Toronto 1965 Dec. 9 Ottawa Dec. 22

BETWEEN:

FOREIGN POWER SECURITIES CORPORATION LTD. ..... APPELLANT;

AND

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

Income tax—Public investment company's profit on sale of shares—Securities transactions—Capital gain—Shares acquired at cost from parent private investment company—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 16(1), 17(2), 138(A), 139(1)(e).

The appellant, a *bona fide* public investment company, realized a gain of $703,636 in 1957 from the sale of 16,000 common shares of Trans-Canada Pipelines Ltd. and from 725 common shares of Quebec Natural Gas Corporation.

In 1958, it realized a reduced gain of $63,932 83 from the sale of shares of the same two companies. The Minister sought to tax these amounts on the grounds that:

1° The profits on the sales resulted from an adventure in the nature of trade on the basis of the activities and intentions of the appellant's controlling shareholder (N T. Company, private investment company), and as a means used by N T. Company to transfer its profits

2° The transactions were underwriting transactions on the part of Nesbitt Thomson Company and its subsidiary, the appellant.

3° The two corporations were not dealing with each other at arm's length, as during the period they were either controlled by the same interests or one controlled the other.

4° The shares were sold to the appellant by N.T. Company at cost which was below their true value at the time.

5° The above factors indicated a deliberate plan to divest N.T. Company of certain trading assets to the appellant.

For these reasons, the appellant appealed the assessments before this Court.

Held: That the appeal was allowed. The profits from the sales of the shares were the realization of an investment and non-taxable.

2. That the acquisition of a controlling interest in the appellant by N.T. investments occurred in the ordinary course of the latter's investment policies and did not give rise to any presumption of business activity.

3. Even if the profits were taxable as underwriting transactions in the case of N.T. Company, they could not be considered as such in the hands of the appellant.

4. That the appellant and N.T. Investments were not dealing at arm's length as the question was not pertinent in the absence of a specific provision of the Act referring thereto in the present context.

5. That an exact evaluation of the shares of a public utility company in the initial stages of development was difficult.

6. That the Court found it impossible, even assuming that the avoidance of taxes was one of the elements which activated the transaction, to come to the conclusion that the profits realized by the appellant resulted from an adventure in the nature of trade and thus were taxable.

7. That if the profits were taxable for the reasons advanced by the Minister it would seem that the party to be assessed in respect thereof should have been N T. Investments instead of the appellant, under the authority of either Section 16 or 17.

APPEAL from assessments of the Minister of National Revenue.

R. De Wolf MacKay, Q.C., Charles Gavsie, Q.C. and *Keith Eaton* for appellant.

Alvin B. Jacobs, Q.C. and *Paul Boivin, Q.C.* for respondent.

NOËL J.:—This is an appeal against the appellant's income tax assessments for the years 1957 and 1958. The appellant (hereinafter sometimes called Foreign Power) realized a gain of $703,636 in 1957 on the sale of 16,000 common shares of Trans-Canada Pipelines Limited (hereinafter sometimes called Trans-Canada), 725 common shares of Quebec Natural Gas Corporation (hereinafter sometimes called Quebec Gas), 16,000 class B shares of Quebec Gas and 150 units of Trans-Canada and (because of a loss sustained of $6,025 on the sale of 500 Quebec Gas units and the loss of $77,625 on the sale of 2,500 units of Trans-Canada) a reduced gain of $63,932.83 in 1958 on the sale of 2,367 common shares of Trans-Canada and 8,865 class B shares of Quebec Gas.

The sole question for determination is whether these gains were realizations of an enhancement in the value of investments by the appellant and, therefore, not subject to income tax as claimed by it or income from the appellant's business within the meaning of sections 3 and 4 and the definition of business in section 139(1)(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148 and, therefore, taxable as submitted on behalf of the Minister.

Sections 3 and 4 of the Act 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.

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Section 139(1)(*e*) defines "business" as follows:

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;

Taxation of the appellant here is sought by the Minister under somewhat extraordinary circumstances in that as the appellant is a *bona fide* public investment company, whatever gains it may realize on its investments should normally not be taxable.

The Minister, however, in this instance has asked the Court to go beyond the actual purchase and sale of the shares involved herein, delve into the manner in which they were obtained from a company called N.T. Investments Ltd. and look at the interrelationship between the appellant, its officers and two corporations, N.T. Investments Limited and Nesbitt Thomson and Co. Ltd. and its officers and directors and consider the fact that N.T. Investments Ltd. purchased the control of the appellant in between the purchase in two batches of some of the shares involved herein.

The above facts were brought into this appeal by the respondent immediately prior to this appeal being placed on the roll by way of a motion to amend his reply by inserting therein paragraph 12 which lists a number of assumed facts on which he relies for the assessments. This motion was strongly opposed before the President of this Court on the basis that facts which occurred prior to the date when the appellant acquired the securities as well as matters dealing with other companies and persons are irrelevant. The President, however granted the motion but reserved the appellant's right to argue at the trial whether the said assumptions were relevant or not as well as to object to the production of any document dealing with any other person than the appellant.

Prior to the evidence adduced at this appeal, one of the appellant's counsel reiterated its objection to any evidence dealing with the assumptions of fact submitted by the Minister which facts had occurred prior to the time when the appellant acquired the securities as well as to all matters dealing with companies and persons other than the

appellant and it is now incumbent upon me to deal with this matter.

The appellant here, relies on the often referred to *Salomon v. Salomon & Co. case*[1] where Lord Halsbury stated:

> But short of such proof it seems to me impossible to dispute that once the Company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the Company are absolutely irrelevant in discussing what those rights and liabilities are.

as well as on the *Pioneer Laundry case*[2] and the decision of Lord Thankerton at p. 417:

> Their Lordships agree with the Chief Justice and Davis J. that the reason given for the decision was not a proper ground for the exercise of the Minister's discretion, and that he was not entitled, in the absence of fraud or improper conduct, to disregard the separate legal existence of the Appellant company and to enquire as to who its shareholders were and its relation to its predecessors. The taxpayer is the company and not its shareholders.

Now, although there is no question that in questions of property and capacity, of acts done and rights acquired or liabilities assumed, the company is always an entity distinct from its corporators, it appears that for the purpose of determining the character in which property is held and the conditions on which the capacity to act is enjoyed and acts are done, the character of a company's shareholders and corporators are open for consideration and this would not seem to be at variance with the principle stated in the *Salomon case* (*supra*) if one refers to the dictum in *Daimler Company Limited v. Continental Type and Rubber Company* (*Great Britain*) *Limited*[3] at p. 340.

It also appears that the facts surrounding a purchase may be of some assistance in determining taxability on the basis that the true nature of the transactions involved must always be considered and where motives are important, the interconnection or interrelationship of companies dealing with each other as well as the motives and acts of a company's manager or directors must be explored because a corporation is but a legal entity which cannot have purposes separate from those of its managers and directors.

The question as to whether the intention of a company may be ascertained through its manager or directors has

[1] [1897] A.C. 22 at 30. [2] [1938-1939] C.T.C. 411.
[3] [1916] A.C. 307.

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come before our courts and been affirmed in several instances, i.e., in *Atlantic Sugar Refineries Limited v. M.N.R.*[1] where Kerwin J., as he then was, stated that:

> While the circumstances of these two cases are entirely different, the intention in each, as stated by Mr. Seidensticker, the company's president and manager, was the same, i.e., to offset losses either actual or feared. His intention, and therefore the intention of the appellant, was to do something as part of the latter's business and to secure a profit.

In *Regal Heights v. M.N.R.*[2], where although the taxpayer was a corporation, Judson J. stated:

> 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.

And in *Rivershore Investments Ltd. v. M.N.R.*[3] where my brother Kearney stated at p. 127:

> I consider, however, that the intentions of the appellant are deemed to be those of its directors and it is bound by the artificiality of the transactions carried out by the said directors.

The question also of whether individuals or a corporation have constituted another company their or its agent is always a question of fact and may be looked into, cf. *Palmolive Manufacturers Co. (Ontario) Ltd. v. The King*[4] and may be useful in some cases in determining the nature of a transaction and assist in fixing liability for taxes. The sole fact, however, that the controlling corporators hold a majority or even the whole of the shares and are the managing directors will not alone suffice to establish the relationship of principal and agent as pointed out by Thurlow J. in *Davidson v. M.N.R.*[5]

> Moreover though the appellant was the president and the sole owner of the capital stock of Davidson Securities Ltd., and no doubt dictated its course of action, there is nothing in the evidence to indicate that the company was in fact or in law an agent for the appellant in carrying out its transactions or that its business was not its own and a separate one from that of the appellant.

And, finally, in some cases in matters of taxation it is necessary for the court to go beyond the corporate entity in order to determine whether a transaction was at arm's length or not or artificial (*Vide Shulman v. M.N.R.*[6]) and *Rivershore Investments Ltd. v. M.N.R.* (*supra*) or to find

[1] [1949] S.C.R. 706 at 707.
[2] [1960] S.C.R. 902 at 905.
[3] [1964] C.T.C. 112.
[4] [1933] S.C.R. 131 at 136 and 137
[5] [1964] Ex. C.R. 48 at 56.
[6] [1961] Ex. C.R. 410.

out whether the corporation should be characterized as a "paper sham" a "similacrum", cloak or alias or alter ego or an artificial vehicle, (*Vide Rolka v. M.N.R.*[1]) and thereby in some cases establish whether the transaction entered in by it be given legal effect or not. Before parting with this matter I should add here that even a corporation set up as a sham cannot, however, be disregarded, although as stated by Lord Buckmaster in *Rainham Chemical Works Ltd. v. Belneden Fish Guario Co.*[2] p. 475:

> . . . it may be established by evidence that in its operations it does not act on its own behalf as an independent trading unit, but simply for and on behalf of the people by whom it has been called into existence

For the purpose of dealing with the appellant's objection here, it will be sufficient, I believe, to rely only on the necessity for the Court to consider the true nature of the transactions involved herein which will then require an examination of all the facts listed in the appellant's assumption of facts. Whether such a course of action will be useful, however and will sustain the respondent's contentions is another matter and this will be dealt with after reviewing and assessing the evidence adduced.

It is with this in mind that I now turn to the facts assumed and relied on by the respondent in assessing the appellant and which are recited in paragraph 12 of the respondent's reply which is reproduced hereunder:

> 12 In making the assessment appealed from, he relied on the following assumptions:
>
> (*a*) On December 22, 1954, The Warnock Hersey Co. Ltd which was controlled by P Thomson acquired control of N T Investments Ltd and on June 28, 1956, acquired control of Foreign Power Securities Corp Ltd On December 31, 1956, The Warnock Hersey Co. Ltd. sold its controlling interest in Foreign Power Securities to N T Investments Therefore, from June 29th to December 31, 1965, N.T. Investments and Foreign Power Securities were controlled by The Warnock Hersey Co Ltd From December 31, 1956, and at all relevant times thereafter, Foreign Power Securities was a subsidiary of N.T. Investments Ltd ;
>
> (*b*) N T. Investments Ltd. was originally Nesbitt Thomson & Co. Ltd. The latter, whose business was underwriting and dealing in securities, was one of the underwriters when in 1950 a project was entered into for the construction of a pipe line to carry natural gas from Alberta to Eastern Canada;
>
> (*c*) To this end, during the years 1950, 1951 and 1952, Nesbitt Thomson & Co. Ltd. made advances to Western Pipe Line Ltd. and to Alberta Interfield in the amount of $84,142 22, which expenses were

[1] [1963] Ex. C.R. 138. [2] [1921] 2 A C. 465.

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charged against taxable income and allowed as such for income tax purposes;

(*d*) In 1952, Nesbitt Thomson & Co. Ltd. changed its name to N.T. Investments Ltd. and changed also its corporate powers from those of a dealer in securities to those of an investment company;

(*e*) A new company, Nesbitt Thomson *and* Co. Ltd., was created for the purpose of carrying on the trading activities of the predecessor company and by agreement dated April 1, 1952, all trading assets including rights to financing and underwriting agreements were purported to be transferred to the new company, and the assets considered in the nature of investment were retained by N.T. Investments Ltd.;

(*f*) The pipe line project was not transferred to Nesbitt Thomson and Co. Ltd. despite the fact that it was a trading asset and had been considered as such by the old company;

(*g*) After it had changed its name to N.T. Investments Ltd., further advances were made to the Western Companies, which expenses were not charged against income but were capitalized as being investments;

(*h*) On January 12, 1954, N.T. Investments Ltd., through its agent, Nesbitt Thomson and Co. Ltd., and together with and as one of a group of original participators in the financing of the pipe line project, entered into an agreement with Canadian Delhi Petroleum Ltd. for the purpose of joining forces in the carrying out of the pipe line project under the existing incorporated company, Trans-Canada Pipe Lines Ltd., and with the understanding that no group would have control;

(*i*) For the advances to the Western Companies by Nesbitt Thomson & Co. Ltd. in 1950, 1951 and 1952, N.T. Investments Ltd. in 1954 and 1955 received 72,624 common shares of Trans-Canada Pipe Lines Ltd. In addition to the above treasury shares, it also acquired from Canadian Delhi Petroleum Ltd. 10,712 common shares of Trans-Canada Pipe Lines Ltd.;

(*j*) The 72,624 treasury shares and the 10,712 shares acquired from Canadian Delhi Petroleum Ltd. forming a total of 83,336 common shares of Trans-Canada Pipe Lines Ltd. were disposed of at cost as follows:

Date		Shares
1954 –	Nov/10 Hudson Bay Oil & Gas	1,910
	Nov/30 "	156
1955 –	May/11 P. Thomson	14,500
	" Canadian Power & Paper Securities	14,600
	" Power Corp.	14,600
	Nov/19 Mr. Tanner	417
1956 –	Jan/27 Mr. J. R. Donald	416
	Apr/11 Canadian Power & Paper Securities	5,400
	Power Corporation	9,400
	July/6 Foreign Power Securities Corp. Ltd.	11,225
1957 –	Feb/18 Foreign Power Securities Corp. Ltd.	7,142
	Mar/5 Nesbitt, Thomson and Company Ltd.	3,570
	TOTAL SHARES	83,336

(*k*) Foreign Power Securities Corp. Ltd. disposed of the 18,367 shares of Trans-Canada Pipe Lines Ltd. as follows:

Date	Number of shares	Selling Price	Cost	Profit (Loss)
May/28/57	6,000	$167,880 00	$ 48,096 00	$119,784.00
June/15/57	10,000	426,960 00	79,904 00	347,056.00
Jan/13/58	2,367	55,600 83	18,936.00	36,664.83
	18,367	$650,440.83	$146,936.00	$503,504.83

(*l*) Foreign Power also acquired in March 1957, 150 Units of Trans-Canada Pipe Lines Ltd. for $26,650.00 which it resold in the same month for $29,163 00, making a profit of $2,513 00;

(*m*) Foreign Power Securities also acquired, in June 1957, 2,500 Partial Units of Trans-Canada Pipe Lines Ltd., which it disposed of as follows:

Date	Number of Partial Units	Selling Price	Cost	Profit (Loss)
Nov/4/57[1]	2,500	$229,875.00	$377,500.00	($77,625 00)

(*n*) Quebec Natural Gas was incorporated in June, 1955, for the purpose of acquiring the gas distributing business of Hydro-Quebec including the gas manufacturing operations of Montreal Coke and the shipping facilities of Keystone Transports.

(*o*) Upon its organization, 5,000 common shares were issued at $10 00 per share as follows:

N. T. Investments Ltd.	725 shares
Wood, Gundy & Co. Ltd.	725 "
International Utilities Corp.	1,000 "
Canadian Delhi Oil Ltd.	1,250 "
Lehman Brothers	625 "
Alben & Co.	625 "
Osler, Hammond & Nanton Ltd.	50 "
	5,000 "

N.T. Investments transferred its common shares at cost to Foreign Power Securities as follows:

Jul/1956	612½ shares at $10.00 or	$6,115 00
Jan/1957	112½ " " 10.00 "	1,125 00
	725	$7,250 00

[1] The Nov/4/57 date should read Nov/4/58.

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(p) Financing of Quebec Natural Gas Corporation was to be made by the above companies in proportion to their interest in common shares;

(q) During 1956 and 1957, there was an initial advance of $1,200,000 plus an additional $3,159,880 00 for which 544,986 Class B shares at $8 00 were issued;

(r) N.T. Investments Ltd. entered into an agreement in or about September 1956 with various companies including Foreign Power Securities Ltd. whereby these companies were to participate in the financing of Quebec Natural Gas to the extent of N.T. Investments' interests in common shares;

(s) The companies involved and the extent of their participation were as follows:

Foreign Power Securities Ltd.	$250,000 00	31,250	Class "B" share
Power Corporation of Canada Ltd.	100,000 00	12,500	"
Great Britain and Canada Inv. Ltd.	30,000 00	3,750	"
Can. Power & Paper Securities Ltd.	200,000 00	25,000	"
Nesbitt, Thomson & Co. Ltd....	52,184 00	6,523	"
	$632,184 00	79,023	"

(t) The 79,023 shares received were issued to N.T. Investments Ltd, which company in turn endorsed the shares to the above companies;

(u) The 725 common shares acquired at cost from N.T. Investments Ltd. in July 1956 and January 1957 were disposed of as follows:

Date	Number of Shares	Selling Price	Cost	Profit (Loss)
Apr/27/57	725	$21,373 00	$7,250 00	$14,123 00

(v) The 31,250 Class "B" Shares acquired from N.T. Investments Ltd. on March 26, 1957, were disposed of as follows:

Date	Number of Shares	Selling Price	Cost	Profit (Loss)
May/28/57	10,000	$228,900 00	$ 80,400 00	$148,500 00
Oct/1/57	6,000	120,000 00	48,840 00	71,160 00
May/22/58	1,000	24,565 00	8,040 00	16,525 00
May/27/58	1,000	24,565 00	8,040 00	16,525 00
Jun/19/58	300	6,957 00	2,412 00	4,545 00
Jun/20/58	100	2,319 00	804.00	1,515 00
Jun/23/58	1,740	39,132 60	13,989 60	25,143 00
Jun/27/58	1,500	33,735 00	12,060 00	21,675 00
Jul/28/58	500	11,595 00	4,020 00	7,575.00

Date	Number of Shares	Selling Price	Cost	Profit (Loss)
Jul/29/58	100	$ 2,319 00	$ 804 00	$ 1,515 00
Jul/31/58	200	4,838 00	1,608 00	3,230 00
Aug/1/58	50	1,209.50	402 00	807.50
Aug/5/58	50	1,209 50	402 00	807.50
Aug/6/58	200	4,838 00	1,608 00	3,230 00
Sep/2/58	500	11,845 00	4,040 00	7,825.00
Nov/12/58	125	2,961 15	1,005 00	1,956 25
Nov/28/58	1,000	21,690 00	8,040 00	13,650 00
Dec/1/58	500	10,845 00	4,020 00	6,825 00
Jan/16/59	1,400	31,077 50	11,256 00	19,821 50
Jan/19/59	100	2,219 00	804 00	1,415 00
Jan/20/59	625	14,025 00	5,025 00	9,000 00
Jan/21/59	375	8,415 00	3,015 00	5,400 00
Jun/2/59	500	8,595 00	4,020 00	4,575 00
Jun/3/59	300	5,157 00	2,412 00	2,745 00
Jun/4/59	300	5,174 50	2,412 00	2,762 50
Jun/12/59	1,000	16,690 00	8,040 00	8,650 00
Jun/24/59	200	3,338 00	1,608 00	1,730 00
Feb/23/61	100	840 50	804 00	36 50
Feb/23/61	385	3,191 65	3,095 40	96 25
Feb/28/61	1,100	9,119 00	8,844 00	275 00
	31,150	$661,366 00	$251,850 00	$409,516 00

(*w*) Foreign Power also acquired in June 1957, 500 Partial Units of Quebec Natural Gas Corp. which it disposed of as follows:

Date	Number of Partial Units	Selling Price	Cost	Profit (Loss)
Nov/4/57[1]	500	$58,475 00	$64,500 00	($6,025 00)

(*x*) N T Investments, as a continuation of the old Nesbitt Thomson & Co Ltd., did not throw off the trading nature of its interest in the pipe line project when in 1952 it sold its purported trading assets to Nesbitt Thomson and Co Ltd and changed its corporate powers from those of a dealer in securities to those of an investment company;

(*y*) The organization and promotion of the pipe line and the Quebec Natural Gas projects proceeded in the same way when the shares were held by Foreign Power Securities as when they were held by N T. Investments or its predecessor, Nesbitt Thomson & Co. Ltd ;

(*z*) The venture in the pipe line and the Quebec Natural Gas projects was from the beginning to the end a venture in the nature of trade, the Respondent alleging that it was never the intention of the Appellant to hold as investment the shares and units of Trans-Canada Pipe Lines Ltd. and Quebec Natural Gas Corporation as appears from all the circumstances surrounding the purchases and sales thereof.

. . .

[1] The Nov/4/57 date should read Nov/4/58.

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15. He submits that the profits derived from the sales of the shares and units of Trans-Canada Pipe Lines Ltd. and Quebec Natural Gas Corporation are profits derived from a venture in the nature of trade within the meaning of section 139(1)(*e*) of the Income Tax Act and taxable under the provisions of sections 3 and 4 of the said Act.

The appellant, as already mentioned, on the other hand, submitted that the gains realized were realizations of an enhancement in the value of its investments and consideration must now be given to its evidence in this regard.

The evidence for the appellant was supplied by one witness only, William Howard Wert, a chartered accountant by profession and a vice-president and director of the appellant company since the end of June 1956. The appellant, a public company, was incorporated as a Canadian company on March 1, 1927, for the purpose of investing in securities of public utility companies throughout the world and primarily outside of Canada. It engaged in this type of activity until the early years of the last war having suffered, however, throughout the depression of the thirties many substantial losses in its investments. Its main asset, prior to the war, which it continued to hold was located in France. With the war, the assets were appropriated and nationalized by the French Government and payments of the expropriation price of its assets were made over a number of years in blocked francs. As and when the appellant was permitted to remit the francs and convert them into Canadian dollars, a portion thereof was then invested in short term Government bonds and the balance deposited in Canadian banks.

The securities purchased prior to June 30, 1956, from funds received from France and the amounts deposited in Canadian banks at that date are listed in Ex. A-2 which is reproduced hereunder:

Assets — as at June 30th, 1956

4,000	Province of Quebec 3% 1969	$ 3,895 00
75,000	Province of Quebec 2½% 1961.	74,312 50
100,000	Province of Nova Scotia 3% 1957	100,000.00
125,000	Province of Nova Scotia 2½% 1959 ..	124,687 50
10,000	Province of New Brunswick 3¼% 1957 . .	10,000 00
9,000	Province of New Brunswick 3¼% 1958	9,000.00
20,000	Province of New Brunswick 3% 1959. .	20,000.00
5,000	Province of Newfoundland 3¼% 1957 . .	5,006 25
320,000	Government of Canada 2⅛% Dec 15th 1956 ..	318,930 00

Assets — as at June 30th, 1956

100,000	Government of Canada 2% 1958	$ 100,000.00
25,000	Government of Canada 2¼% July 1, 1956	24,972.50
208,000	Manitoba Hydro-Electric 3% 1962	209,020.00
87,000	City of Vancouver 3¼% 1962	87,000 00
50,000	Algoma Uranium Mines 5% 1961	49,625.00
550,000	Treasury Bills—$150,000 July 27 125,000 Aug. 3rd 275,000 Aug. 31	546,500 00
10,555	Shs. Power Corporation of Canada—Common	679,457.99
4,500	Shs. B.C. Power Corporation—Common	82,272 50
		$2,289,486 35
	Cash in Banks	$1,032,555.80
	Accrued Revenue	9,943.36
	Prepaid Accounts	1,191 40
		$3,333,176 91

$69,000 capital repayment funds temporarily deposited at June 30th, 1956 by Montreal Trust Company in 1% Non-Personal Savings Accounts.

Mr. Wert stated that up to the end of June 1956, the appellant company had no other assets than the above short term securities, some shares of stock, an amount of $1,032,555.80 in the bank and was carrying on no other activity.

In the month of July 1956, the appellant purchased a number of securities in an amount of approximately 2½ million dollars with monies obtained from the company funds as well as from the proceeds of the sale of the short term Government bonds. The securities so purchased include those sold by the appellant in 1957 and 1958 at a profit, the gains of which were assessed for income tax and which were bought from N.T. Investments Ltd. at a price of $95,925 comprising 11,225 shares of Trans-Canada Pipelines Limited at a cost of $89,800, i.e. $8.00 a share which shares were at the time represented by voting trust certificates and 612½ common shares of Quebec Natural Gas Corporation at a cost of $6,125, i.e. $10.00 per share.

Mr. Wert stated that of the total purchase of some 2½ million dollars worth of securities in July 1956 of which $95,925 were invested in Trans-Canada and Quebec Gas common shares about $1,800,000 are invested in the same securities which the appellant still holds today. On January 25, 1957, the appellant purchased from Canadian oil

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companies 112½ additional common shares of Quebec Gas at $10.00 a share also.

In December 1956 it was agreed that the appellant would purchase a further 7,142 odd common shares of Trans-Canada from N.T. Investments Ltd. represented by voting trust certificates at a price of $8 a share which were delivered shortly after the turn of the year in February of 1957. These voting trust certificates were subject to a voting trust agreement produced as Ex. A-3 which restricted the sale to the public of these shares up until 1958. These shares had been issued from the treasury of Trans-Canada for the money put up to organize and get it into an operating position.

The purchase of the 18,367 shares of Trans-Canada represented by the voting trust certificates from N.T. Investments Ltd., which according to Mr. Wert had been acquired by means of advances to provide funds in conjunction with other founders of Trans-Canada Pipe Lines Ltd. for the economic and engineering studies preliminary to the actual construction of the pipe lines, took place in the following circumstances. N.T. Investments Ltd. received in 1954 and 1955, 72,624 common shares of Trans-Canada for the advances it made to Western Pipelines Ltd. from 1950 to 1952 when it was called Nesbitt Thomson & Co. Ltd. and was trading in securities and from 1952 to 1955 when it had become N.T. Investments Ltd. as well as 10,712 common shares of Trans-Canada from Canadian Delhi Petroleum Ltd. as a result of an agreement made with the latter company on January 12, 1954, thus forming a total of 83,336 common shares which were all sold, 11,225 to the appellant at cost on July 6, 1956 and 7,142 on February 18, 1957. I should interpolate here that in December 1956 N.T. Investments Ltd. purchased 38,683 shares of Foreign Power from the appellant company for the sum of $2,000,250 thereby obtaining control of the company. Wert at page 79 of the transcript stated that when Nesbitt Thomson & Co. Ltd. changed its name in 1952 to N.T. Investments Ltd. and changed its operations from trading to that of an investment company "it retained the right to receive shares to subscribe for the monies, but surrendered any rights which it might have in conjunction

with underwriting and for underwriting purposes another company was formed called Nesbitt Thomson and Co., Ltd."

The appellant then, on March 25, 1957, through N.T. Investments Ltd., again acquired 31,250 class B shares of Quebec Gas from the treasury of the company at a cost of $250,000, i.e. at $8.00 per share, which money had also been put up to organize it and get it in to an operating position and these shares were delivered in March 1957.

It appears from the evidence of Mr. Wert as well as from Ex. A-8, a certified extract from the minutes of a meeting of the directors of the appellant company held on September 28, 1956, that this purchase took place in the following circumstances. On September 20, 1956, the appellant had agreed "to participate to the extent of 12½/29ths of N.T. Investment Limited's option to purchase shares of Quebec Natural Gas Corporation with Foreign Power Security Corporation Limited to two hundred and fifty thousand dollars ($250,000) principal amount instalment payments on account of such sum to be payable on demand". I might point out here that N.T. Investments Limited had prior thereto undertaken to advance to Quebec Gas amounts up to $580,000 as one of the founders of the latter company. It later, however, decided to invest its money in other things and as a result of an arrangement made in September, 1956, with a number of companies such as the appellant, Great Britain and Canada Investments Ltd. and Canadian Power and Paper Securities who all agreed to put up a portion of the funds N.T. Investments had undertaken to advance, the latter had no longer any interest in the matter except for the obligation to turn over to the above companies a number of shares corresponding to their respective interests. As and when monies were required by Quebec Gas to maintain its option to acquire the facilities of the gas distribution system of Hydro-Quebec, the appellant made its portion of monies available at four or five different dates beginning about October 1, 1956, and ending in the early part of 1957 when, as already mentioned, in March of 1957 the advances of $250,000 were then converted into 31,250 class B shares issued to N.T. Investments Ltd. and then transferred to the appellant. These class B shares were subject to a limitation inscribed

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thereon, effective until March 31, 1958 (when they automatically became common shares) to the effect that they had been issued to the subscriber for his own account for investment and not with a view to their distribution and were not to be sold to the public. The company had the right to refuse transfer of any of these shares unless the transferor or transferee certified that the requested transfer was not a part of a public sale. They still, however, could be the subject of a private sale.

Six hundred and twelve and a half common shares of Quebec Gas of the 725 purchased by the appellant were bought from N.T. Investments Ltd. at cost at $10 per share and the balance of 112½ shares was purchased from Canadian oil companies also at $10 per share. N.T. Investments Ltd. had obtained the shares so sold at the formation of the company together with a group of other founders and sponsors such as Wood Gundy & Co. Ltd., International Utilities Corporation, Canadian Delhi Oil Ltd., Lehman Brothers, Allen & Co. and Osler, Hammond & Nanton Ltd. who all had received a certain number of shares. Two of the sponsors of Quebec Gas, Osler, Hammond & Nanton Ltd. and Wood Gundy & Co. Ltd. had also sponsored Trans-Canada, together with the Calgary and Edmonton Corporation Limited, Anglo Canadian Oil Company Limited and International Utilities Corporation and although there was no connection between both companies, Quebec Gas was a natural outlet for the distribution of the gas supplied and carried by Trans-Canada.

The appellant also purchased in 1957 a certain number of units of Trans-Canada and Quebec Gas of which some were sold in 1957 and the balance in 1958 as follows:

(1) 150 units of Trans-Canada were purchased on March 8, 1957 and sold the same month;

(2) 2,500 partial units of Trans-Canada were purchased on the open market from a broker of $250,000 principal amount of the subordinated debentures and 5,000 common shares (2 shares remained only of the original 5 as 3 had been stripped off which were sold by the appellant in November 1958 for an aggregate of $299,875 at a loss of $77,625).

(3) 500 partial units (100 in debentures and 2 common

shares) of Quebec Gas were purchased in June 1957 and sold in November 1958 at a loss of $6,025.

Mr. Wert explained that in purchasing these partial units the company wanted to maintain an interest in what it considered to be a sound industry, but to minimize the risk and, at the same time, to obtain an income in debentures. His explanation as to why the partial units were sold can be found at page 41 of the transcript where he stated:

> A. I believe that our judgment in buying them was poor, our judgment in selling them was good, because they continued to further depreciate in price after we had sold them, and we would be in a position of having some debenture income at a risk of a further capital loss.

From the evidence and documents produced as well as from the assessments of the respondent, it would appear that the following nomenclature sets out generally the purchase and sale of the securities involved in this appeal. For purpose of convenience Trans-Canada and Quebec Gas are hereinafter abbreviated as T.C. and Q.N.

Purchase date	No. of shares		1957 Price	Company	Sale date
July/56	11,225	common shares	$ 8.00	T.C.	10,000 – June 15/57
Feb/57	4,775				6,000 – May 28/57
July/56— 612½	725	common shares	10.00	Q.N.	Apr. 27/57
Jan/57— 112½					
Mar./57	6,000	class B shares	8 00	Q.N.	10,000 – May 28/57 6,000 – Oct./57
Mar./57	150	units		T.C.	– Mar./57

			1958		
Feb./57	2,367	common shares	$ 8 00	T.C.	– Jan.13/58
Mar./57	8,865	class B shares	8 00	Q.N.	between May 22/58 and Dec./58
June/57	2,500	units		T.C.	– Nov./58
June/57	500	units		Q.N.	– Nov./58

I should also point out here that by agreement dated May 8, 1956 made between the Government of Canada and

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Trans-Canada, the Government *inter alia* agreed to recommend to Parliament that a loan to Trans-Canada be authorized in an amount up to 90 per cent of the cost of the Western section of the pipeline, not to exceed $80,000,000 and on June 7, 1956 the *Northern Ontario Pipe Line Crown Corporation Act* came into force and the above loan was then authorized. It therefore appears that all the shares involved herein were purchased after the above agreement and the passing of the necessary authority to enable the above loan.

In February 1957, there was a public issue of Trans-Canada securities in both the United States and Canada by first mortgage bonds and their subordinated debentures. These Canadian subordinated debentures were marketed in units of $100 principal amount and five shares of common stock. In Canada, these units were marketed at $150 per unit plus accrued interest on the debentures. After the public offering, the initial trade over the Canadian market burst into action as appears from Ex. A-4, the over the counter trading record from March 1, 1957 to December 27, 1957 where on March 1, 1957 it started off at $24½ (from a value of $10) a share, went steadily up to as high as 47½ during the period June 7 to 21 and then ended off on December 27, 1957 at $20½. This occurred before the actual listing of this stock which took place on January 2, 1958.

The Quebec Natural Gas Corporation shares were offered to the public on April 12, 1957. The financing here was somewhat similar to Trans-Canada Pipe Lines Limited. The securities were marketed both in Canada and in the United States. The Canadian offering was $100 subordinated debentures to which were attached four common shares, the unit being marketed at $140 and accrued interest.

Mr. Wert also produced a similar over the counter record of the price of the Quebec Natural Gas Corporation common shares covering the period April 18, 1957, to December 27, 1957, which indicates that these shares sold on April 18, 1957 at a price of $29 to $30 (from a value of $10) went to a high of $34¾ on June 14, 1957 and then ended up just prior to being listed, which took place on November 15, 1957, at $18¾-$19½.

I might point out here that none of the 18,367 shares of Trans-Canada represented by the voting trust certificates,

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nor the 31,250 class B shares and 725 common shares of Quebec Gas, acquired by the appellant and involved in the appeal were part of the public issues of February 12, 1957 and April 12, 1957 although, of course, the appellant took advantage of the market rise which occurred after the public issue of both companies to sell some of its holdings acquired prior thereto. As a matter of fact, the evidence discloses that the appellant did not subscribe for any of the units that were offered to the public by both companies nor was it involved in any way in the underwriting of the public issues.

In July 1956, when the appellant purchased the Trans-Canada and Quebec Gas shares, Mr. Wert as well as Mr. P. N. Thomson, amongst others, were directors of both the appellant and N. T. Investments Ltd. and Mr. Wert as Vice-president of the appellant, participated in the discussions which led to the purchase of 11,225 shares of Trans-Canada as well as of 31,250 class B shares of Quebec Gas. He also, as a director and secretary of N. T. Investments, together with P. N. Thomson, was instrumental in the decision by the latter company to sell the above shares to the appellant, adding that as it was a private company the other directors would readily accept the opinion of Thomson and himself in this regard.

This appears from the evidence of Mr. Wert at pages 57-58 of the transcript where, in answer to the following question, he admitted having exercised this dual function:

> Q. Could we say that at the particular time of the sale of these shares by N. T. Investments Ltd. and the purchase by Foreign Power Securities Corporation of these securities, that you were acting in the capacity of an officer of both corporations, as seller and purchaser?
>
> A. I acted as an officer of both corporations.

Wert at pages 111 and 112 of the transcript also admits he was instrumental in having Foreign Power invest $250,000 in Quebec Gas for which it received 31,250 class B shares and that N. T. Investments Ltd's plan throughout was to enlarge its holdings in the appellant company:

> A. We considered again that this was a public utility and there was every reason to believe that it should prove to be a conservative investment. Public utilities usually are This one simply developed special characteristics.
>
> ...

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Q. When did it come about that it was decided to enlarge your holdings in Foreign Power Securities?

A. Currently, no particular day, it was our general policy.

And at p. 112:

Q. But in between September and December, when the negotiations obviously were going on with Quebec Natural Gas Corporation, N. T. Investments Ltd. had the necessary funds to purchase this block of thirty-one thousand two hundred fifty (31,250) Class B shares for two hundred fifty thousand dollars ($250,000) that were eventually purchased by Foreign Power Securities Corporation?

A I repeat it was the decision of the directors that we would not invest in Quebec Natural Gas but we would hold out money for other purposes.

...

Q. This was simply, largely another understanding between you and Peter Thomson as regards your official capacity with N. T. Investments Ltd.?

A. Yes.

Q. This was a way of having Foreign Power Securities go through N. T. Investments to obtain these thirty-one thousand two hundred fifty (31,250) Class B shares?

...

A. Yes, that is correct.

Q. Knowing at that time that N. T. Investments Ltd. was planning control of Foreign Power Securities Corporation?

A. Certainly.

The policy followed by the Board of Directors of Foreign Corporation in deciding whether or not it should invest its funds in shares and bonds, which decision Wert admitted would originate between Thomson and himself would, however, according to Wert, be reported to and be approved by the full Board of Directors of the appellant as the latter was a public corporation and was governed by a desire to become active in Canadian business and investment communities and divest itself of its short term Government bonds, convert them into Canadian dollars and invest the resultant funds in situations considered potentially profitable.

The company had no special guide lines to help it make decisions, but according to Wert relied on common sense. The latter, at p. 61 of the transcript, asked whether the fact that the shares which had cost $8 were being offered at $8 per share by N. T. Investments Ltd. played any part in the decision of the appellant to acquire them, answered:

A. To this extent that we considered eight dollars ($8) a share to be a proper price.

Later the price at which these shares were sold came up again and when Mr. Wert was asked at p. 87 of the transcript, by counsel for the respondent, whether as a sound business practice and as a business man in the investment field he would have sold him those shares at $8 per share if he had approached him, he gave the following answer:

A. I can say this, there were days when you could have had them for about one cent a share.

The Court then asked Mr. Wert whether this was the situation in July 1956 and he stated:

A. But there, throughout the market value or the true market value of these shares, at a pertinent time, had nothing to suggest that they were more or that they were other than this eight dollars ($8) per share.

He later asserted that there was no information available to him that led to believe that any price other than $8 a share would be a fair market value and he referred to the Report of the Royal Commission on Energy, Ex. A-7, p. 78, where it appears that a company called Tennessee Gas Transmissions made a large investment in order to make the pipe line possible and paid $8 a share, though it appeared later that this sale took place prior to the commitment of the Government of Canada to loan $80,000,000 as they were purchased on February 8, 1956 and the loan was undertaken in the spring of 1956. And finally, at pp. 87 and 88 Wert gave the following answer to the following questions by counsel for the respondent:

Q. If I had come to you after the announcement that the Government of Canada was backing the pipe line up to eighty million ($80,000,000) dollars, and I had appeared on the same date as Foreign Power Securities Corporation, would you have sold me those shares at eight dollars ($8) per share, as you did Foreign Power Securities?

A. I am afraid I did not have to consider that matter.

And at pp. 89 and 90 of the transcript, Wert, with regard to the reasonableness of the price paid by the appellant for the shares stated:

A. I can only say that at no time in these earlier days was there any eventuality that these shares were going to be other than a reasonably sound investment in public utilities. It is not in the nature of things that public utilities stock goes from nothing to a very high price overnight. It was never anticipated, and throughout this period there was nothing to give an indication that the stock would take off in the manner that it did elsewhere, and I can only suggest that that opinion was shared by all of the oil and gas

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companies that made up Trans-Canada Pipe Lines, all of their financing advisors, because the directors and officers of Trans-Canada Pipe Lines would have been most derelict in their duty to the Trans-Canada people if they had sold to the public shares at ten dollars ($10) per share, that they thought were going to be worth forty-seven ($47) within a couple of months...

A. Having regard to my responsibility as an officer and director of Foreign Power Securities, a public company listed on the stock exchange, with several hundred shareholders with us...having seventy per cent (70%) of the stock, that is true, but having a substantial minority interest, I, as a director, had to be satisfied that the price of eight dollars ($8) that we paid was the reasonable market value of these securities, I could do nothing else but purchase at fair market value.

Q. How would you reconcile in your mind the fact that on the one hand, it was a sound, good logical investment in a public utility company that had possibilities of growth and, on the other hand, N. T. Investments Ltd, ostensibly an investment company, giving up these shares under the same terms and conditions of the possibility of growth?

A. In the case of N. T. Investments and my responsibility there, it was my opinion that while this was a good investment, in sum total there were too many dollars invested in one situation, in N. T. Investments, having regard to its total resources, and in addition to that it was, or rather as part of our corporate planning, we wished to use funds in N. T. Investments or invest by it, in the acquisition of shares of other companies, notably Foreign Power Securities and create a permanent vehicle...

Q. By selling these eighteen thousand three hundred sixty-seven (18,367) shares, particularly to Foreign Power Securities, you acquired approximately ninety thousand some odd dollars?

A. Yes.

Q. That was applied to other money to obtain control of Foreign Power Securities Corporation?

A. It, with other monies in the portfolio of N. T. Investments, were used to purchase "Securities" yes.

And at p. 95:

Q. Did you not find it strange that the shares were offered at cost, as an officer and director of Foreign Power Securities, after knowing as an officer and director of the Vendor that they were a good investment?

A. I repeat that in my opinion I was selling these shares as an officer of N. T. Investments at a fair market value and as an officer of Foreign Power Securities, I was purchasing them at fair market value.

Q. And on both sides of the coin, you were apparently satisfied that selling was proper for N. T. Investments Ltd. and just as proper, as an officer of another corporation, to purchase at what you stated was fair market value?

A. I did so consider.

He was then asked by the Court at p. 62 of the transcript what his guide was when the shares were sold on behalf of N. T. Investments Ltd., and he gave the following answer:

A. In the investment company, we had decided that we wished to put the money that was there available to other purposes and to that end we disposed of our shares in pipe line companies.

Wert admitted at p. 72 of the transcript that when the appellant decided to purchase the Trans-Canada shares from N. T. Investments Ltd., he personally knew that a pipe line was to be constructed, backed by the Canadian Government up to an amount of $80,000,000 and that the latter decision influenced the decision of the appellant "to a degree but not wholly".

The selling of the 83,336 common shares of Trans-Canada to various purchasers (18,367 of which, as we have seen, were sold to the appellant) over a period extending from November 10, 1954 to March 5, 1957 by N. T. Investments Ltd. was explained as follows by Mr. Wert at p. 86 of the transcript:

A. It was the intention of the directors of N. T. Investments to go into the situations that would be of a permanent investment nature, and the acquisition of the control of Foreign Power Securities Corporation is an example of what we had in mind.

The 18,367 shares purchased by the appellant, although purchased as a long term investment, were sold by the latter over a relatively short period of time which, however, Wert explains as follows at pp. 94-95 of the transcript:

BY THE COURT:

Q. Do you know why they were sold within four (4) months?

A. Because these dates, certainly within the date of the extreme high in the market, the shares of Trans-Canada Pipe Lines had gone to this completely unrealistic price, and we sold them, the market value had far outstripped any possible justification as an investment.

The appellant started to dispose of the 31,250 shares of Quebec Gas as early as two months after their acquisition as appears from Wert's evidence at pp. 119 and 120 of the transcript:

Q. Foreign Power Securities Corporation disposed of approximately one third (⅓) of its interest in Class B shares of Quebec Natural Gas Corporation two (2) months after the acquisition of them?

A. That is correct.

Q. And within an additional four (4) months, they disposed of a further block of six thousand (6,000) Class B shares of Quebec

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Natural Gas Corporation, making a total of pretty close to half of their portfolio of that stock?

A. That is correct.

Q. How do you account for selling those shares at a time when they were purchased for an investment in a company with potential growth?

A. Again in the case of Quebec Natural Gas there was a bidding up on the part of the public for these shares at levels that were completely unrealistic, having regard to our responsibility to the public shareholders of Foreign Power Securities, if nothing else, it was our duty to sell.

The monies received by the appellant from the sale of the shares of both companies were re-invested partly in Trans-Canada or Quebec Natural Gas partial units, in Reynolds Aluminum and in preferred shares of Canadian Car and Bus Advertising Ltd. and Inspiration Mining Development Co.

The reason why after the sale of the shares by Foreign Power Corporation, the latter re-invested part of that money in other stocks or debentures of Trans-Canada is also explained by Wert at pp. 96 and 97 of the transcript:

Q. Could you explain the reasoning behind the sale of shares by the Corporation and re-investing money in the same corporation, within a very short period of time?

A. Well, my Lord, the price of the shares had gone down, but we felt that we could purchase debentures of the Trans-Canada Pipe Lines to which were attached two (2) shares at a price which would give us a continued interest in this industry but would, at the same time, give us a senior position and assured income from the debenture interest and would permit us to keep our funds invested.

Mr. Wert was then, at p. 122 of the transcript, finally asked by counsel for the respondent, whether one of the reasons for the transactions was to transfer the profits that might have accrued to N. T. Investments to Foreign Power and gave the following answers:

A. I would say no.

Q. Even in the light of the explanation that you have given, that was not one of the reasons?

A. It was not.

Q. It just happened in the course of business?

A. We deliberately did not attempt to transfer any tax situation, and again I repeat that we had no possible knowledge, we made these decisions, that there was going to be these unprecedented and unjustified increases in the shares of these companies.

I have gone into the above evidence in some detail because it is on the basis of such facts that the respondent asks that the appellant be held taxable on the profits

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realized on the sale of the securities involved in this appeal. The position taken by the Minister is a rather unusual one in that here he is seeking to have these profits held taxable as resulting from an adventure in the nature of trade on the basis of its shareholder's (N.T. Investments Ltd.) activities and intentions and as being a means used by it to transfer its profits. The respondent would indeed appear to be attempting to tax the appellant because the corporation from which it purchased the securities might have been engaged in a business or a concern in the nature of trade because of its former trading activities, had it not transferred these securities to the appellant. If such is the situation, it would appear to me that the proper party to be assessed herein would be not the present appellant but N.T. Investments Ltd. under either sections 16 or 17(1). However, as this situation is not before me, I will refrain from expressing an opinion on the taxability of N.T. Investments Ltd. if such a course had been followed.

I must now then consider the submission of counsel for the respondent as it appears to be that the profits of the appellant herein are derived from an adventure in the nature of trade within the meaning of section 139(1)(*e*) of the *Income Tax Act*.

According to the respondent, the transactions effected by the appellant should be held to be a business because (1) of the appellant's association with N.T. Investments Ltd.; (2) the transactions were from the beginning to the end, on the part of N.T. Investments and its subsidiary the appellant, underwriting transactions; (3) the two corporations were not dealing with each other at arm's length at the time of the transactions as they were either controlled by the same interests, or one was controlled by the other. Warnock Hersey Co., controlled by Peter Thomson as of December 31, 1956, acquired control of the appellant company and the same Thomson with Wert was instrumental in making this sale of the shares from N.T. Investments Ltd. to the appellant; (4) the shares were sold to the appellant at cost which was below their true value at the time and, finally, according to counsel for the respondent, the above facts as well as a proper consideration of where the shares came from, why they were acquired and why they were transferred at cost would appear to indicate almost a deliberate

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plan to divest N.T. Investments Ltd. of certain trading assets to the appellant.

The appellant's association with N.T. Investments Ltd. on which counsel for the respondent relies in determining that the transactions herein are adventures in the nature of trade is not of much assistance in this regard as the appellant is a public company with shares on the market and although during the course of the transactions N.T. Investments Ltd. purchased control of the appellant, it did so in the course of investing its monies in a public investment company having holdings in several Canadian corporations which as a private investment corporation since 1952 was a normal thing to do and I fail to see how this can be indicative of a business even within the extended meaning given the latter by section 139(1)(*e*) of the Act.

The assertion that the transactions were from the beginning to the end on the part of both N.T. Investments Ltd. and the appellant, its subsidiary, underwriting transactions, is also difficult to understand. There is no question that prior to 1952 N.T. Investments Ltd., under the name of Nesbitt Thomson & Co. Ltd., was carrying on a stockbroking business as well as that of an investment dealer and probably was also underwriting issues of shares although in some cases it might well have also invested in shares as a founder of new corporations such as Trans-Canada and Quebec Gas; whatever profits it would realize on the sale of the shares acquired prior to 1952, even after the change of the name and powers of the company in 1952 to N.T. Investments Ltd. would not change the nature of these profits which would still be considered as business profits under the authority of *Osler, Hammond & Nanton Ltd. v. M.N.R.*[1] and as a matter of fact, this was the manner in which, according to Mr. Wert, (cf. p. 131 of the transcript) an item representing the net realization of certain Trans-Canada Pipe Lines Ltd. shares received by reason of advances made to the predecessors of Trans-Canada Pipe Lines prior to April 1952 was dealt with. The amounts had been written off but when they were, later in 1956, recovered by the sale of the shares, they were brought back into the income of N.T. Investments Ltd., This appears from an examination of N.T. Investments Ltd.'s income tax return

[1] [1963] C.T.C. 164.

for 1956 produced as Ex. R-5. The profits made, however, on the realization of investments or monies which had been invested after April 1952 were taken into capital surplus account and that appears on statement IV of the statements contained in the above returns. Whether such items are taxable in the hands of N.T. Investments Ltd. could be the subject of an assessment of the latter company and I do not intend nor need to express an opinion on the taxability of such profits here. It would seem clear, however, that even if such profits were taxable as underwriting transactions in the case of N.T. Investments Ltd., they certainly could not be considered as such in the hands of the appellant corporation a *bona fide* public investment corporation with no prior underwriting activities.

Respondent's assertion that the two corporations were not dealing with each other at arm's length at the time of the transactions, might have been pertinent in a case where the *Income Tax Act* specifically refers to a transaction being taxable if it is not at arm's length but such is not the nature of the transactions involved here where, although there is an interconnection or interrelationship of the two corporations involved, and a situation where some of their common shareholders and common directors acted in a dual capacity, this inter-twining of interests cannot be of much assistance in determining the issue here which is to be decided on the sole question of whether the profits resulted from a business or not.

The submission by the respondent that the securities were sold at cost which respondent submits was well below its actual value at the time should also be commented upon. It would appear from the evidence that all of the Trans-Canada securities involved herein were sold to the appellant after the Government of Canada had undertaken to advance up to $80,000,000 and although at this time the prices set down for the sale of the shares involved, and this applies as well to the Quebec Gas shares, would appear to have been a conservative figure, it would appear that an exact evaluation of shares in such public utility companies in the initial stages is of considerable difficulty. The success of a company in such cases is dependent upon so many factors that the value of its shares at this stage can only be approximated. The financial assistance given Trans-Canada

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by the backing of the Canadian Government for the construction of the line across the northern part of Ontario although undoubtedly of considerable value, might still not have been sufficient to insure the success of the undertaking, although, at this stage, I do not believe that N.T. Investments Ltd. would have sold the shares to a stranger at the price it sold them to the appellant. It is quite difficult to establish what the real price should have been at the time. I would not, however, say that it should have been the high of 47½ for Trans-Canada and 34¾ for Quebec Natural Gas shares to which the securities went practically overnight. It could have been expected at the time that the securities would eventually do well and here I am even prepared to say that the incidence of taxation may have been an element in the minds of the directors of both the appellant and N.T. Investments Ltd. in selling shares to the appellant. I do accept Mr. Wert's statement that it was, however, never anticipated and that throughout the period, there was nothing to give an indication that the stock would take off in the manner that it did and as he asserted at p. 89 of the transcript:

> A. . . . I can only suggest that that opinion was shared by all of the oil and gas companies that made up Trans-Canada Pipe Lines, all of their financing advisors, because the directors and officers of Trans-Canada Pipe Lines would have been most derelict in their duty to the Trans-Canada people if they had sold to the public shares at ten dollars ($10) per share that they thought were going to be worth forty-seven dollars ($47) within a couple of months . . .

As a matter of fact, the unrealistic heights reached by the shares at one time were based on popular enthusiasm which eventually came back to more objective values and I am convinced that there was no possibility prior thereto for anyone to anticipate this meteoric rise. Here again the prices of the securities sold can be of little assistance in establishing that the transactions were of a business nature.

Looking at these transactions in the light of the above circumstances, as urged by the respondent, and after giving consideration to the nature and origin of the securities involved, why they were sold and the price paid for them and even assuming, as suggested by the respondent, that the above would almost indicate a deliberate plan to divest N.T. Investments Ltd. of the securities to the appellant, I still cannot see how I can reach a decision that the profits realized by the appellant should be held to be taxable.

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We are dealing here with securities, shares, debentures and units, which are essentially a means of investment, as pointed out by Martland J. in *Irrigation Industries Ltd. v. M.N.R.*[1]

> Corporate shares are in a different position because they constitute something the purchase of which is, in itself, an investment. They are not, in themselves, articles of commerce, but represent an interest in a corporation which it itself created for the purpose of doing business. Their acquisition is a well-organized method of investing capital in a business enterprise.

The short period during which these securities were held by the appellant can be of little assistance to the respondent as their fast disposal was properly explained by Mr. Wert in that the directors of the appellant would have been remiss in their duties had they not taken advantage of the surprisingly high rise of the market at the time the securities were sold. The fact that the appellant entered into these transactions for the purpose of making a profit as soon as it could and took advantage of this rise as soon as it occurred, should not either change the nature of its investments if this is what they were and render them taxable as trading receipts and this also would appear from the remarks of Martland J. at p. 355 of the same decision:

> The only test which was applied in the present case was whether the appellant entered into the transaction with the intention of disposing of the shares at a profit so soon as there was a reasonable opportunity of so doing. Is that a sufficient test for determining whether or not this transaction constitutes an adventure in the nature of trade? I do not think that, standing alone, it is sufficient.

I find it impossible after reviewing this whole matter, and even assuming that the avoidance of taxes was one of the elements which motivated the transactions, to come to the conclusion that the profits realized by the appellant herein resulted from an adventure in the nature of trade and are taxable.

I should also add that though there is much to be said in favour of preventing the ingenuity expended by certain people to devise in some cases elaborate and artificial methods of disposing of income in order to avoid the payment of taxes because it thereby increases *pro tanto* the load of the tax on the shoulders of those who do not desire or know how to use such methods, in the absence of specific legislation to prevent such practices, "every man", (as

[1] [1962] S.C.R. 346 at 352.

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stated in the words of Lord Tomlin in the *Duke of Westminster's case*[1]:)

> is entitled, if he can, to order his affairs so as that the tax attracted under the appropriate Act is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however, unappreciative the Commissioner of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay more.

Or as expressed by Lord Sumner in *I.R.C. v. Fisher's Executors*[2] at p. 412:

> My lords, the highest authorities have always recognized that the subject is entitled so to arrange his affairs as not to attract taxes imposed by the Crown, so far as he can do so within the law and that he may legitimately claim the advantage of any express term or of any omissions that he can find in his favour in the taxing acts. In so doing, he neither comes under liability nor incurs blame.

I would think that if it is desired to have an effective deterrent to a tax avoidance practice which is considered to be against the public interest, Parliament should legislate (as it has in some cases, such as with respect to dividend stripping in section 138A) so as effectively to block it. The Court should not be asked to accomplish the task, as it is being asked to do here, by squeezing into the notion of an adventure in the nature of trade, a transaction which is a *bona fide* investment and nothing else. Nor is the situation any different if such a *bona fide* investment was entered into with the knowledge that the capital value of the *res* would surely increase or if the situation is that, if the *res* had not been sold to the appellant until after the increase in value, it would have resulted in the person who sold to the appellant realizing a trading profit that would have been taxable in his hands. Nor, in this latter case, would the situation have been any different if the person who sold to the appellant had purchased control of the appellant and thus arranged to get indirectly a part of the increase in value of the *res* that, if it had realized it directly by a sale of that *res*, would have been a trading profit in its hands. In this same vein, I might point out that, under the Act as it is at the present time, the situation would be no different even if one of the elements in the transaction was the avoidance of taxes. There is indeed no provision in the *Income Tax Act* which provides that, where it appears that the main purpose or one of the purposes for which any transaction or transactions was or were effected was the

[1] [1936] A.C. 1920. [2] [1926] A.C. 395.

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avoidance or reduction of liability to income tax, the Court may, if it thinks fit, direct that such adjustments shall be made as respects liability to income tax as it considers appropriate so as to counteract the avoidance or reduction of liability to income tax which would otherwise be effected by the transaction or transactions. The only authority of this character conferred by the statute is conferred on Treasury Board by section 138.

The appeal, therefore, succeeds and it will be allowed with costs and the re-assessments varied accordingly.