Calgary 1964 Mar. 31, Apr. 1 — Ottawa 1965 Oct. 22

BETWEEN:

DAVID WARREN SMITH ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Income tax—Company promoter—Loss on sale of company shares—Whether business loss or capital loss.

Appellant, who had for many years been engaged in company promotional activities, got together a group of 15 persons who reorganized a dormant oil company, provided it with new capital and launched it on an active exploration program, their object being to develop a market for the company's shares and to sell their own shares at a profit. Under the arrangement appellant acquired a block of shares in the company, but despite his efforts to promote their sale, using customary promotional methods, he suffered a loss of $6,945.50 in 1958 on the sale of some of his shares.

In 1960 appellant obtained an option to buy 800,000 shares in a uranium company together with an outstanding promissory note of the company in the amount of $150,000, both for $165,000 payable over some months. He paid $20,000 thereon but allowed his option to lapse when it was

discovered that the company's ore contained impurities. In result appellant, who had expected to make a profit on the transaction, and actively promoted the company's shares on the market, lost $20,000.

Held, both the loss of $6,945 50 sustained in 1958 and the loss of $20,000 sustained in 1960 were business losses and not capital losses, and were deductible in computing appellant's income for those years.

(*Income Tax Act*, R S.C. 1952, c. 148, s. 12(1)(*b*), 139(1)(*e*) and 1(*x*) referred to.)

APPEAL from income tax assessments for 1958 and 1960.

J. H. Laycraft, Q.C. for appellant.

R. A. MacKimmie, Q.C. and *E. E. Campbell* for respondent.

KEARNEY J.:—We are here concerned with what can be regarded as two cases, which I will proceed to deal with in a single judgment, arising out of two separate sets of facts, the first of which occurred in the appellant's taxation year 1958 and the second in 1960.

In his income tax return for 1958, contained in the documents transmitted by the respondent to this Court pursuant to R.S.C. 1952, c. 148, s. 100(2), the appellant claimed, as an allowable expense from his otherwise taxable income, what is described therein as an "Underwriting loss" incurred in respect of the capital stock of New York Oils Limited (NPV) which amounted to $6,945.50.

In his income tax return for 1960, the appellant claimed as deductible a loss of $20,000 incurred in a transaction described in his return as "Black Bay Uranium Limited Option Loss".

By notices of reassessment, both dated November 24, 1961, the Minister disallowed the deductions claimed in respect of the appellant's aforesaid taxable years 1958 and 1960. Following a notice of objection thereto filed by the appellant, the Minister, on reconsideration, by notice dated July 27, 1962, confirmed his two previous reassessments on the ground that "the amounts of $6,945.50 in 1958 and $20,000 in 1960 claimed as deductions from income were not business losses sustained by the taxpayer but were capital losses" within the meaning of s. 12(1)(*b*) of the *Income Tax Act*, R.S.C. 1952, c. 148. The appellant, relying more particularly on the extended meaning of "business"

and "loss" as contained in s. 139(1)(*e*) and (*x*) respectively of the Act, submits that the reverse is true; hence the present appeal.

Since only the nature and not the amount of each loss is in issue, it follows, I think, that whether the two aforesaid losses are deductible or not depends on whether, in the light of the evidence, they should be considered as business or non-business losses having regard to the two above-mentioned sections of the Act, which read as follows:

> 12 (1) In computing income, no deduction shall be made in respect of
>
> (*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part,
>
> 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;
>
> (*x*) "loss" means a loss computed by applying the provisions of this Act respecting computation of income from a business *mutatis mutandis* (but not including in the computation a dividend or part of a dividend the amount whereof would be deductible under section 28 in computing taxable income) minus any amount by which a loss operated to reduce the taxpayer's income from other sources for purpose of income tax for the year in which it was sustained;

Besides the exhibits, the evidence on behalf of the appellant consists of his own testimony and that of Mr. G. C. Field, who, apart from acting as the appellant's counsel, was also a member of the group engaged in the New York Oils transaction.

Mr. G. V. Fulton, an appeal officer with the Department of National Revenue in Calgary, was heard on behalf of the respondent—and I will make reference to his evidence later.

Before examining seriatim the documentary and verbal evidence with respect to the 1958 and 1960 losses it would be appropriate, I think, to place on record here the early background and main occupation of the appellant, since they are pertinent to both cases.

The appellant was born in New York City in 1928, where he attended school to the end of Grade XII. He has no professional degree but went to M.I.T. and graduated from Harvard College in 1949. Immediately following graduation he went to California and joined the Rio Bravo Oil Company of California, which shortly thereafter sent him to

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Calgary, Alberta, where he has since remained. Since his earliest childhood he has lived in an environment related to "securities and security market corporate promoting and financing." "His father", he stated, "was almost a legendary figure in New York City and had a successful world-wide experience in the promotion and financing of companies". His brother is a member of the New York Stock Exchange and a specialist in securities there. At the age of 15 the appellant worked during the summer of 1943 as a page-boy on the floor of the New York Exchange and in the summers of 1946, 1947 and 1948 he was engaged by a company named LaMort Maloney and Company, which is a member of the New York Stock Exchange. He later acquired a 5 per cent interest in that company, which he retained until 1956. The LaMort Maloney Company was actively engaged as principals in underwriting securities and in financing many companies. He continued in the employ of the Rio Bravo Company until 1952, when, as the company desired to place him in a post outside Canada and as he wished to remain in Canada, he resigned from the company. While working for that company, which catered especially to the requirements of the oil exploration industry, he had devoted part of his time to a company known as Field Service Ltd. When the appellant left the Rio Bravo Company, he engaged on a full-time basis with the Field Service Company. The appellant acquired a 50 per cent interest in the said Company and its name was changed in *1950* to Smith Title Service Limited. The Company's principal business was determining the ownership of mineral holdings in Western Canada and compiling information into maps and documents for oil companies. The witness acquired Canadian citizenship in 1959.

Mr. Smith stated that in 1954-55 he first became interested in Black Bay Uranium Limited, which had been recently incorporated in the Province of Alberta. He knew the principals quite well and they knew his background and associations. The company was looking for financing and the witness suggested a group of eight people who ultimately gave a firm commitment to acquire 200,000 shares of Black Bay Uranium and took options on several hundred thousand more shares. The appellant's father was a member of the underwriting group. The appellant, through a

verbal agreement, acquired a 2 per cent interest in the underwriting. Mr. Field had a similar interest and a Mr. Piller had a 1 per cent interest. Both the appellant and Mr. Field, in 1956, disposed of their interest at a profit, which led to an assessment in 1956 which the appellant raised as a subsidiary submission in paragraph 5 of his notice of appeal.

For reasons which appear later, I consider it unnecessary to make any further reference to the 1956 assessment or to the evidence adduced concerning it, which was admitted subject to objection of counsel for the respondent.

Now with respect to the 1958 loss, according to the testimony of the appellant it was incurred through his participation in an underwriting and stock promotion venture which proved unsuccessful and gave rise to an agreement dated July 3, 1958, which was amended by a further agreement of July 7, 1958, therein described as "the Underwriting and Drilling Agreement" between a company originally known as York Oils Limited (NPL), the name of which was later changed to New York Oils Ltd., of the First Part (sometimes hereinafter referred to as "York" or "the Company"), and a group which the appellant gathered together consisting of himself and fifteen other persons, of the Second Part, and therein called "the Participants".

By consent, copies of the aforesaid agreements, in lieu of the originals, were filed as Exhibits 3 and 4, and as the terms and conditions thereof are not disputed and the verbal testimony of the appellant deals with the circumstances which gave rise to them, I think the following summary will sufficiently describe their purport.

The first agreement (Ex. 3) between York, of the First Part, and the group composed of the appellant and the fifteen other participants, of the Second Part, contained, *inter alia*, the following declarations:

York is a body corporate, incorporated under the laws of the Province of British Columbia, with authorized capital of Three Million (3,000,000) shares without nominal or par value of which, as of the date hereof, approximately One Million Five Hundred Thousand (1,500,000) shares have been issued and are outstanding; and

pursuant to the terms of an Agreement dated the 17th day of January, A.D. 1958 between Canadian Superior Oil of California Ltd., of the 1st part and R. Adair Oil Management Ltd., (hereinafter called "Adair") of the 2nd part (hereinafter called "the Canadian Superior Agreement"), Adair

acquired an undivided interest in certain petroleum and natural gas rights in the Province of Alberta, upon the terms and conditions in the said Agreement contained; and

by Agreements dated the 21st day of January, A.D. 1958 between Adair of the one part and certain of the Participants and York of the other part (hereinafter called "the Adair Agreement"), certain of the Participants together with York acquired the interest of Adair in the Canadian Superior Agreement; and

pursuant to the terms of the Canadian Superior Agreement a well was drilled by certain of the Participants together with York upon the lands described in the Canadian Superior Agreement, which well is productive of petroleum and natural gas; and

some of the Participants together with York have agreed to drill two further wells upon the Canadian Superior lands; and

York desires to acquire the interest of the Participants in the Canadian Superior Agreement subject to the terms and conditions of the Adair Agreement, and has agreed to issue certain of its capital stock as consideration therefor; and

certain of the Participants together with York acquired a petroleum and natural gas Reservation No. 368 and York is desirous of acquiring the interest of such other Participants in such reservation, and has agreed to issue certain of its capital stock as consideration therefor; and

to implement this Agreement, York will be required to revise its capital structure by the consolidation of each ten (10) existing shares for one (1) new share and by the creation of additional common shares ranking pari passu with the existing shares, which shares after such consolidation are hereinafter referred to as "the new shares";

NOW THEREFORE THIS MEMORANDUM WITNESSETH as follows:

1. In consideration of the issue and allotment to the Participants and/or their nominees of Nine Hundred Seventy-Two Thousand, Eight Hundred Eighty-Seven (972,887) fully paid and non-assessable shares in the capital stock of York as constituted after the reorganization of York, at the time, in the manner, and upon the conditions hereinafter contained, the Participants do hereby assign, transfer and convey unto York all of their right, title, estate and interest in and to the said drilling reservation No. 368, and in and to the said Canadian Superior Agreement.

In further consideration of the anticipated allotment of the aforesaid new shares totalling 972,887, the participants agreed to drill two additional wells on the aforesaid petroleum and natural gas properties, and the Company agreed to pay a part of the cost of the said drilling.

A few days after Exhibit 3 had been signed, in a certain respect it was found to be faulty, and as appears by Exhibit 4 (which is short), Exhibit 3, while otherwise remaining the same, was amended to read in part as follows:

Exhibit 4

WHEREAS the parties hereto entered into an Agreement dated the 3rd day of July 1958, hereinafter called "the Underwriting and Drilling Agreement", whereby the Participants assigned certain petroleum and natural gas rights to York and agreed to drill certain wells as in the Agreement more particularly provided;

AND WHEREAS it was not realized by the Participants at the time the Agreement was entered into that they would, in effect, be assuming the responsibility for drilling oil wells on lands in which they had no legal or beneficial interest, and it was not the intent of the Participants to place themselves in such a position, and

WHEREAS in effect York was in any event to drill such wells in accordance with the terms of the said Agreement;

NOW THEREFORE THIS MEMORANDUM WITNESSETH and the parties hereto mutually covenant and agree to and with each other as follows:

1. The participants agree to pay to York forthwith upon the execution hereof the sum of ONE HUNDRED AND SEVENTY-TWO THOUSAND ($172,000) DOLLARS in consideration for which York shall allot to the participants or their nominees in such denominations as the participants may direct Four Hundred and Seventy-Seven Thousand Two Hundred and One (477,201) fully paid and non-assessable shares in the capital stock of York as constituted after the reorganization of York as provided for in the said Agreement.

2. In consideration of the issue and allotment to the participants and /or their nominees 373,541 fully paid non-assessable shares in the capital stock of York as constituted after the reorganization of York the participants do hereby assign, transfer and convey unto York all of their right, title, estate and interest in and to the said Canadian Superior Agreement subject only to terms of the Adair Agreement and also the interest of the participants in the East Innisfail Trust Account with the Canada Trust Company, Calgary, Alberta, and in and to all wells heretofore drilled thereon and all equipment used in connection therewith and in all production obtainable therefrom.

3. In consideration of the issue and allotment to the participants and/or their nominees of 122,145 fully paid and non-assessable shares in capital stock of York as constituted after the reorganization of York the participants hereby assign, transfer and convey unto York all of their right, title, estate and interest in and to the said Drilling reservation No. 368.

IN WITNESS WHEREOF these presents have been duly executed as of the day and year first above written.

In due course, the revision of the capital structure of the Company was effected and the above-mentioned shares were issued to the participants or their nominees in accordance with their respective interests.

The appellant, as a participant, received the following twofold interest in the aforesaid block of shares: (1) in his own right alone, an interest exceeding 25% which entitled him to about 250,000; (2) an equal share with G. C. Field, who was then his legal adviser, in a further 5 per cent share interest which was allotted to Smith-Field Title Service Limited, acting as agent for the appellant and Mr. Field.

The 1958 case is concerned only with the appellant's loss arising out of his share in the said 5 per cent interest which,

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in round figures, amounted to 22,000 shares for which he had paid about $9,000 and which, as later explained, he sold for less than $2,000, resulting in a loss of about $7,000.

This is confirmed, since in the Minister's reply it is stated that in assessing the appellant as he did he acted, *inter alia*, upon the following assumptions: that pursuant to the said agreement of July 7, 1958, New York Oils Ltd. allotted to Smith-Field Title Service Ltd. 45,759 shares in the capital stock of New York Oils Limited (NPL) in consideration of the payment of $17,433.41; that the said shares were sold for $3,542.40 resulting in a loss of $13,891.01; that Smith-Field Title Service's share, or alternatively the appellant's share, of the said loss was $6,945.50; that the said loss was a loss of capital.

In respect of the aforesaid case of York the appellant testified as follows:

In 1957, when he became interested in it it was "inactive and just about broke"; it was, however, listed on the Canadian Stock Exchange. The witness conceived a plan to reorganize the Company and he assembled a group consisting of himself and fifteen others to participate with him in doing so (See Exhibits 3 and 4). The share structure of the Company was to be revised by issuing one new share for each ten old shares, as appears more particularly in paragraph No. 6 of Exhibit 3, which reads as follows:

6. York covenants that it shall forthwith proceed to convene a meeting of its shareholders for the purposes of considering special resolutions of the Company.

(*a*) to consolidate its presently authorized capital on the basis of one (1) new share for each ten (10) shares presently authorized.

(*b*) to increase its authorized capital by the creation of Two Million Seven Hundred Thousand (2,700,000) shares to allow York to carry out its obligations hereunder, such new shares to rank pari passu in all respects with the existing shares.

The group agreed to finance the Company through underwriting or subscribing for approximately One Million (972,887) new shares, to be issued following recapitalization. In the meantime, the group provided the necessary means to embark the Company on a new drilling and exploration venture. The appellant hired a local oilman to inspect a certain area which he thought had high prospects and the latter negotiated a farm-out agreement, on behalf of New York Oils, which is referred to in Exhibit 4 as "Drilling Reservation No. 368."

As appears by agreements Exhibits 3 and 4 and the appellant's testimony, this group guaranteed the drilling performance of York by advancing over $370,000 in money or money's worth to Canada Trust Company, which amount the Company expended as bills were rendered in advance of receipt of the one million new shares of York to be issued as soon as the Company would be in a position to deliver them. In speaking of the disposition that was to be made of the said shares the appellant stated:

> A. The group intended to resell the shares as quickly as possible at a profit and if it deemed advisable at that time to acquire additional shares under option, to further enrich the company's treasury.
>
> Q. What share did you have in this group?
>
> A. I participated in the group in two ways. In one way in a partnership with Mr. Field. I personally had about two and a half percent. In the other way it was one hundred percent my own. I had between twenty-five and thirty percent. I was the largest individual member of the group.

In respect of the 5 per cent held by the appellant and Mr. Field, agreements Exhibits 3 and 4 were signed by Field-Title Service Limited as their respective agent under a power-of-attorney which was filed as Exhibit 2. Speaking of the fourteen other participants, the witness stated: "I had this group in the palm of my hand and they each signed a power-of-attorney in my favour." Three samples which were regarded as typical were filed by consent as Exhibit 5.

When asked if he took any steps to promote the shares of the Company, the witness replied that he resorted to the tried and tested pattern of all people that promote shares. He tried to arrange dramatic news releases concerning the programs that they were carrying out. He tried to stir the fancy of brokers with the great program he had under way and told practically every one he met to buy the shares. He, himself, bought and sold between 50,000 and 60,000 shares on the market in the course of the drilling program, trying to create activity in the shares.

The Company, the witness said, proceeded to drill two more wells, one of which was a very marginal one and, in fact, perhaps should not have been completed as such (gas well) and the other was drilled as a dry hole, offsetting the company's initial discovery well.

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Owing to the fact that York did not encounter the flush type of production anticipated, it was difficult to create or sustain any interest in the York shares; as a result, by the end of the year 1958 the price had sagged.

The witness further stated that he sold the shares he had purchased jointly with Mr. Field at the end of that year and that by the end of 1963 he had disposed of all the 250,000 shares he had acquired in his own right.

Mr. G. C. Field was heard and corroborated the evidence of the appellant.

I might add that whereas, in so far as actual subscribing to or underwriting the new shares of York, his participation was relatively little, as it consisted of less than $9,000, for which he received about 23,000 shares, in respect of promotional activities, the appellant was almost a factotum, which explains why he was allotted a further 250,000 shares.

There is no doubt in my mind—and I so hold—that the testimony of the appellant, which is supported by his background, by the documentary evidence and in many important respects by the testimony of Mr. G. C. Field, clearly establishes that at all material times the York transactions bear the unmistakable earmarks of an underwriting and promotional venture and that the loss of $6,-945.50 was a business loss and accordingly deductible.

I will now consider the second case relating to the appellant's income tax return and assessment for 1960.

The $20,000 loss claimed by the appellant arose as the result of a tripartite agreement dated March 15, 1960 (Ex. 6), entered into by Joanne Holdings Limited, of the First Part (hereinafter referred to as "Joanne") and Messrs. Sullivan, Burt, Glick and Manley, of the Second Part (hereinafter referred to as "the creditors"), and the appellant, of the Third Part (hereinafter referred to as "the optionee").

The said agreement contains, *inter alia*, the following declarations:

The authorized stock of Black Bay Uranium Limited (a company incorporated under the laws of the province of Alberta hereinafter referred to as Black Bay) consisted of 3,000,000 shares of no par value whereof 2,897,171 had been issued as fully paid up and listed for trading on the Toronto Stock Exchange and Joanne is the owner of 800,000 of the said issued shares; Black Bay is indebted to the creditors in the sum of

$175,366.47, evidenced by a promissory note made in favour of Chimo Gold Mines Limited and endorsed by the latter without recourse to the creditors; Joanne and the creditors (subject to conditions later mentioned) have jointly agreed to grant to the optionee the sole and exclusive right or option to purchase the said 800,000 shares of Black Bay and the said debt of $175,366. for and in consideration of the sum of $165,000, apportioned as follows: $50,000 as the price of the debt and $115,000 as the price of the shares. In order to keep the option in good standing, the optionee is required to pay the sum of $10,000 contemporaneously with the signing and delivering of the option and, not later than April 26, 1960, to pay the balance of $155,000, the said payments to be made by certified cheques.

The down payment of $10,000 was to be apportioned thus: $9,000 to the creditors and $1,000 to Joanne and the final payment of $155,000 on July 26, 1960, to be divided as follows: $41,000 to the creditors and $114,000 to Joanne.

It is to be noted that among the covenants given by Joanne to the optionee was one which declared that

the contract between Eldorado Mining and Refining Company and Black Bay Uranium Limited re the purchase and sale of uranium ore is presently in good standing.

As appears more fully by an agreement dated July 26, 1960 (Ex. 7), between the same parties, Joanne and the creditors consented to extend the life of the agreement of March 15, 1960, to October 26, 1960, provided the optionee pays immediately the sum of $10,000 and a further sum of $10,000 on July 26, 1960. The aforesaid agreement (Ex. 7) also included the following stipulations, which, I think, are worthy of mention:

2. It is specifically understood and agreed that while this is an option only and the Optionee is not obligated to make any of the payments above-mentioned, failure on his part to do so as and when same are due will automatically terminate the option hereby extended.

3. It is understood and agreed that each of the $10,000 payments referred to in paragraph 1 hereof shall be apportioned between Joanne and the Creditors as follows:—

9/10ths for Joanne; and

1/10th for the Creditors.

4. It is understood and agreed that while the said option is in good standing, Joanne and the creditors shall have the right if they so desire to offer the optioned shares for sale through the Toronto Stock Exchange under the following conditions:—

(a) if the bid price on the Toronto Stock Exchange for shares of Black Bay is 20¢ or more they shall have the right to sell up to 100,000 shares;

(b) if the bid price on the Toronto Stock Exchange for shares of Black Bay is 25¢ or more they shall have the right to sell up to an additional 200,000 shares;

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(c) if the bid price on the Toronto Stock Exchange for shares of Black Bay is 30¢ or more they shall have the right to sell up to an additional 200,000 shares;

(d) if the bid price on the Toronto Stock Exchange for shares of Black Bay is 35¢ or more they shall have the right to sell sufficient additional shares to fully satisfy the option price.

The proceeds from any such sales to apply on account of the option price.

It is further understood and agreed that while the option is in good standing the Optionee shall have the right to take down optioned shares of Black Bay at 15¢ per share, but it is specifically understood and agreed that the Optionee shall not be entitled to optioned shares for the two payments of $10,000 each referred to in paragraph 1 hereof.

It is specifically understood and agreed that if and when the Optionee becomes entitled to delivery of the Promissory Note for $175,366.47 made by Black Bay to Chimo Gold Mines Limited and endorsed without recourse to the Creditors, that the Creditors will endorse the said Note without recourse to the Optionee.

The appellant testified that for some considerable time prior to 1960 Black Bay mining operations had been closed down although a great deal of money had been spent on the installation of plant and equipment, so much so that the Company had overspent its treasury by $175,000.

Late in 1959 however, a Toronto group had furnished sufficient funds to the Company to allow it to resume operations, in consideration whereof Joanne, whose head office was in the City of Toronto, acquired a controlling interest in Black Bay consisting of 800,000 shares.

The witness declared that he thought he saw "a magnificent opportunity to make some money." He contacted Joanne and the creditors and their negotiations resulted in the signing of an option agreement (Ex. 6) and an extension thereof, as appears by Exhibit 7.

As appears from the aforesaid agreements, the taxpayer's option entitled him to acquire the Company's note which had a face value of over $175,000 for $50,000 or the equivalent of less than 30¢ on the dollar and 800,000 shares for $115,000, which was less than 15¢ per share.

The appellant, apparently, had two schemes in mind which could be combined for raising sufficient money to pay the balance of the option price and at the same time yield him a handsome profit. He stated that Black Bay was producing $36,000 worth of ore a month, and he anticipated that the Company, out of ore production, would be able to redeem its promissory note of $175,000 at its face value and

that the difference between this and the option price of $50,000 would yield a profit sufficient to enable him to pay the option price of the 800,000 shares and thus obtain them for nothing. As appears from the following extract of his evidence, he also planned to raise the market value of the stock by buying and selling Black Bay shares on the Toronto Stock Exchange:

Q. Now, when you entered into this transaction you mentioned that your plan was to promote the stock?
A. Well, it was that, certainly.

Q. Why would it have been necessary to promote the stock?
A. Well, any time you go into a deal in the market in size it is necessary to promote the shares and use all the facilities at your command to do so.

Q. How did you contemplate doing this?
A. I contemplated doing it in exactly the same way that I did it, and again, if I may say, in a tried and tested pattern of promoters. I publicized dramatically, I took active part in the management of the company and I tried to regulate or at least activate the trading in the shares. I took people into the property as I had done earlier. I did everything I could.

Q. Did you enter into any market transactions?
A. I traded the shares actively during the process of four or five months that my option was valid and I was also a director of the company during that time.

Q. With what purpose did you buy and sell the stock?
A. To activate trading and assist in promotion.

Q. Did you become a director of the company?
A. I was a director during the period that my options were in effect which was from March to July of 1960.

There is little doubt that, disregarding the anticipated payments on the note out of production, if the appellant's stock market manipulations were fully successful, the profit thus realized could be more than sufficient to pay the entire option price of $165,000 and leave the appellant with the promissory note—for what it was worth—as a clear profit. In this connection, it should be recalled that, as appears by paragraph 4 of agreement Exhibit 7 *supra,* if the appellant succeeded in raising the bid price on the Stock Exchange to 20¢ per share Joanne and the creditors would have been entitled to sell 100,000 of the option shares and if it advanced to over 25¢ to sell 200,000 more, if it exceeded 30¢ to sell another 200,000 and, if the price reached 35¢ or more to sell sufficient of the 300,000 remaining shares to fully satisfy the option price.

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The effect of the contemplated transactions reduced to figures is as follows:

Total shares sold		Price	Amount realized
100,000	@	.20	$20,000
200,000	@	.25	50,000
200,000	@	.30	60,000
say 100,000	@	.35	35,000
600,000			$165,000
Balance of shares unsold 200,000			Balance due on option Nil

The appellant testified that some time in July 1960 Eldorado Mining and Refining Limited which was milling and buying Black Bay ore discovered that it contained impurities which contaminated ore from other mines with which it was mixed during the process of refinement. It would have cost Eldorado $200,000 or $300,000 to install special machinery to refine the Black Bay ore, which it declined to do, and it cancelled the existing contract with Black Bay. This caused the witness' plans to completely fall apart because the Company could no longer produce or gain any revenue. As a result, the anticipated payments from mined ore did not materialize and his efforts to make a market for Black Bay shares through trading in them on the Toronto Stock Exchange proved fruitless. He therefore allowed the option to lapse and forfeited the aforesaid $20,000 which he had paid on account.

As appears in his cross-examination—which was very brief—the appellant was asked:

Q. And what happened was that due to the unfortunate impurities that were contained in the ore by the time July came, the stock was of no value, or at least you felt it was of no value?

A. Well, my position wasn't one that I could make money on and I elected not to call any more money into the venture. The stock still had some value and to this day has a value. All stocks have a value and are made to be sold.

Q. That surprises me, sir. Is it trading today?

A. Yes, sir, it is and it is listed.

Q. Can you give me some idea of the price fluctuation since you dropped this option?

A. It has probably been as low as 6 cents and as high as 52 cents.

In the absence of any evidence to the contrary it would appear from the foregoing that, if the appellant had been willing and able to maintain his option in good standing, he would conceivably have realized a handsome profit. If he

had done so, I would not hesitate in declaring it taxable. By the same token, I consider that since he incurred a loss it is a loss from a business within the extended meaning of that term under s. 139(1) (*e*) of the Act.

In view of the conclusions I have reached I see no necessity to refer to the secondary issue raised by the appellant pertaining to a previous assessment for his taxation year 1956 or any evidence led concerning it, and as Mr. Fulton's evidence only dealt with the above-mentioned assessment, it does not call for comment.

For the foregoing reasons I find that the appellant was justified in deducting from his otherwise taxable income for the years 1958 and 1960 the amounts of $6,945.50 and $20,000 respectively.

The appeal is maintained with costs and the record is referred back to the Minister for reassessment accordingly.