed by those in the trade to improve an article is just as functional for commercial purposes as one that creates improvements according to some absolute scientific test or standard. 4. That the change in the appearance of the wood that is the ordinary consequence of fire hardening cannot be a trade mark, since the process of fire hardening is primarily designed to improve wooden handles as objects of commerce and has therefore a functional use or characteristic. ELGIN HANDLES LTD. v. WELLAND VALE MFG. CO. LTD. 3

2.—*Trade Marks Act, S. of C. 1952-53, c. 49, s. 6—Registrability—Confusion—Trade mark of wares sold wholesale confusing with trade mark of wares sold retail—"Public" includes only those members of public who would probably buy the wares—Trade marks for wares in same category—Phonetic similarity between trade marks—State of trade marks register.* This is an appeal from the decision of the Registrar of Trade Marks allowing the registration of the respondent's trade mark "Fresk", on the ground that the said trade mark is confusing with the appellant's already registered trade mark "Freshie" and therefore is not registrable. The trade mark "Fresk" had not been used anywhere in Canada prior to the hearing of the appeal nor had the respondent sold any of its products in Canada up to that time. Affidavit evidence was filed on the appeal in addition to the evidence that was before the Registrar of Trade Marks, and this included affidavits of twenty-one persons interviewed on behalf of the appellant. There was evidence that the respondent sold its product only on a wholesale basis whereas the appellant sold "Freshie" at the retail level. *Held:* That the matter of whether the wares in question were sold at the wholesale or retail level is irrelevant in deciding whether there is or is not confusion. 2. That the source of manufacture of the wares in question would be confused in the mind of the public, i.e. those members of the public who would probably buy these wares. 3. That there has been a substantial inherent distinctiveness established for the trade mark "Freshie" and the product sold on which it is endorsed and that it is substantially known by the public in Canada. 4. That the product marketed by the respondent under the trade mark "Fresk" is in the same category of wares as those sold by the appellant under its trade mark "Freshie". 5. That there is sufficient phonetic similarity between the trade marks "Freshie" and "Fresk" and in the appearance of the wares and the advertising in respect of each of them to confuse the public. 6. That the state of the Register which indicates that there are registered in the office of the Registrar of Trade Marks at least twenty trade marks which have in them the common word "fresh" is not a reason for holding that no confusion exists, since only a few of the already registered trade marks refer to wares of a similar category as the wares for which the appellant has had its trade mark registered. 7. That the appeal is allowed. SUNWAY FRUIT PRODUCTS, INC. v. PRODUCTOS CASEROS, S.A. 42

3.—*Registration—Opposition to application for registration of word trade mark—Whether trade mark descriptive or misdescriptive—Connotation of trade mark one of impression and not to be based on research into meaning of words—Trade Marks Act, c. 49, S. of C. 1953, ss. 2(t), 7(d), 12(1)(b), 55 and 58(3).* This is an appeal by the Deputy Attorney General of Canada from a decision of the

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Registrar of Trade Marks rejecting the appellant's opposition to an application by the respondent for registration of the word "Waterwool" as a trade mark intended by the respondent to be used in association with ladies' and men's sweaters, ladies' and men's shorts, ladies' skirts, ladies' slacks and ladies' knitted suits and dresses, limited to such garments made of wool or in which the majority of the fibres or textiles are composed of wool. *Held* That the word "Waterwool" when used in relation to garments does not connote that the garment has a certain appearance, i.e., a wavy lustrous finish or an undulating sheen. 2. That the word "Waterwool" may mystify the person who is confronted with it in association with a garment and it may even vaguely suggest some association with wool, but it does not describe the garment as being made of the wool of any animal. 3. That the decision as to the connotation of a trade mark must be one of impression and must not be based on research into the meaning of words. 4. That the proposed mark, having no specific descriptive connotation, is capable of distinguishing the wares of the respondent from the wares of others. 5. That on the facts of this case at least, if the trade mark does not fall within s. 12(1)(*b*) of the *Trade Marks Act* and meets the requirements of s. 2(*t*), its use will not necessarily contravene s. 7(*d*). 6. That the appeal is dismissed. DEPUTY ATTORNEY GENERAL OF CANADA v. JANTZEN OF CANADA LTD. 227

4.—*Infringement—Registered user agreement—Permitted use terminated by breach of registered user agreement—Permitted use of trade mark by registered user deemed to be use by owner thereof—Permitted use controlled by registered owner—User agreement not to be registered if not in the public interest—Application for registered user to be refused if it would cause deception or confusion beyond that necessarily resulting from registered user provisions of Trade Marks Act—Assignment of trade mark need not include goodwill of assignor—Goodwill severable from trade mark—Use of trade mark by permitted user after breach of user agreement constitutes infringement—Loss of distinctiveness—Piracy of trade mark may result in its loss to owner—Abandonment of trade mark—Whether trade marks have become generic—Descriptiveness and distinctiveness not necessarily incompatible qualities—Assignment agreement acted upon by both parties cannot be objected to by them although improperly authorized and executed by the party objecting to it—Assignor of trade mark cannot retain equitable ownership thereof where consideration given for assignment—Ownership of trade mark not divisible into legal and equitable title between registered owner and registered user—Non-distinctive trade mark—Trade mark may be name under which business is carried on—Trade names can be transferred only with goodwill attached to them—Goodwill of trade mark identical to and inseparable from that of trade name where trade mark is part of trade name—Corporate name used as trade mark—Wares not distinguished by trade mark when trade name also used as trade mark—Trade Marks Act, S. of C. 1952-53, c. 49, ss. 2(f), (t), (u) and (v), 4, 18(b), 20, 47(1) and (2), 49 and 53(2)—Unfair Competition Act, R.S.C. 1952, c. 274, s. 2(m).* The defendant company was incorporated in 1938 and carried on the business of selling tops and bats. In 1955 the plaintiff's wife, who owned 75 per cent of the shares in the defendant company, sold her interest therein to one Albert Krangle, but just prior thereto the defendant company assigned all but one of its trade marks to the plaintiff, the remaining trade mark being assigned to the plaintiff in 1957. By the terms of the agreement under which the transfer of interest in the defendant company took place, the plaintiff granted a non-exclusive licence to the defendant company to use the trade marks, patents, industrial designs and copyrights referred to in the licence, which included all the trade marks formerly owned by the defendant company. Under the said agreement the defendant company agreed, *inter alia*, to pay to the plaintiff an annual sum equal to five per cent of the sale price of all bandalore tops sold by it. The defendant company, together with the plaintiff, applied for registration of the defendant company as a registered user of each of the trade marks in issue and an entry was made in the register of trade marks whereby the defendant company was registered as a registered user thereof but with the proviso that it could so use the trade marks only so long as the registered owner, the plaintiff, was given free access to the defendant companys' premises to inspect the finished wares and found them to be in compliance with the standards therein set out. The permitted use was without definite period. In December 1962, at a meeting between Krangle, the president and controlling shareholder of the defendant company and the plaintiff, the defendant company, through Krangle, denied free access to the plaintiff to inspect its wares. In January 1963 the plaintiff purported to terminate the registered user agreement because of this breach of the terms thereof. This action was then instituted by the plaintiff in which he claims damages and consequential relief for infringement by the defendant company of the plaintiff's trade marks and designs. *Held:* That the plaintiff was entitled to free access for inspection under the terms of the registered user agreement and this could not be restricted to one area only of the defendant company's premises. 2. That when the defendant denied the plaintiff free access for inspection it forfeited the right to any use of the trade marks subsequent to that time and therefore ceased to be a permitted

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user within the meaning of s. 49(2) of the *Trade Marks Act*. 3. That the terms referred to in s. 49(2) of the *Trade Marks Act* are the terms which appear in the user agreement and are not restricted to what is defined as use in s. 4(1), (2) and (3) of the *Trade Marks Act*. 4. That the rule under the present *Trade Marks Act* is still that the purpose of a trade mark is to indicate origin by distinguishing the wares of one from those of another, as it was under the *Unfair Competition Act*. 5 That the permitted use under s. 49(3) of the *Trade Marks Act* is an exception to the rule and therefore must be strictly construed and this applies not only to the substantive law but also to the procedure set down therein to give effect to this departure from the general rule. 6. That s. 49(3) is of a very general and broad nature and goes as far as to deem not only that the permitted use of a trade mark by the registered user is use by the owner thereof but also that the wares in association with which the trade mark is used by the permitted user are deemed to distinguish the wares of the owner of the trade mark and it also confers on the permitted user, *inter alia*, the right to raise the same defences in an infringement action as are available to the registered owner, including the statutory right of use of the trade mark conferred on the registered owner by s. 19 of the Act. 7. That the permitted use of a trade mark is a type of deception which Parliament has implicitly recognized as necessary in the general interest of trade but it should not go beyond what is necessary to permit the owner of a trade mark to allow some other person to use it providing the name of such person is not confusingly similar to that of the owner, or if so, no additional objectionable confusion results from the concurrent use by him of the trade mark. Any further deception would be against the public interest which is the governing consideration the Registrar of Trade Marks is faced with when he comes to approve a person as a registered user or when once he has approved the registered user he comes to vary the terms of such use, and it can become a valid reason for cancellation of the registration of a registered user. 8. That the provisions of s. 49 are permissive and not mandatory and are for the utility of the owner of the trade mark and the registered or permitted use ceases upon the breach of the terms of the registration as endorsed in the Register of Trade Marks if the language of the terms so provides, provided such terms are limited to what is set down in the section as being necessary for the proper carrying out of its intent. 9. That it is a basic requirement on an application for a registered user that the owner of a trade mark retain control over the permitted use; that information with respect to the wares or services for which registration is requested or the restrictions proposed with respect to the characteristics of the wares, to the mode or place of permitted use or to any other matter, be supplied, as well as information as to the proposed duration of the permitted use and such further documents, information or evidence as may be required by the Registrar. 10. That the whole purpose of the conditions underlying the registered user provisions is that the quality of the goods would not be reduced if the marks were permitted to be used by persons other than the owner and the matter of origin is not of too great concern. 11. That since the governing consideration which the Registrar must adopt in permitting the use of a trade mark is the public interest and there is no limitation in the registered user section in this regard, the registration of a proposed registered user is not to be permitted if, for any reason at all, it would not be in the public interest. The Registrar would have to refuse the application if, for any reason whatsoever, approval thereof would cause deception or confusion which went beyond that necessarily resulting from the registered user provisions of the Act. 12. That not only may a trade mark be assigned apart from the goodwill of a business but the goodwill also is considered severable so that a trade mark also can be assigned together with the particular portion of the business in association with which it has been used or even with a particular part of the business being conducted in a particular restricted area. 13. That the same grounds as those enumerated under s. 49(10)(*c*) can be raised on a hearing before the Registrar under s. 49(10)(*a*) or (*b*). 14. That the defendant was no longer a permitted user after breach of the user agreement and any use made by it of the plaintiff's trade marks after that time would constitute infringement. 15. That in cases where the question is whether a particular symbol has been used for the purpose of distinguishing the wares of a particular manufacturer or whether it has been used principally as a description or a name of the wares themselves, the whole course of conduct of the owner or permitted user of the trade mark must be considered in order to determine whether or not it has lost its distinctiveness. 16. That whether a word registered as a trade mark has come to mean the name of the goods or wares themselves is a question of fact to be determined from the circumstances of the particular case. 17. That a trade mark can be lost because it has come to mean the ware itself only when the owner has been careless in its use and has allowed extensive piracy of the mark by others. 18. That there can be no abandonment of the trade marks YO-YO and BO-LO by the owner because he has maintained his rights to them by allowing the defendant to use them under controlled licence as permitted by the Act, such use being deemed under

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the Act to be use by the owner, and for which he has over the period of the user agreement and up to date, received royalty payments. 19. That the conduct of the plaintiff and defendant in successfully taking action on two occasions to terminate infringement of the trade marks is such as to make it apparent that the trade marks have been used principally as trade marks and consequently cannot be considered to have become generic. This conclusion is strengthened by the fact that in many cases the words YO-YO and BO-LO have been accompanied by the letter "R" in a circle, meaning registered trade mark, on the packing boxes of the wares and that in its advertising the defendant has always indicated that these were registered trade marks. 20. That the sold basis on which the trade mark BEGINNERS might be invalidated as being no longer distinctive would be its descriptiveness, even though these two qualities are not necessarily incompatible, and the question as to whether or not the trade mark actually distinguishes the wares in association with which it is used by its owner from those of others is one of fact. 21. That although it has not been shown that any other producer of tops or bats has used the trade mark BEGINNERS on the same product anywhere in Canada, it has been established on the evidence that the word BEGINNERS, when used by the plaintiff through its registered owner in association with the wares on which it has been used in the area in which the products are sold, was descriptively used for the purpose of indicating that the wares were easy of operation and for beginners as contrasted with those of better quality, and does not actually distinguish such wares from those of others within the first part of the definition of "distinctive" in the statute, and the trade mark is accordingly invalid as not being distinctive at the material time, i.e. when the counterclaim of the defendant was delivered. 22. That since, by virtue of s. 49(3) of the *Trade Marks Act*, use of a trade mark by a registered user has the same effect as use by the registered owner for all purposes of the Act, use by the registered user is deemed to be use by the owner, so that if such use is sufficient to distinguish, then it distinguishes the wares in association with which it is used by its owner (through the registered user) from the wares of others as required by s. 2(*f*) of the *Trade Marks Act*. 23. That although evidence was adduced which indicated that the agreement by which the trade marks were assigned by the defendant company to the plaintiff in 1955 was improperly authorized and executed by the defendant company, both parties have acted on the assignment, the defendant company having paid royalties thereunder for nearly ten years, and the parties revised the conditions of the assignment in 1959 and 1961, this alone being sufficient in the circumstances of this case to prevent the defendant company from now raising this objection. 24. That although the plaintiff, because of his position in the defendant company in 1955, cannot be considered an outsider and might not therefore be able to benefit from what is termed the indoor management rule, he would still be entitled to whatever rights he might have as a party in good faith to a valid document which contains the transfer of rights and mutual obligations and on which the seal of the company was affixed. 25. That although the assignment was recited to be for $1.00 and other valuable consideration, there was in fact other consideration therefor, since the transaction was part of an overall deal whereby the majority of shares of the defendant company were transferred to Krangle and the company was allowed to use the trade marks so that the transfer of the trade marks to the plaintiff cannot be said to have been gratuitous and the defendant company is not the equitable owner of the trade marks. 26. That the fiction created by s. 49(3) of the *Trade Marks Act*, which states that the permitted use of a trade mark has the same effect for all purposes of the Act as a use thereof by the registered owner, would make it impossible in the present situation to argue that there is any division and that the plaintiff has legal title but the defendant has the beneficial or equitable title. 27. That the assignment of the trade marks from the defendant company to the plaintiff and of the user rights back to the defendant company must all be read together and if this is done it appears that as a result of these two transactions there has subsisted rights in two persons to the use of confusing trade marks and the evidence disclosing that those rights have been concurrently exercised by such persons, the trade mark CHEERIO has become non-distinctive within the meaning of s. 47(2) of the *Trade Marks Act*. The confusing trade marks are not the trade mark CHEERIO as deemed to be used by the plaintiff and as in fact used by the defendant company but the trade mark CHEERIO which stands in the name of the plaintiff, on the one hand and the corporate name "Cheerio Toys and Games Limited" which stands in the name and ownership of the defendant company on the other hand, and which, under s. 2(*u*) of the Act, can be the name under which a business is carried on and at the same time a trade mark if it is used in association with wares. 28. That although s. 47(1) of the *Trade Marks Act* now permits the assignment of trade marks with or without the goodwill of the business, this section does not apply to the transfer of trade names which can only be transferred together with the goodwill attached to them, and as there was no assignment of the trade name of the defendant company in

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1955, the goodwill remained with it. 29. That since the trade mark CHEERIO is part of the trade name "Cheerio Toys and Games Limited" the goodwill of one is identical to and inseparable from that of the other. 30. That the use by the defendant of its trade name in its advertisements and also on the boxes containing its wares and on the tops themselves is clearly a trade mark use. 31. That even if the defendant had no right to use its trade name as a trade mark the fact as disclosed by the evidence that the plaintiff has allowed or tolerated the defendant to use its trade name as a trade mark over a long period of time has created a situation such that the trade mark because of this can and does no longer distinguish the wares of the plaintiff from those of others, notwithstanding the fact that under s. 49(3) of the Act use by the permitted user is deemed to be use by the owner, bearing in mind here the strict interpretation to be given to the permitted user section which permits the use of a mark and not the use of an infringing mark. 32. That the plaintiff has made out a case of infringement of the trade marks PRO, YO-YO, BO-LO, 99 and TOURNAMENT. The other trade marks in issue having been found invalid there can be no infringement of them. SAMUEL DUBINER v. CHEERIO TOYS AND GAMES LTD.. 524

5.—*Trade Marks Act, S. of C. 1952-53, c. 49, ss. 49(11) and (12) and 55—Application for registered user—Appeal from decision of Registrar of Trade Marks—Who may appeal decision of Registrar of Trade Marks granting application for registered user—Whether decision of Registrar of Trade Marks adverse to appellant as required by s. 49(12) of Trade Marks Act—Whether appellant must be registered user of trade mark in question.* The appellant and the respondent, Dubiner, were respectively the defendant and plaintiff in the action *Dubiner v. Cheerio Toys and Games Ltd.* reported at p. 524 *ante*. In this action the respondents applied to the Registrar of Trade Marks for registration of the respondent company as a registered user of several trade marks of which the respondent, Dubiner, was the registered owner. The application was granted without the appellant having been given an opportunity to oppose it although it had notified the Registrar of its desire to do so. *Held:* That the appellant has a right of appeal under s. 55(3) of the *Trade Marks Act*, as it allows any person entitled to a notice of a decision made by the Registrar to appeal it and the appellant was entitled to and did receive such notice. 2. That to the extent that the grounds of appeal are the same as or similar to those grounds mentioned in s. 49(10)(*c*)(i), (ii), (iii) and (iv) of the *Trade Marks Act*, the procedure outlined in that section for cancellation was the only one available to the appellant. 3. That the Registrar's decision was adverse to the appellant within the meaning of s. 49(12) of the *Trade Marks Act* in that the proposed user would be actively competing with the appellant and its name would be confusingly similar to that of the appellant and such a confusion or deception would go beyond what the registered user's provisions tolerate. 4. That although the appellant was no longer a registered user of the trade marks in question at the time when the events here under review occurred, it is not because of any status as a registered user that it was injuriously affected by the Registrar's decision but because the Registrar has approved a registered user under a trade name confusingly similar to that of the appellant and the registered user section of the Act cannot be construed to allow conflicting trade names to operate with the resultant confusion and deception which such a situation would create, unless the trade names were those of companies which are related, affiliated or connected as representing a group of traders in a manner such as no conflicting confusion would result from their concurrent use. 5. That the registered user section of the *Trade Marks Act* must be interpreted strictly and cannot go beyond the confusion necessary to allow one or several persons to use the same registered trade mark. 6. That the appellant clearly had a right to be heard by the Registrar under s. 49(12) of the *Trade Marks Act* and its appeal from the Registrar's decision on the ground that he had refused to hear it is properly raised under s. 55 of the Act. 7. That the appeal is allowed. CHEERIO TOYS AND GAMES LTD. v. SAMUEL DUBINER *et al*.... 579

6.—*Trade Marks Act, S. of C. 1952-53, c. 49, ss. 7, 47(1) and 49(4) and 10(c)—Injunction—Passing off—Whether permitted use of trade mark distinguishes user's wares sufficiently to support a passing off action—Use of non-registered trade mark—Whether goodwill assigned with trade mark or trade name—Goodwill of company and of trade mark inseparable where trade name includes the trade mark—Whether distinctiveness of trade mark lost through use by affiliated or related companies—Confusion between plaintiff's business and that of defendant—Confusion where plaintiff and defendant dealing in identical wares—Use of slogans—What required to establish passing off with respect to packages, labels and get-up—Unfair competition.* The plaintiff and defendant were respectively the appellant and one of the respondents in the action *Cheerio Toys and Games Limited v. Samuel Dubiner and Cheerio Yo-Yo and Bo-Lo Company Ltd.*, reported *ante*, p. 579. and the plaintiff was the defendant in the action *Samuel Dubiner v. Cheerio Toys and Games Ltd.*, reported *ante*, p. 524. In this action the plaintiff seeks an injunction to restrain the defendant, *inter alia*, from doing business under the name, Cheerio Yo-Yo and Bo-Lo Company Ltd., from using, in

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merchandising its products, certain trade marks, slogans, expressions and packages, and any packages, labels or get-up confusing with those of the plaintiff. *Held:* That the use by the plaintiff of trade marks, to the use of which it was entitled only as a registered user, is deemed to be use by the owner and cannot assist the plaintiff in its attempt to establish that their use by the plaintiff has distinguished its wares from those of others to the point where it could avail itself of a passing off action to protect its rights. 2. That those trade marks, the permitted use of which by the plaintiff had been terminated prior to the commencement of this action, are not available to the plaintiff in the present passing off action. 3. That where the plaintiff relies on a non-registered trade mark, then, in order to sustain its action for passing off, the plaintiff must satisfy the Court that it did use the trade mark in association with its wares, that the trade mark had come to be identified by the public with its wares exclusively and that the use of the trade mark by the defendant was a violation of its common law rights. 4. That under the present *Trade Marks Act* the task of the plaintiff is somewhat lessened due to the fact that much of the common law relating to passing off has been introduced into the statute by s. 7 of the Act as compared to the situation in the United Kingdom where there is no corresponding section. 5. That under the *Trade Marks Act*, s. 47, a trade mark may be assigned with or without the goodwill of the assignor, but a trade name cannot be assigned under the Act without the goodwill attaching thereto. 6. That the goodwill of a company is attached to its trade name and when the trade name includes a trade mark, in this case CHEERIO being included in "Cheerio Toys and Games Limited", the goodwill of the company and of the trade mark are the same and inseparable. 7. That in an action for passing off the plaintiff is required to prove his title to the mark that he claims by evidence that his goods or his business have come to be known by that mark or name, which is tantamount to saying that the goodwill attached to the mark is his. 8. That the distinctiveness of a trade mark is not lost as a result of its use by two companies which are affiliated, related and connected. 9. That whether the plaintiff had a right to the use of the word CHEERIO *per se* or not, would make very little difference as far as the plaintiff's trade name is concerned as it is undeniable that it has a right to its trade name and to the goodwill attached to it or to its business, and any act which would be likely to take that away from it would be one of unfair competition and this would apply whether the trade mark CHEERIO was valid or not. 10. That the defendant, by carrying on business as it did under its trade name, adopted a means of directing public attention to the business carried on under that name as set down in s. 7(*b*) of the *Trade Marks Act* and, under the circumstances, it makes no difference whether the defendant thought that because it was a registered user of the trade mark it had a right to do so. 11. That the defendant, in using its trade name in carrying on its business and in its advertising, has directed public attention to its business in such a way as to be likely to cause confusion between its business and that of the plaintiff and the plaintiff is therefore entitled to have the use by the defendant of its trade name restrained. In addition, the defendant, by its use of the word CHEERIO, has also directed public attention to its business in such a way as to cause or be likely to cause confusion between its business and that of the plaintiff, contrary to s. 7(*b*) of the Act. 12. That the fact that an employee of the post office in readdressing a letter addressed to the defendant, struck out its former address and substituted the plaintiff's address is a clear case of confusion, if one considers that both companies are dealing in identical wares. 13. That since the slogans in issue have been widely used by the plaintiff in all its advertising and on its boxes for many years and have by long and extensive use become two of the badges or symbols of the origin of its wares there can be no doubt that the plaintiff has acquired a reputation for those badges in the market place and that a person paying ordinary attention would be likely to be deceived by the use thereof by the defendant. 14. That the use by the defendant of a slogan used by the plaintiff which is a coined phrase and is in fact complete nonsense cannot be interpreted otherwise than as directing public attention to its wares contrary to the provisions of s. 7 of the Act. 15. That in order to establish a passing off with respect to the use of packages, labels and get-up, which latter means the physical appearance of wares or the packages, their colour, style, etc., a high degree of reputation, akin to a secondary meaning, must be shown. 16. That where instructions appearing on the defendant's containers are similar to those the plaintiff has been using for many years but it is established that they were taken by the plaintiff from a container belonging to another company, the plaintiff cannot complain, for it has no exclusive right, copyright or otherwise to the use thereof. 17. That the defendant has committed a series of acts of unfair competition and passing off, by misappropriating the trade mark CHEERIO, by using a corporate name similar to that of the plaintiff, by its magazine advertising and by copying and using the plaintiff's price list, all of which have been done in violation of the plaintiff's rights. CHEERIO TOYS AND GAMES LTD. v. CHEERIO YO-YO AND BO-LO CO. LTD. .**562**

7.—*Infringement—Validity—Registration—Descriptive of character or quality of wares—Distinctive or adapted to distinguish—Trade*

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mark which is not "descriptive" is not "misdescriptive"—Similar trade marks—Similar wares—Misstatements in application for registration of trade mark—Confusion of public—User of trade marks in same area—Infringement deemed to exist—Length of time trade marks have been in use—Nature of the wares—Nature of the trade—Trade Marks Act, S. of C. 1952-53, c. 49, ss. 2(b), 6(1), (2) and (5), 7(b), 12(1), 18(1), 19, 20, 22, 26(1) and (3), 29(b), 40(1)(c) and (2) and 47(1)—Unfair Competition Act, R.S.C. 1952, c. 274, ss. 2(1) and (m), 22(1), 26(1) and 30(1)(a). The plaintiff claims relief against the defendant for infringement by the defendant of the plaintiff's rights as owner of a registered trade mark, for directing public attention to the defendant's canned food products in such a way as to be likely to cause confusion in Canada between them and the plaintiff's canned food products, and for using the plaintiff's registered trade mark in a manner likely to have the effect of depreciating the value of the goodwill attaching thereto. The defendant counterclaimed to have the entry of the plaintiff's trade mark in the Trade Marks Register struck out. One Louis Giuriato became the registered owner of the trade mark "Bonus" effective June 2, 1944 in respect of "food products, namely, salad oils, ripe olives, green olives, grated cheese", this trade mark being assigned in June 1947 by him to Bonus Foods, of which he was the sole proprietor. At the time of the assignment, the registration was amended to include "Ravioli dinner and spaghetti sauce; noodle chicken dinner; peas; and noodle mushroom dinner" in the statement of the wares in association with which the mark was used. The plaintiff and its predecessor in title had been using the registered trade mark "Bonus" on goods sold in different parts of Canada and abroad for the period from some time before the effective date of its registration, June 2, 1944, until the time of the trial of this action. No premiums or prizes were given by the plaintiff or its predecessor in connection with wares sold under the mark "Bonus". The defendant carries on a business as a slaughterer, processor, manufacturer, seller and distributor of a complete line of food products and in 1961 it started to manufacture and sell two different lines of dog food, utilizing for that purpose by-products of its slaughtering operations; one of these lines being marketed under the name "Bonus Dog Food", despite the fact that the defendant had been advised, upon attempting to register "Bonus" as a trade mark in respect of dog food, that the plaintiff had been registered as owner of the trade mark "Bonus" in respect of certain foods for humans. The defendant offered premiums to purchasers of Bonus dog food. Most of the defendant's sales were made in Ontario, the Greater Montreal area and the Atlantic provinces while the plaintiff sold most of its products in the Western provinces and through export. *Held:* That infringement of the exclusive right to the use throughout Canada of a trade mark, as conferred on the registered owner thereof by s. 19 of the *Trade Marks Act*, consists in the unauthorized use of the mark by someone else on goods of the kind in respect of which the mark was registered. 2. That the two allegations of the defendant that the registration of the plaintiff's trade mark is invalid as not being distinctive or adapted to distinguish because the word "Bonus" is incapable of being adapted to distinguish the goods of one from those of another and because the word is laudatory of goods and accordingly lacks the quality of distinctiveness, could relate either to the time of registration or to the time that these proceedings were brought. 3. That the word "Bonus", while it is a noun and not an adjective, may conceivably be used to describe a prize or premium that is given with a purchase or to describe the transaction by which a principal object plus some premium or "prize" is sold but it cannot be regarded as descriptive of the "character or quality" of articles of food being sold as such. 4. That the word "Bonus" has no generally understood meaning in relation to the character or quality of wares. It may be contrasted with "Gold Medal" or "premium", which have generally accepted meanings in relation to the quality of wares. 5. That if the trade mark is not "descriptive" of the character or quality of wares it is not "misdescriptive" of the character or quality of wares. 6. That any idea that might be conjured up by the word "Bonus" in relation to the character or quality of canned meat is so remote as to be fanciful. 7. That once it is decided that a word is not "descriptive" or "misdescriptive" of the character or quality of the wares, the possibility of its not being adapted to distinguish the plaintiff's wares from wares of the same category of some other person becomes remote. 8. That the word "Bonus" is capable of distinguishing the wares of one person from the wares of another and is not laudatory of the goods in association with which it is used. 9. That the attack on the trade mark "Bonus" on the ground that it was similar on the date of its registration to the registered trade mark "Bonox" fails because it was not alleged by the defendant that the mark "Bonox" was registered for use in connection with "similar wares" and, in any event, "Bonox" is not similar to "Bonus" in this context. 10. That the trade mark "Bonus" registered prior to the registration of the plaintiff's mark was registered in respect of ". . . beverages, sold as soft drinks and syrups and extracts for making the same" which cannot be regarded as "similar" to the wares in respect of which the plaintiff's trade mark was registered. 11. That there is no provision in the *Trade Marks Act* under which "misstatements" made in the application for registration, become grounds for invalidating the registration of the trade mark and s. 18 of the

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Trade Marks Act does not extend to such a case unless the misstatement had the effect of making the trade mark "not registrable". 12. That there has been no infringement of the plaintiff's registered trade mark in the sense that the defendant has done something that the plaintiff had the exclusive right to do. Section 19 of the *Trade Marks Act* does not confer on the plaintiff the exclusive right to use "Bonus" as a trade mark in relation to canned dog food. 13. That it must be emphasized that, to bring the defendant within s. 20 of the *Trade Marks Act*, it does not have to appear that the plaintiff and defendant had, in fact, used the mark "Bonus" in the same area or that the public had ever, in fact, been confused in the sense that they had thought that the plaintiff's canned meats, spreads, chicken and other products had been made by the same person as made the defendant's canned dog food. 14. That the test in s. 6(2) is not what has happened in fact but what inference would be likely to be drawn if it did happen that the plaintiff and defendant used the mark "Bonus" in respect of these different classes of goods in the same area. A finding must be made whether, in the purely hypothetical event of user by the plaintiff of its registered trade mark rights and user by the defendant of the mark "Bonus" in respect of its dog food in the same area, it would be likely to lead to the inference that the wares in relation to which the plaintiff used the trade mark and the wares in relation to which the defendant used it were manufactured or sold by the same person. 15. That the finding made as a result of the test provided for in s. 6(2) of the *Trade Marks Act* might conceivably lead to the conclusion that the defendant must be deemed to have infringed the plaintiff's registered trade mark even if the plaintiff's sales were, in fact, restricted to a small area in British Columbia and the defendant's sales were in fact restricted to a small area in Newfoundland and even if no single member of the public had ever, in fact, seen wares originating from them both. 16. That in reaching a conclusion on the hypothetical question framed by s. 6(2) of the Act, the Court must have regard to all the surrounding circumstances including those enumerated in s. 6(5)(*a*) to (*e*). 17. That the "inherent distinctiveness of the trade marks . . . and the extent to which they have become known", in s. 6(5)(*a*) of the Act, applies only in the case where there are two different trade marks, each more or less established in the public mind to such an extent that the public would not infer that they pointed to one person. 18. That "the length of time the trade marks have been in use" in s. 6(5)(*b*) of the Act, does nothing in this case to negative the inference of one manufacturer or one vendor, otherwise flowing from the use of the same brand, because the alleged infringer is using the registered owner's registered trade mark and as the owner has been using it for over twenty years and the alleged infringer has been using it only during a developmental period. 19. That with respect to the words "the nature of the wares . . ." as used in s. 6(5)(*c*) of the Act, the plaintiff uses the mark on canned meat for human consumption and the defendant uses it on canned meat for consumption by dogs and, on the evidence, the probability is that one person would manufacture both of these kinds of wares and this is the inference that would be drawn by an ordinary member of the public. 20. That with respect to the words "the nature of the trade" as used in s. 6(5)(*d*) of the Act, the same manufacturers, trade channels, retail outlets and purchasers are likely to be concerned with canned meat for human consumption and canned meat for dog consumption. 21. That the ordinary person making the rounds of grocery stores or supermarkets would be led to the conclusion, upon seeing the word "Bonus" on the label on dog food and also on the label on canned meat for human consumption, that both products were put out by the same manufacturer or by the same vendor. 22. That the use of the word "Bonus" in respect of canned dog food is likely to have the effect of depreciating the value of the goodwill attaching to the plaintiff's registered trade mark for the reason that most members of the public are likely to have some repugnance to buying food for human consumption under the same brand name as that under which dog food is sold, particularly if, in both cases, it is canned meat. 23. That it is doubtful whether s. 22 of the *Trade Marks Act* has any application to a case where the defendant has infringed or is deemed to have infringed the trade mark. 24. That the defendant has infringed the plaintiff's registered trade mark. BONUS FOODS LTD. v. ESSEX PACKERS LTD. . . . 735

TRADE MARKS ACT, S. of C. 1952-53, c. 49, ss. 2(b), 6(1), (2) and (5), 7(b), 12(1), 18(1), 19, 20, 22, 26(1) and (3), 29(b), 40(1)(c) and (2) and 47(1).

See TRADE MARKS, No. 7.

TRADE MARKS ACT, S. of C. 1952-53, c. 49, ss. 2(f), (t), (u) and (v), 4, 18(b), 20, 47(1) and (2), 49 and 53(2).

See TRADE MARKS, No. 4.

TRADE MARKS ACT, S. of C. 1953, c. 49, ss. 2(t), 7(d), 12(1)(b), 55 and 58(3).

See TRADE MARKS, No. 3.

TRADE MARKS ACT, S. of C. 1952-53 c. 49, ss. 2(t), 29(h) and 56.

See TRADE MARKS, No. 1.

TRADE MARKS ACT, S. of C. 1952-53, c. 49, s. 6.

See TRADE MARKS, No. 2.

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See Trade Marks, No. 6.

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