1953

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Exchequer Court of Canada

RALPH M. SPANKIE, Q.C.
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74731—3½

JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

THE HONOURABLE JOSEPH T. THORSON
(Appointed, October 6, 1942)

PUISNE JUDGES:

THE HONOURABLE J. C. A. CAMERON
(Appointed September 4, 1946)

THE HONOURABLE JOHN DOHERTY KEARNEY
(Appointed November 1, 1951)

THE HONOURABLE ALPHONSE FOURNIER
(Appointed June 12, 1953)

THE HONOURABLE WILLIAM PITT POTTER
(Appointed September 29, 1953)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

THE HONOURABLE FRED H. BARLOW, Ontario Admiralty District—appointed October 18, 1938.

The Honourable SIDNEY ALEXANDER SMITH, British Columbia Admiralty District—appointed January 2, 1942.

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

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

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

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

The Honourable Sir ALBERT JOSEPH WALSH, Newfoundland Admiralty District—appointed September 13, 1949.

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

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

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

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:
The Honourable STUART S. GARSON, Q.C.

SOLICITOR GENERAL FOR THE DOMINION OF CANADA:
The Honourable R. O. CAMPNEY, Q.C.

The Honourable Maynard Brown Archibald, Puisne Judge of the Exchequer Court of Canada, died during the current year.

On October 1st, 1953 the Honourable Eugene Real Angers, Puisne Judge of the Exchequer Court of Canada, resigned because of ill health.

CORRIGENDA

At page 15 in the second line of the headnote the words "income from employment" should appear in quotes.

At page 38 in the sixth line of the headnote the year 1926 should read 1946.

At page 209 in the first line of the headnote the word "War" should be deleted.

At page 231 in the third line of the headnote the word "person" should appear in quotes.

At page 231 in the second line of the headnote the words "related corporations" should appear in quotes.

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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BETWEEN:

THE B. MANISCHEWITZ COMPANY OF CANADA LIMITED.. } PLAINTIFF;

AND

MAX HARTSTONE and BENJAMIN RICHMAN, trading under the firm name and style of Crown Bread Company, and the said CROWN BREAD COMPANY ... } DEFENDANTS.

1951
Feb. 1, 8

1952
Dec. 23

Trade Marks—Infringement—Passing off—"Tam Tam"—"Some Tam"—The Unfair Competition Act, 1932, S. of C. 1932, c. 38, ss. 2(k), 2(l), 3(c), 11(b)—Tests of similarity of wares—Tests of similarity of marks—Onus on plaintiff in infringement action to show reasonable probability of confusion—Similarity of word marks a matter of first impression—Evidence of actual confusion helpful in determining likelihood of confusion—Onus on plaintiff in passing off action to show reasonable apprehension of likelihood of confusion—Evidence of actual confusion strong evidence of probability of confusion.

The plaintiff claimed that the defendants' use of their word mark "Some Tam" on their farfel was an infringement of the plaintiff's word mark "Tam Tam" as applied to its biscuits and that the defendants' conduct in using the word mark Some Tam and also the Star of David and the six-branched candelabrum amounted to passing off the defendants' farfel as a product of the plaintiff's.

Held: That the defendants' Some Tam farfel and the plaintiff's Tam Tam crackers are similar wares.

2. That in an action for infringement the plaintiff must show that the use of the word marks "Some Tam" and "Tam Tam" at the same time and in the same area in association with similar goods is likely to result in confusion. The onus is on the plaintiff to show reasonable probability of such confusion.

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3. That the answer to the question whether two words are similar must be answered by the judge on whom the responsibility lies as a matter of first impression.
4. That in an action for infringement evidence of actual confusion is not necessary but is helpful in determining likelihood of confusion.
5. That where there is evidence of actual confusion it cannot fairly be held that there was no reasonable probability of confusion.
6. That the word marks "Some Tam" and "Tam Tam" are similar marks.
7. That there can be infringement through the use of similar marks on similar wares.
8. That the plaintiff in a passing off action need not prove that the defendant's course of conduct was likely to create confusion. All that need be shown is a reasonable apprehension of such likelihood.
9. That while it is not necessary in an action for passing off to prove actual confusion the fact of its actual occurrence is strong evidence of the probability of its occurrence.

ACTION for infringement and passing off.

The action was tried before the President of the Court at Ottawa.

J. Rudner and *G. I. Harris* for plaintiff.

R. M. W. Chitty Q.C. and *J. Friedman* for defendants.

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

THE PRESIDENT now (December 23, 1952) delivered the following judgment.

This is an action for infringement of the plaintiff's trade mark Tam Tam and for passing off the defendants' goods as those of the plaintiff.

The plaintiff is the wholly owned Canadian subsidiary of The B. Manischewitz Company, which was incorporated under the laws of the State of Ohio, one of the United States of America, and has offices in Jersey City, New Jersey, and Cincinnati, Ohio. The parent Company is engaged in the business of manufacturing and selling Kosher food products and especially bakery products including matzos, matzo meal, matzo farfel, biscuits and crackers. It has for many years carried on an extensive business in the United States and, prior to the incorporation of the plaintiff, also in Canada. It is the largest matzo bakery in the world and perhaps also the largest manufacturer of Kosher bakery products generally. All its products are Kosher products. This means that they are

clean according to the requirements of the Jewish dietary laws and have been manufactured under rabbinical supervision.

In 1944 The B. Manischewitz Company brought out a new product in the form of crackers and first used the words Tam Tam as a trade mark in association with its crackers on or about August 30, 1944. On March 14, 1945, it applied for registration of the words as a word mark and it was registered in its name on March 22, 1945, as Trade Mark No. N. S. 20652, Register 79, for use in association with crackers and biscuits.

On February 13, 1948, the plaintiff was incorporated under the laws of Canada as a private company for the purpose of carrying on the Canadian business of The B. Manischewitz Company and acting as the Canadian distributor of its products and on April 13, 1948, the parent Company transferred and assigned to the plaintiff all its Canadian business and assets including the good will of its Canadian business and its trade marks including the word mark Tam Tam. The assignment of the mark was duly recorded in the Trade Mark Office on April 14, 1948, under N. S. No. 7988, and since that date the plaintiff has been its registered owner and has used it continuously in association with the crackers which it distributes in Canada for its parent company which has continued to manufacture them in the United States.

The defendants, a Toronto firm, are engaged in the business of manufacturing and selling food products and especially bakery products including bread, rolls and noodles. On September 1, 1949, they adopted the words Some Tam as a trade mark for use on their baked noodles and on September 14, 1949, applied for registration of the words as a word mark and it was registered in their name on September 17, 1949, as Trade Mark No. N. S. 33258, Register 130, for use in association with baked noodles of all types.

The defendants have put out a farfel under their word mark Some Tam and distributed it in Montreal and Toronto to retail stores many of which also sell the various Manischewitz products including the plaintiff's Tam Tam crackers. In addition to using the word mark Some Tam

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on the containers in which they sold their farfel the defendants also put a representation of the Star of David and a representation of a six-branched candelabrum on the package. Both of these symbols have long been used by The B. Manischewitz Company and, since its incorporation, by the plaintiff.

These were the circumstances under which the plaintiff brought its action. I shall deal first with its claim for infringement. It was contended that the defendants' word mark Some Tam was confusingly similar to the plaintiff's word mark Tam Tam and constituted an infringement of it. The claim is based on section 3(*c*) of The Unfair Competition Act, 1932, Statutes of Canada 1932, chapter 38, which provides:

> 3. No person shall knowingly adopt for use in Canada in connection with any wares any trade mark or distinguishing guise which
>
> (*a*) is already in use in Canada by any other person and which is registered pursuant to the provisions of this Act as a trade mark or distinguishing guise for the same or similar wares; or
>
> (*c*) is similar to any trade mark or distinguishing guise in use, or in use and known as aforesaid.

The evidence establishes that the defendants had knowledge of the plaintiff's word mark Tam Tam a considerable time before they adopted Some Tam as their word mark.

The next enquiry is whether the defendants' Some Tam farfel and the plaintiff's Tam Tam crackers are similar wares within the meaning of section 2(*l*) of the Act, which provides as follows:

> 2. In this Act unless the context otherwise requires:—
>
> (*l*) "Similar", in relation to wares, describes categories of wares which, by reason of their common characteristics or of the correspondence of the classes of persons by whom they are ordinarily dealt in or used, or of the manner or circumstances of their use, would, if in the same area they contemporaneously bore the trade mark or presented the distinguishing guise in question be likely to be so associated with each other by dealers in and/or users of them as to cause such dealers and/or users to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin;

In my opinion, the wares meet the tests of similarity thus laid down. The defendants' farfel and the plaintiff's crackers have common characteristics in that both are bakery products. Their ingredients are essentially the same. The farfel is made of flour, eggs, a little salt and

a little shortening and the crackers of flour, vegetable shortening, sugar, malt, salt and leavening. The difference in the ingredients is not sufficient to make the products dissimilar. Both the farfel and the crackers are baked in a hot oven. The evidence also proves that the classes of persons by whom they were ordinarily dealt in or used correspond. Both products are sold through the same channels by distributors to retail grocery stores, principally in Montreal and Toronto, although distribution of the plaintiff's product is much more widespread. The farfel and the crackers are primarily intended for Jewish consumption. It is true, of course, that the products are also bought by Gentiles but to a much greater extent in the case of the Tam Tam crackers than in that of the Some Tam farfel. The evidence is that 95 per cent of the latter is sold to Jewish people whereas the sale of the former to Gentiles actually exceeds in volume its sale to Jews because of the large number of non-Jewish outlets for its distribution. Finally, there is similarity in the manner and circumstances of the use of the two products. The Some Tam farfel is used for soups, as a side dish and for stuffing poultry. The Tam Tam crackers are also used for soup and as a base for canapes. They are also broken up and used for stuffing poultry. The primary use of both is for soups. On the evidence and having regard to the tests of similarity set by section 2(*l*) of the Act, I am satisfied that the defendants' Some Tam farfel and the plaintiff's Tam Tam crackers are similar wares within the meaning of the Act.

I now come to the question whether the word marks are similar within the meaning of section 2(*k*) of the Act which provides as follows:

2. In this Act, unless the context otherwise requires:—

(*k*) "Similar", in relation to trade marks, trade names or distinguishing guises, describes marks, names or guises so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they are produced, or for their place of origin.

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To succeed in its action for infringement the plaintiff must show that the use of the word marks Some Tam and Tam Tam at the same time and in the same area in association with the wares mentioned is likely to result in the confusion mentioned in the definition. The onus is on the plaintiff to show reasonable probability of such confusion: *vide Pepsi-Cola Company of Canada Limited* v. *Coca-Cola Company of Canada Limited* (1).

Before I refer to the tests of similarity mentioned in the cases I should state that the words Tam Tam are coined or invented words. The evidence of Mr. D. B. Manischewitz is that when The B. Manischewitz Company developed its new crackers it thought it would be helpful to have a contest for the name of its new product and the judges selected Tam Tam as a name which would be likely to be favourably received. The word Tam was catchy and had the advantage of repeating itself. By itself it has no meaning in Yiddish or in Hebrew. There is no contradiction of this evidence.

On the conclusion of the plaintiff's case counsel for the defendants moved for a non-suit in conformity with the practice of this Court that such a motion is to be entertained only after counsel has informed the Court that he does not intend to adduce any evidence in reply to the case put for the plaintiff. Counsel argued that the word marks Some Tam and Tam Tam should not be considered to be similar. He submitted that there was a difference between them not only in the vowels of the two words Some and Tam but also in their initial consonants and that this difference made the two word marks dissimilar. On the other hand, counsel for the plaintiff argued that the marks were phonetically similar and that there was a similarity in the ideas conveyed by them.

The tests of similarity of trade marks have been dealt with in many cases, one of the latest in this Court being *Freed & Freed Ltd.* v. *Registrar of Trade Marks et al* (2), where several of the leading cases were referred to. There it was stated that it is not a proper approach to the determination of whether trade marks are similar to break them up into their elements, concentrate attention upon the

(1) (1940) S.C.R. 17 at 32. (2) (1950) Ex. C.R. 431.

elements that are different and conclude that, because there are differences in such elements the marks as a whole are different. Trade marks may be similar when looked at in their totality even if differences may appear in some of the elements when viewed separately. It is the combination of the elements that constitutes the trade mark and gives distinctiveness to it, and it is the effect of the trade mark as a whole, rather than of any particular element in it, that must be considered. In the same case it was also stated that it is not a correct approach to the solution of the problem whether two marks are similar to lay them side by side and make a careful comparison of them with a view to observing the differences between them. The Court should not subject the two marks to careful analysis but should seek to determine the issue of similarity from the point of view of a person who has only a general and not a precise recollection of the earlier mark and then sees or hears the later one by itself. If such a person would be likely to think that the goods on which the later mark appears are put out by the same person as the goods sold under the former mark of which he has only a general and not a precise recollection the Court may properly conclude that the marks are similar. These propositions are based on leading English cases: *vide Re Christiansen's Trade Mark* (1); *Sandow Ld's Application* (2). As was pointed out in the *Freed & Freed Ltd.* case (*supra*), the reasons for such a view is clear. Careful analysis of the marks with a view to ascertaining the differences between them merely serves the purpose of pointing out the differences in the marks but does not answer the question whether they are similar. It is always important to remember that marks may be similar although there are differences between them. Indeed, they cannot be similar unless there is some difference. Similarity connotes difference for if there were no difference there would be identity, not similarity.

In the *Freed & Freed Ld.* case (*supra*) it was also stated that the proper test to be applied has been laid down by high authority and reference was made *inter alia* to *Aristoc, Ld.* v. *Rysta, Ld.* (3) in which the House of Lords decided that the question whether two marks are similar must be

(1) (1886) 3 R.P.C. 54. (2) (1914) 31 R.P.C. 196.
(3) (1945) A.C. 68.

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answered by the judge on whom the responsibility lies as a matter of first impression. They adopted as a fair statement of the duty cast upon the Court the following passage from the dissenting judgment of Luxmoore L.J. in the Court of Appeal (1):

> The answer to the question whether the sound of one word resembles too nearly the sound of another so as to bring the former within the limits of section 12 of the Trade Marks Act, 1938, must nearly always depend on first impression, for obviously a person who is familiar with both words will neither be deceived nor confused. It is the person who only knows the one word, and has perhaps an imperfect recollection of it, who is likely to be deceived or confused. Little assistance, therefore, is to be obtained from a meticulous comparison of the two words, letter by letter and syllable by syllable, pronounced with the clarity to be expected from a teacher of elocution.
>
> The Court must be careful to make allowance for imperfect recollection and the effect of careless pronounciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to that person's wants.

Lord Luxmoore's statement was expressly approved by Kerwin J., giving the judgment of the Supreme Court of Canada, in *Battle Pharmaceuticals* v. *The British Drug Houses Ltd.* (2) and must be regarded as the leading authority on the subject. While it may be easier to apply the test of first impression to single words, such as those in question in the *Aristoc* case (*supra*), than to word marks consisting of more than one word, the principle is the same.

In the *British Drug Houses Ltd.* v. *Battle Pharmaceuticals* (3) I expressed the opinion that on a motion to expunge a word mark on the ground that it was confusingly similar to a previously registered word mark it was not necessary that there should be any evidence of actual confusion since the issue was not whether there had been confusion but whether confusion was likely to occur but, on the other hand, when there is evidence of actual confusion such evidence is helpful in determining whether there would be likelihood of confusion. The same principle applies in an action for infringement.

In the present case there was evidence of actual confusion between the defendants' Some Tam farfel and the plaintiff's products on the part of users of the wares. This evidence was given by Mr. M. Lifshitz, an independent grocer who operates a store on St. Lawrence Boulevard in

(1) (1943) 60 R.P.C. 87 at 108. (2) (1946) S.C.R. 50 at 53.
(3) (1944) Ex. C.R. 239 at 244.

Montreal. Most of his customers are Jewish. He had dealt in the various Manischewitz products that I have mentioned, including their matzo farfel and their Tam Tam crackers for many years and also carried the defendants' Some Tam farfel. He kept this on his shelves together with the other noodle and farfel products. He also kept the plaintiff's Tam Tam crackers. When Mr. Lifshitz was asked what impression he got when he first saw the defendants' package of Some Tam farfel he said that he thought it was another new Manischewitz product. Some Tam appeared to him like a Tam Tam product. I mention this evidence now for it has more bearing on the issue of passing off than on that of infringement although it is also relevant to it. His evidence as to the confusion of his customers is more important. But before I set it out I have some comments to make. In the course of his evidence I made some adverse comments to the effect that he was inconsistent in what he had said and that it was he rather than his customers that had been confused. I made a notation in my note book that he was confused but I thought he was truthful. Since then I have carefully read the transcript of his evidence several times and I must now say that while his evidence was not quite as clear as it might have been he was not inconsistent and was not confused. Having said this in fairness to him, I now summarize his evidence as I find it. He had a delivery service and took orders over the telephone. After he started carrying the defendants' Some Tam farfel some of his customers called for it by different names. They sometimes asked for Manischewitz farfel or Manischewitz baked farfel or Manischewitz Tam farfel or Tam Tam farfel when what they really meant was the defendants' Some Tam farfel. Mr. Lifshitz knew this because when such a call had been made he had sometimes sent the customer a Manischewitz farfel since he had asked for that and the customer had returned it to the store and asked for the Some Tam farfel as the farfel he wanted. It was not a case of giving the customer something different from what he had asked for but rather a case of the customer asking for a Manischewitz product when he really meant the defendants' product. Even when customers came to the store and saw the defendants' Some Tam farfel on the shelves they sometimes called it by a variety of names,

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such as Tam farfel, Manischewitz Tam Tam farfel or Manischewitz baked farfel. When they asked for a Manischewitz Tam farfel they indicated the defendants' Some Tam farfel. Likewise, when they asked for a Manischewitz Tam Tam farfel they did the same thing. As Mr. Lifshitz gave particulars of what had happened his evidence became clearer. When customers came to his store and asked for a farfel or a baked farfel he gave them the defendants' Some Tam farfel for that was the only baked farfel he had in the store. Similarly, when a customer asked for Tam Tam farfel he gave her the defendants' Some Tam farfel because that was what she wanted. If she asked for Manischewitz farfel he gave her a package of Manischewitz matzo farfel. When customers telephoned and asked for a Manischewitz Tam farfel he sent out the defendants' Some Tam farfel. If they asked for a Manischewitz farfel he sent them the Manischewitz matzo farfel. But even in such cases he quite often got the package back because what the customer wanted was the Some Tam farfel. Incidents such as this had happened quite often since he started carrying the defendants' Some Tam farfel. Mr. Lifshitz was not able to give the name of any customer who had wanted the defendants' Some Tam farfel but had asked for it by a different name. Notwithstanding this fact, I am satisfied that he was telling the truth and I accept his evidence. I believe there has been confusion in the minds of some of his customers between the defendants' Some Tam farfel and the plaintiff's products. Indeed, it is easy to see that customers who knew the trade mark Tam Tam and associated it with a Manischewitz product would be quite likely to think of Some Tam farfel as another Manischewitz product.

Having in mind the tests of similarity that have been referred to and the evidence of actual confusion I have no difficulty in finding that the defendants' word mark Some Tam is confusingly similar to the plaintiff's word mark Tam Tam within the meaning of section 2(*k*) of the Act. In my opinion, this finding could have been fairly made without any evidence of actual confusion. And in view of the evidence of actual confusion that has been adduced I do not see how it could fairly be held that there was no reasonable probability of confusion.

Counsel for the defendants urged that there could not be infringement in the case of similar trade marks being used on similar wares but I am unable to accept this submission. Consequently, I find that since the wares are similar and the marks are similar, within the meaning of the statutory definitions, the plaintiff has made out a case of infringement.

I now come to the claim for passing off. This is made under section 11(*b*) of The Unfair Competition Act, 1932, which provides as follows:

> 11. No person shall, in the course of his business,
>
> (*b*) direct public attention to his wares in such a way that, at the time he commenced so to direct attention to them, it might be reasonably apprehended that his course of conduct was likely to create confusion between his wares and those of a competitor;

This statutory cause of action is the equivalent of the common law action for passing off. The onus on the plaintiff in this action is not quite the same as in an infringement action. He need not prove that the defendants' course of conduct was likely to create confusion. All that need be shown is a reasonable apprehension of such likelihood.

It has already been stated that the plaintiff carried a large range of bakery products intended primarily for Jewish consumption. All of these were Kosher and, therefore, fit for daily use by professing Jews but some of them were also Kosher for passover use. This meant that they complied with the special Kosher requirements for passover over and above those for daily use. Its matzos were sheets of unleavened bread. It also carried two forms of matzo farfel. The farfel was a bakery product in sheets like biscuits and then broken up and crumbled so that the individual pieces were uniform in size. One form of matzo farfel was Kosher for daily use and the other Kosher for passover. One difference was that there could not be any salt in the farfel for passover. There were other differences. Finally, the plaintiff carried its Tam Tam crackers, which were Kosher for daily use but not for passover since they included leavening. The evidence shows that the words Tam Tam had become adapted to distinguish the crackers in association with which they were used as a trade mark as a Manischewitz product. In fact, the Tam Tam crackers

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had a larger sale than any other Manischewitz product. Indeed, Mr. Hahanovitch went so far as to say that the sale of Tam Tams had surpassed the sale of the other Manischewitz products during the past 5 years by so much that whereas he had often been referred to as the "Manischewitz man" he was now referred to as the "Tam Tam man".

In addition to marking its crackers with its Tam Tam word mark the plaintiff, and its parent company before it, had for many years used two Jewish emblems on its packages, one the Star of David and the other the six-branched candelabrum. These emblems were used to indicate that the products in the packages were Kosher. The Star of David by itself indicated a Kosher product for daily use, whereas the six-pointed candelabrum or the Star of David combined with the six-pointed candelabrum indicated a product that was strictly Kosher for passover. The Tam Tam crackers carried only the Star of David emblem for the reason that while they were Kosher for daily use they were not strictly Kosher for passover, because of their leavening ingredients.

The plaintiff's products, whether produced in Canada by it or distributed in Canada for its parent company, carried indications of the bakeries of manufacture. For example, the package containing the matzos referred to The B. Manischewitz Company as "famous the world over for its strictly Kosher bakeries". The package containing the matzo farfel (Exhibit 20) referred to the Manischewitz bakeries as "the largest and most Kosher Matzo Bakeries in the world". And the Tam Tam cracker package with Tam Tam printed on the Star of David described the Tam Tam crackers, "Star of them all", as coming "from the world famous bakeries of the B. Manischewitz Co".

The course of conduct of the defendants of which the plaintiff complains may now be stated. There were three specific complaints, namely, the use of the word mark Some Tam, the use of the Star of David and the six-branched candelabrum as symbols and the description of the defendants as "Toronto's Most Famous Quality Bakery". On the other hand, counsel for the defendants stressed the differences between the defendants' farfel and the plaintiff's products. The Some Tam farfel did not look

like the plaintiff's matzo farfel or the plaintiff's Tam Tam crackers. Indeed, it was not a matzo farfel but rather a baked noodle. But a customer looking at it might think of it as a cracked up cracker. Moreover, the shape of the Some Tam farfel package was not like that of any of the packages in which the plaintiff sold its products. And the colors of the packages and the general get-up were different. But, as was pointed out in the case of trade marks, the presence of difference does not deny similarity. Indeed, there cannot be similarity between two objects unless there is some difference between them. Otherwise, there would be identity, not similarity.

The differences relied upon by counsel do not, therefore, answer the plaintiff's complaint. It is the total effect of the defendants' course of conduct that must be considered and looked at in the light of whether there would be a reasonable apprehension that it would be likely to create confusion. The defendants knew of the plaintiff's word mark Tam Tam 2 or 3 years before they adopted the word mark Some Tam. They also knew that the plaintiff produced a farfel. When they first put out their own farfel, which is a baked noodle, rolled out, dried and then crumbled, they sold it in plain cellophane bags. They did not put it out under the name Some Tam until after August 31, 1949, which was 5 years after the first use of Tam Tam by the plaintiff's parent. By this time, Tam Tam had become known as a Manischewitz product. No reason was given by the defendants for their use of such a meaningless word as Tam as part of their word mark, although counsel for the defendants made much of the fact that the farfel was described on the package as "The farfel with that Haimishen Tam!" as if "tam" meant something.

Moreover, the defendants' use of the Star of David and the six-branched candelabrum on its package was intended to convey the idea that they were selling a Kosher product. They knew that these emblems were used by the plaintiff. It was suggested that these were well known Jewish emblems but Mr. Hahanovitch said that he did not know of any product except that of the plaintiff that carried both emblems. Mr. Manischewitz also said that he did not know of any other company or any company in any trade that had ever marked on their products the Star of David and

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the six-branched candelabrum together. Then there was the use by the defendants of the words "Toronto's Most Famous Quality Bakery".

It is not necessary in an action for passing off to prove actual confusion but the fact that confusion has actually occurred is strong evidence of the probability of its occurrence: *Vide* 32 Hals., Second Edition, page 618. Here, as I have already pointed out, there is evidence of actual confusion. The evidence of Mr. Lifshitz is as relevant to the issue of passing off as it was to that of infringement. I consider it important. When he was asked what impression he got when he first saw the defendants' package of Some Tam farfel he said that he thought that it was another new Manischewitz product. He looked at the package. It appeared to him like Tam Tam instead of Some Tam as the marks on it were similar to the Manischewitz product. These were the Star of David and the candelabrum which he had seen mostly on the Manischewitz products. He just noticed that Some Tam farfel appeared like a Tam Tam product.

I must say that I am not surprised at the confusion described by Mr. Lifshitz. In my judgment, it would be quite natural for persons accustomed to the Manischewitz products and knowing the Tam Tam crackers as a Manischewitz product to think of the Some Tam farfel as some kind of a Tam Tam or Manischewitz product. Under the circumstances, I find that the defendants so directed public attention to their Some Tam farfel that at the time they commenced to do so it might be reasonably apprehended that their course of conduct was likely to create confusion between their farfel and the plaintiff's products and that the plaintiff has established its cause of action.

There will, therefore, be judgment in favour of the plaintiff for the injunction sought by it and the order for delivery up of all containers, labels and the like containing the word Some Tam. Since counsel for the plaintiff in the course of his argument elected an accounting of profits rather than damages there will be, unless the parties agree otherwise, a reference to the Registrar for an accounting of profits and judgment for the amount found by him. The plaintiff will also be entitled to costs.

Judgment accordingly.

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Jan. 20, 21

BETWEEN:

DOUGLAS U. McGREGOR .....APPELLANT;

AND

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

Revenue—Income tax—The Income Tax Act, S. of C. 1948, c. 52, ss. 3, 5, 55(2)—Meaning of income from employment.

On July 21, 1938, Dr. J. K. McGregor, the owner of the McGregor Clinic at Hamilton, made an agreement with the appellant, who was his brother and a surgeon employed at the clinic, that if the appellant should be on the permanent staff of the clinic at the time of his death or discontinuance of the clinic the appellant would be entitled to one-sixth of the amount realized from the accounts receivable outstanding on the books of the clinic at the date of such death or discontinuance. At the date of Dr. J. K. McGregor's death on January 22, 1946, the appellant was on the permanent staff of the clinic and in due course received from his brother's executor in 1949 the sum of $7,125 as part of his entitlement under the agreement. In his return for 1949 the appellant claimed this amount as a legacy but the Minister in his assessment added it to the amount of taxable income reported by the appellant in his return. From this addition the appellant appealed directly to this Court.

Held: That the amount received by the appellant was not compensation for the loss of an office. *Fullerton* v. *Minister of National Revenue* (1939) Ex. C.R. 13 distinguished.

2. That the appellant earned the amount in his character as an employee. It thus came to him from his employment and was remuneration for it and was income from employment.

3. That the amount was received under a profit sharing arrangement and was remuneration because of and for employment and, as such, income from employment.

APPEAL under The Income Tax Act.

The appeal was heard by the President of the Court at Toronto.

R. B. Law, Q.C. for appellant.

E. D. Hickey and *J. D. C. Boland* for respondent.

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

The PRESIDENT on the conclusion of the hearing (January 21, 1953) delivered the following judgment:

This is an appeal under The Income Tax Act, Statutes of Canada, 1948, chapter 52, from the appellant's income tax assessment for 1949. It is brought directly to this

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Court under section 55(2) of the Act as enacted by section 20(1) of chapter 40 of the Statutes of Canada, 1950.

The appeal relates only to the sum of $7,125 which the appellant received in 1949, under the circumstances hereinafter described, from National Trust Company, Limited, the executor of the last will and testament of James Kenneth McGregor, the appellant's deceased brother and former employer. In the financial statements accompanying his income tax return for 1949 the appellant showed this amount as an item of capital account describing it as a "legacy from Dr. J. K. McGregor Estate", but the Minister in his assessment added it as an item of taxable income to the amount of taxable income which the appellant had reported in his return. It is against this addition that the appeal herein is taken.

In his notice of appeal the appellant alleges that the amount in dispute constituted compensation for loss of office or a legacy or bequest and was not income within the meaning of the Act. The Minister, on the other hand, after alleging certain facts, submits that the amount was income from an office or employment within the meaning of sections 3 and 5 of the Act.

The facts are not in dispute. The appellant is a surgeon and has been practising as such in Hamilton since 1925. In that year he joined the staff of the McGregor Mowbray Clinic at Hamilton, which was then owned by his brother, Dr. James Kenneth McGregor, and one Dr. Mowbray. Subsequently, his brother became the sole owner of the clinic and it was thereafter called the McGregor Clinic. Then, on or about July 21, 1938, Dr. J. K. McGregor brought an agreement to the appellant's house, handed it to him and asked him to sign it. It had already been executed by himself. The appellant read it through, signed it and put it away. In the agreement the parties recited that Dr. J. K. McGregor owned and operated the McGregor Clinic and that the appellant was and had been for many years a surgeon on its staff and then set out its terms in 6 paragraphs only one of which, namely, paragraph 1(*a*), need be mentioned for the purposes of this appeal. It read as follows:

1. (*a*) In the event of the Party of the Second Part being on the permanent staff of the said Clinic at the time of the death of the Party of the First Part, upon the death of the said Party of the First Part

during the operation by him of said Clinic, or should the Party of the First Part discontinue the operation of said Clinic as provided for in paragraph 5 hereinafter contained and the Party of the Second Part is on the permanent staff at the time of such discontinuance, the Party of the Second Part shall be entitled to one-sixth of the amount realized from the accounts receivable outstanding on the books of the said Clinic at the date of the death of the Party of the First Part or discontinuance of said Clinic, and which share of the amount realized from the said accounts receivable shall be paid to the Party of the Second Part if, as and when the same are collected in each year thereafter, and as soon as convenient after the completion by the auditors for the said Clinic of the annual audit for each year shall receive his share of the amount realized from the said accounts receivable during the preceding year.

The agreement had not been the subject of any previous discussion between the appellant and his brother. At its date he was employed by the clinic on a salary basis with a yearly bonus determined by his brother. There were then about ten doctors, including the appellant, on the staff, all of them being on salary and bonus. There was only one other member of the staff with whom Dr. J. K. McGregor made an agreement similar to that which he made with the appellant, namely Dr. E. C. Janes, the only other surgeon on the staff in addition to the appellant and Dr. J. K. McGregor himself. After the date of the agreement the appellant continued his employment on the basis of salary and bonus. On January 22, 1946, Dr. J. K. McGregor died. At that time the appellant was on the permanent staff of the clinic. About a week afterwards he ceased his practice with it and set up a private practice of his own. Letters probate of Dr. J. K. McGregor's last will and testament were issued in due course to National Trust Company, Limited, on April 16, 1946. Subsequently National Trust Company, Limited, paid the appellant the sum of $7,125 in 1948 and a similar amount in 1949. These amounts represented one-sixth of the amounts realized from the outstanding accounts receivable of the clinic at the time of Dr. J. K. McGregor's death and were paid to the appellant pursuant to the agreement above referred to.

Dr. Janes was also on the permanent staff of the clinic at the time of Dr. J. K. McGregor's death, on the basis of salary and bonus. He remained with the clinic and is still connected with it. He also received payments from

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National Trust Company, Limited, pursuant to the agreement made with him. These payments amounted to $6,000 in 1948 and $6,000 in 1949.

Counsel for the appellant sought to establish that by the agreement Dr. J. K. McGregor made a special provision for the protection of his brother and his family and that this was a personal gift to him and, therefore, not income. Here I shall briefly summarize what the appellant said touching this question. He stated that his brother was thirteen years older than he, that he had paid for his education and that there was a very close personal relationship between them. They had lived together on the upper floor of the clinic before the appellant was married in 1927 and thereafter his brother had stayed with himself and his wife during the summers at their summer home. The appellant further stated that when his brother brought in the agreement he said, "Here's something I'm giving to you for yourself". He then gave his understanding of its purpose. He did not regard it as a reward for services rendered or as an inducement to stay on in the clinic. Indeed, at that time, he had no intention of leaving it. His view was that the agreement was given to him as a protection to himself and his family, to himself in the event of his brother's death and to his family in the event of his own. Counsel's indirect suggestion by way of question that his brother had made this provision for him because his future was uncertain is a fanciful one in view of his income since he left the clinic. There is also a complete answer to the suggestion that Dr. J. K. McGregor made a special provision for the appellant in the nature of a gift to him because he was his brother and to protect him from the uncertainties of the future in the fact that he made identically the same agreement with Dr. Janes, who was not related to him. In both cases, the payment was made conditional on the recipient being on the permanent staff of the clinic at the time of Dr. J. K. McGregor's death or discontinuance.

Finally, counsel sought to establish that the true nature of the provision in the agreement was that it was a legacy or testamentary disposition. The appellant described his brother as a promiscuous will writer. He had seen practically every will his brother had made, about 15 of them.

At one time, prior to his brother's marriage he was practically his brother's sole heir. The provision relating to him in his brother's wills varied from time to time both in the nature and in the amount of the bequest, particularly after his brother's marriage in 1939 or thereabouts and his subsequent adoption of a child. He was gradually being taken down in the amount bequeathed to him. Finally, in his brother's last will, dated June 4, 1945, he was given a legacy of $10,000.

One other portion of the evidence remains to be mentioned. The bonuses paid to the appellant and the other doctors on the staff of the clinic were always fixed by Dr. J. K. McGregor but they bore a relation to the amount of work done. In the operation of the clinic the amount of fees brought in by the surgeons exceeded that brought in by the physicians. Indeed, as the appellant put it, the clinic was run by the surgeons, notwithstanding the fact that there were only three of them. In my judgment, it would not be unfair to infer that this was the reason why the only members of the staff of the clinic with whom Dr. J. K. McGregor made agreements were the appellant and Dr. Janes, both of whom were surgeons, and that the agreements were intended to remunerate them for their special services by giving them a share in the fees which they had particularly helped to earn subject, in each case, to the condition already specified.

It was argued for the appellant that the amount paid to him was compensation for the loss of an office and the decision of this Court in *Fullerton* v. *Minister of National Revenue* (1) was cited. In my opinion, this decision has no application in the present case. There was no cessation of employment here as there had been in the *Fullerton* case. The appellant could have continued his employment with the clinic if he had wished to do so just as Dr. Janes did but he chose of his own free will to leave it and start a practice of his own. The payment could not possibly be regarded as compensation for the loss of an office.

And there is no support at all for the submission that it was a legacy or testamentary disposition. The appellant received a legacy from his brother under his will but the

(1) (1939) Ex. C.R. 13.

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receipt of the amount in question was of quite a different character. Furthermore, the fact that he would have been just as much entitled to it on his brother's discontinuance of the clinic as on his death negatives the suggestion that it was a testamentary disposition.

Nor am I able to agree with the contention that it was a capital amount or a gift that was personal to the appellant. The evidence is against any such contention.

There are two Canadian cases dealing directly with the amounts received by the appellant and Dr. Janes in 1948 under their respective agreements, namely, *No. 16* v. *Minister of National Revenue* (1), the appellant in that case, described as No. 16, being Dr. E. C. Janes to whom reference has been made, and *No. 51* v. *Minister of National Revenue* (2), the appellant in that case, described as No. 51, being the appellant in the present case. These were decisions of the Income Tax Appeal Board dismissing appeals from assessments for 1948 wherein the Minister had added the amounts respectively received by the appellants in 1948 under their agreements to the amounts reported in their returns. It was explained on behalf of the appellant herein that his reason for not appealing from the decision of the Income Tax Appeal Board to this Court was that he had been too late in filing his security for costs. In my judgment, the Income Tax Appeal Board was right in dismissing the appeals in these two cases. While they were taken under the Income War Tax Act, R.S.C. 1927, chapter 98, and this appeal is under the Income Tax Act, I see no reason for deciding differently in this case from the decisions referred to.

In my opinion, the amount received by the appellant was plainly income from an employment within the meaning of section 3 and 5 of the Act. Section 3 describes income 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.

(1) (1951) 4 Tax A.B.C. 158. (2) (1952) 6 Tax A.B.C. 257.

And section 5 defines income for a taxation year from an office or employment in part as follows:

> 5. Income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year plus

and then sets out the particular heads of income to be added with which we are not here concerned.

As I see it, the appellant was entitled to the amount received by him as a matter of right under his agreement by reason of the fact that he was a member of the staff of the clinic at the time of Dr. J. K. McGregor's death. Thus he earned the amount in his character as an employee. If he had not been in such employment at that time he would have had no entitlement. It was because he was employed that he was entitled to his share of the accounts receivable. The amount thus came to him from his employment and was remuneration for it. This makes it income from employment within the meaning of sections 3 and 5 of the Act.

I am also of the view that the agreement provided for a sharing of income between the owner and those who had particularly assisted in earning it. It was thus, in a sense, a profit sharing arrangement that was to go into effect if the appellant was still a member of the clinic at the time of the owner's death or discontinuance. This also was remuneration because of and for employment and, as such, income from employment.

For these reasons, I have no hesitation in holding that the amount in dispute was properly included in the assessment, from which it follows that the appeal herein must be dismissed with costs.

Judgment accordingly.

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Jan. 8,
Feb. 10

Feb. 20

BETWEEN:

MICHAEL MAGDA .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Claim for damages for unlawful imprisonment, unlawful internment and other unlawful acts—Question of law under Rule 149 of General Rules and Orders—The Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c)—Quebec Civil Code, Article 1053—Order in Council P.C. 4751 of Sept. 12, 1940, s. 4—Petition of right does not lie against Crown in right of Canada for unlawful imprisonment or internment or other unlawful act not amounting to negligence—Essentials of actionable negligence—"Faute" wider in scope than "negligence".

The suppliant, a native and national of Roumania, who had come to Halifax on December 11, 1940, as a member of the crew of a neutral ship which had been seized by British warships, alleged that he had been unlawfully imprisoned and interned from December 14, 1940 to April 17, 1947, and had suffered from other wrongful acts during that period and claimed substantial damages from the Crown. Under rule 149 of the General Rules and Orders it was ordered that the question of law whether a petition of right lay against the Crown even if the allegations should be established should be heard and disposed of before the trial.

Held: That under the present state of the law a petition of right does not lie against the Crown in right of Canada for unlawful imprisonment or unlawful internment or any wrongful act that was not an act of negligence.

2. That to come within the ambit of actionable negligence within the meaning of section 19(*c*) of the Exchequer Court Act there must be circumstances giving rise to a duty to take care owing to the suppliant, failure to attain the standard of care prescribed by law for the fulfilment of that duty and actual damage suffered by the suppliant, and that the necessary allegations to warrant a claim for such actionable negligence do not appear in the suppliant's petition.

3. That the term "faute" in Article 1053 of the Civil Code of Quebec is much wider in its scope than the term "negligence" in section 19(*c*) of the Exchequer Court Act.

4. That while negligence is an independent tort in the common law provinces of Canada, that concept is unknown to the Civil Law of Quebec where "négligence" is, so to speak, only a segment of "faute", and not an independent delict.

QUESTION OF LAW whether petition of right lies against Crown in right of Canada for damages for alleged wrongful acts.

The question of law was heard by the President of the Court at Ottawa.

G. A. Roy for suppliant.

W. R. Jackett Q.C. and *J. Desrochers* for respondent.

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

THE PRESIDENT now (February 20, 1953), delivered the following judgment:

In these proceedings the Court is required to hear and dispose of a question of law before the trial, pursuant to an order made under Rule 149 of the General Rules and Orders of this Court on the application of the respondent and with the consent of the suppliant. The question of law to be determined is stated as follows:

> Assuming the allegations of fact contained in the Petition of Right to be true, does a petition of right lie against the Respondent for any of the relief sought by the suppliant in the said Petition?

In his petition of right the suppliant, now a resident of Montreal who alleges that he is a native of Roumania and a Roumanian national, claims the sum of $157,150 from the Crown as damages for his alleged unlawful imprisonment and internment from December 14, 1940, to April 17, 1947, under the circumstances related in the petition, and for other alleged wrongful acts during that period. The suppliant relates in detail his version of the facts on which he bases his claim. I shall first summarize his account of the events leading up to his imprisonment in Halifax in Nova Scotia on December 14, 1940. On or about October 10, 1940, at Lisbon in Portugal he signed on as an assistant mechanic on the S.S. *Thijisville*, a Portuguese ship, with over 60 other neutral seamen on the understanding that she would sail only between neutral countries. On October 14, 1941, when the ship was out to sea, she was taken under escort by two British warships and a Captain B. H. Powell of the British merchant marine, who had secretly come on board at Lisbon, took command of her. On October 15, 1940, the ship still under escort by the two warships, arrived at Gibraltar. There the suppliant and about 67 seamen of neutral countries asked to see Captain Powell and requested their immediate repatriation to Lisbon or another port of a neutral country, but he told them that the ship was now under British Admiralty orders and under his command and that they would have to comply with his orders. After this interview the seamen, including the suppliant, were taken ashore under military escort to a prison in Gibraltar where they remained until October 31, 1940. They were

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then brought back on board under military escort and the ship left for Kingston in Jamaica where she arrived on November 15, 1940. There a similar course was followed. The seamen were taken ashore under military escort to a prison where they remained until December 3, 1940, when they were taken back on board under military escort and the ship left for Halifax in Nova Scotia where she arrived on December 11, 1940. There the neutral seamen, including the suppliant, went in a group before Captain Powell and renewed their request for liberation and repatriation. He promised to go to the Canadian Immigration authorities and discuss their repatriation and keep them in touch with the result of his overtures. The seamen were then allowed to go ashore and spent several hours in Halifax. On December 13, 1940, Captain Powell summoned them and told them that all the neutral seamen who had embarked at Lisbon were to go to the Canadian Immigration Office at Halifax at 9 a.m. on December 14, 1940, to be discharged and receive their pay. When they went there the Canadian Immigration authorities immediately placed them under military guard and proceeded to interrogate them. Certain documents belonging to the suppliant, including his passport, his international sailing card, his military booklet, his maritime discharge certificates and other personal papers, proving his nationality and neutrality, were taken from him and confiscated by the Canadian Immigration authorities and never returned to him although he claimed them on several occasions. After their interrogation the seamen, including the suppliant, were taken under military escort to the Rockhead prison in Halifax where the suppliant remained unlawfully imprisoned until February 2, 1942.

The suppliant could have obtained his freedom from this imprisonment if he had been willing to serve on a British or allied ship. He relates the various proposals made to him. A few days after the imprisonment the neutral seamen, including the suppliant, had a visit from Captain Powell, accompanied by the first mate and the chief engineer of the S.S. *Thijisville,* who proposed that they should continue and return to their service on board the ship leaving for England under the orders of the British Admiralty and that if they would accept this proposal they

would be liberated, but they refused. About three weeks afterwards, they received another visit from Captain Powell who again offered them their liberty if they would serve as seamen on ships of the British merchant marine and told them that their personal effects and baggage had reached the prison and that their pay had been deposited at the Matthewson Agency in Halifax, but they refused to take employment on ships of the British or other belligerent merchant marines. Regularly, during the whole of the unlawful imprisonment, captains of the British or other belligerent merchant marines, accompanied by the Governor of the prison or one of his officers, came to the cells of the neutral seamen, including the suppliant, and offered them employment on board their ship. Those who accepted these offers were immediately escorted on board the ships on which they had accepted employment but the suppliant always refused employment on any belligerent ships whether British or not. On one occasion when he had already spent several months in unlawful imprisonment the captain of a neutral ship, a Spanish ship, came to recruit seamen at the prison and asked him to serve on his ship. He immediately accepted but the Governor of the prison intervened and objected, saying "these men are reserved to the British marine". The suppliant explained that in refusing to serve on a belligerent ship he was merely availing himself of his rights. He did not act through enmity against the allied cause but only because his country Roumania was exposed by reason of her geographical situation to being forced to take part in the hostilities and range herself on the side of the enemies of the allies and in the eyes of his country he would have become a traitor. He did not want this. His acceptance would also have brought reprisals against his family in Roumania and meant certain death to him in the event of his capture.

The suppliant makes several complaints against his treatment while in the Rockhead prison. On several occasions he asked the Governor of the prison for permission to write to the Roumanian Consulate at Montreal for counsel and aid in pressing his rights but this was refused during the first three months of his unlawful imprisonment on the pretext that the Roumanian Consulate could not

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help him and that he would be liberated only if he agreed to take employment on a British or other belligerent nation ship bound for England.

The suppliant's other complaints are mainly of physical ill-treatment. About February, 1941, the prison authorities tried to subject him unlawfully to hard labour and on each occasion when he refused to perform it he was unlawfully put into solitary confinement. During 1941 he spent a total of almost six months in such solitary confinement on bread and water and without a mattress. Another complaint was that after the repeated refusals of the neutral seamen, including the suppliant, to serve on belligerent merchant marine ships the prison authorities at Halifax cut their rations so that they were unlawfully reduced. The suppliant says that in spite of his very strong constitution his general health was seriously affected by reason of his unlawful and inhumane treatment and that he began to suffer cramps in his back and continuous swelling of his feet to such an extent that the last times that he left solitary confinement the prison guards had to carry him to his cell.

A further complaint is that it was not until three months after the beginning of his unlawful imprisonment that he received any writing paper and envelopes. He then wrote and addressed several letters to the Consul General of Roumania in Montreal but he received no reply until about February 2, 1942, when he heard from the Consul General of Sweden, who was then in charge of Roumanian affairs in Canada, telling him that his case had been submitted to the Department of External Affairs at Ottawa. Later, he received a second letter from the Consul General of Sweden which cited two paragraphs of a letter from the Department of External Affairs of Canada which explained that the suppliant had been sentenced in December 1940, under Order in Council P.C. 4751, dated September 12, 1940, to imprisonment until he agreed to sail from Canada or could be deported, that he had constantly refused to serve on a ship leaving Canada, saying that he preferred to be interned rather than serve the allied cause, that he had been sentenced to hard labour in July, 1941, for refusing to serve on board his ship, that the medical officer in the Halifax prison had certified in August, 1941, that he was incapable of heavy work, that in October, 1941, he was

interrogated under Order in Council P.C. 2385, dated April 4, 1941, and that the Investigation Committee had recommended that he be detained until he could be interned.

The suppliant also alleges that during his unlawful imprisonment at Halifax he received treatment that was inhumane and worse than that accorded to enemies.

The suppliant then relates the story of his various internments. On or about February 2, 1942, he was brought under escort from the Halifax prison to the Canadian Immigration Hall at Halifax where he was unlawfully imprisoned until March 2, 1942. While he was held there by the Canadian Immigration authorities he was interrogated by a Canadian Immigration Board of Enquiry and the officers of this board renewed the offers of liberation if he would accept service on ships of the British or other belligerent merchant marines but he refused for the reasons already indicated. On March 2, 1942, escorted by two officers of the Royal Canadian Mounted Police, he was taken by train from Halifax to Fredericton and there brought to the Fredericton internment camp where he remained unlawfully interned until August 30, 1945. On that date he was taken under escort to internment camp No. 23 at Monteith where he arrived on September 2, 1945, and remained unlawfully interned until July 6, 1946. On that date he was taken to internment camp No. 32 at Hull (the common jail) where he was unlawfully interned and imprisoned until January 20, 1947.

The suppliant alleges that during his unlawful internment in the Fredericton, Monteith and Hull camps he was treated more harshly than the other internees, as if he were a traitor, that he was not allowed to write to his family through the Red Cross, that he did not receive the medical care accorded to interned enemies and that, finally, in the Hull internment camp, the Hull common jail, almost two years after the cessation of hostilities with Roumania, he was put in a cell.

On September 26, 1946, the suppliant became seriously ill and was taken to the R.C.A.F. hospital at Rockcliffe where he remained until October 28, 1946, when he was taken back to the jail at Hull where he remained unlawfully imprisoned until January 29, 1947. On that date he was taken under escort to Montreal and handed over to the

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Canadian Immigration authorities at 1162 St. Antoine Street where he was unlawfully imprisoned under guard until April 17, 1947, when he was finally liberated.

The suppliant also complains that prior to February, 1941, he had not been advised that any administrative or judicial decision had been made against him and that he had never appeared before a board of enquiry or had an opportunity to make any defence to any charge, complaint or proceeding against him.

The suppliant then claims that his physical and mental health has been seriously affected during his imprisonment and internment and will be permanently impaired and that he has not been able to engage in his normal occupation since his liberation and that he will not be able to do so in the future.

The suppliant claims damages amounting to $157,150 made up as follows, namely, $85,000 for loss of liberty, injuries to the person and physical and mental suffering as the result of his imprisonment, $10,000 for moral suffering during his imprisonment, $30,600 for monetary loss during his imprisonment, $6,550 for monetary loss since his liberation because of his imprisonment and $25,000 for monetary loss in the future because of his physical and mental weakness as a result of his imprisonment and internment.

The suppliant filed his petition of right with the Under Secretary of State on August 15, 1947. In due course a fiat was issued and the petition was filed in this Court on November 24, 1947. In this the suppliant claimed $40,325 damages. No further step was taken by the suppliant until about the beginning of April, 1952, when a copy of the petition was served on an officer of the Department of Justice. On September 22, 1952, the solicitors for the suppliant filed an amended petition of right claiming $142,150 as damages. On November 6, 1952, the Deputy Attorney General filed a statement of defence on behalf of Her Majesty. Then on November 18, 1952, counsel for the respondent moved with the consent of counsel for the suppliant for an order that the points of law raised by the pleadings be set down for hearing before this Court and be disposed of before the trial herein and that a date be fixed for the hearing of the argument on the said points

of law and an order was made accordingly, the question of law being stated as already set forth. On the opening of the argument on the question of law counsel for the suppliant moved for leave to amend the petition of right still further and leave to do so was granted.

The allegations made by the suppliant are disputed. In the statement of defence filed on behalf of Her Majesty the Deputy Attorney General alleges that he does not admit them. He also pleads that the suppliant was detained pursuant to an order made on or about December 20, 1940, under Order in Council P.C. 4751, dated September 12, 1940, made by the Governor in Council under the War Measures Act and, later, that he was detained pursuant to an order made by the Minister of Justice on or about February 19, 1942, under regulation 21 of the Defence of Canada Regulations, made by the Governor in Council under the War Measures Act and, still later, that on or about June 27, 1945, he was ordered to be deported and was thereupon detained under the Immigration Act. The Deputy Attorney General also submits that the petition of right does not allege facts giving rise to any liability for which Her Majesty is bound or may be adjudged to respond or claim relief for which a petition of right will lie.

It is, therefore, not to be assumed, except for the purpose of the question of law, that the allegations in the petition of right are true or that the suppliant was unlawfully imprisoned or interned or that the acts of which he complains were wrongful. All these matters are put in issue by the pleadings. But these issues are not before the Court in these proceedings. It is not now called upon to decide whether the suppliant's imprisonment and internment were unlawful as the suppliant alleges or lawful as is contended on behalf of Her Majesty. Nor is any decision presently sought on the legality or otherwise of the other acts of which the suppliant complains, if they were committed.

The only matter that is before the Court is the bare question of law, namely, whether the suppliant has any legal claim against the Crown even if he should be able to prove that the allegations in his petition of right are true and establish that he was unlawfully imprisoned and interned and that the acts of which he complains were

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wrongful. The answer to this question must, in the present state of the law, be in the negative. Consequently, I must hold that even if the allegations in the petition of right are true and even if the suppliant was unlawfully imprisoned and unlawfully interned and even if the acts of which he complains were wrongful he is not entitled to any relief as against the Crown and his claim for damages must be wholly denied. The reason for this is that in the present state of the law no petition of right lies against the Crown in right of Canada for any tort, or "faute", to use the language of Article 1053 of the Civil Code of Quebec, committed by an officer or servant of the Crown while acting within the scope of his duty or employment except for such tort or segment of "faute" as will give rise to a claim expressly permitted by statute, as under section 19(*c*) of the Exchequer Court Act, R.S.C. 1927, chap. 34, and that the allegations in this petition are not allegations of acts of negligence within the meaning of that section.

I had occasion to deal with this question recently in the case of *Palmer* v. *The King* (1). There I held that the law on this subject was as I have stated it. I also pointed out that it had been the subject of adverse comment by students of the law including such an eminent English legal historian as Professor W. S. Holdsworth who considered that an obvious failure of justice had arisen from the rule that the modern doctrine of the employer's liability for the torts of his servants was not applicable to the Crown and that the rule was due to failure on the part of the judges who formulated it to understand the true basis of the employer's liability, namely, that it rested on grounds of public policy rather than on the grounds commonly assigned, as set out in the *Palmer* case (*supra*), at page 367. But while this is so, and I agree with the criticism made by Professor Holdsworth, the fact remains that the law is settled and only Parliament can change it. A measure of reform that will remove this defect in the law is before the present session of Parliament but it cannot affect the present case.

(1) [1951] Ex. C.R. 348 at 364.

There would be no need for any further discussion in this case were it not for the pleading in paragraph 74 of the finally amended petition, which reads as follows:

74. L'incarcération et l'internement du réquerant, tels que décrits ci-dessus, sont dûs à la faute et/ou la négligence d'employés, de fonctionnaires, d'officiers et/ou de serviteurs de la Couronne, pendant qu'ils étaient dans l'exercise de leurs fonctions ou de leur emploi.

I assume that the purpose of this pleading is to bring the suppliant's claim within the ambit of section 19(*c*) of the Exchequer Court Act, which reads as follows:

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment;

Obviously, the pleading does not come within the words of this section. There is no allegation in the paragraph or elsewhere in the petition that the suppliant's injury to the person was the result of any negligence on the part of any officer or servant of the Crown. On the contrary, it is claimed that it was the result of his imprisonment. What is alleged is that the imprisonment and the internment were due to "the fault and/or negligence of employees, officials, officers and/or servants of the Crown."

But the objection goes deeper. To engage the responsibility of the Crown to a suppliant under section 19(*c*) it must be shown that an officer or servant of the Crown, while acting within the scope of his duties or employment, was guilty of such negligence as to make himself personally liable to the suppliant, for the Crown's liability under section 19(*c*), if the term liability is a precise one to apply to the Crown, is only a vicarious one. Consequently, the suppliant must allege facts from which negligence on the part of an officer or servant of the Crown may be found, that is to say, facts showing that the officer or servant of the Crown owed a legal duty, whether imposed by statute or arising otherwise, to the suppliant to take care to avoid injury to him, that there was a breach of such duty while the officer or servant was acting within the scope of his duties or employment and that injury to the suppliant

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resulted therefrom: *vide Lochgelly Iron and Coal Co.* v. *McMullan* (1); *Hay* or *Bourhill* v. *Young* (2); *The King* v. *Anthony* (3).

It is now settled that negligence is a specific and independent tort: *vide Grant* v. *Australian Knitting Mills* (4); *Lochgelly Iron and Coal Co.* v. *McMullan* (5). But it is of comparatively recent origin, dating back only to about 1825, when it emerged out of the action on the case into its separate existence as a tort by itself: *Vide* Prosser on Torts, at page 171. And it cannot yet be said that its limits have been fixed with precision. It is still a "complex concept of duty, breach and damage", as Lord Wright put it in the *Lochgelly Iron and Coal Co.* case (*supra*), at page 25. With this in mind, I proceed to a statement of the essential elements of actionable negligence as they have thus far been determined. In the *Lochgelly Iron and Coal Co.* case (*supra*), at page 18, Lord MacMillan defined the essentials of negligence as follows:

> Here then are the essential elements of a case of negligence. Where two persons stand in such a relation to each other that the law imposes on one of these persons a duty to take precautions for the safety of the other person, then, if the person on whom that duty is imposed fails to take the proper precautions and the other person is in consequence injured, a clear case of negligence arises.

A brief definition to the same effect is suggested by Charlesworth on the Law of Negligence, 2nd Edition, at page 10:

> Negligence is a tort, which is a breach of a duty to take care imposed by common or statute law, resulting in damage to the complainant.

While this definition is useful it requires amplification for it is necessary to know when the duty arises and what care is required. So far, the Courts have not been in full agreement on the principle to be applied in determining when the circumstances are such as to give rise to the duty to take care. There have been several attempts to state the proper principle but I shall refer only to the statement made by Lord Atkin in *Donoghue* v. *Stevenson* (6) where he said:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then in law, is my neighbour? The answer seems to be—persons who

(1) [1934] A.C. 1.
(2) [1943] A.C. 92.
(3) [1946] S.C.R. 569.
(4) [1936] A.C. 85 at 103.
(5) [1934] A.C. 1 at 23.
(6) [1932] A.C. 562 at 580.

are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

This statement has been the subject of much discussion and some criticism by text book writers: *vide* Pollock on Torts, 15th Edition, at page 326; Salmon on the Law of Torts, 10th Edition, at page 433; Prosser on Torts, at page 181; and Charlesworth on the Law of Negligence, 2nd Edition, at page 12. There have also been many references to it in the Courts. But, while it has been criticized as being too wide and an over-simplification of a difficult problem, it can safely be said that it is generally accepted. It is one of the classical statements of this century.

When it has been shown that a duty to take care arises it is necessary to consider the standard of care to be applied. This is a question of law. Ordinarily, the standard is that of a reasonable man, that is to say, reasonable care under the surrounding circumstances. But there are cases in which a statute not only imposes a duty of care but also prescribes the standard of care to be used. Breach of such duty through failure to do what the statute prescribes, regardless of whether there was reasonable care in the ordinary sense, is called statutory negligence. The leading case on this is the *Lochgelly Iron and Coal Co.* case (*supra*). There, at page 23, Lord Wright said that the breach of the statutory duty has been correctly described as statutory negligence but, strictly speaking, it would be more appropriate to describe it merely as a breach of statutory duty.

Without elaborating the matter further I adopt the statement in Charlesworth, at page 20, that actionable negligence consists of the following elements, namely, circumstances giving rise to a duty to take care owing to the complainant, failure to attain the standard of care prescribed by the law for the fulfilment of that duty and actual damage suffered by the complainant.

Thus in a claim under section 19(*c*) of the Exchequer Court Act it is necessary to allege the facts from which actionable negligence within the meaning described may properly be found.

In the suppliant's petition of right the necessary allegations to warrant a claim for such actionable negligence do not appear.

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Counsel for the suppliant argued that the imprisonment of the suppliant was an act of negligence. He submitted that there was a duty on the part of the Canadian Immigration authorities not to imprison the suppliant, a neutral seaman, unlawfully, that when they imprisoned him they committed a breach of this duty and thus were guilty of negligence. A similar argument was made in respect of the other acts of which the suppliant complains. This submission is untenable. Its acceptance would mean either that every tort or wrongful act, being a breach of a legal duty, would be negligence or, alternatively, that the word negligence in section 19(*c*) of the Exchequer Court Act should be read as if it meant tort, or "faute" in the French version.

Indeed, as I listened to counsel's argument it seemed to me that he assumed that the word "negligence" in section 19(*c*) of the Exchequer Court Act meant the same thing as the word "faute" in section 1053 of the Civil Code of Quebec. The words are not synonymous. Section 1053 of the Civil Code reads as follows:

1053. Toute personne capable de discerner le bien du mal, est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par imprudence, négligence ou inhabilité.

And in the English version:

1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

It is clear that the term "faute" in section 1053 is much wider in its scope than the term "negligence" in section 19(*c*) of the Exchequer Court Act. Moreover, while negligence is an independent tort in the Common Law provinces of Canada that concept is unknown to the civil law of Quebec where "négligence" is, so to speak, only a segment of "faute", and not an independent delict. The difference in concepts may have had something to do with counsel's submission. Whether that is so or not, the fact remains that even to the extent that the suppliant's cause of action, if any, arose in Quebec the Crown in right of Canada is responsible only for that segment of "faute" on the part of its officer or servant while acting within the scope of his duties or employment that amounts to negligence. For all other segments or forms of "faute" the responsibility of the Crown cannot be engaged.

Thus it is plain that the allegations of unlawful imprisonment and internment in the suppliant's petition cannot be regarded as allegations of acts from which actionable negligence within the meaning of section 19(*c*) of the Exchequer Court Act may properly be found. They are put forward as allegations of intentional acts, and not as breaches of a duty to take care, and the pleading in paragraph 74 of the petition that the imprisonment and internment were due to "fault and/or negligence" is argument rather than an allegation of circumstances giving rise to a duty to take care, breach of such duty and resulting damage.

Counsel for the suppliant realized this on the resumption of the argument after his request for an adjournment and put forward a different submission. He referred to Order in Council P.C. 4751, dated September 12, 1940, which authorized the detention of alien seamen when unwilling to serve on a ship sailing from Canada. It was under this Order in Council that an order of detention was made against the suppliant resulting in his imprisonment in Halifax. Section 4 of this Order in Council provided as follows:

> (4) The order for detention shall be issued by an Immigration Board of Inquiry or officer acting as such, appointed or authorized as the case may be, by the Minister under the authority of the Immigration Act, after an inquiry and the provisions of the said Act respecting Appointment, Powers and Procedure of Boards of Inquiry shall apply *mutatis mutandis* to such inquiry.

It was alleged in the petition that the order for detention was made without an enquiry first having been held. On this allegation counsel submitted that section 4 of the Order in Council was tantamount to a statutory imposition of a duty to take care enacted for the benefit of alien seamen, of whom the suppliant was one, and that the detention of the plaintiff without first having an inquiry was a breach of the statutory duty and amounted to statutory negligence. I do not agree. The simple answer to the argument is that the requirement of an order of inquiry was a statutory condition precedent to a valid detention. If, therefore, the order of detention was made without a preliminary enquiry, as alleged, it was not made under the authority of the Order in Council and was unlawful. If so, it was a wrongful act, but plainly not an act of negligence.

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Nor can the other acts of which the suppliant complains be considered as acts of negligence. They are not alleged as such. Several of them are clearly acts of disciplinary action and the others are related thereto. As such their commission had nothing to do with failure to carry out a duty of care for the safety of the suppliant.

Thus the alleged unlawful imprisonment and detention and the other alleged wrongful acts of which the suppliant complains are all acts that fall outside the ambit of negligence within the meaning of section 19(*c*) of the Exchequer Court Act. Consequently, a petition of right does not lie against the Crown in right of Canada for damages for any of them. This means that the question of law now before the Court must be answered in the negative. That being so, there is no object in proceeding to a trial of the facts for even if they were all proved the suppliant would not be entitled to any relief.

This disposes of the whole petition. There will, therefore, be judgment that the suppliant is not entitled to any of the relief sought by him in his petition of right and that the respondent is entitled to costs.

Judgment accordingly.

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BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

NORTHERN QUEBEC POWER COMPANY LIMITED ..... RESPONDENT.

AND BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

ST. MAURICE POWER CORPORATION ..... RESPONDENT.

AND BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... } APPELLANT;

AND

SAGUENAY POWER COMPANY LIMITED ..... } RESPONDENT.

AND BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... } APPELLANT;

AND

SOUTHERN CANADA POWER COMPANY LIMITED ..... } RESPONDENT.

AND BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... } APPELLANT;

AND

CANADIAN LIGHT AND POWER COMPANY ..... } RESPONDENT.

AND BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... } APPELLANT;

AND

OTTAWA VALLEY POWER COMPANY ..... } RESPONDENT.

AND BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... } APPELLANT;

AND

MacLAREN-QUEBEC POWER COMPANY ..... } RESPONDENT.

AND BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... } APPELLANT;

AND

GATINEAU POWER COMPANY.....RESPONDENT.

D. W. Mundell, Q.C., Léon Garneau, Q.C. and *T. Z. Boles* for appellant.

J. G. Porteous, Q.C. for respondents Northern Quebec Power Company Limited, Southern Canada Power Company Limited and Gatineau Power Company.

W. B. Scott, Q.C. and *E. J. Courtois* for respondents, St. Maurice Power Company and Canadian Light and Power Company.

C. A. Geoffrion for respondent Saguenay Power Company Limited.

H. E. O'Donnell, Q.C. and *Jacques Senecal, Q.C.* for respondent Ottawa Valley Power Company.

John Aylen, Q.C. for respondent MacLaren-Quebec Power Company.

The appeals by the Minister of National Revenue were allowed for the reasons stated in *The Minister of National Revenue* v. *The Shawinigan Water and Power Company*, *Post* p. 38.

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BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

THE SHAWINIGAN WATER AND POWER COMPANY ..... RESPONDENT.

Revenue—Income Tax—The Income War Tax Act, R.S.C. 1927, c. 97, s. 6(1) (o)—Para. (o) of s. 6(1) of the Income War Tax Act intra vires Parliament—Order in Council P.C. 5948, dated December 23, 1948, intra vires the Governor in Council—"Additional charge" and "contribution" paid to the Province of Quebec under provisions of "An Act to Ensure the Progress of Education" S. of Q. 1926, 10 Geo. VI, c. 21 are taxes and within definitions of "corporation tax" and "specific corporation tax" in P.C. 5948 but not within definitions of "rental" and "royalty" therein—Such taxes not deductible under s. 6(1) (a) of the Income War Tax Act—Appeal from Income Tax Appeal Board allowed.

In its income tax return for the taxation year 1947 the respondent deducted an amount of $316,087.16 which it had paid to the Minister of Hydraulic Resources for the Province of Quebec under the provisions of "An Act to Ensure the Progress of Education", S. of Q., 10 Geo. VI, c. 21, enacted in 1946 by the Legislature of that Province.

The deduction was disallowed by the appellant on the ground that it was a corporation tax as defined by P.C. 5948 dated December 23, 1948, and passed under the authority of s. 6(1) (*o*) of the Income War Tax Act, R.S.C. 1927, c. 97, and, therefore, under the provisions of that subsection was not deductible. On an appeal from the assessment the Income Tax Appeal Board held that the Quebec Education Act did not impose a corporation tax, that P.C. 5948 was *ultra vires* the Governor in Council and that, in any event, a portion of the deduction was within the exceptions provided for in the Order in Council as being rents or royalties in respect of natural resources. The Board referred the assessment back to the Minister for re-assessment and to allow the full amount of the deduction "as it was an expense wholly, exclusively and necessarily laid out for the purpose of earning the income for the year 1947". From that decision the Minister appealed to this Court.

Held: That para. (*o*) of s. 6(1) of the Income War Tax Act, R.S.C. 1927, c. 97, is *intra vires* Parliament. In exercising the power of "raising money by any mode or system of taxation", as provided in s. 91(3) of the British North America Act, Parliament could in enacting or amending an Income Tax Act specify those expenses or outlays which would be deductible and those which would not be deductible in computing taxable income.

2. That the disallowance of a deduction from income of a corporation tax paid to the Government of a province or to a municipality, as enacted by s. 6(1) (*o*) of the Income War Tax Act, cannot be said to be legislation "in relation to education", even if that tax be one which has for its purpose the raising of funds to be used for school purposes. To contend that a trespass on provincial rights is occasioned by the effect of the passage of para. (*o*) is to stress the possible consequential effect of the legislation rather than the subject-matter. *Reference re Saskatchewan Farm Security Act* [1947] 3 D.L.R. 689; [1949] 2 D.L.R. 145; *Margarine* case [1950] 4 D.L.R. 689, referred to.

3. That the Governor in Council in enacting P.C. 5948 has defined "corporation tax" in accordance with the duty imposed on him by para. (*o*) of s. 6(1) of the Income War Tax Act, R.S.C. 1927, c. 97; and in using the words "either formally or in effect", or otherwise has not exceeded the power conferred by that paragraph. It follows that P.C. 5948 must be declared valid and *intra vires* the Governor in Council.

4. That the "additional charge" levied under para. c and the "contribution" levied under para. d of s. 3 of the Act to Ensure the Progress of Education, Statutes of Quebec, 1946, 10 Geo. VI, c. 21 were taxes just as much as were the taxes levied on the paid-up capital of oil refining companies and telephone companies under para. 3a of the Act, where they are, in fact, called taxes. The test is not answered by the mere name of the impost or levy but rather by ascertaining its essential nature. *Attorney General of Canada* v. *Registrar of Titles* [1934] 4 D.L.R. 764 referred to.

5. That in effect, (although not formally), the imposition of these taxes singled out classes of corporations, namely those holding or owning water power rights for taxation or for discriminatory rates or burdens of taxation, by imposing a tax in respect of the activities or operations mainly done by or carried on by corporations, namely, electricity generated and derived from hydraulic powers. Such taxes are, there-

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fore, within the definition of "specific corporation tax" contained in s. 2(5) of P.C. 5948 and may not be deducted unless they fall within the exceptions provided for in that section.

6. That the taxes levied under paras. c and d of the Quebec Education Act were not levied to compensate the province for the value of the occupation of the water power sites or of the use of the water, or for the value of things forming part of its natural resources prior to their severance, taking, extraction or removal, but were levied solely for the purpose of raising funds to establish the Education Fund and thereby promote the progress of education. These taxes, therefore, were not within the definitions of "rental" and "royalty" as found in P.C. 5948 and do not fall within any of the exemptions contained therein.

7. That since P.C. 5948 clearly prohibits the deduction of specific corporation taxes, and that the payments made by the respondent fall within the definition of that term, such payments are not deductible under s. 6(1) (*a*) of the Income War Tax Act, R.S.C. 1927, c. 97, even though these expenses when measured by sound commercial and accounting practices alone would appear to be deductible. *Montreal Light, Heat and Power Consolidated* v. *Minister of National Revenue* [1942] S.C.R. 89; *Ushers' Wiltshire Brewing* v. *Bruce* 6 T.C. 399 referred to.

8. That in seeking to ascertain what is or is not a corporation tax, it is necessary to look at the particular subsection of the Quebec Education Act under which the tax is paid and that the nature of the levy is not to be determined by reference to other subsections which impose different levies in different ways on different persons, notwithstanding that all such levies constitute part of the same fund, but are made up from many miscellaneous sources.

9. That the appeal is allowed.

APPEAL from a decision of the Income Tax Appeal Board.

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

D. W. Mundell, Q.C., Léon Garneau, Q.C. and *T. Z. Boles* for appellant.

W. B. Scott, Q.C. and *E. J. Courtois* for respondent.

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

CAMERON J. now (January 23, 1953) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board dated June 11, 1951 (4 T.A.B.C. 270), which allowed an appeal by the respondent company from an assessment to income tax made upon it on February 3, 1950, in respect of the taxation year ending December 31, 1947. In computing

its taxable income for that year, the respondent claimed as a deduction the sum of $316,087.16 which it had paid to the Minister of Hydraulic Resources for the Province of Quebec under the provisions of "An Act to Ensure the Progress of Education," enacted by the Legislature of the Province of Quebec, 10 George VI, c. 21. That deduction was disallowed by the Minister on the ground that it was a corporation tax as defined by the regulations contained in P.C. 5948 passed under the authority of s. 6(1) (*o*) of the Income War Tax Act, and therefore under the provisions of that subsection was not deductible.

An appeal to the Income Tax Appeal Board was allowed, the Board being of the opinion that the Quebec Act did not impose a corporation tax, and that the Governor in Council in enacting P.C. 5948 exceeded the powers conferred on him by s. 6(1) (*o*) of the Income War Tax Act, and that it was therefore *ultra vires*. The Board also held that in any event a portion of the deduction claimed was within the express provisions of certain exceptions contained in P.C. 5948, as being rents or royalties in respect of natural resources. The Board referred the assessment back to the Minister for re-assessment and to allow the full amount of the deduction claimed, "as it was an expense wholly, exclusively and necessarily laid out for the purpose of earning its income for the year 1947."

In submitting that the appeal should be allowed and the assessment restored, counsel for the appellant vigorously attacked each of these conclusions of the Board.

This appeal was heard at the same time as eight others in which the Minister was the appellant and in which the respondents were seven other power corporations, also in the Province of Quebec, namely: St. Maurice Power Corporation, The Canadian Light & Power Company, Ottawa Valley Power Company, Saguenay Power Company, Ltd., Gatineau Power Company, Northern Quebec Power Company, Ltd., Southern Canada Power Company, and MacLaren-Quebec Power Company. In each case the issue was the same as I have outlined above, and in each case the appeals of the corporations have been allowed by the Income Tax Appeal Board. I am advised that in every case the full amounts now claimed by the Minister as payable have, in fact, been paid, no doubt under protest.

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It was agreed at the hearing of the appeals that the evidence given before the Income Tax Appeal Board, and a certain admission of facts supplementary thereto which was filed with the consent of all parties, would be the evidence on these appeals, subject only to the question of the admissibility of certain evidence tendered to the Board.

At the hearing I heard counsel for all the respondents, each of whom in the main adopted the arguments of the others. In one respect, however, they were not in accord. Counsel for Ottawa Valley Power Company and for Mac-Laren-Quebec Power Company did not join with counsel for the other respondents in the submission that s. 6(1) (*o*) of the Income War Tax Act was *ultra vires* the Parliament of Canada. In all cases the respondents submit that P.C. 5948 exceeded the powers conferred on the Governor in Council by s. 6(1) (*o*) of the Act and was therefore *ultra vires*, that in any event, the payments sought to be deducted were within the exceptions provided for in P.C. 5948 and were also disbursements and expenses wholly, exclusively, and necessarily laid out and expended for the purpose of earning the income, and therefore deductible under the provisions of s. 6(1) (*a*) of the Act.

Very many issues were raised during the course of the argument. In my opinion, however, the issue as a whole will be determined by considering five major questions as follows:

1. Is para. (*o*) of s. 6(1) of the Income War Tax Act invalid?

2. Is P.C. 5948 enacted thereunder *ultra vires* the Governor in Council?

3. Does the disbursement made by the respondent fall within the general provisions of P.C. 5948, defining corporation tax and specific corporation tax?

4. If Question 3 is answered in the affirmative, is the respondent entitled to the benefit of the exceptions contained in the definition of specific corporation tax?

5. In any event, is the deduction permissible under the provisions of s. 6(1) (*a*) of the Income War Tax Act?

1. PARA. (O) OF S. 6(1) OF THE INCOME WAR TAX ACT

The disputed Para. (*o*) in the form below was enacted by s. 5(1) of c. 63, Statutes of Canada, 1947, and by s. 17 of the same Act, it and the regulations passed pursuant thereto were made applicable to 1947 and subsequent years.

6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

(*o*) any corporation tax, as defined by regulation made by the Governor in Council, paid to the government of a province or to a municipality.

It is not suggested that Parliament could not delegate to the Executive the power to define "corporation tax." Nor could it be suggested that in exercising the power of "raising of money by any mode or system of taxation," as provided in s. 91 (3) of the British North America Act, Parliament could not in enacting or amending an Income Tax Act specify those expenses or outlays which would be deductible and those which would not be deductible in computing taxable income. *Prima facie* at least, para. (*o*) is *intra vires* of Parliament. I may note here that the Income Tax Appeal Board found it unnecessary to reach any conclusion on this question.

Para. 3 of the respondent's reasons contained in its Reply summarizes its submission that para. (*o*) is *ultra vires*. It is as follows:

3. Section 6(1) (*o*) is *ultra vires* the Parliament of Canada and in its purpose, object, and effect it does not come within Section 91(3) of the British North America Act. The purpose and object of 6(1) (*o*) is to prevent any Province from exercising its constitutional power of direct taxation by levying a corporation tax. Moreover under the guise of Income Tax legislation Section 6(1) (*o*) encroaches and trespasses upon the exclusive powers of the Government of a Province or of a municipality to raise revenue by direct taxation for maintaining the schools within such Province or such municipality.

On the first point it was submitted that para. (*o*) in its real nature and substance is not intended for the purpose of "raising of money by any mode or system of taxation" as provided in s. 91(3) of the British North America Act; but that its real purpose was to bring pressure to bear upon the various provinces to enter into the agreements contemplated by the Dominion-Provincial Tax Rentals Agreement Act, 1947, and "to penalize the people in any province that did not elect to suspend the authority given to it under the constitution (s. 92(2) of the British North America Act) to levy personal income taxes, succession duty taxes and corporation taxes"—that is, the provinces that did not enter into such agreements. The provinces of Ontario and Quebec had not then entered into such agreements and I understand that the Province of Quebec in

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which all the respondent corporations carry on business, has not as yet entered into any such agreement.

Now while it is the fact that para. (*o*) was re-enacted in the form set out above at the same session of Parliament as the Dominion-Provincial Tax Rentals Agreement Act, 1947, and received the Royal assent on the same date, I am quite unable to find that the purpose of its provisions denying the deductibility of corporation tax was to penalize the inhabitants of any province which did not enter into an agreement under that Act, or to bring pressure on the provinces to enter into such agreements. It must be noted that the Income War Tax Act had long since established the general principle that taxes paid to a province were not deductible.

Para. (*o*) was first enacted in 1940 and by it deductions were not allowed in respect of:—

(*o*) any tax, licence fee or other levy, or the amount represented by the increase in any tax, licence fee or levy imposed, exacted or increased after the 24th day of June, 1940, by virtue of the authority contained in any provincial statute or Order in Council, save such amount as the Minister in his discretion may allow.

In that form para. (*o*) was not limited to corporations, but applied to all taxpayers. However, by s. 5(2) of Statutes of Canada, 1946, c. 55, para. (*o*) in that form was repealed and the following substituted therefor (applicable to the year 1947 but never used in that form):

(*o*) any corporation tax paid to the government of a province except any such tax the deduction of which may be allowed by the Minister as a royalty or rental on natural resources in the province.

In that form the general principle was established that corporation tax paid to the Government of a province was not to be deducted, the only exception being such corporation taxes as might be allowed by the Minister as a royalty or rental on natural resources. As will be noted later, s. 6(6) of the Act provided a definition of corporation tax as applicable to para. (*o*) in that form.

It is the fact—as will be noted later—that the change in the final form of para. (*o*) was brought about because of the prospective agreements to be entered into by the Dominion with the provinces and that such agreements made provision for the non-deductibility of corporation taxes, save as excepted therein. In substance, there was no change in the general policy regarding corporation taxes

—they continued to be non-deductible; but the prohibition was broadened to include such taxes paid to municipalities as well as to a province.

I can find nothing to support the respondent's submission that the purpose and object of enacting para. (*o*) in its final form was to prevent a province from exercising its constitutional powers of direct taxation by levying a corporation tax; or that it encroaches or trespasses upon the exclusive powers of the government of a province or a municipality to raise revenue by direct taxation for maintaining its schools. The constitutional powers of a non-agreeing province and of its municipalities were not affected in the slightest degree by the passage of para. (*o*).

It seems to me that in attacking the validity of para. (*o*) the respondents have stressed the possible consequential effect of the legislation rather than the subject matter. The distinction was pointed out by Rand, J. in *Reference re Saskatchewan Farm Security Act* (1). The judgment of the Supreme Court of Canada in that case was affirmed in the Privy Council (2), in which Viscount Simon stated:

> There was abundant evidence that agriculture is the main industry of Saskatchewan and that it is the principal source of revenue of its inhabitants. It is moreover clear that the result of the impeached legislation, if it is validly enacted, would be to relieve in some degree a certain class of farmers from financial difficulties due to the uncertainties of their farming operations. But, as Rand, J. points out, there is a distinction between legislation "in relation to" agriculture and legislation which may produce a favourable effect upon the strength and stability of that industry. Consequential effects are not the same thing as legislative subject-matter. It is "the true nature and character of the legislation"—not its ultimate economic results—that matters *Russell* v. *The Queen* (1882), 7 App. Cas. 829 at pp. 839-40. Here, what is sought to be statutorily modified is a contract between two parties one of which is an agriculturist but the other of which is a lender of money. However broadly the phrase "Agriculture in the Province" may be construed, and whatever advantages to farmers the reshaping of their mortgages or agreements for sale might confer, their Lordships are unable to take the view that this legislation can be regarded as valid on the ground that it is enacted in relation to agriculture.

Reference may also be made to the *Margarine* case (3), where Lord Morton of Henryton in delivering the judgment of the Privy Council, quoted the paragraph just referred to and continued at p. 702 as follows:

> Although the prohibition now under consideration relates to a different subject-matter, the passage just quoted would seem to apply with much

(1) [1947] 3 D.L.R. 689 at 705. (2) [1949] 2 D.L.R. 145 at 149.
(3) [1950] 4 D.L.R. 689.

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force to the present case. The prohibition might well "produce a favourable effect on the strength and stability" of the dairy industry; but the passage just quoted shows that this fact alone is not sufficient to make it legislation "in relation to agriculture" within s. 95; and there is no other ground on which it can be brought within s. 95. To sum up, the connection between the prohibition and the operations carried on by farmers is too indirect and remote to bring the prohibition within the terms of s. 95, and for this reason counsel's fourth and last argument fails.

Now in the instant case it is suggested that the trespass on provincial rights is occasioned by the effect of the passage of para. (*o*); that taxpayers would complain to the provincial taxing authorities that they were not entitled thereunder to deduct corporation taxes, and in particular, the tax imposed by the Province of Quebec under the Act to Insure the Progress of Education, and to urge the province not to levy any such taxes. I am unable to see that such a contention in any way affects the true nature of the subject-matter of the legislation. It is merely a consequenial effect of the exercise of the undoubted power of Parliament to raise money by imposing a tax on income.

It could scarcely be suggested that a general income tax which would include levies on those engaged in farming would be legislation "in relation to agriculture" although it would undoubtedly affect farmers, and indirectly agriculture. Similarly, it cannot be found that the disallowance of a deduction from income of a corporation tax is legislation "in relation to education," even if that tax be one which has for its purpose the raising of funds to be used for school purposes.

Para. (*o*) is part of the disallowance section of the Income War Tax Act, is meaningless by itself, and must be read with the Act as a whole. The Act itself is clearly within the competence of Parliament. In determining what income is to be the subject of taxation, it is necessary to determine what deductions, if any, should be allowed or disallowed. In doing so, consideration has to be given to the question as to whether or not municipal and provincial taxes should be considered as proper deductions. Its power to give priority to provincial and municipal taxes or to declare them as non-deductible, is completely unfettered.

In my opinion, it was competent for Parliament to enact para. (*o*) of s. 6(1) of the Income War Tax Act, and I must therefore reject the submission of counsel for the respondent that it is *ultra vires*.

2. IS P.C. 5948—DATED DECEMBER 23, 1948—ULTRA VIRES THE GOVERNOR IN COUNCIL?

The Order in Council revoked the regulation contained in a previous one—P.C. 332, dated January 30, 1948 (as amended by P.C. 953 dated March 6, 1948)—which regulation had defined "corporation tax" pursuant to the provisions of s. 6(1) (*o*), and provided a new regulation defining that term; it further provided that the new regulation was to apply to 1947 and subsequent taxation years.

One of the submissions was that the Governor in Council, having made earlier regulations pursuant to the authority of para. (*o*), was *functus officio* and therefore had no power to substitute other regulations therefor. Section 31(1) (*g*) of the Interpretation Act, R.S.C. 1927, c. 1, as amended, provides a complete answer to that submission and I must reject it.

P.C. 5948 is as follows:

Income War Tax Act—Regulations defining Corporation Tax
P.C. 5948

AT THE GOVERNMENT HOUSE AT OTTAWA

Thursday, the 23rd day of December, 1948.

PRESENT:

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL

His Excellency the Governor General in Council, on the recommendation of the Minister of National Revenue and pursuant to the powers conferred by the *Income War Tax Act*, Revised Statutes of Canada, 1927, Chapter 97, is pleased to order as follows:

1. The regulations established under paragraph (*o*) of ss. (1) of section 6 of the *Income War Tax Act* by Order in Council P.C. 332 of 30th January, 1948, as amended, are hereby revoked; and

2. The following Regulation, defining corporation tax for the purposes of paragraph (*o*) of subsection (1) of section 6 of the *Income War Tax Act*, is hereby made and established in substitution for the regulations hereby revoked:

(1) For the purpose of paragraph (*o*) of subsection one of section six of the *Income War Tax Act*, a corporation tax means a specific corporation tax or a corporation gross revenue tax as hereinafter defined except any such tax that was imposed on or before September 1, 1941, if the rate of or manner of imposing the tax has not been changed since that day; Provided that where the rate of or manner of imposing any such tax that was imposed on or before September 1, 1941, has been changed after that day, the tax shall be deemed to be the amount of tax payable by the taxpayer minus the amount that would have been payable by him if there had been no change.

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(2) An amount deemed to be a corporation tax under paragraph (*a*) of subsection five of this Regulation is a corporation tax for the purposes of paragraph (*o*) of subsection one of section six of the *Income War Tax Act* notwithstanding anything contained in subsection one.

(3) For the purposes of this Regulation where a charge by way of a corporation tax is imposed on one class of persons and that charge or a like charge is imposed on another class of persons on whom such a charge might be deemed to be imposed by way of royalty or rental, the charge or the like charge on the second class of persons is a corporation tax.

(4) Where a corporation tax was imposed under legislation in force on or before September 1, 1941, but the legislation was suspended or repealed pursuant to a Wartime Tax Agreement and that legislation or a new enactment in the place thereof imposing the same tax was brought into force after the expiration of the Wartime Tax Agreement, the tax shall be deemed to have been imposed on or before September 1, 1941, for the purpose of this Regulation.

(5) In this Regulation "specific corporation tax" means a tax or fee other than a tax on net income or gross revenue, the imposing of which singles out for taxation or for discriminatory rates or burdens of taxation corporations, or any class or classes thereof, or any individual corporation, either formally or in effect, by imposing a tax or fee on or in respect of any act, matter or thing or any activities or operations mainly done by, or affecting, or carried on by corporations, or otherwise, except

(*a*) a *bona fide* and reasonable provincial licence, registration, filing or other fee of an amount not in excess of

(i) the amount of $250 per annum for each corporation; or

(ii) the amount of the fee imposed on or immediately prior to September 1, 1941,

whichever is greater, and if it does exceed the said greater amount, the amount of the excess shall be deemed to be a corporation tax for the purpose of this Regulation;

(*b*) a licence fee or other fee or tax for specific rights, benefits or franchises granted by a municipality, or where they are exercised or enjoyed only on territory not included in any municipality by any authority (including a province) having jurisdiction in such territory;

(*c*) any assessment under *The Workmen's Compensation Act* of any province;

(*d*) a business or occupancy tax based on floor space or on the rental or assessed value of property, imposed by a municipality, or in territory not included in any municipality by any authority (including a province) having jurisdiction in such territory; or

(*e*) any royalty or rental on or in respect of natural resources within a province.

(6) In this Regulation "corporation gross revenue tax" means a tax that is levied on the gross revenue or any part thereof of a corporation but does not include

(*a*) a *bona fide* and reasonable business or occupancy tax imposed by a municipality or, in a territory not included in a municipality, by any authority (including a province) having jurisdiction

in such territory on the gross revenue or gross receipts within the municipality or territory from all or part of the business of;

(i) a telephone, electric light, electric power, gas, street railway or bus company, in lieu of taxes imposed on power lines, pole lines, towers, cables, wires, conductors, conduits, equipment, mains, tracks, and other like property or improvements at a rate not in excess of three per cent of the gross receipts or gross revenue subject to the tax; or

(ii) of any other corporation if

(A) the tax is imposed under legislation enacted prior to June 27, 1946;

(B) the tax is in lieu of such a tax based on floor space or upon the rental or assessed value of property;

(C) the tax is imposed on a corporation or class of corporations that is subject to the said tax under legislation enacted prior to June 27, 1946; and

(D) the rate of tax is not in excess of the general tax rate;

(*b*) a licence fee or tax for specific rights, benefits or franchises granted by a municipality, or where they are exercised or enjoyed only in territory not included in any municipality, by any authority (including a province) having jurisdiction in such territory.

(7) In this Regulation

(*a*) "natural resources" means lands and waters, any rights to or interests in lands and waters, vested in the Crown in right of a province, including forests, minerals, petroleum and natural gas on or in such lands and waters and rights vested in the Crown in the said right to take wild animals and fish on or in such lands and waters;

(*b*) "rental" means a charge imposed on a person in respect of the occupation or use by him of a natural resource, whether improved or unimproved, including the use of water or water power sites, without severance, taking, extraction or removal thereof or of any part thereof, the real intent and purpose of which charge is to compensate for the value of such occupation or use; and

(*c*) "royalty" means a charge

(i) required to be paid by a person in respect of any right conferred on or vested in him to sever, take, extract or remove anything forming part of the natural resources of a province including therein timber, mineral ore, petroleum and natural gas, and wild animals or fish the right to take which forms part of said natural resources;

(ii) the amount of which is determined by reference to the quantity or value or both of the thing that he severs, takes, extracts or removes, or alternatively in the case of mineral ore, the value at market prices of the minerals contained therein after extraction therefrom; and

(iii) the real intent and purpose of which is to compensate a province for the value in whole or in part of the said thing prior to its severance, taking, extraction or removal;

but does not include a charge, the amount of which is determined in relation to the profits or gross receipts derived by the said person from the sale of products produced by the processing or manufacturing of the said thing unless provision is made for a reasonable deduction from

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the profits or gross receipts in determining the amount of the charge, in respect of the costs and value added to the said thing by reason of the processing or manufacturing for the purpose of eliminating, in the determination of the amount of the charge, any value added to the said thing by the said processing or manufacturing.

(8) This Regulation applies in respect of the 1947 and subsequent taxation years.

(Signed) A. D. P. HEENEY,
Clerk of the Privy Council.

The Income Tax Appeal Board held that the Order in Council was invalid on the ground that the Governor in Council in enacting it had exceeded the powers conferred by para. (*o*). It was of the opinion that in defining "specific corporation tax" (para. (5) of the Regulation—*supra*), the definition was wide enough to include taxes levied on other than corporations. Its conclusions on this point were as follows:

> Surely when Parliament enacted section 6(1) (*o*) and quite clearly stated that it was "any corporation tax" which was to be disallowed as a deduction, it meant a tax imposed solely upon corporations. In any event, I have reached the conclusion that that is the meaning which must be given to the words "any corporation tax" as contained in section 6(1) (*o*), and that these words cannot be interpreted to mean "any tax imposed upon a corporation". That being the case, I am of the opinion that the words "as defined by Regulation made by the Governor in Council" which immediately follow the phrase "any corporation tax" merely gives the Governor in Council the right to set forth by regulation such purely corporation taxes as he might determine should not be permitted to be a deduction from income, but that the Governor in Council had no power, in the regulations which he was authorized to make, to include any tax which might happen to be payable by a corporation but was payable also by individuals or partnerships or other types of association and say that such a tax or rental or supplementary charge or royalty is a corporation tax and will be disallowed as a deduction under the provisions of section 6(1) (*o*).
>
> In my opinion, the Governor in Council has exceeded his powers in the regulation contained in P.C. 5948, having gone far beyond what Parliament authorized him to do, which was to settle the corporation taxes—within the limits of what were purely corporation taxes—which would not be allowed as deductions under section 6(1) (*o*). Having reached this conclusion, it is not necessary for me to decide whether the Governor in Council was *functus officio* after he passed the first Order in Council, P.C. 332, dated 30th January, 1948.

Before me the Regulation was said to be invalid on at least two grounds. It was submitted that Parliament in using the word "define" did not have in mind a lengthy definition such as is found in the Regulation, but something of a much more limited nature, something that would set out or enumerate such taxes within the limits of levies made

on corporations alone as could not be deducted; and that by the use of the words "any *corporation* tax," Parliament intended that the Governor in Council should have no power to pass any regulation save in regard to taxes levied on corporations alone.

In my opinion, the nature and extent of the power conferred by para. (*o*) upon the Governor in Council to define corporation tax is sufficiently clear in the words of the paragraph itself. Later herein reference will be made to various definitions of the word "define." For the moment it is sufficient to say that it here means "to state precisely, declare or set forth" what the term "corporation tax" means. That is what was done by the Regulation contained in the Order in Council.

But if there is any doubt on the matter, it is entirely removed by a consideration as to how the law stood and the state of things existing at the time para. (*o*) in its final form was enacted. I have no doubt that I am entitled to enter upon such a consideration.

In *re Mayfair Property Co.* (1), Lindley, M.R. said:

> In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported Heydon's Case, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief.

In *Keates* v. *Lewis Merthyr Consolidated Collieries* (2), Lord Atkinson said:

> In the construction of a statute it is, of course, at all times and under all circumstances permissible to have regard to the state of things existing at the time the statute was passed and to the evils which, as appears from its provisions, it was designed to remedy.

Again, in *Murray* v. *I.R.C.* (3), Lord Lindley stated: "I think reasons can be conceived why the Legislature should have desired to impose the tax in this way," and proceeded to state the reasons.

As I have stated above, the special provision prohibiting the deduction of corporation taxes *as such* was contained in para. (*o*) by s. 5(2), Statutes of Canada, 1946, c. 55. By the next subsection (3) of the same amending Act, Parliament itself defined corporation tax as follows:

> (6) For the purpose of paragraph (*o*) of subsection one of this section "corporation tax" means any tax or fee other than a tax on

(1) [1898] 2 Ch. 28 at 35. (2) [1911] A.C. 641 at 642.
(3) [1918] A.C. 541 at 549.

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net income, the imposing of which in the opinion of the Minister singles out for taxation or for discriminatory rates or burdens of taxation, either formally or in effect, corporations or any class or classes thereof or any individual corporation, but does not include . . .

It is to be noted particularly that in that definition Parliament stated what corporation tax *means*, and did not enumerate the various provincial Acts which were corporation taxes. It may be noted, also, that the exceptions contained in the definition (but not here set out) are in many respects the same as the exceptions contained in the definition of "specific corporation tax" in P.C. 5948, but did not include an exemption for royalty or rental on natural resources within a province, the deductibility thereof being left to the Minister's discretion in para. (*o*) itself.

Then in 1947 an entirely new situation arose. The war-time agreements which had been entered into between the Dominion of Canada and all the provinces pursuant to the Dominion-Provincial Taxation Agreement Act, 1942, were about to expire. On July 17, 1947, the Dominion-Provincial Tax Rental Agreements Act, 1947, received the Royal assent. Briefly, it empowered the Minister of Finance with the approval of the Governor in Council on behalf of the Government of Canada, to enter into agreements with the provinces by the terms of which compensation would be paid to such agreeing provinces (together with their municipalities) as would refrain for a five-year period from levying personal income taxes, corporation income taxes, corporation taxes and succession duties, *all as defined in the several agreements to be entered into.*

It was necessary, of course, that the definition of corporation tax in the Income War Tax Act should include within its scope the definitions of that term in all of the prospective agreements to be negotiated and entered into by the Minister with the various provinces under the Dominion-Provincial Tax Rental Agreements Act, 1947. For that reason, the original statutory definition of corporation tax formerly found in s. 6(6) was repealed and by the amended para. (*o*) the power to define that term was conferred on the Governor in Council—the same authority as was required to approve the terms of any agreement entered into by the Minister of Finance with a province—and in each of which agreements "corporation tax" was to be defined. The non-deductibility of such corporation taxes was also extended to those paid to municipalities.

In construing the nature of the power conferred on the Governor in Council to *define* corporation tax, it seems clear that what Parliament intended was that the Governor in Council should by regulation declare or state what the term means—as Parliament itself had previously done in the repealed s. 6(6)—taking also into consideration the definition or definitions which would be included in the Dominion-Provincial Agreements themselves.

In *Dill* v. *Murphy* (1) the Judicial Committee of the Privy Council considered the meaning of the word "define" as found in the Colonial Act of 1854. By that Act the Legislature of Victoria was empowered to "define" the privileges, immunities and powers to be held, enjoyed and exercised by the Council and Assembly and by the members thereof. The Colonial Legislature in pursuance of that power enacted that such bodies and their members should hold and enjoy such of the like privileges, immunities and powers as at the passing of the Imperial Act of Parliament, 18 and 19th Vict. c. 55, were held and enjoyed by the Commons House of Parliament of Great Britain and Ireland, and by the committees and members thereof. It was held that this enactment had properly defined their privileges and sufficiently exercised the power delegated to the Local Legislature. Lord Cranworth in that case said at p. 514:

> The question solely turns upon the true construction and interpretation of the word "define" used in the 35 section of the Colonial Act. There can be little doubt on this ground. The attempt of the Appellant to interpretate and give it the meaning of "enumerate" is absurd, and plainly untenable. The word "define", in the opinion of their Lordships, is equivalent to the word "declare." It has been also urged, that when the Colonial Legislature was required to define its privileges, it was bound to specify, one by one, the privileges it decided upon claiming; but it would be impossible and could not be intended, that it was to go by an exhaustive process through the whole series of Parliamentary immunities and privileges. The Colonial Parliament have clearly defined the privileges claimed, and could not have done so in any way more convenient.

In the Oxford Dictionary (Unabridged) the following are included among the meanings of "define":

> 4. To determine, lay down definitely; to fix, decide; to decide upon, fix upon;
>
> 5. To state precisely or determinately; to specify;

(1) Moore's P.C. Cases, N.S. Vol. 1, 487.

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6. To state exactly what (a thing) is; to set forth or explain the essential nature of:

(b) To set forth or explain what (a word or expression) means; to declare the signification of (a word).

In enacting P.C. 5948 containing the Regulation, the Governor in Council in stating what "corporation tax" means, has set forth and explained the essential nature of that term, has stated precisely or determinately what it means and that I think is what Parliament intended it should do.

The major attack, however, is directed against the extent of the power conferred on the Governor in Council. It is said that in the term "corporation tax," corporation is an adjective qualifying the noun "tax" and that its effect is to limit the power of definition to those taxes which are actually imposed and levied solely on corporations. For the respondents it was contended that the appellant to succeed must depend on the catch-all phrase "or otherwise," found at the conclusion of the definition of "specific corporation tax." Counsel for the appellant, however, disclaimed any intention in this case of placing any weight on those words but directed his argument to the words "the imposing of which singles out for discriminatory rates or burdens of taxation, corporations or any class or classes thereof, or any individual corporation, either formally or in effect," and more particularly the concluding words "either formally or in effect." The import of these words is to bring within the definition of specific corporation tax those enumerated taxes which formally or specifically are levied on corporations or classes of corporations or on an individual corporation, and also those which, though not formally or specifically so levied, are in effect so levied.

Now it cannot be doubted that Parliament could have included in the Income War Tax Act the same definitions of corporation tax and of specific corporation tax as those enacted by P.C. 5948 and could have included therein the same words "either formally or in effect" as are found in the Regulation. Indeed, it had used precisely these words in the repealed s. 6(6) defining "corporation tax." Surely the Governor in Council in exercising the power to define a term could take into consideration and, if thought advisable, adopt part or all of the language Parliament itself had used in defining the same term for the same purpose, namely, the non-deductibility of such taxes.

Again, if the terms of the Regulation in P.C. 5948 be compared with the relevant provisions of the agreements (Ex. RC5) entered into by eight of the provinces with the Dominion pursuant to the Dominion-Provincial Tax Rentals Agreement Act, 1947 (seven of which were entered into prior to the date of P.C. 5948), it will be found that while the Regulation defines corporation tax as including both a specific corporation tax and a gross revenue tax (both as later defined therein), the agreements provided definitions of corporation tax and corporation income tax which in their terms correspond precisely and almost verbatim with the definitions of specific corporation tax and gross revenue tax respectively as found in the Regulation. I have not examined them individually but I am informed that the Agreement with the Province of Manitoba dated August 20, 1947, is typical of all. In the Interpretation Section thereof (s. 16) meaning of "corporation tax" is word for word the same as that of "specific corporation tax" in the Regulation, including the words "either formally or in effect," and the exceptions are the same, including that applicable to rental or royalty in respect of natural resources within a province. Likewise, the definitions of rental, royalty and natural resources are precisely the same.

I think that these agreements are admissible in evidence, inasmuch as the change in the wording of para. (*o*) of the Income War Tax Act (which conferred the power on the Governor in Council to define corporation tax) and the Dominion-Provincial Tax Rental Agreements Act, 1947, form part of the same legislative scheme. The latter Act is pleaded in the respondent's Reply and as I have mentioned above it provides that the term "corporation tax" in the Act shall be as defined in the agreements themselves.

In any event, I think that in entering upon the legislative scheme of providing for agreements with the provinces under the 1947 Act, and which included the necessity of changing the form of para. (*o*), Parliament must have had in mind certain provincial Acts which had already been entered into to enable the provinces to enter into such agreements. Four or five of the provinces had already passed such enabling legislation prior to the coming into effect of the new form of para. (*o*) or the Dominion-Provincial Tax Rentals Agreement Act. Of these, I am informed

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that that of Manitoba—Statutes of 1947, c. 56—is an example. Appended to that Act itself is the form of agreement which the Provincial Treasurer was authorized to execute. That form, insofar as it is here relevant, is in precisely the same language as in the completed agreement to which I have referred above. I was informed by counsel for the appellant that in some other cases similar definitions were contained in the enabling provincial Acts and then embodied in the agreement. The definitions of corporation tax, in its various forms, as defined in these Acts or in an appendix thereto, were surely available to the Governor in Council in carrying out its power to define the same term, and I think that Parliament necessarily intended that he should take them into consideration; otherwise, the whole intent and purpose of the Legislative scheme would have been frustrated. He did take them into consideration and for all practical purposes adopted them in their entirety in the Regulation, and in my view was entitled to do so.

It may be noted, also, that the Dominion had previously entered into agreements with the then nine provinces of Canada pursuant to the provisions of the Dominion-Provincial Taxation Agreement Act, Statutes of Canada, 1942-3, c. 13. In many respects these agreements were for the same purpose as the later agreements of 1947. By the Act, the Minister of Finance was empowered, with the approval of the Governor in Council, to enter into agreements regarding provincial and municipal personal income and corporation taxes "as defined in such agreement." These agreements are found in Ex. RC4. I refer only to that with the Province of Quebec dated May 28, 1942, which I am informed is typical of all. That agreement remained in effect until March 31, 1947, and was therefore in effect for part of the taxation year in question and for that reason alone I think it is admissible. Therein "corporation tax" was defined as follows:

> (1) In this agreement or any appendix thereto, unless the context otherwise requires, the expression,—
>
> (a) "Corporation tax" means the tax or fee the imposing of which singles out for taxation or for discriminatory rates or burdens of taxation, *either formally or in effect,* corporations or any class or classes thereof or any individual corporation except—

There again are found the words "either formally or in effect."

The Province of Quebec by c. 27, Statutes of Quebec, 1942, empowered its representatives to enter into an agreement in that form and similar enactments were passed by the other provinces.

S. 9 of that Act provided as follows:

9. (1) Notwithstanding anything herein contained, this agreement shall not be construed as interfering with the right of the Province to levy and collect taxes, licence fees and royalties upon or in respect of natural resources within the Province but any such taxes, licence fees and royalties imposed after June twenty-fourth 1940, and increases in taxes, licence fees and royalties after the said date will be subject to the provisions of section 6(*o*) of the Income War Tax Act.

(2) Taxes, licence fees and royalties imposed by the enactments enumerated in Appendix C to this agreement shall be deemed to be upon or in respect of natural resources.

Appendix C thereto included c. 90, R.S.Q. 1941, "An Act to Provide for the Erection of an Education Fund from the Natural Resources of the Province," an Act which was said to be the predecessor or parent of "An Act to Insure the Progress of Education, 1946." It is submitted by the respondents that as the former Act was similar to the latter and included a provision for levies on power corporations, by its inclusion in Appendix C there was a recognition that such levies were recognized as in the nature of rentals or royalties on natural resources within the province, and were therefore to be deductible; and that the same treatment should be accorded to the levies made under the later Act of 1946. It is common ground, however, that no levies on power corporations were ever made under the old Act at any time. The provisions of s. 9, while providing that the levies under the old Act should be deemed to be upon or in respect of natural resources, clearly provide that if levied after June 24, 1940, they would be regarded as being subject to the provisions of the then para. (*o*) and therefore *prima facie* non-deductible. Moreover, c. 27 of Statutes of Quebec, 1942, did not define "natural resources" or rental or royalty, but provided that all the taxes imposed by the enactments enumerated in Appendix A thereto, not being income taxes, should be deemed to be corporation taxes, and all those imposed by the enactments set forth in Appendix B should be deemed to be neither corporation nor income taxes. I am unable to conclude that the inclusion of the former Act in Appendix C can be of any assistance to the respondent herein.

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The Governor in Council in exercising the power to define corporation tax was not precluded from using part or all of the language which Parliament itself had used. In framing its definition he had also to use language which would be adequate to include taxes and levies which were, in fact, taxes on corporations, although called by some other name, or which in terms were made applicable to other than corporations, but in fact were levies only on corporations. The whole purpose and intent of para. (*o*) would—or readily could—be frustrated if the definition of corporation tax were confined to taxes which were named by the levying authority as corporation taxes and if it did not include taxes which formally were made applicable to individuals or partnerships as well as corporations, but in effect applied only to corporations. The mere form of the Act or bylaw levying the tax might be sufficient in some cases to establish that the tax singled out corporations for taxation. In others it might be necessary to go behind the form in order to ascertain whether in effect corporations had been singled out to bear the burdens of the tax. In using the words "either formally or in effect," the Governor in Council was ensuring that the substance as well as the form of the taxing enactment would be taken into consideration. That was an ordinary and necessary precaution to take—one which Parliament itself had stamped with its approval. If that precaution had not been taken, any other legislative body, provincial or municipal, could have framed the taxing enactments in such a way as to nullify the intent and purpose of para. (*o*) by making the tax in form applicable to individuals as well as to corporations, and then imposing limitations and conditions which in effect would exclude other than corporations from payment of the tax.

For these reasons I am of the opinion that the Governor in Council, in enacting P.C. 5948 and the Regulation established thereunder, has defined "corporation tax" in accordance with the duty imposed on him by para. (*o*); and in using the words "either formally or in effect," or otherwise, has not exceeded the power conferred by that paragraph. It follows that the Order in Council and the Regulation established thereunder must be declared valid and *intra vires* the Governor in Council.

3. DOES THE DISBURSEMENT MADE BY THE RESPONDENT FALL WITHIN THE GENERAL PROVISIONS OF P.C. 5948 DEFINING CORPORATION TAX AND SPECIFIC CORPORATION TAX?

By s. 2(1) of the Order in Council, "corporation tax" means "a specific corporation tax or a corporation gross revenue tax as hereinafter defined . . ." The appellant submits that the disbursement falls within the later definition of specific corporation tax in s. 2(5) (*supra*). It becomes necessary to consider first the nature of the disbursement made by the respondent.

The Act to Insure the Progress of Education, Statutes of Quebec, 10 George VI, c. 21, was assented to on April 17, 1946. It repealed a similar Act entitled "An Act to Provide for the Creation of an Education Fund from the Natural Resources of the Province (R.S.Q. 1941, c. 90; 16 George V, c. 45), but it is common ground that under that Act no taxes or levies had been imposed on power corporations.

The preamble to the new Act is as follows:

WHEREAS the financial situation and the insufficiency of resources of a large number of school corporations place them in the impossibility of suitably meeting the needs of education;

Whereas such a state of affairs is of a nature to hinder the normal progress of public instruction and prevent the population from entirely benefiting by the advantages to which it is entitled;

Whereas there is reason to relieve immoveable property and particularly small property, an essential factor of stability and social order, from the excessive burden of real estate taxes;

Whereas it is necessary to create new sources of revenue to meet such a situation without further involving immoveable property, and it is deemed just that the natural resources of the Province contribute a reasonable share of the cost of public instruction in the Province;

Whereas it is expedient to adopt measures for such purposes;

Sections 2, 3 and 3a as amended and as applicable to the year 1947 provide for the creation of the Education Fund and its constitution, as follows:

2. In order to assist school corporations to improve and stabilize their financial position and ensure the progress of teaching in the province, a special fund designated under the name of *Education Fund* is created by this Act.

This fund, exclusively affected for the purposes of this Act, shall be constituted and provided for by the sums derived from the various sources enumerated in sections 3 and 3a.

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3. For the civil year 1946 and for each subsequent year,

a. Every holder of timber limits situated within the province shall pay to the Minister of Lands and Forests an additional stumpage due of fifteen cents per cord of wood cut on such timber limits and destined to the manufacture of pulp or of paper, or of the accessory by-products and products of pulp;

b. Every owner of wooded territories situated within the province, save settlers and farmers, shall pay to the Minister of Lands and Forests a contribution of fifteen cents per cord of wood cut on such wooded territories and destined to the manufacture of pulp or of paper, or of the accessory or by-products of pulp;

c. Every holder of hydraulic powers of the public domain shall pay to the Minister of Hydraulic Resources *an additional charge* of fifteen cents per thousand kilowatt-hours of electricity generated and derived from such hydraulic powers;

d. Every owner of hydraulic powers situated within the province shall pay to the Minister of Hydraulic Resources *a contribution* of fifteen cents per thousand kilowatt-hours of electricity generated and derived from such hydraulic powers;

e. The Quebec Hydro-Electric Commission shall pay, out of its revenues, to the Minister of Hydraulic Resources, a sum of two million eight hundred thousand dollars;

f. The Provincial Treasurer shall pay to the said education fund, notwithstanding any provision to the contrary in the Retail Sales Tax Act (Revised Statutes, 1941, chapter 88), one-half of the revenues derived from the tax collected in virtue of the said act; such payment shall however, be restricted, as to the year 1946, to one half of the revenue collected after the thirty-first of March.

The provisions of paragraphs c and d shall not apply to municipal corporations nor to electricity cooperatives formed in virtue of the Rural Electrification Act, nor to any organization acting as an agent of the Crown, *nor to any holder or proprietor of water-powers of a natural output of less than ten thousand horse-power per six months.*

The additional stumpage dues, contributions, charges and instalments provided for in this section shall be exigible on the first of August of each year.

The Minister of Lands and Forests and the Minister of Hydraulic Resources shall, upon reception, remit the proceeds of such contributions to the Provincial Treasurer, who shall pay them into the education fund constituted in virtue of section 2.

3a. For the civil year 1947 and for each subsequent year,

a. Every company refining petroleum in the province shall pay annually to the Provincial Treasurer a tax of one-third of one per centum on the amount of its paid-up capital;

b. Every company owning, operating or utilizing, in the province, a telephone system or part of a telephone system and whose paid-up capital is in excess of one million dollars shall pay annually to the Provincial Treasurer a tax of one-third of one per centum on the amount of its paid-up capital.

S. 18 makes provision for reduction in the amount of contributions, and as amended is as follows:

> The contribution which a holder or owner of hydraulic powers must pay to the Education Fund in virtue of paragraph c or of paragraph d of section 3 is reduced, each year, by the amount equal to that which he has paid in school taxes for the school year ending on the 30th June, 1946.

The general provisions of the Act need not be particularized, it being sufficient to say that the Quebec Municipal Commission is empowered to inquire into the financial position of every school corporation, to declare any such corporation in default which the Commission considers unable to meet its obligations, to prepare a financial re-organization of such corporations as may have been declared in default, to issue bonds guaranteed by the government of the province in lieu of the bonds or debentures in default, and to pay out of the revenue from the Education Fund the principal and interest of such bonds, any deficiency therein to be paid out of the Consolidated Revenue Fund.

Omitting for the moment any consideration as to whether the sums paid by the respondent under the Quebec Act fall within the exceptions contained in s. 2(5) (*e*) of the Regulation as being "any royalty or rental on or in respect of natural resources within the province," do such payments fall within the term "a tax or fee other than a tax on net income or gross revenue?" The respondent's business is the production, transmission, distribution and sale of electric energy derived from hydraulic powers in the Province of Quebec. Part of such hydraulic power is held by the respondent under emphyteutic leases from the Province of Quebec, as enumerated in its reply, and the remaining part is owned by the respondent in full ownership under title from the Crown in the right of the Province of Quebec. In 1947, 1,891,334,000 kilowatt hours of electricity were generated and derived from powers held under such leases, and 2,681,630,000 kilowatt hours from power held by the respondent in full ownership. Under the Act, therefore, it became liable to payments under both subsection c and d of s. 3. In 1947 the "additional charges" under c, and the "contribution" under d, aggregated $684,-022.30, which amount was reduced under s. 18 by the amount paid in school taxes of $367,935.14—a net payment of $316,087.16.

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It will be noted that under para. (*c*) the respondent was required to pay an additional charge of fifteen cents per 1000 k.w.h. of electricity generated and derived from such hydraulic powers. Considerable stress is laid by the respondents on the word "charge" which is also used in some, but not all, of the emphyteutic leases filed. I have examined one filed by the Gatineau Power Company dated August 8, 1922, which provides that in addition to the fixed annual price or rental of $1,000, the lessees shall pay "an annual supplementary charge or royalty on each h.p. installed as follows:

(*a*) Up to 16,000 h.p.—nothing.

(*b*) On ½ of h.p. installed in excess of 16,000 h.p.—50 cents."

Then provision is made for the revision of such supplementary charges at the end of each ten-year period of the lease (which was for 50 years) and if the parties could not agree on the revision, the matter was to be referred to arbitration.

I am invited to find that because of the use of the term "additional charge" in para. c, that it is of the same nature as the "supplementary charge or royalty" provided for in the leases, and is not therefore a tax, but I find nothing to support that contention. There is no evidence whatever that the supplementary charge or royalty was being revised or that the time for such revision had arrived. Moreover, the "additional charge" in para. c is based on the electricity actually generated and developed, whereas the "supplementary charge or royalty" in the lease I have mentioned, is computed from the actual total turbine power or other hydraulic motors in h.p. as may be from time installed. The provisions for initiating the revision of the supplementary charge or royalty had not been undertaken. Likewise, it could not be considered as merely "raising the rent."

There is still another reason why the levy made under para. (*c*) cannot be considered as in the nature of a rental. In terms the levy is made on "a holder of hydraulic powers of the public domain," and is not confined to those holding leases from the Province of Quebec. In the appeal of one of the respondents—Canadian Light and Power Company—the Income Tax Appeal Board stated that it had been proven that that company was such a holder *under leases from the government of the Province of Quebec.* However,

that does not appear to be the fact. Exhibits A-3 and A-4 in that case are the company's returns for the year 1947 to the Dept. of Hydraulic Resources under the Act to Insure the Progress of Education. Therein it is stated that its hydraulic powers are held under "a lease from Dept. of Railways and Canals, Ottawa". Ex. A-2 is the renewal of the lease itself, dated April 29, 1946, and the lessor therein is His Majesty the King represented by the Minister of Transport. Certainly, as to that company, the levy could not be considered in any way as a rental, there being nothing in the nature of a lease between the parties affected. As to that company it is a tax and nothing more and I am quite unable to find that the same words as are used to impose a tax on one taxpayer can be of a different character and mean something quite different such as rental, when applied to other taxpayers.

In my opinion, the "additional charge" levied under para. c, and the "contribution" levied under para. d, were taxes just as much as were the taxes levied on the paid-up capital of oil refining companies and telephone companies under para. 3a, where they are, in fact, called taxes. The test is not answered by the mere name of the impost or levy, but rather by ascertaining its essential nature.

In the case of *Attorney General of Canada* v. *Registrar of Titles* (1), Macdonald, C.J.B.C. said at p. 764:

> The definition of a tax includes *inter alia* the imposition of it by competent authority. It must be imposed in clear and unambiguous language, and requires compulsory payment. There can be no option on the part of the taxpayer to pay or not to pay a tax.

In the same case Macdonald, J.A. said at p. 773:

> The essentials of a tax were discussed by Duff J. (now C.J.C.) in *Lawson* v. *Interior Tree Fruit & Vegetable Committee,* (1931) 2 D.L.R. 193, at pp. 197-8, referred to with approval by the Judicial Committee in *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.,* (1933) 1 D.L.R. 82, at p. 86. The tests are (1) it must be enforceable by law (2) imposed by a public body under legislative authority and for a public purpose. In addition "compulsion is an essential feature" (*Halifax* v. *Nova Scotia Car Works* (1914) 18 D.L.R. 649, at p. 652).

Again, "tax" is defined in Corpus Juris, Vol. 61, p. 65, and in the notes that follow other definitions are extracted from certain decisions, including the following:

> Any Government charge imposed for raising revenue is a "tax" regardless of name by which it is called.

(1) [1934] 4 D.L.R. 764.

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As indicated in its definition, the essential characteristics of a tax are that it is not a voluntary payment or donation but an enforced contribution exacted pursuant to legislative authority in the exercise of the taxing power, the contribution being of a proportional character and payable in money and imposed, levied and collected for the purpose of raising revenue to be used for public or Government purposes and not as payment for some special privilege or service rendered.

In my view, the levies imposed upon the respondent by the Act meets all those tests and are therefore taxes. It is obvious, of course, that they were not imposed on net income or gross revenue.

The Act to Insure the Progress of Education has for its main purpose the rendering of assistance to school corporations in default. Instead of directing that the costs thereby incurred should be paid entirely out of the Consolidated Revenue Fund, it established a special Education Fund to be built up by the annual taxes levied under Clauses a, b, c and d of s. 3, and of Clauses a and b of s. 3a, supplemented by an annual payment of $2,800,000 by one of its own Crown companies (The Quebec Hydro-Electric Commission) and by a further payment by the Provincial Treasurer of one-half of the revenues collected under the Retail Sales Tax Act. The taxes so levied are of various sorts, but in this case I am concerned only with the tax levied under para. c and d, all other taxes being levied on quite a different basis. It is apparent that the imposition of such taxes does not single out for taxation or for discriminatory rates or burdens *all corporations* or any single corporation. Nor does it *formally* single out any class or classes of *corporations*. It is made applicable to every holder or owner of hydraulic powers within the province and therefore *formally* paragraphs c and d could include individuals and partnerships as well as corporations. It is to be noted, however, that s. 3 provides that the provisions of paragraphs c and d shall not apply to municipal corporations, to electricity co-operatives, to an agency of the Crown, *nor to any holder or proprietor of water powers of a natural output of less than 10,000 h.p. per 6 months.*

The effect of that limitation which I have underlined is shown by the Admissions of Fact, filed. Such admissions show that in 1947 twelve power corporations only (including the nine respondents herein) paid additional charges or contributions under paragraphs c and d; that no person

other than a corporation has ever paid or been liable to pay any of such additional charges or contributions; that some corporations, holders or owners of hydraulic powers in Quebec and who have generated electricity therefrom have never paid or been liable to pay any of such additional charges or contributions (presumably because of the deductions for school taxes permitted under s. 18); that in the years 1946 and 1947 persons other than corporations were holders or owners of hydraulic powers in the Province of Quebec within the meaning of paragraphs c and d and generated and derived electricity therefrom, but no person in the Province of Quebec other than a corporation was the holder or proprietor of water powers of a natural output of more than 10,000 h.p. at ordinary six months' flow.

These admissions establish that at least for the years 1946 and 1947 (and there is no suggestion in the evidence that there has since been any change), the taxes levied under paragraphs c and d were borne solely by corporations, either as holders or proprietors of water power of a natural output of 10,000 h.p. per 6 months or over and, whose taxes, levied under paragraphs c and d, exceeded the school taxes which were deductible under s. 18. It can scarcely be doubted that the legislature had full knowledge that only corporations were the proprietors or holders of water power of a natural output of more than 10,000 h.p. at ordinary 6 months' flow and that such corporations alone would be called upon to bear the burden of the additional taxes.

In effect, therefore (although not formally), the imposition of these taxes singled out classes of corporations, namely those holding or owning water power rights for taxation or for discriminatory rates or burdens of taxation, by imposing a tax in respect of the activities or operations mainly done by or carried on by corporations, namely, electricity generated and derived from hydraulic powers.

Such taxes are therefore within the definition of "specific corporation tax" and may not be deducted unless they fall within the exceptions provided for in ss. 5 of the regulation.

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4. IS THE RESPONDENT ENTITLED TO THE BENEFIT OF THE EXEMPTIONS CONTAINED IN THE DEFINITION OF SPECIFIC CORPORATION TAX?

From the definition contained in s. 2(5) of the regulation, there are excepted five categories of levies, the only one relied upon by the respondent being (*e*)—"any rental or royalty on or in respect of natural resources within a province." The regulation also provides definitions for natural resources, rental and royalty in s. 2(7) (*a*) (*b*) (*c*) (*supra*).

The Income Tax Appeal Board came to the conclusion that as to the amounts paid by the respondent under para. c, the respondent was in any event entitled to that deduction. Its reasons were stated as follows:

> There is, however, still another reason for this taxpayer's appeal to succeed at least in part. Even if I were wrong in my conclusion that the Governor in Council had exceeded his powers in making the regulation contained in P.C. 5948, paragraph (*e*) of subsection (5) of section 2 of that regulation provides for an exception in respect of "any royalty or rental on or in respect of natural resources within a province", as such charges shall not be deemed to be a corporation tax within the provisions of the Order-in-Council. I have already found that the additional charge imposed upon the appellant herein under the provisions of paragraph (*c*) of section 3 of the Quebec *Education Act* by reason of the fact that the appellant is a *holder* of hydraulic powers of the public domain, was in the nature of a rent, an annual supplementary charge, or a royalty, and not a tax. In so far, therefore, as the appellant was called upon to pay an additional charge under the Quebec *Education Act* by reason of being the *holder* of hydraulic powers of the public domain under leases from the Crown, such additional charge, in my opinion, was clearly a royalty or rental and, to that extent at least, it came within the express provisions of the exception contained in paragraph (*e*) of subsection (5) of section 2 of the Order-in-Council P.C. 5948.

In view of the conclusion which I have reached as to the interpretation to be placed upon the definition of "rental," it becomes unnecessary to discuss or determine the question as to whether the Crown in the right of the province of Quebec owns the water, the use of which was taken without severance by the respondent in developing electricity. The definition of "rental" concludes with the words "the real intent and purpose of which charge is to compensate for the value of such occupation or use." An examination of the various charges which are excepted out of the definition of "specific corporation tax" indicates that such charges in the main, if not entirely, are not in fact

taxes in the ordinary sense but rather in the nature of fees or charges for which the payer receives some form of compensation in return. The same connotation is involved in the definitions of rental. Not all rental charges are deductible, but only those charges in respect of natural resources, the real intent and purpose of which is to compensate for the value of such occupation or use, and in this case that means for the occupation of a water power site or the use of the water. From what has been said above, it is apparent that the taxes levied under paragraphs c and d were not levied to compensate for the value of the occupation of the water power sites or of the use of the water. They were levied solely for the purpose of raising funds to establish the Education Fund and thereby promote the progress of education. The compensation for the occupation of water power sites and the use of the water had already been determined and agreed upon in the leases themselves. There is nothing in the Act to suggest that the value of the rented property had increased from the time the leases were granted or that the compensation provided for therein was inadequate. The additional charges and contributions, or taxes as I have found them to be, were not therefore within the definition of "rental."

Likewise, they were not "royalties" as that term is defined in the regulation. The definition applies to things severed, taken, extracted or removed and which formed part of the natural resources of the province, such as timber, minerals, oil, wild animals, fish and the like. Here nothing of that nature occurred. Moreover, the definition requires that to be a royalty, the real intent and purpose of the payment is to compensate a province for the value in whole or in part of the said thing prior to its severance, taking, extraction or removal. I place the same interpretation on that requirement as I have done in the similar words found in the definition of rental.

My opinion, therefore, is that the payments in question made by the respondent, fall within the definition of "specific corporation tax" as found in the regulation and do not fall within any of the exceptions contained therein.

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5. IS THE DEDUCTION PERMISSIBLE UNDER S. 6(1) (*a*) OF THE INCOME WAR TAX ACT?

That subsection is as follows:

> 6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;

On this point also the Income Tax Appeal Board ruled in favour of the respondents, although its reasons for so doing are not apparent in the judgment itself. As I understand the argument of counsel for the respondents, the submission on this point is based on the allegation that while the Income War Tax Act does not specifically provide for the deduction of local school taxes in computing taxable income, such are invariably allowed (perhaps with very minor exceptions) as being wholly, exclusively and necessarily laid out for the purpose of earning the income. It is said that the Education Fund was used to advance education within the province and is therefore a school tax which likewise should be deducted.

As far as I am made aware, the only provision in the Income War Tax Act which specifically provides for the deduction of taxes in computing taxable income is that found in s. 5(1) (*w*), namely, such amount as the Governor in Council may by regulation, allow in respect of taxes on income for the year from mining or logging operations; that, of course, has no application to this case. The mere fact that local school taxes, paid to a municipality for the use of school boards and commissions, and levied upon all classes of property owners—whether Roman Catholic, Protestant or neutrals (such as corporations on which the levies in some cases are higher than on individuals)—have been allowed as a deduction, does not lead to the conclusion that taxes paid to the province under the Act to Insure the Progress of Education by special classes of taxpayers throughout the province as a whole should also be deducted.

These expenses when measured by sound commercial and accounting practices alone would appear to be deductible. But that fact alone does not make them deductible

under s. 6(1) (*a*). As stated by Davis, J. in *Montreal Light, Heat & Power Consolidated* v. *Minister of National Revenue* (1):

> The Court must interpret the statutes without reference to its own views of the fairness or unfairness, in a commercial sense, of the result in any particular case. Parliament has made the law; we are merely to interpret and apply it.

It has been well settled, moreover, that sound commercial and accounting practices are not to be followed where the statute contains some express direction or prohibition which diverges from such practices. In *Usher's Wiltshire Brewery* v. *Bruce* (2), the principle was stated shortly as follows:

> Where a deduction is proper and necessary to be made to ascertain the balance of profits and gains, it ought to be allowed . . . provided there is no prohibition against such allowance . . .

Here the regulation clearly prohibits the deduction of specific corporation taxes, and having found that the payments made by the respondent fall within the definition of that term, such payments are not deductible.

There is another submission to which I must refer in order to indicate that it has not been overlooked.

One of the clauses in the agreed Statement of Facts was as follows:

> 5. Persons other than corporations paid additional stumpage dues or contributions under paras. (*a*) and (*b*) of s. 3 of the above-mentioned Act (i.e., An Act to Insure the Progress of Education).

It is submitted by counsel for some of the respondents that s. 3 of that Act must be read as a whole and that when so read it should be found that the levies—to use a neutral word—imposed by Clauses a, b, c and d of s. 3, and all included in one section of the Act, should be treated as one levy. The argument is then advanced that because levies made under paras. a and b are shown to be payable by individuals as well as by corporations, none of the levies, and particularly those under paras. c and d, are in fact corporation taxes. If that argument is sound it could logically be extended to the provisions of para. f of the same section (*supra*) which require the Provincial Treasurer to pay to the fund a proportion of the revenue under the Retail Sales Tax Act, a payment which is not a tax but merely an allocation of moneys to be received by the Treasurer.

(1) [1942] S.C.R. 89 at 104. (2) 6 T.C. 399 at 429

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MINISTER OF NATIONAL REVENUE v. THE SHAWINIGAN WATER AND POWER CO.

Cameron J.

It seems to me, however, that in seeking to ascertain what is or is not a corporation tax, it is necessary to look at the particular subsection under which the tax is paid and that the nature of the levy is not to be determined by reference to other subsections which impose different levies in different ways on different persons, notwithstanding that all such levies constitute part of the same fund, but are made up from many miscellaneous sources. If the argument submitted were valid, it would follow that the levies made on companies refining petroleum and on companies owning or operating a telephone system, under s. 3a, a and b, could not be corporation taxes although counsel for at least some of the respondents admitted—and I think properly so—that these levies came squarely within the definition of specific corporation tax in P.C. 5948. It is true that s. 3a did not form part of the original Act, but was added in 1947 by 11 George VI, c. 32 (Quebec); it was made applicable to the year 1947 and its provisions cannot in any respect be considered as differing from those of s. 3. In my opinion, this submission cannot be supported and I reject it.

For the reasons given the appeal herein will be allowed, the decision of the Income Tax Appeal Board set aside, and the assessment made upon the respondent by the Minister will be affirmed. The appellant is entitled to be paid its costs after taxation.

Judgment accordingly.

ONTARIO ADMIRALTY DISTRICT

1953
Jan. 7, 8 & 9
Jan. 29

BETWEEN:

COLONIAL STEAMSHIPS LIMITED ....PLAINTIFF;

AND

THE SHIP *WINNIPEG* .....DEFENDANT.

Shipping—Action for damages—Failure to discharge onus of showing collision was caused by the faulty navigation of defendant ship—Action dismissed.

Held: That in an action for damages arising out of a collision between two ships in the Soulanges Canal the onus is on plaintiff to show by a preponderance of evidence that the damage to its ship was caused by the faulty navigation of defendant ship and since that onus has not been discharged the action must be dismissed.

ACTION by plaintiff to recover damages allegedly caused by defendant ship.

The action was tried before the Honourable Mr. Justice Barlow, District Judge in Admiralty for the Ontario Admiralty District, at Toronto.

Peter Wright and *F. O. Gerity* for the plaintiff.

R. C. Holden, Q.C. for the defendant ship.

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

BARLOW, D.J.A. now (January 29, 1953) delivered the following judgment:

An action arising out of a passing on the 3rd day of November, 1951, about 0455 hours E.S.T. by the Ship *George M. Carl,* hereinafter called the *Carl* which was downbound and the ship *Winnipeg* which was upbound in the Soulanges Canal east of Lock 5, when the plaintiff alleges that by reason of the faulty navigation of the *Winnipeg* the *Carl* rubbed the bank of the canal and damaged certain plates on her starboard side and twisted her rudder stock necessitating repairs costing about $25,000.

Each ship is about 250 feet long with a beam of about 43 feet. The canal has a width at full depth of 96 feet and a width from bank to bank of 162 feet.

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COLONIAL STEAMSHIPS LIMITED
v.
THE SHIP *Winnipeg*

Barlow D.J.A.

The plaintiff alleges that the *Carl* observed the *Winnipeg* when about a mile distant. The plaintiff then pleads as follows:

> The *George N. Carl* kept her course and dead slow speed, sounding one blast. This was answered by one blast from the *Winnipeg*. When some 300 feet, or so, from the *Winnipeg* the course of the *George M. Carl* was altered to starboard so that the vessels might safely pass. When it was seen that the *Winnipeg* had not altered course the wheel of the *George M. Carl* was put to starboard in an endeavour to clear the *Winnipeg*. As the ships neared each other the *Winnipeg* was seen to be headed for the *George M. Carl* and it appeared that she would strike amidships. The wheel of the *George M. Carl* was then put to port to straighten the ship in line with the canal bank and to avoid collision. The *George M. Carl* struck the east bank of the canal, and the *Winnipeg* coming on at speed struck the port quarter of the *George M. Carl* and drove her heavily into the canal bank, causing extensive damage.

The defendant, the ship *Winnipeg* observed the *Carl* when about one and a half miles distant, and then pleads as follows:

> When the vessels were about half a mile apart passing signals of one short blast were exchanged, and the engines of the *Winnipeg* were at once reduced to slow, and shortly afterwards to dead slow. When the ships were still two or three ship's lengths apart the *Carl* was seen to have gone against or too close to her starboard bank and there appeared to be danger that she would get out of control and sheer out towards the *Winnipeg* when passing. The *Winnipeg* had been coming up in the centre of the canal and at the time was commencing to direct her course gradually to starboard in order to take her own starboard side and to meet and pass the *Carl* in the usual and proper manner. When it was seen that the *Carl* had got too close to her starboard bank too soon the course of the *Winnipeg* was directed further to starboard, in order to try to keep clear of the *Carl* if the latter should sheer, and when the ships met their bows cleared by a greater distance than usual. As the ships passed the *Winnipeg* straightened up, and while passing she was completely on her own starboard side of the canal. The *Carl* had ample water in which to pass safely, but was not under proper control, and shortly before the sterns of the ships cleared one another the stern of the *Carl* came out towards the *Winnipeg* and her port quarter rubbed the port side aft of the *Winnipeg* lightly while passing, but without doing any damage to either ship. When it was seen that the ships were going to rub the *Winnipeg* was given port wheel, but her stern was over against or close to her starboard bank and it was not possible for the *Winnipeg* to avoid the rubbing which occurred. After rubbing lightly the ships cleared one another and the *Carl* proceeded on down and the *Winnipeg* up in the centre of the canal.

The above quoted pleadings set out the facts which each party endeavoured to prove. There is some conflict between the evidence of the Captain and Mate of the *Carl* and the evidence of the Captain and Mate of the *Winnipeg*.

I was impressed with the demeanour in the witness box of the Captain and Mate of the *Winnipeg* and accept their evidence where it conflicts with that of the Captain and Mate of the *Carl*. Clearly the two ships did not pass within 1,000 feet of Lock 5 as is sworn to by the Master of the *Carl*. The passing took place at least three-quarters of a mile east of Lock 5. The evidence clearly establishes that the rub of the two vessels on their port quarters did not move either ship out of her course and did not drive the *Carl* into the canal bank causing damage as alleged by the plaintiff. The evidence establishes that it was a normal passing. The port quarters merely rubbed slightly as the ships cleared one another.

When the *Carl* was dry-docked at the end of the season it appeared that she at some time had suffered damage to certain of her plates on the starboard side, which damage could have been suffered by the rubbing of the canal bank. If this damage was suffered during the voyage in question, and at or about the time the two ships passed, the evidence satisfies me that it was caused before the passing and by reason of the faulty navigation of the ship *Carl* as she approached the *Winnipeg*. I accept the evidence of the Captain and Mate of the *Winnipeg* as to the course of the *Carl* and as to the course of the *Winnipeg* as the two ships approached each other. Furthermore, the onus is upon the plaintiff to show by a preponderance of evidence that the damage to the *Carl* was caused by the faulty navigation of the *Winnipeg*. There is not sufficient evidence to satisfy me that the navigation of the *Winnipeg* caused the *Carl* to rub the bank of the canal.

The evidence as to the twisting of the rudder stock is most unsatisfactory and does not show how this damage could have been suffered at the time of the passing of the ships. The rudder of the *Carl* would be about 21 feet from her starboard side. At no time was the *Carl* in such position in the canal as to cause her rudder to come in contact with the bank. Again the onus is upon the plaintiff and this onus has not been satisfied.

For the above reason the action will be dismissed with costs.

Judgment accordingly.

1953

Jan. 6, 7, 8 & 9

Feb. 2

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

D. GRATSOS *et al* .....PLAINTIFFS,

AND

THE SHIP *BARANOF* .....DEFENDANT.

AND BETWEEN:

ALASKA STEAMSHIP COMPANY, OWNERS OF THE STEAMSHIP *BARANOF* ..... PLAINTIFF,

AND

THE SHIP *TRITON* .....DEFENDANT.

Shipping—Collision action—Limitation of liability—Use of radar does not dispense with the International Regulations for Preventing Collisions at Sea.

The action arises out of a collision between two ships, the *Triton* and the *Baranof*, each ship alleging negligence on the part of the other and each claiming damages against the other. The Court found the *Baranof* solely to blame for the collision.

Held: That the owners of the *Baranof* are entitled to limitation of liability under s. 649 of the Canada Shipping Act 1934, 24-25 Geo. V, c. 44.

2. That the introduction of radar as an aid to navigation does not warrant the assumption that the International Regulations for Preventing Collisions at Sea are to be disregarded or are changed in any way.

CONSOLIDATED ACTIONS for damages sustained through the collision of two ships in the Strait of Georgia.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

Alfred Bull, Q.C. and *J. R. Cunningham* for the ship *Triton.*

F. A. Sheppard and *F. U. Collier* for the ship *Baranof.*

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

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Baranof v. *Triton*

SIDNEY SMITH, D.J.A. now (February 2, 1953) delivered the following judgment:

The plaintiffs, owners of the Greek Steamer *Triton*, claim against the American steamer *Baranof* in respect of damage sustained by the *Triton* in a collision between the two vessels shortly after midnight on 25 July last in the Strait of Georgia. The owners of the *Baranof* in a separate action claim against the *Triton* for damage done to the *Baranof*. The two actions were consolidated. Each vessel accuses the other of being solely to blame for the collision. They were both very considerably damaged, and each provided the other with security in the sum of $300,000. Two members of the *Triton's* crew lost their lives: at least one other was severely injured.

The *Triton* is a United States Liberty type of merchant vessel of 7,250 tons gross, 423 feet long, 57 feet beam. At the time of the collision she was laden with 9,600 tons of iron ore, and bound from Campbell River, B.C., to Japan, via way ports. The *Baranof* is a passenger and cargo vessel 4,990 tons gross, 360 feet long, 51 feet beam, and was on one of her regular voyages from Seattle, Washington, to Alaska with cargo and passengers.

During the critical time before the collision two officers were in charge of the navigation of each vessel: British Columbia Pilot Green and 2nd Officer Fatsis were on the bridge of the *Triton*, while Pilot Landstrom and 3rd Officer Flaherty were in the wheelhouse of the *Baranof*. Pilot Green gave evidence on the trial. So did British Columbia Pilot Simpson, also engaged by the *Triton*. He stood watch and watch with Pilot Green and retired below about half an hour before the collision. The testimony of nine other members of the ship's company was taken *de bene esse* at Vancouver while the *Triton* was undergoing repairs at Victoria. Two of these were produced by *Triton's* counsel at the request of, and for examination by, *Baranof's* counsel. One or two other witnesses testified for the *Triton* on the trial, but they need not now be particularly mentioned.

In the case of the *Baranof*, matters were rather different. On the trial I heard and saw only two of her officers, both of whom were below at the material times and so played no part in the incidents leading up to the collision, viz., Captain Ramsauer (the Master of the vessel) and 2nd

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Baranof v. *Triton*

Sidney Smith D.J.A.

Officer Woodard. Neither of her navigators appeared before me. Their testimony, with that of five crew members, was taken *de bene esse* at Seattle and read into the record on the trial. Pilot Landstrom had left the company and was living in Seattle. I was told he refused to come to Vancouver to give evidence, though on his *de bene esse* examination he had expressed himself otherwise. There was nothing said about the whereabouts of 3rd Officer Flaherty.

It seems to me the issues involved are entirely of fact. I have to decide which of the two different accounts given is the true account of what happened. I formed the impression that the *Baranof* was relying rather on alleged weaknesses in the *Triton's* case than on the strength of her own. The *Triton* left Campbell River shortly after 4 p.m. on the 25th, Pilot Simpson and a ship's officer then being on the bridge. Her clocks were on daylight-saving time but I use standard time throughout, as did the *Baranof*. Pilot Simpson was relieved at 11.50 p.m. by Pilot Green who was on the bridge with 2nd Officer Fatsis until the collision. The voyage southward from Campbell River was normal. The Gyro compass had been out of order for some days and the ship was being steered by the standard magnetic compass on the upper bridge. I find this compass was in good order and that on the voyage south the various courses were carefully checked by the Pilot on duty as the ship proceeded from point to point. About 8 p.m., in the vicinity of Cape Lazo, an azimuth bearing was taken by the officer on watch. This bearing gave a deviation of 3·7° westerly and due allowance was made for this in the courses steered, which were made good. I have no hesitation in holding that the vessel was equipped with all proper navigational instruments, and that she was navigated throughout at a speed of 10 knots in a careful and seaman-like manner. It is perhaps worth noticing that the coast from Campbell River to Entrance Island is particularly well lit, and that in a distance of some 75 miles there are over 20 shore lights. There are no hidden dangers on the way. Even without a compass, in the fine weather then prevailing, a navigator would find his way by going from light to light, keeping a safe distance off each. Throughout the

night the sea was smooth, the visibility excellent. There may have been a light wind and some ebb tide at the vital time, but these were not of much consequence.

There was criticism of the *Triton's* regulation lights, and this is the first crucial question in the case. These were claimed in the *Baranof's* pleadings to be "improper", "dim", "obscure." The evidence of her witnesses was that they were "dim". This contention however was not pressed upon me in argument, though I do not suppose it was abandoned. On the evidence I have no doubt that her lights were in good order and at the material times burning brightly.

The starting point of the matter is the sighting of the *Baranof* by Pilot Simpson and 2nd Officer Fatsis, at about 11.45 p.m., at a distance of approximately 12 miles, and bearing 1 to 1½ points on their starboard bow. These are all approximations and at the time there was no reason for particularly noting them. The *Baranof* was then roughly in the neighbourhood of Thrasher Rock and, as it turned out, proceeding at a speed of 13 knots on a course of 302° True. Her two masthead lights were sighted, and when the vessels were about 5 miles distant her green side light was also seen. The 2nd Officer watched her closely through binoculars and concluded, rightly, that the two ships were in a position to pass each other safely starboard light to starboard light, had each maintained her course. The enquiry must therefore be as to what change took place so as to bring them together some quarter of an hour later. This is the second crucial question in the case. It is clear that one or the other took helm action at the wrong time and to too great an extent, for otherwise there would have been no collision. The *Triton* says the *Baranof* in the circumstances mentioned, wrongly starboarded; the *Baranof* says the *Triton* was on the *Baranof's* port hand and was on a course to pass safely port to port, and that she wrongly ported. These are the opposing contentions. In my respectful opinion the balance of probabilities weighs heavily in favour of the *Triton's* case. Her witnesses gave substantially the same account of the incidents. I heard and saw the two *Triton* pilots. In my opinion they were skilled pilots and trustworthy witnesses. I accept their evidence, as I do that of 2nd Officer Fatsis.

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Baranof v. *Triton*

Sidney Smith D.J.A.

The *Triton* was abeam of Entrance Island light distant 2½ to 3 miles, on a course of 114° True at 0015 on the 26th. The *Baranof* was then about two miles away with her bearing changing normally for a starboard passing. She was being continuously watched by both Pilot Green (who had relieved Pilot Simpson) and the 2nd Officer. The Pilot estimated they would pass each other at a distance of less than half a mile. But something intervened, namely, a change of course to starboard on the part of the *Baranof*. This was approximately two minutes after the *Triton* had passed Entrance Island and was indicated by a closing of the *Baranof's* masthead lights. At that time Pilot Green thought the vessels were a mile, or slightly less, apart. What occurred then is described by him in these words:

Q. Then what happened after you saw this change of course to starboard? Just relate as you remember it, what happened.

A. I made a remark to the officer there as to "What is that fellow trying to do?"

Q. You made the remark?

A. I made the remark, and I could see him alter and come some more, and finally swing very hard, and then I ordered hard-a-port, two short blasts on the whistle, and stand-by on the engines.

Q. When you did that, are you able to translate it into time before the actual impact?

A. Well, it was just shortly before.

Q. Well, shortly might be five minutes sometimes, or a matter of seconds.

A. It was in between the two minutes. There was an interval of time, from the time I first saw him alter course until I did it, because I thought he might be altering for a log, or some such thing. It was a fine night and you could see very well.

The *Baranof's* stem struck the starboard side of the *Triton* at an angle of approximately 90° just abaft of amidships at 0019. (*Triton* time). This caused a gash in her shell-plating through which the water quickly flooded the engine-room, stopped the engines, extinguished all lights, leaving the vessel quite helpless. At daylight she was towed to an anchorage near Nanaimo, and some days later to Esquimalt, where repairs were carried out in due course.

The *Baranof* story is one of some uncertainty. She puts the collision at 0021. As I have said, on watch in her wheelhouse from shortly before midnight were Pilot Landstrom and 3rd Officer Flaherty. The *Baranof*, like the *Triton*, carried two pilots but, unlike the *Triton* pilots, these were permanent ship's officers. There would seem

to have been a lack of co-operation between the 3rd Officer and the Pilot, and their explanations differed from time to time. There is no evidence of any word being exchanged between them touching the navigation of the ship until the 3rd Officer reported seeing the *Triton's* green light. The Pilot seems to have been pre-occupied with the radar apparatus —unduly so. The pleadings say that he was on a course of 302° True and first saw the *Triton* as a target in the radar screen 5° on his starboard bow, and 3 miles distant. He thereupon altered course to 312° T. Later he noticed visually two dim white lights (the *Triton's* masthead lights) about 1½ miles away, bearing 5° on his port bow, so that the vessels were in a position to pass each other safely port to port. A little later when they were one mile or so apart the *Triton* altered her course to port, crossed athwart the bows of the *Baranof*, showing for the first time an obscure green light and creating imminent danger of collision. Thereupon the *Baranof* starboarded, then hard-a-starboarded, went full astern on her engines and almost immediately after collided in the manner already mentioned. At no time did she give a whistle signal. Such is the story disclosed in the pleadings, which differs in material respects from the evidence. But there is this significant fact to be noted: Although it is claimed that the two vessels would have safely passed port to port, no *Baranof* witness testified that he at any time saw the red light of the *Triton*. Nor was this pleaded.

At the preliminary Coastguard enquiry held at Seattle a few days after the collision the Pilot's memory of the incidents was at its best. He then testified that he saw the *Triton* target in the radar 3 miles away, and 5° on his starboard bow. He noticed that this bearing did not change (but on *de bene esse* examination he stoutly held that it narrowed on the bow and that for this reason he altered course), so when 1½ miles distant he altered course 10° right, looked out and suddenly saw two dim white lights close together, very dim lights. They did not change their bearing (then on the port bow) so he gave 5° more to the right, and when there was still no change in bearing he put the helm hard over to the right. As he got closer he saw her green light, went full astern, and so matters remained until the collision. This is substantially what was seen by

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the navigators on the *Triton's* bridge. The 3rd Officer of the *Baranof* gave much the same evidence except that he said he saw the *Triton's* masthead lights at 4 miles—a distance he sought to reduce on his *de bene esse* examination to 2½ or 3 miles. He did not tell the Pilot about seeing these lights, nor did the Pilot tell the 3rd Officer why he starboarded 10°. But it was this starboarding that caused the 3rd Officer to look through the glasses and pick up for the first time the *Triton's* green light, as he says, 2 or 2½ points on the port bow. All this happened within a very few minutes, for it is important to remember that the vessels were approaching each other at a joint speed of 23 knots.

In view of my finding on the *Triton's* lights it is manifest that the *Baranof's* navigators failed to keep a vigilant and competent lookout. This would seem to dispose of the case. I hold that the *Baranof* proceeded at full speed towards an approaching vessel of which she knew little or nothing, committing herself to starboard and still more starboard wheel action, without even whistling to show what she was doing; whereas, as her Master testified, had she simply maintained her course the two vessels would have passed each other in safety starboard to starboard. As indicative of their total lack of appreciation of the oncoming danger, it should be noticed that the Pilot, when asked how the collision occurred, gave this hopeless answer:

> The only idea I have is that he cut across my bow, where he came from and how he got there I don't know. What he was doing I don't know.

And at another time when asked how long it was before the collision when he became aware that there was another vessel there, answered:

> I have no knowledge as to the minutes. The distance possibly was roughly about 500 feet away from her.

Although on other occasions he said he concluded that the radar target was a vessel when they were 1½ miles apart.

The evidence for the *Baranof* was voluminous, conflicting and difficult to understand. But I think her Master indicated to me the true explanation for the strange misapprehensions of her navigators. I think the Pilot was conning the ship by means of the radar and, without saying so, left the matter of look-out to the 3rd Officer who failed

him there. It is true the Master did not agree with this suggestion and that the Pilot repudiated it when put to him. But I think the evidence as a whole shows that it was so. I may be allowed to quote this paragraph from an article by Mr. James H. Hamilton, under the pseudonym of Captain Kettle, in Harbour & Shipping of January 1953, p. 17:

> In a recent collision case in the United States courts the judge made the remark that radar "is a very good working cane but a very bad crutch". His intention was no doubt to call to mind the fact that the introduction of radar as an aid to navigation did not warrant the assumption that the international "Regulations for Preventing Collisions at Sea" are by-passed or in any way changed by reason of the additional and valuable assistance which radar provides.

That this is radar's true function is the view of Captain Ramsauer of the *Baranof* and it is also my own. I think the Pilot was at fault, on that fine summer's night, in paying so much attention to radar, and so little to what his eyes could have seen ahead of his vessel. Again it seems that the fatal mistake they made when they did see the *Triton* was to conclude that she was going in the same direction and that they were overtaking her. This is what the Master gathered from the information the Pilot gave him an hour after the collision, though he added that the Pilot did not expressly say so. The Pilot repudiates this view also. But in my opinion it affords the most probable explanation of the event. It seems to me the significant fact that emerges from the evidence as a whole is that this collision could not have happened but for the wrongful starboarding of the American vessel within one mile or so of the Greek vessel.

Commander Leonard formerly of the United States Navy, gave instructive expert evidence for the *Baranof*. But his testimony on cross-examination was all in favour of the *Triton*. The views he expressed in chief cannot be accepted because they were not based on given data in accordance with my findings herein. The further testimony he gave in re-examination was founded (as directed by counsel) on merely approximate bearings and distances marked on a chart by a witness, and so also unacceptable. I may add that I have not overlooked the evidence of the other *Baranof* witnesses, in particular that of the look-out man.

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Baranof v. *Triton*

Sidney Smith D.J.A.

I think this witness might easily be mistaken in his belief that he saw the *Triton's* light where and when he says he did.

The Pilot was 70 years of age on 1st January last. One must regret that he ends an otherwise successful career at sea on this note of tragedy.

It was submitted that the collision could have been averted had the *Triton* gone astern on her engines or taken different helm action. But the heading of the ship only altered about half-a-point to port, and in my view the vessels were so close that no engine or other action on the part of the *Triton* would have done any good. Indeed it might well have worsened the situation, and caused infinitely more damage and perhaps loss of life to the *Baranof* with her large number of passengers and crew. But should I be wrong in this I would apply the well-known rule in the *Bywell Castle* (1). It may be worth while repeating what was there said by Cotton, L.J. at pp. 228-9:

> For in my opinion the sound rule is, that a man in charge of a vessel is not to be held guilty of negligence, or as contributing to an accident, if in a sudden emergency caused by the default or negligence of another vessel, he does something which he might under the circumstances as known to him reasonably think proper; although those before whom the case comes for adjudication are, with a knowledge of all the facts, and with time to consider them, able to see that the course which he adopted was not in fact the best. In this case, though to put the helm of the Bywell Castle hard a-port was not in fact the best thing to be done, I cannot hold that to do so was under the circumstances an act of negligence on the part of those who had charge of that vessel.

The owners of the *Baranof* claim limitation of their liability under sec. 649 of the Canada Shipping Act. This is resisted by the *Triton's* owners, on the ground of incompetency of Pilot Landstrom, which was known or should have been known to the ship-owners. It was pressed upon me that this would have been demonstrated had the Pilot appeared on the trial. That may be so, but I must take the evidence as I find it. And it would seem, on the evidence before me, that the assumption is purely conjectural and the whole line of argument too speculative to permit of my drawing any safe conclusion. One or two other grounds for disentitling the owners in this respect were set up in the pleadings, but they were not seriously

(1) (1879) 4 P.D. 219.

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pressed in argument, and I am unable to give effect to them. The *Baranof* was equipped with all the latest navigational instruments and they were all in good order.

I hold the *Baranof* solely to blame for this collision, but I also hold that her owners are entitled to limit their liability under the Canada Shipping Act. If necessary, the learned registrar will hold a reference to assess damages.

There will be judgment accordingly.

Judgment accordingly.

BETWEEN:

THE BERTON DRESS INCORPORATED ..... } SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1952

Nov. 4

1953

Feb. 25

Crown—Petition of right—The Commodity Prices Stabilization Corporation Limited—P.C. 5518 dated July 16, 1943—"Subsidized goods"—Subsidy repayment upon export of subsidized goods—The Export Permit Branch of the Department of Trade and Commerce—Powers of the Commodity Prices Stabilization Corporation under P.C. 5518 in regard to exported goods.

Pursuant to the provisions of P.C. 5518 dated July 16, 1943, the Commodity Prices Stabilization Corporation, Ltd.—a Crown corporation—issued in March, 1944, a general notice by which certain types of cotton goods were designated as "subsidized goods" and the amount of subsidy repayment upon the export of such goods fixed at 10 per cent of the invoice price. In 1944, 1945 and 1946 suppliant imported certain cotton fabrics which were manufactured into dresses and, desiring to export those, it from time to time made applications to the Export Permit Branch of the Department of Trade and Commerce which acted as the collecting agency of the Corporation, for the necessary export permits. As suppliant had received no subsidy in respect of the imported fabrics, it could have received the export permits, under the notice referred to, by filing with the Export Permit Branch a certificate in form C-21 certifying that the cotton content of such goods had not been subsidized. Suppliant, however, did not follow that procedure but instead paid to the Corporation the stated percentage of the invoice prices thereupon receiving the permits. The C-21 forms were completed and forwarded later with a request for the repayment of $3,607.43 "paid in respect to repayment of import subsidy in error". The request was refused and the C-21 forms returned because of suppliant's failure to file them at the time of the applications for export permits and of the lateness of its application for a refund. By its petition of right suppliant now seeks to recover the amounts so paid in error.

70000—2½a

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Held: That the Commodity Prices Stabilization Corporation's power under P.C. 5518 in regard to exported goods was to recover the actual or designated subsidy which the exporter had received from it. While it is true that specific delegated powers may be enlarged by implied powers reasonably necessary to carry out the duties imposed, it could not in this case be implied that the powers of the Corporation extended to a point enabling it to declare as forfeited monies which had come into its hands through error, mistake or inadvertence, and to which it had no legal right. Under the circumstances of this case any regulation or by-law to that effect would have been *ultra vires*.

2. That the burden lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to show that by express words, or by necessary implication, such an intention appears. *Metropolitan Asylum District* v. *Hill* (1881) 6 A.C. 193; *Commissioner of Public Works* v. *Logan* (1903) A.C. 355 referred to.

PETITION OF RIGHT by suppliant to recover certain amounts allegedly paid in error to a Crown corporation.

The action was tried before the Honourable Mr. Justice Cameron at Ottawa.

Gordon F. Henderson for suppliant.

Paul Dalmé and *Luc A. Couture* for respondent.

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

CAMERON J. now (February 25, 1953) delivered the following judgment:

This is a Petition of Right in which the Petitioner seeks to recover from the Respondent the sum of $3,571.78 paid under the circumstances presently to be mentioned to a Crown corporation—The Commodity Prices Stabilization Corporation, Ltd.

Before setting out the facts of the case, it is advisable to state briefly the nature and duties of the Commodity Prices Stabilization Corporation (hereinafter called the 'Corporation'). It was formed in 1940 for the purpose of assisting in stabilizing the wartime prices of goods to be consumed in Canada, and for such purposes and as agent of the Government of Canada, to pay subsidies, subventions and bonuses, and to buy and sell goods. In 1943 it was considered that the subsidies paid on goods which were later exported, or sold as ships' stores for ships leaving Canada should be recoverable, such goods not being subject to the

maximum prices prescribed by the Wartime Prices and Trade Board Regulations. P.C. 5518 was therefore enacted on July 16, 1943, and thereby it was provided:

3. The corporation may from time to time, by notice published in Canadian War Orders and Regulations, designate a class or kind of goods as subsidized goods for the purposes of this order and may by a similar notice cancel or vary any such designation; and any goods of a class or kind so designated shall be conclusively presumed to be subsidized goods for the purposes of this order until the designation of such class or kind has been cancelled pursuant to this section.

4. (1) Every person shall, before he exports any subsidized goods from Canada, repay the subsidy involved in such goods by paying to the corporation an amount which is determined by the corporation to be equal thereto; and no person shall export any subsidized goods from Canada until such amount has been paid to the corporation.

(4) Every amount payable under this section shall be determined by the corporation, either by specific determination or by specifying the method of calculation, and every such determination shall be conclusive for all the purposes of this order.

(5) Notice of any determination under this section published in Canadian War Orders and Regulations shall be evidence of such determination.

5. No permit, licence or inspection certificate required by Order in Council P.C. 2448 of the 8th day of April, 1941, or by any other statute or law before any subsidized goods may be exported or taken out of Canada shall be issued until the payments required by this order have been made.

Pursuant to the provisions of that Order in Council, the Corporation from time to time issued various Government Notices in the Canadian War Orders and Regulations. General Notice RS-9 dated March 27, 1944 (Ex. E) was in effect throughout the years 1946 and 1947. By that notice, certain types of cotton goods (including those fabrics imported into Canada by the Respondent) were designated as "subsidized goods" and by Item 1 thereof the amount of subsidy repayment upon the export of such goods was fixed at 10 per cent (later increased to 15 per cent) of the invoice price.

Note A to that General Notice provided:

Note A.—Applicable only to Item 1.

Where the exporter

(1) purchases the cotton entering into the goods being exported and obtains written assurance that the cotton entering into such goods has not been subsidized, or

(2) imports the goods, or the cotton entering into the goods direct and in either case has not received or claimed subsidy, or

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(3) purchases the goods as manufactured goods and obtains written assurance that the cotton entering into such goods has not been subsidized, he may obtain a permit to export such goods without paying the amount required by Item 1 of this notice if the application for such permit is accompanied by a certificate in such form as Commodity Prices Stabilization Corporation Ltd. may approve setting out the circumstances and certifying that the cotton content of such goods has not been subsidized.

The certificate referred to therein and as approved by the Corporation was later known as Form C-21.

Under the provisions of s. 5 of P.C. 5518 (*supra*) the Export Permit Branch of the Dept. of Trade and Commerce (which branch was established by P.C. 2448 dated April 8, 1941, and is filed as Ex. A) was prohibited from issuing an export permit in respect of subsidized goods until the exporter had repaid to the Corporation "the subsidy involved in such goods," by paying to the Corporation "an amount which is determined by the Corporation to be equal thereto." The evidence is that in practice the Export Permit Branch functioned not only as the agency to which the applications for export permits were made, but also as the collecting agency of the Corporation, to receive the amount of the repaid subsidy and to then remit it to the Corporation.

In the years 1944, 1945 and 1946 the Petitioner imported directly from the United States of America certain cotton fabrics, the import entries being set out in Ex. 1. The Petitioner manufactured all of such fabrics into dresses, and it is shown that in respect of such fabrics no subsidy was asked for or received. Desiring to export these dresses to countries outside of Canada, it from time to time made applications to the Export Permit Branch for the necessary export permits. Ex. 3 contains copies of all the relevant applications, all dated between July 31, 1946, and July 16, 1947.

Inasmuch as the Petitioner had received no subsidy in respect of the imported fabrics (all of which, it is admitted, were converted into the dresses later exported) the Petitioner was entitled to adopt the procedure laid down in Note A of Government Notice RS-9 and to file with its application for an export permit the certificate in Form C-21. That form contained space for the particulars of the entry of imported goods and the evidence shows that with that information and the certificate itself, it was the

practice of the Export Permit Branch to accept that evidence as proof that no repayment of subsidy was involved and to issue the permit. At the trial it was admitted that had the Petitioner followed this procedure on each occasion the necessary export permits would have been issued, presumably without payment of any sort.

The petitioner, however, at the time of each application did not file a C-21 Form but instead computed on the application "the amount of subsidy repayment" on the basis of Government Notice RS-9 (either at 10 or 15 per cent of the invoice price) and paid that amount to the Export Permit Branch as agent for the Corporation, thereupon receiving the necessary permits and later exporting the goods out of Canada. It is admitted that the amounts so paid were transferred by the Export Permit Branch to the Corporation.

The amounts so paid totalled $3,572.78, that amount, less $1.00 refunded on December 11, 1946, being the amount now claimed by the Petitioner.

It was not until January, 1948, that the C-21 Forms were completed by the Petitioner. On January 12 its agent, Mr. G. E. Hooper, forwarded to the Export Permit Branch C-21 Forms applicable to each of the export permits it had received, such forms being comprised in Ex. 7, and at the same time requested repayment of $3,607.43 "paid in respect to repayment of import subsidy in error." It appears that immediately following the receipt of these forms they were processed by the Export Permit Branch and in a series of memoranda addressed to the Corporation, dated January 13, 1948, and initialled by Mr. J. G. McKinnon, the supervisor of the subsidy section, there were supplied details of the "cheque amount," the cheque number, and it was stated that the reason for refund was "subsidy rebate not required on cotton as per attached C-21 Forms." In each case the memorandum was headed "Adjustment of subsidy refund payment—complete."

Within a day or two Mr. McKinnon also completed another form headed "Cheques received from Department of Trade and Commerce—Export Permit Branch, Reference C-680 (Ex. 10)." That exhibit comprises three pages, refers to the serial numbers of each of the permits which

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had been issued to the Petitioner for the goods in question, and in addition to other data again gives the cheque numbers to be used in making the refund, the amount of each cheque, and with the necessary variations again states, "Subsidy rebate not required on cotton as per attached C-21 Forms." The sums under the heading "Amount to be refunded" total the sums now claimed by the Petitioner.

The cheques, however, were never issued. Instead the Petitioner was notified by a letter dated January 17, 1948 (Ex. 6) from Mr. S. W. Laird, Chief Examiner of the Corporation, that the application for refund was refused, and the C-21 Forms were returned. I quote below the essential parts of that letter as it sets out the nature of the Respondent's defence.

> We have for acknowledgment a number of Forms C-21 respecting re-payment of subsidies on exported subsidized goods, and requesting a refund of the 10 per cent paid to the Corporation through the Export Permit Branch as required under Government Notice R.S. 9 dated March 28, 1944, as amended.
>
> If you will refer to the above notice, a copy of which is attached, you will note, in order to eliminate the necessity of re-payment of subsidy on exports the applicant was required on making application for an export permit to accompany the same with a certificate in such form as Commodity Prices Stabilization Corporation Limited approved (Form C-21), setting out the circumstances and certifying that the cotton content of the goods had not been subsidized. It appears that you omitted to conform with this part of the regulations and are now requesting the Corporation to refund all payments, and accept Forms C-21 at this late date.
>
> Under the established policy Form C-21 should be filed in accordance with the R.S. notice. However, the Corporation has accepted later filing of the form in a few instances, but in no instance later than four calendar months after the date of the export permit. This of course does not apply where cancellation of the export permit has been granted.
>
> Under the circumstances the Corporation cannot accept Forms C-21 in contravention of the requirements outlined above except in such instances, say within four calendar months of the date of export permit.

Correspondence followed between the parties and under date of January 22, 1948, the Corporation solicitor wrote Mr. Hooper as follows: (Ex. 9)

> Your representations were discussed with the officials of the Corporation and it does not appear that any points raised in your letter were not covered in the letter to the Berton Dress Inc.
>
> The refund of subsidy notice No. RS-9 is quite specific in that Form C-21 must accompany the application for an export permit. The Corporation has no authority, at this late date, to accept the belated forms as executed by your clients and to make the refund which would be involved if they were accepted.

AVIS

Une traduction française des Règles et Ordonnances Générales de la Cour de l'Échiquier du Canada, telles qu'amendées à date, sera publiée sous peu. On pourra s'en procurer des exemplaires en s'adressant à l'Imprimeur de la Reine, à Ottawa, et sur paiement de la somme de $1.00.

NOTICE

A French translation of the General Rules and Orders of the Exchequer Court of Canada, as amended, will be published shortly. Copies may be obtained from the Queen's Printer, Ottawa, upon payment of the sum of $1.00.

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It is contended that the respondent is not bound, and that it has not been the practice of the Corporation, to make refunds of any subsidy repayments made in error after so long a delay and that the Petitioner is estopped from making such a request for repayment because of its alleged failure to comply with the provisions of Government Notice RS-9 as to filing the C-21 Forms at the time of the application for export permits.

At the trial it was somewhat vaguely suggested that the Petitioner had not proven that there was no subsidy involved in the dresses that were exported. While it was admitted that no subsidy had been paid on the imported cotton fabrics converted into the dresses, it was suggested that there could have been some form of subsidy in other goods which formed part of the dresses. That suggestion is completely disposed of by the evidence of Mr. J. D. C. Mahaffey, former executive vice-president of the Corporation, taken on his examination-for-discovery and read into the record. He stated that the Corporation agent—the Export Permit Branch—had given the Corporation all the information necessary to enable it to conclude that no previous subsidy had been paid on the goods mentioned in the C-21 Forms filed, and that the Petitioner was merely requesting the return of its own money.

From the same evidence and from Mr. Mahaffey's letter of April 28, 1948, to Mr. Hooper (Ex. 13) it is also clear that there were other exporters who had received no subsidy, who proceeded in exactly the same manner as the Petitioner in applying for export permits, and did not file the C-21 Forms but paid to the Corporation the stated percentage of the invoice prices. Later they filed C-21 Forms and received a refund of the amounts so paid. I infer from the evidence that some official of the Corporation made a decision that only applications for refunds which reached it within a period of four months from the date of the related export permit would be favourably considered and that in no case was the application refused when it was received within that time. There is no evidence that any such exporter other than the Petitioner filed its C-21 Forms and applied for a refund after the expiry of the four months' period. There is no evidence whatever that the Corporation itself

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gave formal consideration to the problem of dealing with late filings of C-21 Forms, to applications for refunds in cases such as the instant one, or to the placing of any time limit on such applications. It is frankly admitted that there was in fact no authority for the ruling that applications for refunds which were received within four months would be favourably considered and all others rejected; and that no notice of such ruling was given to interested parties at any time. The door was closed to late comers regardless of the merits of their application. In my opinion, the ruling was made without authority of any sort and is of no effect.

Counsel for the Respondent relies, however, on the provisions of Government Notice RS-9 and Mr. Mahaffey stated in evidence that its provisions constituted the only ground for denying the Petitioner's right to recovery. In so far as that notice is relevant to this case it did two things. It stated the amount of subsidy repayment which must be paid in respect of subsidized goods, before an export permit would be granted (by P.C. 7460 dated December 28, 1945, the Corporation was empowered to vary the times within which such payment was to be made, but I do not think that is of any importance here). I assume that the provision was intended to apply to cases where subsidy in one form or another had in fact been paid. Then by Note A (*supra*) provision was made whereby exporters who had not received subsidy could obtain export permits by filing proof to that effect in the certificate Form C-21. The notice does not state that an exporter who had received no subsidy must comply with the provisions of Note A and file the certificate; nor does it state that if he pays "the amount of subsidy repayment" in order to secure his export permit he is barred from recovery. What it does state is that if the necessary C-21 Certificate is filed with the application for the export permit, that will be accepted as evidence that no subsidy was paid and the export permit will be granted. It was purely a procedural matter designed to facilitate the issue of export permits when no subsidy had been paid.

There is no evidence as to why the Petitioner paid the required "amount of subsidy repayment" when on the facts it could have adopted the procedure set out in Note A.

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It could only have been done by inadvertence or error for it is difficult to believe that it would deliberately "repay" something which it had not been paid and which it was under no obligation to pay. It may have acted through a subordinate official who was concerned solely with obtaining the necessary export permits and who had no knowledge as to the applicable regulations or whether any subsidy had in fact been paid. It may have been done in order to expedite the issue of the export permits and to avoid the delay entailed in processing and checking the C-21 Forms. The payments may have been made in the belief that all cotton goods to be exported were within the classes and kinds of goods specified in the notice and without knowledge of the alternative provisions of Note A.

On the merits the Petitioner has made out its case. The Export Permit Branch which normally acted on behalf of the Corporation in these matters was completely satisfied that the application for refund was warranted on the facts and recommended repayment. The Corporation itself admits that upon the export of the goods it was not entitled to receive any amount from the Petitioner and would not have claimed any had the C-21 Forms been then filed. What it has done in effect is to declare as forfeited the moneys it received through an error or inadvertence and to which it had no legal claim. Had valid powers been conferred on it to declare such a forfeiture or to retain the sums it received through error, mistake or inadvertence on the part of an exporter, its right to do so could not be questioned. I have examined P.C. 5518 and the other documents filed and can find no such authority.

The Corporation's power under P.C. 5518 in regard to exported goods was to recover the actual or designated subsidy which the exporter had received from it. While it is true that specific delegated powers may be enlarged by implied powers reasonably necessary to carry out the duties imposed, it could not in this case be implied that the powers of the Corporation extended to a point enabling it to declare as forfeited moneys which had come into its hands through error, mistake or inadvertence, and to which it had no legal right. Any regulation or by-law to that effect would have been *ultra vires*.

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The burden lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to show that by express words, or by necessary implication, such an intention appears (*Metropolitan Asylum District* v. *Hill* (1)). Reference may also be made to *Commissioner of Public Works* v. *Logan* (2) in which Lord Davey said at p. 363:

> But their Lordships are also influenced by the consideration that the effect of the appellant's construction would be to take away the respondent's property without any compensation. Such an intention should not be imputed to the Legislature unless it be expressed in unequivocal terms. This principle has frequently been recognized by the Courts of this country as a canon of construction, and was approved and acted on by Lord Watson in delivering the judgment of this Board in *Western Counties Ry Co.* v. *Windsor and Annapolis Ry. Co.*, 7 App. Cas. 178, at p. 188.

Moreover, the practice of the Corporation in approving all similar applications made within the four months' limit has proven that even in the opinion of the Corporation itself a non-subsidized exporter who did make payment upon export was not barred from later applying for a refund, when he had not filed the C-21 Forms with his application for an export permit. It is true that there was some delay on the part of the Petitioner but that has not prejudiced the Corporation in any way. The Petitioner engaged the services of Mr. Hooper who was well acquainted with the Order in Council governing the Corporation and with its practice. After making a thorough examination of the books and records of the Petitioner for a period extending over two months, he completed the necessary certificates and at once filed them with the Export Permit Branch.

Under these circumstances I am of the opinion that the Petitioner is entitled to succeed.

Some question was raised as to the jurisdiction of this Court to consider a claim of this nature. In my view such jurisdiction is conferred by the provisions of s. 18 of the Exchequer Court Act, R.S.C. 1927, c. 34 as amended.

There will therefore be judgment declaring that the Petitioner is entitled to be paid by the respondent the sum of $3,571.78 and the costs of these proceedings, after taxation.

Judgment accordingly.

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(1) (1881) 6 A.C. 193 at 208. (2) [1903] A.C. 355.

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Jan. 19
Mar. 14

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

SIMPSON'S LIMITED ..... RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 5(a), 6(b), 6(n)—Minister's discretion to allow depreciation deductions—Hearing of appeal from Income Tax Appeal Board a trial de novo—Presumption of validity of assessment on appeal by Minister from decision of Income Tax Appeal Board—When Minister may base allowance of depreciation deductions on costs of assets to former owner—Minister's discretion under s. 6(n) administrative.

The respondent acquired land and buildings from a company in which it had a controlling interest and claimed a deduction in respect of the depreciation of the buildings based on the cost of the buildings to it. The Minister allowed a deduction of less than this amount basing his allowance on the cost of the buildings to their former owner and on his assessment added the difference to the respondent's taxable income. The Income Tax Appeal Board allowed the respondent's appeal from this assessment and the Minister appealed from this decision.

Held: That the hearing of an appeal from a decision of the Income Tax Appeal Board to this Court is a trial *de novo* of the issues of fact and law that are involved and the hearing in this Court must proceed without regard to the case made before the Board or the Board's decision.

2. That on an appeal to this Court from a decision of the Income Tax Appeal Board, whether the taxpayer or the Minister is the appellant, the assessment under consideration carries with it a presumption of its validity until the taxpayer establishes that it is incorrect either in fact or in law and the onus of proving that it is incorrect is on the taxpayer, notwithstanding the fact that the Income Tax Appeal Board may have allowed an appeal from it. Statement in *Goldman* v. *Minister of National Revenue* [1951] Ex. C.R. 274 at 282 corrected.

3. That it is for the Minister in the exercise of his discretion, and not for the Board, to determine not only the rate of deduction in respect of depreciation, if any, that should be allowed but also the amount, whether of cost or of value, to which such rate should be applied.

4. That the first proviso to section 6(*n*) of the Act set a top limit to the total amount of deductions in respect of depreciation that could be allowed in the case of assets acquired under the circumstances of controlling interest specified in it and while it does not direct the Minister to base his allowance of deductions in respect of the depreciation of such assets on their cost to their former owner there is nothing in the proviso or elsewhere that precludes him from using such a base.

5. That the discretion vested in the Minister by section 6(*n*) of the Act is an administrative discretion rather than a quasi-judicial one.

6. That the Minister's action was in accord with the proper exercise of his discretion.

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APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the President of the Court at Toronto.

T. Z. Boles and *F. R. Duncan* for appellant.

R. M. Sedgewick for respondent.

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

The PRESIDENT now (March 14, 1953) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board (1), dated September 6, 1951, allowing the respondent's appeal from its income tax assessment for its taxation year ending January 8, 1947, on the ground that the Minister had not properly exercised his discretion under section 6(*n*) of the Income War Tax Act, R.S.C. 1927, chapter 97.

The appeal relates to the nature and extent of the discretion vested in the Minister to allow deductions in respect of depreciation from what would otherwise be taxable income. So far as relevant to the appeal section 6(*n*) reads as follows:

> 6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*n*) depreciation, except such amount as the Minister in his discretion shall allow, including
>
> . . .
>
> Provided, however, that the Minister shall not allow a deduction in respect of depreciation of assets owned by an incorporated taxpayer from the income of the said taxpayer if he is satisfied that the said taxpayer directly or indirectly had or has a controlling interest in a company or companies previously the owner or owners of the said assets or that the said previous owner (which term shall include a series of owners) directly or indirectly had or has a controlling interest in the said taxpayer or that the said taxpayer and the previous owner were or are directly or indirectly subject to the same controlling interest and that the aggregate amount of deductions which have been allowed to the said taxpayer and/or the said previous owner in respect of the depreciation of such assets is equal to or greater than the cost of the said assets to the said previous owner or to the first of the previous owners where more than one;

(1) (1951-52) 5 Tax A.B.C. 45.

The facts are not in dispute. By an agreement, dated August 1, 1946, the respondent purchased from R. H. Williams & Sons Limited certain lands and buildings in Regina for $850,000, of which $506,000 was for the buildings. The cost of these buildings to R. H. Williams & Sons Limited had been $432,341.42 and the aggregate amount of deductions which had been allowed to it in respect of their depreciation was less than such cost.

It was also admitted than on January 8, 1947, the respondent had a controlling interest in R. H. Williams & Sons Limited and, on the hearing, counsel for the respondent admitted further, but only for the purposes of this appeal, that it had such a controlling interest at all material times.

In its income and excess profits tax return, dated July 8, 1947, for the taxation year under review the respondent claimed a deduction of $5,452 in respect of the depreciation of the buildings which it had purchased from R. H. Williams & Sons Limited but the Minister in his assessment allowed a deduction of only $4,936.05, basing his allowance on the cost of the buildings to R. H. Williams & Sons Limited, and added the difference back to the amount of taxable income reported by the respondent in its return.

The respondent objected to the assessment and appealed against it to the Income Tax Appeal Board. The appeal was heard before Mr. W. S. Fisher Q.C. He followed the decision of the Board in *Stovel Press Limited* v. *Minister of National Revenue* (1) and allowed the appeal for the reasons given in that case, the particular reason being that the Minister, in basing his allowance of deduction in respect of depreciation on the cost of the buildings to R. H. Williams & Sons Limited, their former owner, instead of on their cost to the respondent, their present owner, had not properly exercised his discretion under section 6(*n*) of the Income War Tax Act and referred the assessment back to the Minister for reconsideration and reassessment by allowing depreciation based on the cost of the buildings to the respondent. From this decision the Minister appeals to this Court.

(1) (1950) 4 Tax A.B.C. 359.

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MINISTER OF NATIONAL REVENUE v. SIMPSON'S LIMITED

Thorson P.

Before I deal with the issue in the appeal I must comment on a preliminary question on which I requested argument by counsel, namely, whether the following statement in *Goldman* v. *Minister of National Revenue* (1) is correct:

> On the other hand, where the Minister is the appellant from the decision of the Income Tax Appeal Board it cannot be said that the appeal to this Court is an appeal from the assessment. There is this further difference, namely, that while the issue in the appeal is the correctness of the assessment, it is for the Minister to establish its correctness in fact and in law. The Board has power under section 83 of the Income Tax Act to vacate or vary the assessment or refer it back to the Minister for reconsideration and reassessment. It is to be assumed that the Minister's appeal is from a decision by which the Board has exercised one of these powers. Consequently, the assessment has been found erroneous by a court of record and the Minister does not come to this Court with any presumption of its validity in its favour. Indeed, the reverse is true. Thus, subject to the same comments on the use of the term onus as those made previously, the onus is on the Minister to establish the correctness of the assessment. Likewise it is the Minister who should be called upon to begin.

The statement is *obiter* and affords another illustration of the danger involved in such a statement in matters that have not been fully argued. On further consideration, I have come to the conclusion that the statement is erroneous in several respects and ought to be corrected. The basic error lies in failure to appreciate the effect of the fact that the hearing of an appeal from a decision of the Income Tax Appeal Board to this Court is a trial *de novo* of the issues of fact and law that are involved. There cannot, I think, be any doubt that this is so where the appeal is by the taxpayer. It must equally be so when the Minister is the appellant. In either event the hearing in this Court must proceed without regard to the case made before the Board or the Board's decision. Consequently, where the Minister appeals from the decision of the Board allowing an appeal from the assessment the fact that the Board found the assessment to be erroneous must be disregarded. To do otherwise would be tantamount to giving effect to the Board's decision which would be inconsistent with the view that the hearing of the appeal from it is a trial *de novo*. Consequently, it was incorrect to say that because the Board found the assessment erroneous the Minister does not come to this Court with any presumption of its validity

(1) [1951] Ex. C.R. 274 at 282.

in his favour and that the onus is on him to establish its correctness. On the contrary, the true position is that on an appeal to this Court from a decision of the Income Tax Appeal Board, whether the taxpayer or the Minister is the appellant, the assessment under consideration carries with it a presumption of its validity until the taxpayer establishes that it is incorrect either in fact or in law. Thus, the onus of proving that it is incorrect is on the taxpayer, notwithstanding the fact that the Income Tax Appeal Board may have allowed an appeal from it. It follows, under the circumstances, that while the Minister, being the appellant, may be called upon to begin he may rest on the assessment so far as the facts are concerned without adducing any evidence. The onus of proving the assessment to be erroneous in fact is on the taxpayer.

I now come back to the issue in this appeal. There are, in my judgment, several reasons for allowing it. In the first place, it was not within the competence of the Board when it referred the assessment back to the Minister for reconsideration and reassessment to direct him to allow depreciation based on the cost of the buildings to the respondent. This was an arrogation by it of a decision that only the Minister could make. It was for him in the exercise of his discretion, and not for the Board, to determine not only the rate of deduction, if any, that should be allowed but also the amount, whether of cost or of value, to which such rate should be applied. On this ground alone the appeal from the decision *a quo* must be allowed to the extent of varying the terms of the reference back to the Minister if any reference is required.

But there is a stronger reason for allowing the appeal. Counsel for the respondent submitted that the Minister based his depreciation allowance on the cost of the buildings to their former owner because he considered that the proviso in section 6(*n*) was applicable, that he was mistaken in this view since it was not applicable by reason of the fact that the aggregate amount of the deductions which had been allowed in respect of their depreciation was not equal to their cost to the former owner, that in considering the proviso applicable when it was not he had taken an irrelevant matter into account and had not acted on proper principles and that under the authority of the

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decision in *Pioneer Laundry and Dry Cleaners Limited* v. *Minister of National Revenue* (1) the assessment appealed against must be referred back to the Minister. A similar submission had found favour with the Income Tax Appeal Board which gave effect to it. There Mr. Fisher, following the earlier decision by the Board in the *Stovel Press Limited* case (*supra*), considered that the *Pioneer Laundry* case (*supra*) supported his decision. I am unable to agree.

Under the circumstances, it is important to set out the facts of the *Pioneer Laundry* case (*supra*) in their relation to the law that was then in force and then analyze what it really decided. The facts may be summarized briefly. The appellant company in that case had acquired certain machinery and equipment from Home Service Company Limited at a price fixed by an independent appraisal. The latter Company had acquired all the assets of seven companies including the original Pioneer Laundry and Dry Cleaners Limited which had gone into voluntary liquidation. These assets included the machinery and equipment in question which had previously belonged to the original Pioneer Laundry and Dry Cleaners Limited. While they were in this ownership they had been fully written off by depreciation. Moreover, it was also established that the appellant company was in fact controlled by the same shareholders who formerly controlled the original company. At this time the provisions of the Act relating to the allowance of deductions in respect of depreciation were contained in sections 5 and 6. Section 5(*a*) read as follows:

> 5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*a*) Such reasonable amount as the Minister, in his discretion, may allow for depreciation, . . .

And section 6(*b*) provided:

> 6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*b*) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act; . . .

In its income tax return for its taxation year ending March 31, 1933, the appellant company claimed deductions in respect of the depreciation of the machinery and equip-

(1) [1940] A.C. 127.

ment but the Minister, through the Commissioner of Income Tax, disallowed the deductions on the grounds, put briefly, that the machinery and equipment had already been fully depreciated and there had really been no change of ownership of them and on the assessment the Minister added the amount of the deductions back to the amount of taxable income reported by the appellant company in its return. From this assessment the appellant company appealed first to the Minister and then to this Court, which dismissed its appeal. An appeal to the Supreme Court of Canada was also dismissed (1) by a majority of the Court, but its decision was reversed by the Judicial Committee of the Privy Council. Lord Thankerton, who delivered its judgment, held that under section 5(*a*) the taxpayer had a statutory right to an allowance in respect of depreciation during the accounting year in which the assessment in dispute was based and that the Minister had a duty to fix a reasonable amount in respect of that allowance. And in that respect he adopted the statement of Davis J. in the Supreme Court of Canada, at page 5;

> The appellant was entitled to an exemption or deduction in "such reasonable amount as the Minister, in his discretion, may allow for depreciation." That involved, in my opinion, an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles.

Lord Thankerton held further, in effect, that the Minister could not look behind the facade of the transaction by which the machinery and equipment had been acquired with a view to determining whether there was any real change in their ownership. As he put it, the Minister was not entitled to disregard the separate legal existence of the appellant company and to inquire as to who its shareholders were and its relation to its predecessors. The taxpayer was the company and not its shareholders. Thus he found two errors on the part of the Commissioner of Income Tax, one being that he had failed to appreciate that the appellant was not the same taxpayer as the shareholders but had a separate legal existence, and the other that the taxpayer had a statutory right to a reasonable depreciation allowance and that it was not within the power of the Commissioner to refuse it. For these reasons Lord Thankerton held that

(1) [1939] S.C.R. 1.

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the Minister had not exercised his discretion and referred the assessment back to the Minister for exercise of it.

The decision of the Judicial Committee was given on October 13, 1939, and as soon as it was possible for Parliament to do so it amended the law. By section 10 of chapter 34 of the Statutes of 1940 paragraph (*a*) of section 5 of the Act was repealed and by section 16 of the same amending Act paragraph (*n*) was added to section 6 so that it read as follows:

> 6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*n*) depreciation, except such amount as the Minister in his discretion may allow, including such extra depreciation as the Minister in his discretion may allow in the case of plant and equipment built or acquired to fulfil orders for war purposes;

The amendments were assented to on August 7, 1940, and made applicable to the 1940 taxation period and fiscal periods ending therein and to all subsequent periods. The proviso to section 6(*n*) came later. It was enacted by section 7 of chapter 14 of the Statutes of 1943, assented to on May 20, 1943, and made applicable on passing.

It is plain that after these changes there was a fundamental change in the law from that which obtained at the time of the *Pioneer Laundry* case (*supra*). In the first place, the statutory right which the former section 5(*a*) gave to every taxpayer to have a reasonable allowance for depreciation has been taken from him. Now he has no statutory right to any deduction in respect of depreciation except that which the Minister in his discretion may allow to him. And, secondly, the Minister, far from being forbidden to look behind the facade of the transaction by which the assets were acquired, is specifically required to do so in order to determine whether there was a controlling interest between the owner of the assets and their former owner.

Thus it seems clear that if the present law had been in force at the time the *Pioneer Laundry* case (*supra*) was before the Courts it would not have been possible to take a valid objection to the action of the Commissioner of Income Tax for it would clearly have been permissible and proper. Moreover, it seems apparent that the change in the law was deliberately made to render the decision in the

Pioneer Laundry case (*supra*) inapplicable in the future in the case of circumstances similar to those that then existed and to enable the Minister, in such circumstances, to do exactly what the Judicial Committee of the Privy Council had said he could not do under the law then in force. By this change in the law Parliament cured by legislation a defect which the Commissioner had unsuccessfully tried to overcome by administrative action.

Thus the situation now under consideration is very different from that which Lord Thankerton found in the *Pioneer Laundry* case (*supra*). The errors which he attributed to the Commissioner of Income Tax in that case do not exist here. Here there is no denial by the Minister of a statutory right to a deduction in respect of depreciation as there was held to be in that case. Nor has there been any failure on the part of the Minister to recognize the separate legal existence of the two companies, the former and the present owner of the buildings under consideration. Indeed, in my opinion, the decision in the *Pioneer Laundry* case (*supra*) has no applicability in the present case.

In support of his submission that the Minister, in basing his allowance of a deduction in respect of the depreciation of the buildings on their cost to the previous owner, had not exercised his discretion on proper principles counsel for the respondent relied strongly on a letter written on behalf of the Director General of the Corporation Assessments Branch of the Taxation Division of the Department of National Revenue to the respondent, dated April 29, 1950, in which the following statement relating to depreciation in respect of the buildings appears:

> The question has received careful consideration and it has been concluded that the first proviso to section 6(1) (*n*) of the Income War Tax Act is applicable. Therefore, the depreciation allowances will be based on depreciated cost in the hands of the vendor corporation as indicated to you by the Toronto Office of this Division. Your attention is directed in particular to the words "had or has a controlling interest". Although Simpson's Limited did not necessarily have a controlling interest in the vendor corporation at the time the buildings were purchased, it had a controlling interest in 1947 and 1948 and the use of the word "has" in the quotation given above makes the proviso effective.

It was argued on the strength of this letter that the Minister had concluded that the proviso was applicable and that since it was not applicable in view of the fact that the aggregate amount of the deductions which had

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been allowed in respect of depreciation of the buildings was less than their cost to their former owner the proviso was irrelevant and that the Minister in taking an irrelevant matter into account had not acted on proper principles. In my opinion, there is no substance in this submission. In the first place, it is plain that the language of the letter is not as precise as it might have been. It is obvious, of course, that the facts of this case do not bring it within the operation of the proviso. Its prohibition against the allowance of any further deduction in respect of depreciation cannot take effect until the Minister is satisfied that two conditions exist, firstly, that there was a direct or indirect controlling interest within the meaning of the proviso and, secondly, that the aggregate amount of the deductions in respect of depreciation which have been allowed is equal to or greater than the cost of the assets to the former owner or owners. It is only when the Minister is satisfied that both of these conditions exist that the proviso applies in the sense that it comes into operative effect which means, of course, that the Minister has no discretion to allow any further deduction. That being so, it is plain that when the writer of the letter said that it had been concluded that the proviso was applicable he could not have meant literally what his letter said, for if it had been so concluded the Minister would not have had any right to allow any further deduction. Since the writer of the letter could not have meant what his words said the true meaning of his letter must be sought. If it is read as a whole it becomes reasonably clear that all that the writer meant to tell the respondent was that since there was a controlling interest of the kind mentioned in the proviso the proviso was "applicable" or "effective" in the sense that the buildings had been acquired by the new owner under circumstances of controlling interest that brought them within the purview of the policy embodied in the proviso and that, therefore, the depreciation allowance would be based on the cost of the buildings to their former owner. I must say that I see nothing irrelevant or improper in this statement or the action that was taken.

It seems to me that after the former section 5(*a*) of the Act was repealed and the opening words of section 6(*n*) were enacted it would have been competent for the Minister,

even if there had not been any proviso, to do exactly what he did. In cases where he found that assets had been acquired under circumstances where there was a controlling interest within the meaning of the proviso he could, even if there had been no proviso, have accomplished through the exercise of his discretion exactly the same policy as that which is embodied in the proviso. If in such cases he had continued to allow only the same deductions in respect of depreciation as he had allowed previously I cannot see how it could reasonably have been argued that his allowances were not within his discretion. Indeed, it seems to me that Parliament deliberately changed the law in order to enable the Minister to take such a course of action as that which he took in this case without running the risk of having it set aside as was done in the *Pioneer Laundry* case (*supra*) under a different state of the law.

That being so, I am unable to find any reason for thinking that after the proviso was enacted the Minister was precluded from doing what he could have done if there had been no proviso.

If the Minister's assessment officers, including the writer of the letter, thought that the existence of a controlling interest within the meaning of the proviso made it obligatory to base the depreciation allowance on the cost of the buildings to their former owner they were in error in so thinking. The proviso gives no such direction to the Minister and does not prescribe any such base or, indeed, any base. It is silent on the matter, which is consistent with the fact that the allowance of deductions in respect of depreciation is expressly left to the discretion of the Minister by the opening words of the section. But the letter does not say that the Minister was bound by the proviso to take the proposed course. To have said that would have implied a denial of the Minister's discretion under the opening words of the section and the substitution of a statutory obligation under the proviso. No such implication should be imputed to the writer of the letter and no such meaning should be read into it. What the letter in effect said was that the proposed action would be taken because of the proviso. That is a different thing from saying that the proviso compelled the proposed action.

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Thus, there is no justification in the letter for finding that the Minister did not exercise his discretion on proper principles.

It is important to appreciate what the proviso did and what bearing it had on the situation under review. It set a top limit to the total amount of deductions in respect of depreciation that could be allowed in the case of assets acquired under the circumstances specified in it. When the aggregate of these deductions reached the cost of the assets to their former owner no further allowance of deductions was to be made and the Minister's discretion to allow deductions came to an end. The proviso clearly embodies a policy deliberately adopted by Parliament to restrict the allowance of deductions in respect of depreciation in the case of assets acquired under the circumstances specified in the proviso to the cost of such assets to their former owner. Thus, while the proviso does not direct the Minister to base his allowance of deductions in respect of the depreciation of such assets on their cost to their former owner there is nothing in the proviso or elsewhere that precludes him from using such a base. Moreover, the fact that the proviso does not apply in this case, in the sense that its prohibition is not operative for the reason already explained, does not mean that it is devoid of effect and must be totally disregarded, as counsel for the respondent contended and Mr. Fisher decided. On the contrary, the Minister must consider the proviso before he deals with a claim for deduction in respect of depreciation. Each year when such a claim is made it is the duty of the Minister to determine whether the proviso applies or not. If he is satisfied that the assets were acquired under circumstances that bring them within the purview of the policy embodied in the proviso he must then determine whether the top limit of the permissible allowances of deduction in respect of depreciation of such assets has been reached. If it has not, he knows that the total amount of depreciation deduction that may still be allowed in respect of such assets is the difference between the aggregate of the deductions which have been allowed and the cost of such assets to their former owner. It is in respect of this balance that he must exercise his discretion. Thus, each year his attention is directed to the policy of the

proviso and he must pay attention to it. Likewise, it seems to me that the Court ought not to adopt any interpretation of the proviso that flouts the policy that underlies it.

When the Minister after determining that under the proviso there is still a difference between the aggregate amount of deductions in respect of depreciation of the assets in question which have been allowed and their cost to the former owner so that the proviso has not yet operative effect and his discretion to allow deductions is still vested in him up to the amount of the difference how can it possibly be said that he must not base his allowance of a deduction on the cost of the assets to their former owner? To say so is to deny his discretion. Similarly, by what right can the new owner of the assets assert, as Mr. Fisher did, that the allowance must be based on the cost of the assets to him. To admit this is to say, as the Income Tax Appeal Board in effect did, that the Minister's actual exercise of his discretion is reviewable by the Court and that it may substitute its opinion of what should be done, as the Income Tax Appeal Board in effect did, for the Minister's exercise of his discretion. There is no judicial authority of which I have any knowledge that sanctions any such review or substitution.

For the same reason, I am unable to agree with the submission that the Minister in the exercise of his discretion must act in accordance with the requirements of sound accounting practice and, therefore, relate his allowance of deductions in respect of depreciation of the buildings to their cost to the respondent according to its books. This submission really requires no answer for it is tantamount to substituting the accountant's opinion for the Minister's discretion. There is no necessary relationship between the amount of deduction in respect of depreciation of an asset that may be set up in the taxpayer's books and the amount of the deduction from what would otherwise be taxable income that may be allowed. The former is for the accountant and the taxpayer, the latter for the taxing authority under the taxing Act. Thus accounting practice must give way to the discretion that Parliament has vested in the Minister.

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This does not mean that there are no limitations on the Minister's exercise of his discretion. He must not act arbitrarily. This, indeed, is inherent in the concept of discretion itself as was stated by the House of Lords in *Sharp* v. *Wakefield* (1) where Lord Halsbury L.C. said, at page 179:

> "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be according to the rules of reason and justice, not according to private opinion: *Rooke's* case (5 Rep. 100, a); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself: *Wilson* v. *Rastall* (4 T.R. at p. 754).

This statement is really a definition of what discretion is. There was nothing in the Minister's action that offended against the precepts of this statement. How could it be said that it was arbitrary, vague or fanciful on the part of the Minister to base his allowance of a deduction in respect of the depreciation of the buildings on their cost to their former owner when Parliament itself enacted that such cost was the top limit of the deductions in respect of their depreciation that could be allowed. If I were called upon to express an opinion on the Minister's actual course of action I would have no hesitation in saying that it was more consistent with the policy of Parliament, as embodied in the proviso, than the action desired by the respondent and approved by the Income Tax Appeal Board would have been. But the Court is not called upon to express any such opinion for Parliament has expressly preferred the opinion of the Minister in the exercise of his discretion. If he has actually exercised his discretion the Court has no right to interfere with it even if it would have come to a different conclusion if the matter had been one for it to decide.

Thus, I see no reason for finding that the Minister acted on wrong principles in exercising his discretion as he did. I do not think that the letter proves that the Minister was mistaken in his interpretation of the proviso. On the contrary, the action taken was in harmony with it. But even if he had been mistaken this would not have made his action an improper one for the Court is concerned with the

(1) [1891] A.C. 173.

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question whether what he did was within his discretion to do rather than with why he did it. It is quite possible that the reason for doing a thing may be challenged but the thing done is proper. Many a judgment has been affirmed on appeal although the reasons given for it were erroneous.

Moreover, there are, I think, sound reasons for saying that when Parliament made the changes I have referred to it made the discretion which it vested in the Minister an administrative discretion rather than a quasi-judicial one. In that view, the considerations that may have moved him to the actual exercise of his discretion is not a matter for inquiry by the Court. There are numerous decisions of outstanding authority that establish this principle: *vide*, for example, *Julius* v. *Lord Bishop of Oxford* (1), and, especially, *Allcroft* v. *Lord Bishop of London* (2).

In my judgment, there is no justification for finding that the Minister's action in this case was otherwise than in accord with the proper exercise of his discretion.

For the reasons given, the appeal herein must be allowed with costs and the assessment appealed against restored.

Judgment accordingly.

BETWEEN:

THE QUEEN on the Information of the Attorney General of Canada .. PLAINTIFF;

AND

PETER BOYD COWPER, ALFRED ABRAHAM LESSOR and ETHEL LESSOR, wife of ISIDORE LESLIE WEINER, and LEOPOLD PARE ..... DEFENDANTS.

1951

June 11-15 18, 19, 25-27 Aug. 13-16, 20-23

1953

Mar. 6

Expropriation—Expropriation Act, R.S.C. 1927, c. 64, ss. 9, 23—Claim to compensation assignable without acquiescence of the Crown.

The plaintiff expropriated property on University Street in Montreal. The action was taken to have the amount of compensation payable to the owner determined by the Court.

Held: That a claim to compensation for land taken under the Expropriation Act may validly be assigned, without the acquiescence of the Crown and that when notice of the assignment has been duly given to the Crown the assignee is the person entitled to recover the compensation. *Chipman* v. *The King* (1934) Ex. C.R. 152 at 161 not followed.

(1) (1880) 5 A.C. 214. (2) [1891] A.C. 666.

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INFORMATION by the Crown to have the amount of compensation money payable to the owner of expropriated property determined by the Court.

The action was tried before the President of the Court at Montreal.

J. A. Prud'homme Q.C. for plaintiff.

A. Forget for defendants Cowper, Lessor and Weiner.

J. Martineau Q.C. and *L. P. Gagnon* for defendant Pare.

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

The PRESIDENT now (March 6, 1953) delivered the following judgment.

The information exhibited herein shows that the land described in paragraph 2 thereof was taken by His late Majesty the King under the Expropriation Act, R.S.C. 1927, chapter 64, for the purpose of a public work, namely, a postal station, and that the expropriation was completed by depositing a plan and description of the land of record in the office of the Registrar of Deeds for the Registration Division of Montreal in the City of Montreal, in which the land is situate, on May 26, 1947, pursuant to section 9 of the Act. Thereupon the land became vested in His late Majesty and the defendants ceased to have any right, title or interest therein or thereto.

The parties have been unable to agree upon the amount of compensation money to which the defendants are respectively entitled and these proceedings are brought for an adjudication thereof. The parties are far apart. By the information the plaintiff offered the defendants the sum of $159,146.04 without apportioning it among them. By his amended statement of defence the defendant Cowper claimed $298,980 as the value of his interest and estate in the expropriated property and $133,100 as damages making a total claim of $432,080. The claim of the defendants Lessor and Weiner or of the defendant Pare was finally put at $95,930.44 as either that of the defendant Pare under an assignment from the defendants Lessor and Weiner or that of the defendants Lessor and Weiner if it should be held that the assignment was not binding. Thus

the claims of the defendants come to a total of $528,010.44 for a property which the defendant Cowper purchased on May 16, 1944, for only $80,000.

The expropriated property is on the west side of University Street in Montreal just a short distance south of St. Catherine Street. It has a frontage of 42.95 feet on University Street and a depth of 94.6 feet, giving it a total area of 4,024 square feet. Immediately north of it there is a 15-foot lane and to the west of it a 10-foot lane. On the property there was a 3-storey building known as the Oxford Hotel. This had been converted from an old private residence built in 1881. The front of the first storey was of stone and the rest of brick construction. In the north-west corner of the ground floor there was a tavern 17 feet by 66 feet, known as the Oxford Tavern, and on the rest of it a dining room, grill and bar. On the second floor there were two private dining rooms. On the rest of the floor and on the third floor there were rooms. The roof was flat and of tar and gravel finish. Under the building there was a basement and a stone foundation.

At the date of the expropriation the property, carrying municipal numbers 1250 and 1254 University Street, stood in the name of the defendant Cowper subject to certain mortgages and arrears of taxes and subject to a lease of the Oxford Tavern to the defendants Lessor and Weiner.

I shall deal first with the claim of the defendant Cowper. He purchased the property on May 16, 1944, from Patrick W. Rafferty for $80,000, of which $20,000 was payable in cash, the balance of $60,000 representing charges and liens the payment of which he assumed, namely, $45,000 to the Estate of William J. Rafferty, $6,000 to John P. Nugent and $9,000 of consolidated taxes to the City of Montreal. On the same date he bought from the Oxford Hotel Company Limited the whole of its business for $10,000 in cash. This was carried on under the names of The Oxford Hotel, the Oxford Grill and the Oxford Tavern. The purchase included the good will of the business, the right to operate the Company's licences, including the tavern licence, and all the furniture and furnishings on the premises. The story of how the defendant Cowper, who was a real estate agent, came to make these purchases is an unusual one. He knew Mr. Rafferty, the owner of the property and the

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shares in the Company, and kept after him to sell. The condition of the property was poor and the business was not doing well. Finally, Mr. Rafferty who was not anxious to sell gave him an option to buy. This was not exclusive to him. In that sense it was a listing for sale as well as an option to buy. The defendant Cowper tried to find a purchaser but was unable to do so, but the more he considered the property the more favorable it looked to him and he decided to buy it himself. But he did not have the necessary cash. The idea of selling the tavern business and renting the tavern premises to finance the purchase of the property and the hotel business then occurred to him. He got in touch with Mr. Maurice Audette, who dealt in the sale and purchase of taverns, and asked him to find a buyer. Mr. Audette introduced the defendant Lessor to him. After an examination of the tavern beer quotas the defendants Lessor and Weiner agreed to pay $43,000 for the tavern business, including the licence, and a rental of $250 per month for the tavern premises. Thereupon on May 16, 1944, the defendant Cowper sold the tavern business, including the licence, to them for $43,000, of which $30,000 was payable in cash and $13,000 in notes. On the same date he executed a lease of the tavern premises to them at a rental of $3,000 per year, payable at $250 per month, for a period of 5 years from May 17, 1944, with the lessees having the privilege of continuing the lease for a further period of 5 years from May 1, 1949. With the $30,000 cash thus obtained the defendant Cowper was able to make the cash payments of $20,000 to Mr. P. W. Rafferty for the property and $10,000 to the Oxford Hotel Company Limited for the hotel business, including the tavern licence. All four transactions went through on the same day. On their conclusion the defendant Cowper found himself the owner of the property, subject to the charges and liens assumed by him and the lease of the tavern premises, the owner of the hotel business, less the tavern business, the landlord of the tavern premises and the payee of $13,000 in notes, without having put up any cash of his own.

Then, although he had never been in the hotel business previously he began to operate the Oxford Hotel. This business consisted of renting rooms on the two upper floors, 28 in number, and running a dining room and grill. In

connection with this he acquired a cafe licence, which authorized him to sell beer, wines and liquors with meals, although the consumption of meals was not insisted on. The acquisition of this licence cost him $3,500, which came out of the proceeds of notes from the defendants Lessor and Weiner. As he realized the notes and took in receipts from the hotel business he renovated the premises and made certain alterations and repairs, to which further reference will be made later, and bought additional furniture, furnishings, equipment and supplies. All the money for these purposes came from the proceeds of the notes and the receipts of the business.

In addition to running the hotel the defendant Cowper also operated as a real estate broker. He incorporated Montreal Realties Limited and ran it from one of the rooms on the second floor of the hotel, which he used as his business office. The hotel business was not a profitable one. The annual statements show that the hotel was operated at a loss in every year except one. The defendant Cowper sought to explain this as due to the need for extensive alterations and repairs because of its run down condition. But against this there is the fact that there was no charge in the accounts for the costs of management.

The defendant Cowper was advised of the expropriation by a letter dated June 2, 1947, and made some enquiries with a view to re-locating himself but was unable to do so. He remained in occupation of the property and continued to run the hotel business and collect the rent from the tavern until the end of December, 1948. On December 6, 1948, he sold his cafe licence for $30,000 cash. Then he closed the hotel business but remained in occupation of the property until February 3, 1949.

The plaintiff has paid the defendant Cowper the sum of $110,000 on account of his claim in two payments, one of $60,364.27 on May 20, 1948, made up of $7,364.27 to himself and the City of Montreal in payment of the outstanding consolidated taxes and $53,000 to himself, and the other of $49,635.73 on May 26, 1948, made up of $39,021.37 to himself and the Estate of William J. Rafferty and $10,614.36 to himself. As I understand it, the charges against the property in favour of the Rafferty Estate and in favour of the City of Montreal for taxes have been paid

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leaving the defendant Cowper entitled to whatever compensation is awarded to him for his interest and estate in the property, less the sum of $110,000 already paid to him.

The fact that the defendant Cowper was able to finance his purchases of the property and the hotel business in the manner described must not be allowed to influence the Court in determining the amount of compensation money to which he is entitled. If he got a bargain, as he said he did, he is entitled to the benefit of it. He has the right to receive the value of the property to him as at the date of is expropriation.

It is, of course, well established that in estimating such value the Court must consider the most advantageous use, both present and prospective, to which the property could be put but it is only the present value as at the date of the expropriation of its prospective advantages that is to be determined: *The King* v. *Elgin Realty Limited* (1).

There is no doubt that the expropriated property was well located and that its site was a valuable one. It was near the centre of the city and close to the big retail stores on St. Catherine Street. Moreover, University Street was becoming a commercial street. But there was a difference of opinion on whether the best use was being made of the site. The defendant Cowper and his witnesses thought it was an excellent location for a hotel business such as had been carried on there. Mr. H. Frappier of the La Salle Hotel did not think that it could really be said that the building was a hotel. It was rather a cafe with rooms on the upper floors. And Mr. Therien considered that the site was too small for a hotel and that its best use would have been for a first-class restaurant with rooms above. Mr. Pitt was also critical of the use made of the property. Originally it was a good location for a small hotel but now the property could have been put to better use, with offices on the upper floors.

Opinion evidence of the value of the property was given for the defendant Cowper by the defendant himself and his experts, Mr. J. H. Hand, Mr. C. S. W. Baker and Mr. R. D. Towle, and for the plaintiff by Mr. E. Therien and Mr. J. Pitt.

(1) [1943] S.C.R. 49.

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[The President then reviewed the evidence of the value of the property given by the above witnesses and the evidence of damage by disturbance and held.]

On the evidence as a whole, I have come to the conclusion that an award of $150,000 would be ample compensation to the defendant Cowper for his estate and interest in the expropriated property. This will amply cover every factor of value of it to him that could properly be taken into account including his claim for disturbance. I, therefore, estimate the value of his estate and interest in the property accordingly.

Counsel for the defendant Cowper urged that the Court should grant an additional allowance of 10 per cent for forcible taking. I dealt with this vexatious question at length in *The Queen* v. *Sisters of Charity of Providence* (1). There I reviewed the cases and came to the conclusion that the leading Canadian case on the subject was *The King* v. *Lavoie* (December 18, 1950, unreported). In that case Taschereau J., delivering the unanimous judgment of the Supreme Court of Canada, laid down the following rule:

> Le contre-appellant soumet en second lieu, qu'il a droit à un montant supplémentaire de 10 pour cent de la compensation accordée pour dépossession forcée. Ce montant additionnel de 10 pour cent n'est pas accordé dans tous les cas d'expropriation, et ce n'est que dans les causes où il est difficile par suite de certaines incertitudes dans l'appréciation du montant de la compensation, qu'il y a lieu de l'ajouter à l'indemnité (*Irving Oil Co.* v. *The King* (1946) S.C.R. 551; *Diggon Hibben Ltd.* v. *The King* (1949) S.C.R. 712). Ici, on ne rencontre pas les circonstances qui existaient dans les deux causes que je viens de citer et qui alors ont justifié l'application de la règle. Il n'a pas été demontré qu'il existait des éventualités inappréciables et incertaines, impossibles à évaluer au moment du procès.

While the term "certaines incertitudes" is not precise, it seems clear that the uncertainties which Taschereau J. had in mind were those of the kind that existed in the *Irving Oil Co.* and *Diggon-Hibben Ltd.* cases, in both of which there was disturbance. In my judgment, this case falls within the class of cases mentioned and I award the 10 per cent additional allowance accordingly. In doing so I repeat the opinion that I have expressed in many cases that, when the Court has made an adequate award of compensation to the former owner of expropriated property

(1) [1952] Ex. C.R. 113 at 131.

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after taking into account all the factors of its value to him that ought to be considered, as has been done in the present case, the award of an additional allowance for compulsory taking is an unwarranted bonus. Under the circumstances, I stress the fact that I grant the additional allowance only because of the decisions of the Supreme Court of Canada that I have mentioned. This brings the total amount of the award to the defendant Cowper up to $165,000, of which $110,000 has already been paid to him, leaving $55,000 as the amount of compensation money to which he is still entitled.

There remains the question of interest. The defendant Cowper remained in undisturbed possession of the expropriated property until February 3, 1949, and continued to collect the monthly rent for the tavern premises until then, first from the defendants Lessor and Weiner and then from the defendant Pare. In accordance with the established practice of the Court he is not entitled to any interest up to that date but from February 3, 1949, and up to this date he will be allowed interest on $55,000 at the rate of 5 per cent per annum.

Although the defendant Cowper put his claim for compensation at $432,090, an excessive amount, no serious attempt was made to establish it at such an amount and it did not unduly prolong the trial. Thus, I see no reason for denying him any costs. He will, therefore, be entitled to costs to be taxed in the usual way.

I now come to the alternative claim of the other defendants. But before I deal with it I should set out certain facts relating to them and outline the circumstances under which the defendant Pare became a party to the proceedings. The defendants Lessor and Weiner went into occupation of the Oxford Tavern premises almost immediately after May 16, 1944, the date of their purchase of the business and the lease. They made certain alterations, to which further reference will be made later, and carried on the business with increasing profits, as the beer quotas were successively increased in 1945 and 1946, until a short time after they sold it to the defendant Pare on July 29, 1947.

The defendant Lessor first heard of the expropriation a day or so after June 2, 1947, when the defendant Cowper showed him the letter of that date to which reference has

been made. He knew then that it was only a matter of time until he would be called upon to vacate the premises and find another place to which to transfer the tavern licence. After he heard of the expropriation he made only one enquiry about other premises, namely, the cafe known as the Blue Bird, just a short distance south of the Oxford Tavern. He did not try to rent any other place. Nor did he think of selling the Oxford Tavern until Mr. Audette, to whom reference has already been made, brought him an offer from the defendant Pare, dated July 21, 1947, to buy the business, including the tavern licence, the unexpired portion of the lease and the movables for $90,000, and asked him whether he was interested in selling. He studied the offer for three days and decided to accept it. It is clear that he had made no move to sell his business. It was the defendant Pare who was looking for a tavern and got in touch with Mr. Audette. Then under a deed of sale, dated July 29, 1947, and passed before Notary Herschorn, the defendants Lessor and Weiner sold the business to the defendant Pare for $90,000. The sale covered the business carried on under the name and style of the Oxford Tavern, comprising the good will of the business, the rights to the tavern licence and the furniture, furnishings and equipment, and also the rights of the defendants Lessor and Weiner to the lease of the tavern premises and the privilege of its renewal. The defendants Lessor and Weiner undertook to obtain a consent from the defendant Cowper to the transfer of the lease and it was a condition of the sale that the Quebec Liquor Commission should consent to the transfer of the tavern licence.

When the parties to the deed of sale appeared before Notary Herschorn the defendant Pare signed a memorandum in which he declared that he was "aware of a possibility of an expropriation by the Dominion Government of the buildings of which the Oxford Tavern forms part". On the day after the deed of sale, namely, July 30, 1947, the defendant Pare went with the defendant Lessor to see the defendant Cowper to obtain his consent to the transfer of the lease. He told them that the property had been expropriated, telephoned his solicitor, and then, in their presence, dictated a letter addressed to the defendants

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Lessor and Weiner in which he consented to transfer of the lease to the defendant Pare with the following proviso, namely:

> that Mr. Pare, the purchaser of your business, is aware of the fact that I have been given notice of expropriation by the Department of Public Works of the property situated at 1250-1254 University Street, and there shall not be any guarantee that he can remain on the premises, for the reason that the site is vested in His Majesty the King at the present time.

There is thus no doubt that on July 30, 1947, if not on the day before, the defendant Pare knew that the property had been expropriated and that his occupancy of the premises would be only a permissive and precarious one. Nevertheless, after obtaining the defendant Cowper's consent to the transfer of the lease with the proviso mentioned, he and the defendant Lessor went to the Montreal office of the Quebec Liquor Commission to arrange for the transfer of the tavern licence. There they saw Mr. L. Mouillard, the Chief of the Permits Division, presented to him the deed of sale of July 29, 1947, the original lease to the defendants Lessor and Weiner and the consent to its transfer, and applied for a transfer of the tavern licence to the name of the defendant Pare. Mr. Mouillard then showed the defendants Lessor and Pare a letter from Mr. J. Sommerville, the secretary of the Department of Public Works, to the general manager of the Quebec Liquor Commission, dated July 19, 1947, calling his attention to the fact that the premises, bearing Civic No. 1250 University Street, Montreal had been expropriated by the Crown on May 26, 1947, and that "the present tenants will be allowed to continue in occupation until April 30th next, after which date the Department does not desire that any further licences be issued in the aforesaid premises".

This information did not deter the defendant Pare. Although he knew that the property had been expropriated and now belonged to the Crown and that he could not expect to be permitted to occupy the premises after April 30, 1948, he signed the application for the tavern licence. On August 19, 1947, he was notified that his application had been approved and that a licence up to April 30, 1948, would be issued to him. Thereupon, on August 25, 1947, he took possession of the Oxford Tavern. The defendant Lessor paid the rent for it up to the end of August, 1947, and thereafter the defendant Pare paid it.

After the defendant Pare went into possession of the tavern premises the defendant Lessor temporarily gave up his occupation as a tavern keeper and went into the grocery business for about a year. Then he began to look around for another tavern and, on March 21, 1949, located himself in a tavern on Stanley Street for which he paid a rental of $500 per month.

The defendant Pare remained in occupation of the Oxford Tavern and paid rent to the defendant Cowper until the end of January, 1949. But sometime in 1948 he became dissatisfied with his position and consulted his solicitor, the late Mr. R. Dufresne. Mr. Dufresne then called the defendant Lessor to his office, complained that when he sold the tavern business he had no right to do so and threatened him with proceedings to rescind the sale. The defendant Lessor then consulted his solicitors and left it to them to negotiate an agreement with the defendant Pare's solicitor. The result of the negotiations was an agreement in writing between the defendants Lessor and Weiner and the defendant Pare, dated January 22, 1949, whereby the defendants Lessor and Weiner transferred, ceded and abandoned to the defendant Pare all their right, title and interest in and to an indemnity due by His Majesty the King to the defendants Lessor and Weiner because of the expropriation. It was also agreed that the defendants Lessor and Weiner would use their best efforts to have the defendant Pare added as a party to these proceedings.

Pursuant to this agreement a motion was made on behalf of the defendants Lessor and Weiner before Angers J. to have the defendant Pare joined as a defendant in this action and to have the defendants Lessor and Weiner placed out of Court. This motion was made at the request of the defendant Pare. It was heard on January 28, 1949, and on February 16, 1949, Angers J. ordered that the defendant Pare be joined as a defendant. An appeal from this order was taken to the Supreme Court of Canada. There a motion to quash the appeal for want of jurisdiction was granted by the Supreme Court of Canada on April 12, 1949, but by consent of the parties it was declared "that no res judicata attaches to the order of the Exchequer Court, beyond the terms of the formal order."

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On March 25, 1948, counsel for the plaintiff, represented by the Minister of Public Works, addressed a letter to all the defendants herein requesting under section 26 of the Expropriation Act "a true statement showing the particulars of any estate and interest and every charge, lien or encumbrance to which the same is subject" which each defendant might have or claim to have in the expropriated property. The letter also requested that "the above statements should also show the claim made by any of you in respect of the estate or interest therein described."

I have already referred to the reply made on behalf of the defendant Cowper to this request in which he put his claim for the land and building at $180,000. The defendants Lessor and Weiner replied to the request on March 29, 1948, as follows:

> With reference to your letter of March 25th signed by Mr. Prud'homme in connection with the expropriation of the Oxford Hotel property by His Majesty's Government, I wish to advise that Mrs. Isidore L. Weiner and the undersigned sold the Oxford Tavern on August 20, 1947, to Mr. Leopold Pare who is the present owner of the Tavern only and holds the lease which was given to me in 1944 for a period of ten years. This lease was transferred by Mr. Peter Boyd Cowper to Mr. Pare at the time the sale was made.
>
> We hold no lien on said property but there is a balance of sale of approximately $15,000 in connection with the sale of said Tavern owing to Mrs. (Ethel) I. L. Weiner and myself by Mr. Leopold Pare.

But the defendant Pare replied on April 15, 1948, giving particulars of his interest under the deed of sale of July 29, 1947, and of his claim by reason of the expropriation, amounting to $170,212.69. This claim was based on a report made to him by his real estate adviser and expert, Mr. G. Desaulniers, dated April 14, 1948, (Exhibit 40). He estimated the amount of the damages caused to the defendant Pare by the expropriation at this amount. After making this claim the defendant Pare remained in occupation of the Oxford Tavern premises and paid rent for them to the defendant Cowper up to the end of January 1949. Subsequently, namely, on January 25, 1950, he filed an amended claim, dated January 18, 1950, for $96,553.34, which was made on the following basis:

> Réclamation amendée de M. Léopold Paré, No. 746 Avenue Allard, Verdun, par suite de l'expropriation de la propriété connue comme étant l'Hotel Oxford et située aux Nos. 1250 et 1254 de la rue Université, à Montréal, laquelle a entraîné la fermeture du commerce de taverne appartenant à M. Léopold Paré et exercé audit No. 1254, et connu sous

le nom de "Oxford Tavern", la perte du droit du bail desdits lieux qui se terminait le premier mai 1954 et l'obligation de déménager et de réaménager de nouveau le dit commerce dans un autre local.

The claim was put on this basis notwithstanding the assignment of January 22, 1949. Finally, he amended his claim to $60,337.02 as the value of the lease and $21,480.75 by way of damages, together with $12,512.67 for forcible taking, making a total of $95,930.44.

In view of the facts which I have outlined it is obvious that the defendant Pare has no independent claim of his own against the Crown. On May 26, 1947, the date of the expropriation, the defendants Lessor and Weiner ceased to have any interest in the lease of the tavern premises and the defendant Pare could not acquire any interest from them. Therefore, there is no support for his claim for damages due to the expropriation. It was completed almost two months before he offered to buy the tavern business. As I view the evidence, it seems manifest that the defendant Pare was primarily interested in the tavern licence. There is support for this inference in the fact that when he was in the notary's office on July 29, 1947, he declared in writing that he knew that the property might be expropriated. Then on the following day he knew definitely from the defendant Cowper that it had already been expropriated and that the defendants Lessor and Weiner had no unexpired term to sell. And on the same day he knew from Mr. Mouillard that he would not be permitted to stay on the premises after April 30, 1948. Yet, although he knew these facts, he made no attempt to rescind his contract of sale but, on the contrary, approved it. In my opinion, he was willing to take a chance on finding another location to which he could transfer his valuable tavern licence. It was not until later in 1948 that he began to be nervous about finding another location and his solicitor threatened the defendant Lessor with recission proceedings, which resulted in the assignment of January 22, 1949.

Thus, the position of the defendant Pare is that if he has any claim against the Crown it can only be by virtue of the assignment to him of the rights of the defendants Lessor and Weiner. He cannot have any greater right than they had. He has no independent right of his own. It was not until after the trial had proceeded for several days

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that his became clear and was conceded by counsel on his behalf. Up to this time, there was a great deal of evidence that was irrelevant to the real issue, namely, the amount of compensation to which the defendants Lessor and Weiner were entitled by reason of the expropriation of their leasehold interest in the tavern premises. Therefore, as I see it, all the evidence of the defendant Pare's course of action is irrelevant. What he did has no bearing on the rights of the defendants Lessor and Weiner. His acts cannot in any way affect the amount of their entitlement. The Court is, therefore, not concerned with his efforts to find a new location. Nor is it concerned with the amount of rent he had to pay for his new premises on Phillips Square or whether he could have found a better location or whether it was a better or worse location than the one on University Street. And there is no relevancy in the evidence relating to his expenditures in his new premises or the amount of the profits of his business there as compared with those on University Street. Nor can the fact that counsel for the defendants Lessor and Weiner applied to have the evidence adduced on behalf of the defendant Pare considered as evidence on behalf of the defendants Lessor and Weiner affect the matter. The quantum of compensation to which the defendants Lessor and Weiner became entitled on May 26, 1947, when their leasehold interest was taken from them, cannot be affected by anything that the defendant Pare did.

That being so, his claim must be confined to such rights as he may have under the assignment of January 22, 1949, and cannot exceed the amount of compensation to which the defendants Lessor and Weiner were entitled. This raises an important question of law. It was contended for the plaintiff that the assignment from the defendants Lessor and Weiner to the defendant Pare, while valid as between them, is not binding on the Crown and that the defendant Pare has no status as a party to these proceedings, notwithstanding the order made by Angers J. I must say that when this submission was first made I was inclined to agree with it but after further consideration I have reached a different conclusion.

The question whether a right to compensation for land taken under the Expropriation Act is assignable and, if so, whether the assignment is binding on the Crown is not free from difficulty. Counsel for the plaintiff submitted that the answer to it must be in the negative. He relied upon the decision of this Court in *Chipman* v. *The King* (1) where Angers J. held that "on grounds of public policy a claim against the Crown, in the absence of acquiescence, is not assignable". This opinion was based on several authorities, one of which was the statement of Burbidge J. in *The Queen* v. *McCurdy* (2). There the Court gave effect to the assignment of a claim for compensation for the general benefit of creditors where all the parties were before the Court and the Crown raised no objection to the assignment. At page 319, Burbidge J. said:

> In Canada the practice of the Crown is, so far as I know, against the recognition of the assignment by one person to another of a claim against it. By the third rule of the rules prescribed by the Treasury Board (February 1, 1870), under sanction of His Excellency-in-Council, it is provided in reference to the mode of acquittal of warrants for the payment of money that no power of attorney which partakes of the character of an assignment of the moneys to another party, or purports to be irrevocable or in any respect qualified, will be received by the Government for the payment of money. At the same time the practice has always been, I think, to give effect to transfers by operation of law, or by will, of claims against the Crown, and, although I do not recall any case in point, I have no doubt that the same course would be followed in respect of a voluntary assignment for the general benefit of creditors. It is, I think, free from objection and eminently fair and just that effect should be given to such assignments, but that perhaps is not conclusive. In *Flarty* v. *Odlum* 3 T.R. 681, Buller, J., while concurring with the other members of the Court that, on grounds of public policy, the half-pay of an officer is not saleable and cannot be assigned, expresses the view that salary accrued due might be assigned; and in the *Queen* v. *Smith et al* 10 Can. S.C.R. 66, Mr. Justice Strong says, that had it appeared from the proof in that case that there had been an equitable assignment to the suppliants of the payments to arise from the performance of the work by the original contractors, the former would have been undoubtedly entitled to recover in respect of work actually performed by the latter; for such an equitable assignment would have been entirely free from objection, either upon the general law, or upon any provision contained in the contract, and the record would have been properly framed for relief upon such a state of facts.

Another decision on which Angers J. relied was that of Burbidge J. in *Powell* v. *The King* (3) where he held that on grounds of public policy the salary of a public officer was

(1) [1934] Ex. C.R. 152 at 161. (2) (1891) 2 Ex. C.R. 311.
(3) (1905) 9 Ex. C.R. 364.

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not assignable by him and that neither the Librarian of Parliament nor the Auditor-General of Canada had power to bind the Crown by acknowledging explicitly or implicitly an assignment of salary by an officer or clerk employed in the Library of Parliament and also expressed the opinion that even if the Judicature Act of Ontario gave an assignee of certain *choses in action* a right to sue in his own name such an Act could not bind the Crown in right of Canada.

In my view the statement of Angers J. in the *Chipman* case (*supra*) is too wide. The general statement that it is against public policy that claims against the Crown should be assignable, unless there is acquiescence by the Crown, cannot be supported on grounds of reason. There is no doubt that it is contrary to public policy to allow public officers to assign their salaries: *vide Flarty* v. *Odlum* (1); *Arbuckle et al* v. *Cowtan* (2); *Powell* v. *The King* (3). But there are other classes of claims against the Crown where there are no considerations of public policy requiring a ban against their assignment. In such cases it makes no difference to the Crown whether they are assigned or not and the only question to be considered is whether the assignment is valid under the law of the province in which it was made. The dictum of Strong J. of the Supreme Court of Canada in *The Queen* v. *Smith et al* (4) to which Burbidge referred in the *McCurdy* case (*supra*) recognizes this.

In the United Kingdom there are several cases which show that there is nothing to prevent the assignees of certain *choses in action* from having the same right to present a petition of right against the Crown as the assignors themselves would have had. They are referred to by Robertson on Civil Proceedings by and against the Crown in the following statement, at page 366:

> As to assignees, in *re Rolt* (1859), 4 De G. & J. 44, was a petition of right by one of the assignees of a bankrupt contractor, on a contract of his completed by them by arrangement with the Admiralty (compare the similar case of *Broadbent & Co.* v. *R.* (1900), not reported), and in *Grays Chalk Quarries Co., Ltd.* v. *R.* (1900), not reported, we find a petition of right presented, without objection, by the mere assignees of a debt alleged to be due from the Admiralty to a contractor. *Imperial Supply and Cold*

(1) (1790) 3 T.R. 681.
(2) (1803) 3 B. & P. 321.
(3) (1905) 9 Ex. C.R. 364.
(4) (1883) 10 Can. S.C.R. 1 at 66.

Storage Co., Ltd. v. *R.* (1904), not reported, was a petition of right for damages for breach of a contract alleged to have been assigned to the suppliants with the consent of the War Department.

And it was settled by the Court of Appeal in *Dawson* v. *Great Northern and City Railway Company* (1) that a claim under section 68 of the Lands Clauses Consolidated Act, 1845 for compensation in respect of an interest in land that had been injuriously affected within the meaning of the section was not a claim for damages for a wrongful act but a claim of a right to compensation for damage which might be done in the lawful exercise of statutory powers. It was thus a legal *chose in action* within the meaning of section 25 of the Judicature Act and, therefore, capable of assignment so that the assignee could sue in his own name. The assignment was not a transfer of a mere right of litigation but was essentially a transfer of a right of property. It would follow, *a fortiori,* that a claim for compensation for land taken under section 68 is assignable.

Likewise, in Australia, there is no objection to the assignment of a claim against the Crown where no considerations of public policy are involved. In *Ex parte Patience; Makinson* v. *The Minister* (2) Jordan C.J. said:

> It is clear that moneys receivable from the Crown are assignable: *Alexander* v. *Duke of Wellington* 2 Russ & M. 35 at 64: unless they are inalienable upon some ground of public policy. If a plaintiff who had recovered against the Crown a judgment for the payment of money assigned his interest, I have no doubt that the assignment would be effectual to vest in the assignee rights to the money which would be enforceable against the Crown by the use of the appropriate procedure.

And later, at page 107, he followed the decision in *Dawson* v. *Great Northern and City Railway Company* (*supra*), saying:

> Rights to receive compensation moneys are alienable, and the authority liable to pay them cannot ignore alienations of which it has notice.

A similar view was taken in this Court by Audette J. in *The King* v. *Picard* (3). There he expressed the opinion that an assignment of compensation money under the Expropriation Act was good and valid. And in *The King* v. *Hye* (4), the validity and binding effect of an assignment of a right to compensation under the Expropriation Act

(1) [1905] 1 K.B. 260.
(2) (1940) 40 N.S.W. (S.R.) 96 at 103.
(3) (1916) 17 Ex. C.R. 452 at 454.
(4) (1921) 21 Ex. C.R. 76.

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came squarely before the Court. There the Crown had expropriated the right to flood certain property which belonged to V. He sold the property to H. together with his right to recover compensation from the Crown for the damage caused by the flooding and the expropriation of the easement to flood. In the proceedings to fix the compensation the Crown made H. the defendant. Counsel for the Crown contended that a claim for flooding of land could not be assigned and relied upon the statement of Fitzpatrick C.J. of the Supreme Court of Canada in *Olmstead* v. *The King* (1) that a claim against the Crown for damages for flooding could not be assigned. But Audette J. was of the view that the case before him did not come within the ambit of *Olmstead* v. *The King* (*supra*) and that the assignment of the claim for compensation from V. to H. was valid and that H. was entitled to the compensation. I agree with this view.

The situation is the same in the province of Quebec as in the common law provinces. Indeed, the ambit of assignability of *choses in action* is wider under Article 1570 of the Civil Code of Quebec than under the various Judicature Acts, or their equivalents, of the common law provinces.

Where property has been expropriated under the Expropriation Act it vests immediately in Her Majesty and all the right, title or interest of the former owner in or to the property is extinguished. But by section 23 of the Act it is converted into a claim to the compensation money which is made to stand in the stead of the property. The claim for compensation is, therefore, essentially a right of property and there is no sound reason why the Crown should have any right to question its assignment, if the assignment is otherwise valid as between the parties to it and due notice of it has been given to the Crown. I am, therefore, of the opinion that a claim to compensation for land taken under the Expropriation Act may validly be assigned, without the acquiescence of the Crown, and that when notice of the assignment has been duly given to the Crown the assignee is the person entitled to recover the compensation.

(1) (1916) 53 Can. S.C.R. 450 at 453.

In the present case the defendant Pare's solicitors sent a notice of the assignment, dated January 25, 1949, to the Attorney General of Canada. Consequently, in view of what I have said I find that the defendant Pare, being the assignee under the assignment of January 22, 1949, of the amount of compensation money to which the defendants Lessor and Weiner were entitled in respect of the expropriation of their leasehold interest, is the person entitled by law to receive the compensation and was properly made a party to these proceedings.

I now come to consideration of the amount of compensation to which the defendants Lessor and Weiner were entitled. Section 47 of the Exchequer Court Act, R.S.C. 1927, chapter 34, requires that the Court shall estimate the value of the expropriated property at the time when it was taken. This means that it must bring itself back, as far as it is possible for it to do so, to May 26, 1947, and view the situation as if the trial had taken place immediately after that date. The quantum of the owner's entitlement to compensation cannot be increased by reason of a rise in values after that date or decreased by reason of a fall. It cannot depend on either booms or depressions. Thus it seems to me that it would have been better and more consistent with principle if at the trial of this action I had taken a similar course to that which I took recently in the case of *The Queen* v. *Potvin* (1) and excluded all evidence of sales of property or rentals of taverns made subsequently to the date of the expropriation. But this does not mean exclusion of the fact that at the date of the expropriation land values were rising. This must be kept in mind.

It is in the light of these considerations that the value of the unexpired portion of the lease of the Oxford Tavern premises as at May 26, 1947, should be estimated. The site was a good one for a tavern. It was just off St. Catherine Street, near the big retail stores and several large office buildings and convenient to a tramway transfer point where there was a large circulation of people. There was also the advantage of an entrance from the lane. There is no doubt that the location was excellent. Indeed, Mr. Trudeau went so far as to describe it as a golden spot. I

(1) [1952] Ex. C.R. 436 at 442.

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am also satisfied that the rental of $250 per month was low. There was no contrary opinion. The defendant Cowper explained that he had set the rent at this low figure as an inducement to the defendants Lessor and Weiner in order to enable him to finance the purchase of the property and the hotel business.

There is no doubt that the leasehold interest was worth a great deal more than the rent paid for it. Several witnesses gave opinion evidence of this value. The defendant Cowper thought that in May, 1947, he could have got $500 per month for the premises. Mr. Baker also considered that they could have been rented for that amount. The defendant Lessor agreed that the lease was worth more than its actual rental and thought that $400 per month would have been a proper rental. Later, he said that he would have paid up to $600 per month rather than be ejected. Mr. Desaulniers also thought that the premises could have been subleased in 1947 for $400 per month but this would have been for only a short term because of the increases in rental values and the imminent release of rent controls. For the years subsequent to 1947 he put a higher value but admitted that he did so in the light of increases in value that had actually taken place. Mr. Trudeau put the value of the lease at $600 per month for 1947, $700 for 1948 and $800 for 1949 to 1954. For the plaintiff, Mr. Therien said that in May, 1947, the tenants could have sublet for 2 or 3 years at $350 per month but he would have set $400 per month for a lease of 5 years. On the evidence, I put its value at $450 per month for the unexpired portion of the term. This means $200 per month more than the rent for a period of 83 months from the date of the expropriation or 62 months from the time that the defendant Pare gave up possession. Thus it is the present value of $200 per month for 62 months that is to be determined. At 5 per cent this would have come to $10,907.89 and at 3 per cent to $11,473.53. But this does not necessarily mean that the right to the unexpired term could have been sold for that amount for a purchaser might well have taken into account various contingencies such as the possibility of fire, loss of the tavern licence, a business depression or recession or a decrease in general rents and been willing to pay only a smaller amount.

The defendants Lessor and Weiner would also have been entitled to compensation for the improvements made in the tavern. The amount of these was put at various sums but was finally agreed upon at $6,500 and Mr. Therien put their present value at $3,700. I accept this figure.

Up to this point there is no difficulty in estimating the value of the leasehold interest of the defendants Lessor and Weiner that was taken from them. But there is serious difficulty in determining the amount of their entitlement for disturbance in view of the fact that they did not suffer any actual loss from disturbance. They had found a willing purchaser of their tavern business in the person of the defendant Pare who went into possession of the premises knowing that he would soon be disturbed. After the sale to him the defendant Lessor was not interested in finding a new location and did not incur any expense at all as the result of the expropriation. Indeed, he had done very well out of the investment he had made in 1944. He explained that when he wrote to counsel for the plaintiff that he had no lien on the property it seemed to him that since he had sold the business to the defendant Pare he had no claim against the Government. This was likewise his reason for saying that he had no monetary interest in these proceedings, his only concern being his obligation under the assignment of January 22, 1949. He was anxious that this should be carried out not only to the letter but also according to its spirit.

But the entitlement of the defendants Lessor and Weiner for disturbance must be dealt with independently of their sale of the tavern business, including the license, to the defendant Pare on the basis of such evidence as exists. The defendant Lessor said that if he had not found a purchaser of the tavern business he would have had to find another place, get a suitable lease and fix the place up. He thought that two months would have been sufficient time for the necessary repairs and alterations in a new place if he had had to make them but that if they were to be attended to by the owner of the new place there would have been little disruption of business. There would be the expense of moving to the new place, the cost of fixing it up, if there was any, the possibility of some duplication of rent and disruption of business and other

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expenses connected with moving. But there is no evidence of the amount of any of these items so far as the defendants Lessor and Weiner are concerned. There is no justification for considering the evidence of the expenses incurred by the defendant Pare under the various heads alleged in the pleadings as proof of the expenses that the defendants Lessor and Weiner would or might have incurred. Thus the Court is left with only a modicum of relevant evidence to assist it. Nevertheless, it must do its best to determine a proper amount.

Under these difficult circumstances I find that the amount of compensation to which the defendant Pare is entitled, as assignee of the defendants Lessor and Weiner, is the sum of $20,000, inclusive of an additional allowance of 10 per cent for forcible taking which I award for the same reason and subject to the same comment as in the case of the defendant Cowper.

On this amount I allow interest at the rate of 5 per cent per annum from February 3, 1949, to this date.

There remains the question of costs. In view of the fact that I have found that because of the assignment of January 22, 1949, the defendant Pare is entitled to the compensation to which the defendants Lessor and Weiner would otherwise have been entitled, the latter have no rights and ought not to have been continued as parties after notice of the assignment. But this was done by the plaintiff and they ought not to be deprived of costs. Since, however, they were represented at the trial by the same counsel as appeared for the defendant Cowper they are not entitled to include counsel fees in their costs. To obviate taxation difficulties I fix their net costs, after deducting costs assessed against them in motions during the trial, at $500, inclusive of disbursements.

The position of the defendant Pare is much more difficult. His original claim for damages, dated April 15, 1948, amounting to $170,212.69 was outrageously excessive and merits sharp censure. When he made it he was still in occupation of the Oxford Tavern premises and had not suffered any loss. Moreover, there could not be any reason for relating it to the expropriation which had occurred two months before the defendant Pare purchased the tavern business. As I understand it, the claim was based

on a report made by Mr. G. Desaulniers, the defendant Pare's chief real estate adviser and expert witness. I put the responsibility for the claim on him. The amended claim for $96,553.34, dated January 18, 1950, while less in amount, was equally objectionable in principle. While, of course, great latitude for the expression of divergent opinions by real estate experts in expropriation cases must be maintained, the Court is entitled to careful and reasonable opinions. The reports presented to the defendant Pare by Mr. Desaulniers did not, in my opinion, measure up to this requirement. Moreover, the defendant Pare's unjustifiable claim might well have interfered with the chances of a settlement. It certainly unduly lengthened the trial. Under the circumstances, I have concluded that while the defendant Pare should not be entirely deprived of his costs he should not be permitted to include any fees for Mr. Desaulniers. It is also my view that he should not be allowed any costs for the days by which his improper claim unduly prolonged the trial and I determine the number of such days as being four. Moreover, in respect of these four days the defendant should pay the costs of the plaintiff, including those payable to the defendant Pare should be set off against those payable to him.

There will, therefore, be judgment declaring that the lands described in paragraph 2 of the Information are vested in Her Majesty the Queen as from May 26, 1947; that the amounts of compensation to which the defendants Cowper and Pare are respectively entitled, subject to the usual conditions as to all necessary releases and discharges of claims, are $55,000 for the defendant Cowper with interest thereon at the rate of 5 per cent per annum from February 3, 1949, to this date and $20,000 for the defendant Pare with interest thereon at the rate of 5 per cent per annum from February 3, 1949, to this date; and that the defendants are respectively entitled to costs as indicated.

Judgment accordingly.

1952

Nov. 24, & 28, Dec. 1

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Feb. 23

BETWEEN:

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED ..... } PLAINTIFF;

AND

MAPLE LEAF BROADCASTING COMPANY LIMITED ..... } DEFENDANT.

Copyright—Action for infringement of copyright, damages and an injunction—Copyright Appeal Board—The Copyright Amendment Act, 1931, S. of C. 1931, c. 8, ss. 10(1) (2) (3), 10(B) (6) (6) (a) (7) (8) (9)—An Act to amend the Copyright Amendment Act, 1931, and the Copyright Act, S. of C. 1938, c. 27, s. 3—The Copyright Act, R.S.C. 1927, c. 32—Radio broadcasters—Validity of tariff of "fees, charges or royalties" established by the Copyright Appeal Board—Tariff No. 2 including provision authorizing inspection of licensee's books and records and statements certified by the Copyright Appeal Board intra vires the Board—Counterclaim dismissed.

Pursuant to the provisions of the Copyright Amendment Act, 1931, 21-22 Geo. V, c. 8, S. of C. 1931, plaintiff which carries on in Canada the business of acquiring performing rights in musical works and deals with the grant of licences for the performance in Canada of such works duly filed at the Copyright Office within the time specified in the Act what purported to be the statement of all fees charges or royalties it proposed to collect during 1952 in compensation for the grant of said licences. In due course the Copyright Appeal Board proceeded to consider the statement and objections thereto, and after hearing the interested parties, certified its approved statements to the Minister, notice thereof being given in the *Canada Gazette*.

Defendant performed over its station certain of plaintiff's works without its consent and without securing a licence or paying any fees. The action is one for infringement of copyright, damages and an injunction but, actually, was brought to test the validity of the tariff of "fees, charges or royalties" established by the Board as those which plaintiff might charge radio broadcasters for a general licence for the calendar year 1952 (Tariff No. 2.) In its counterclaim defendant asked for a declaration that the tariff was *ultra vires* the Board, mainly on the ground that being based on the "gross revenue" of the broadcasting companies it is not a statement of "fees, charges or royalties" within the meaning to be attributed to those words in the Act.

Held: That under the provisions of the Copyright Amendment Act a purely administrative function was given to the Board by Parliament, namely, to fix the rates which the plaintiff could legally charge for the use of its works; or at the most that it was of a quasi-judicial nature. If it be the former, it is not open to review by the Court; if it be the latter, all that was necessary was that those opposed in interest to that of the plaintiff should have had a fair opportunity to be heard in the dispute. *The King* v. *Noxzema Chemical Company of Canada* [1942] S.C.R. 178; *Pure Spring Company Limited* v. *Minister of National Revenue* [1946] Ex. C.R. 471 referred to.

2. That the words "fees, charges or royalties" as used in the Copyright Amendment Act, 1931, do not permit of a narrow interpretation. Parliament by using them must have intended that there would be included every form of toll, be it a fee, a charge or a royalty, which would enable the Copyright Appeal Board to establish a suitable tariff of rates which was its primary task. "The statement of fees, charges or royalties" in the Act is equivalent to "statement of the tariff rates". They do not mean only tolls or rates fixed at a specific amount in dollars and cents.

3. That the difficulty for the broadcasting companies which have a fiscal year corresponding to the calendar year to precisely ascertain their "gross revenue" on December 31 was a matter for consideration by the Copyright Appeal Board and its reasonableness or otherwise is not for the Court to determine. *Carltona Limited* v. *Commissioners of Works* [1943] 2 A.E.R. 560 referred to.

4. That in carrying out its duties, while it was not absolutely necessary for the Copyright Appeal Board to base the rates for annual licenses on the income or a proportion of the income of the licensees or to fix the rates for annual licenses to broadcasting stations on a percentage of their gross revenue, yet in view of all the classifications involved it was reasonably necessary to do so and in the absence of any direction in the Act, it could do so.

5. That the Copyright Appeal Board having the power to fix a tariff of rates on the basis of the income or on the gross revenue of a licensee, it must necessarily have the power to impose reasonable conditions upon those who desired to take advantage of an annual license where the tariff was based in some way or other on income, on gross revenue, or in any way other than on a fixed dollar amount. The provision in Tariff No. 2 authorizing the inspection of a licensee's books and records seemed not only reasonable, but absolutely necessary if suitable protection were to be afforded to plaintiff.

6. That Tariff No. 2, including the provision relating to the inspection of a licensee's books and records and the whole of the statements certified by the Copyright Appeal Board were *intra vires* the Board.

ACTION for infringement of copyright, damages and an injunction.

The action was tried before the Honourable Mr. Justice Cameron at Toronto.

H. E. Manning, Q.C. and *R. F. Reid* for plaintiff.

Samuel Rogers, Q.C. and *G. W. Ford, Q.C.* for defendant.

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

CAMERON J. now (February 23, 1953) delivered the following judgment:

The plaintiff herein is a company incorporated by Letters Patent under the Companies Act of the Dominion of Canada, having its head office at Toronto. It carries on in

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Canada the business of acquiring copyrights of dramatico-musical or musical works or performing rights therein and deals with or in the issue or grant of licenses for the performance in Canada of such works. The defendant is a corporation with its head office in Hamilton, Ontario, and operates there a broadcasting station, licensed under the Broadcasting Act of Canada, having the station identification "CHML."

In form, the action is one for infringement of copyright, damages and an injunction. Actually, in its major aspect, it is brought to test the validity of the tariff of "fees, charges or royalties," established by the Copyright Appeal Board (hereinafter to be called "the Board") as the "fees, charges or royalties" which the plaintiff might charge radio broadcasters for a general licence for the calendar year 1952 (Tariff No. 2). In its counterclaim the defendant asks for a declaration that the said tariff is null and void. I propose to consider that issue first.

The dispute centres around the interpretation to be placed upon certain sections of the Copyright Amendment Act, 1931, as amended, and which by s. 3 of c. 27, Statutes of Canada, 1938, is to be read and construed with and as part of The Copyright Act, R.S.C. 1927, c. 32 amended. The relevant sections are as follows:

10. (1) Each society, association or company which carries on in Canada the business of acquiring copyrights of dramatico-musical or musical works or performing rights therein, and which deals with or in the issue or grant of licences for the performance in Canada of dramatico-musical or musical works in which copyright subsists, shall, from time to time, file with the Minister at the Copyright Office lists of all dramatico-musical and musical works, in current use in respect of which such society, association or company has authority to issue or grant performing licences or to collect fees, charges or royalties for or in respect of the performance of its works in Canada.

(2) Each society, association or company shall, on or before the first day of November, one thousand nine hundred and thirty-six, and, thereafter, on or before the first day of November in each and every year, file, with the Minister at the Copyright Office statements of all fees, charges or royalties which such society, association or company proposes during the next ensuing calendar year to collect in compensation for the issue or grant of licences for or in respect of the performance of its works in Canada.

(3) If any such society, association or company shall refuse or neglect to file with the Minister at the Copyright Office the statement or statements prescribed by the last preceding subsection hereof, no action or

other proceeding to enforce any civil or summary remedy for infringement of the performing right in any dramatico-musical or musical work claimed by any such association, society or company shall be commenced or continued, unless the consent of the Minister is given in writing.

10A. (1) As soon as practicable after the receipt of the statements prescribed by subsection two of the last preceding section, the Minister shall publish them in the *Canada Gazette* and shall notify that any person having any objection to the proposals contained in the statements must lodge particulars in writing of his objection with the Minister at the Copyright Office on or before a day to be fixed in the notice, not being earlier than twenty-one days after the date of publication in the *Canada Gazette* of such notice.

(2) As soon as practicable after the date fixed in said notice as aforesaid the Minister shall refer the statements and any objection received in response to the notice to a Board to be known as the Copyright Appeal Board.

10B. (6) As soon as practicable after the Minister shall have referred to the Copyright Appeal Board the statements of proposed fees, charges or royalties as herein provided and the objections, if any, received in respect thereto, the Board shall proceed to consider the statements and the objections, if any, and may itself, notwithstanding that no objection has been lodged, take notice of any matter which in its opinion is one for objection. The Board shall, in respect of every objection, advise the society, association or company concerned of the nature of the objection and shall afford it an opportunity of replying thereto.

(6) (*a*) In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made, no fees, charges or royalties shall be collectable from the owner or user of the radio receiving set or gramophone, but the Copyright Appeal Board shall, so far as possible, provide for the collection in advance from radio broadcasting stations or gramophone manufacturers, as the case may be, of fees, charges and royalties appropriate to the new conditions produced by the provisions of this subsection and shall fix the amount of the same. In so doing the Board shall take into account all expenses of collection and other outlays, if any, saved or saveable by, for or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of the provisions of this subsection.

(7) Upon the conclusion of its consideration, the Copyright Appeal Board shall make such alterations in the statements as it may think fit and shall transmit the statements thus altered or revised or unchanged to the Minister certified as the approved statements. The Minister shall thereupon as soon as practicable after the receipt of such statements so certified publish them in the *Canada Gazette* and furnish the society, association or company concerned with a copy of them.

(8) The statements of fees, charges or royalties so certified as approved by the Copyright Appeal Board shall be the fees, charges or royalties which the society, association or company concerned may respectively lawfully sue for or collect in respect of the issue or grant by it of licences for the performance of all or any of its works in Canada during the ensuing calendar year in respect of which the statements were filed as aforesaid.

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(9) No such society, association or company shall have any right of action or any right to enforce any civil or summary remedy for infringement of the performing right in any dramatico-musical or musical work claimed by any such society, association or company against any person who has tendered or paid to such society, association or company the fees, charges or royalties which have been approved as aforesaid.

As shown by these sections, the scheme which Parliament adopted was briefly as follows: dealers in performing rights are to file at the Copyright Office lists of all dramatico-musical and musical works in current use in respect of which the dealer has the right to grant licences or to charge fees for performances, and to file statements on or before the 1st of November in each year of all fees, charges or royalties which such dealer proposed during the next ensuing calendar year to collect in compensation for the issue or grant of licences in respect of the performance of such works.

There was set up a Copyright Appeal Board whose duty it is to consider these proposed charges and to make such alterations in the statements as may seem just and transmit the statements so altered or revised or unaltered, as the case may be, to the Minister, certified as approved statements. The statements so certified are published in the *Canada Gazette;* and the fees, charges or royalties so certified are the fees, charges or royalties which the performing rights dealer may collect in respect of the issue of licences during the ensuing calendar year. The Act provides that no dealer shall have any right of action or have any right to enforce any civil or summary remedy for the infringement of the performing rights in any of its works against any person who has tendered or paid to such dealer the fees, charges or royalties that have been approved.

Pursuant to the requirements of the Act, the plaintiff duly filed at the Copyright Office within the time specified what purported to be the statement of all fees, charges or royalties which it proposed to collect during the year 1952 in compensation for the issue or grant of licences in respect of the performance of its works.

In due course the Board proceeded to consider the statement and objections thereto, and after hearing the interested parties, certified its approved statements to the Minister, notice thereof being given by the Secretary of State in the *Canada Gazette* of March 27, 1952. Insofar

as the plaintiff is concerned the approved statement contains some sixteen tariffs but only Tariff No. 2 is of direct importance on this particular issue. It is in part as follows:

Tariff No. 2

RADIO BROADCASTING

(1) *Domestic Broadcasting*

For a general licence to all operating broadcasting stations covering the broadcasting for private and domestic use only at any time during 1952 and as often as desired of any and all the works for which the Association has from time to time power to grant a performing licence the following fees.

(A) By the Canadian Broadcasting Corporation a fee of $.01 per capita of the population of Canada as latest reported by the Dominion Bureau of Statistics, plus the sum provided for in paragraph (B) hereunder written, which is made applicable *mutatis mutandis* to the Corporation with respect to its gross revenue from commercial broadcasting.

(B) By each licensee of the Association operating a commercial broadcasting station or stations a sum equal to 1¾ per cent of the gross revenue of such station or stations as defined in P.C. 5234, enacted on the 14th day of October, 1949, in the operation of such station or stations for the fiscal year of the licensee ending on or before the 31st day of December, 1951: provided that, if the licensee shall not have operated in 1951 for a full fiscal year, the gross revenue shall be computed on the basis of the period during which the station was in operation until the 31st day of December, 1951, prorated for a full twelve months.

The Association will, if payments are punctually made, accept fees payable by any licensee in twelve equal monthly instalments paid in advance on the first day of each month.

The Association shall have the right by a duly authorized representative at any time during customary business hours to examine books and records of account of the licensee to such extent as may be necessary to verify any and all statements rendered by the licensee.

It will be noted that Clause (A) affects only the Canadian Broadcasting Corporation and that the charges to be paid by it consist of the levies made under both Clauses (A) and (B). Presumably no objection has been raised by that Corporation and in any event it is not here represented. The action is brought against the defendant pursuant to an agreement dated May 14, 1952 (Ex. B) entered into between the plaintiff and a representative of the privately owned broadcasting stations—The Canadian Association of Broadcasters.

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I am of course not concerned with the amounts which the defendant—or other private broadcasting stations—may be called upon to pay under Tariff 2. That is entirely a matter for the Board. The Copyright Amendment Act provides no appeal from the statements so certified by the Board but specifically provides that such statements "shall be the fees, charges or royalties which the society, association or company concerned may respectively lawfully sue for or collect in respect of the issue or grant by it of licences for the performance of all or any of its works in Canada during the ensuing calendar year in respect of which the statements were filed as aforesaid." (s. 10 B. (8)). It is of some interest, however, to note that Tariff 2 for the year 1952 imposes charges which, if paid by the private broadcasting stations, would increase the income of the plaintiff from that source by something in excess of 100 per cent over such income for the preceding year.

For each year prior to 1952, the Board had fixed the fees for radio broadcasting at a fixed dollar amount based on the number of radio receiving sets licenced by the Department of Transport. For the previous five years, the total of such fees was at the rate of fourteen cents for each such receiving set, of which seven cents was paid by the Canadian Broadcasting Corporation and seven cents by the privately-owned radio stations. As I understand the matter, the total amount to be paid by the privately-owned stations was apportioned between themselves by their representatives, and that apportionment was approved by the Board in a schedule to its findings.

The proposed tariff which the plaintiff filed at the Copyright Office as being its fees, charges or royalties for the year 1952 was not approved by the Board. It proposed the following: (*a*) payment by the privately-owned broadcasting stations to be divided between them according to a schedule to be approved, at the aggregate rate of eight-tenths of a cent per capita of the population of Canada; (*b*) payment by the Canadian Broadcasting Corporation of a fee of one cent per capita of the population, plus the sum provided for in (*c*); (*c*) payment by each licensee of a sum equal to 2¼ per cent of the gross billings for the sale of broadcasting on the station or stations owned and operated by such licensee during its fiscal period ending in 1951.

It provided, also, that each licensee furnishing certain required data at the end of each month should be entitled to a discount of 9 per cent; that the association would accept payments in twelve monthly instalments if regularly made; it also contained the same provisions for examination of the licensee's books as appears in the statement later approved by the Board.

I have summarized the nature of that statement inasmuch as the defendant by way of defence also alleged that it was not a statement of fees, charges or royalties as required by s. 10(2); that therefore under s. 10(3) the plaintiff, having neglected to file a statement of its fees, charges or royalties, was barred from taking any action for infringement unless the consent of the Minister had been given in writing. It is admitted that no such consent had been asked for or granted.

It will be seen, therefore, that the Board in establishing the plaintiff's tariff for 1952 in respect of broadcasting, did not state a specific dollar amount which each broadcasting station is required to pay for a general licence, although it did so for another similar association—B.M.I. Canada, Ltd. Insofar as private broadcasting stations are concerned, each licensee was required to pay a sum equal to $1\frac{3}{4}$ per cent of its gross revenue for its fiscal year ending in 1951, the term "gross revenue" being as defined in P.C. 5234 of October 14, 1949 (Ex. L). That Order in Council established regulations under the Radio Act, 1938, Part I, and part of s. 1 thereof is as follows:

> For the purpose of this regulation "gross revenue" means the total revenue earned by the licensee in the operation of the station, less agency commissions, as set forth in the financial return made under oath by the licensee to the Minister covering the operation of the station for the fiscal year of the licensee.

It may be noted here that the Radio Act, 1938, empowers the Minister of Transport (*inter alia*) to make regulations regarding the issue of licences to broadcasting stations, and authorizes the Governor in Council "to prescribe the tariff of fees to be paid for licences."

P.C. 5248 establishes a schedule of license fees for private commercial broadcasting stations varying in amount from $100 for stations whose annual gross revenue is under $25,000 to $6,000 for those whose annual gross revenue is $400,000 and over.

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Further, it will be noted that in respect of Tariff 2 applicable to broadcasting stations, the Board for the first time incorporated the provision giving the plaintiff the right by its authorized representative to examine the books and records of the licensee to such extent as may be necessary to verify the statements rendered by the licensee. A similar provision had appeared in previous approved statements in regard to other categories of licensees, whose licence fees were based on such matters as the amount paid for entertainment (in cabarets, restaurants and the like), or on the receipts from admission charges (in ballrooms, dance halls, rinks, etc.); or for performances conveyed by telephone wire to non-industrial establishments other than domestic where the fees were a percentage of the gross amount paid for entertainment and servicing of equipment, and the furnishing of programs. It is obvious that the new Tariff 2 included the provision for inspection of books and records because of the change in the licence fee from a fixed dollar amount to a charge based on gross revenue, which latter amount could not be verified by the plaintiff until such inspection had been made.

The main submission by the defendant is that the approved statement of "fees, charges or royalties" as published in the *Canada Gazette,* is not a statement of "fees, charges or royalties" within the meaning of the sections of the Copyright Amendment Act which I have quoted and is therefore null and void. The alleged reasons as found in para. 1 of the counter claim are briefly as follows: It says—

(*a*) That on January 1, 1952, it was unable to ascertain by reference to the said purported approved statement the specific amount which it was required to pay to the plaintiff to acquire a licence in 1952; and that as of the date of the counter claim—June 20, 1952—it was still unable to do so.

(*b*) That an impost based on the gross revenue of the defendant as set out in section 1(B) of Tariff 2 is not in law a statement of fees, charges or royalties.

(*c*) That an impost based on gross revenue bears no relationship to the revenue derived from the use of the rights acquired by the defendant under the plaintiff's licence.

(*d*) That the provision in the last paragraph of section 1 of Tariff 2 in the approved statement deals with matters other than quantum of fees, charges or royalties and is therefore beyond the jurisdiction of the Board.

(*e*) That an impost which by its terms or for its enforcement involves access to the books or other private records of the defendant is an invasion of and inconsistent with the civil rights of the defendant.

Later herein consideration will be given to that clause in Tariff 2 which gives the plaintiff the right to inspect the defendant's books, both as to its validity and as to its effect on Tariff 2. The first point to be considered is whether Tariff 2, certified as approved by the Board and based on the gross revenue of the broadcasting companies, is a statement of "fees, charges or royalties" within the meaning to be attributed to those words in the Act.

The purpose of the Copyright Amendment Act was to control and provide for the fixation of the prices or rates which a Performing Rights Society could lawfully charge for the user of those works in which it owned or controlled copyright in Canada. For that purpose, Parliament created a Copyright Appeal Board charged with the annual duty of considering proposed rates for the following year, hearing objections thereto, considering the proposed statements and objections and, when necessary, taking notice of any matter which in its opinion was one for objection. The Board could alter or revise the proposed statements "as it may think fit," and was required to transmit the statements thus altered, revised or unchanged to the Ministry as the approved statements. It is of particular importance to note that such statement of "fees, charges or royalties" so certified, "shall be the fees, charges or royalties which the Society . . . may lawfully sue for or collect during . . . the ensuing calendar year."

The entire matter was left to the judgment and discretion of the Board. No right of appeal was provided; the statements so certified were not subject to the approval of the Minister and were not required to be laid before Parliament. Moreover, the statute does not specify what principles the Board is to follow in considering and fixing the rates. It is required to consider the proposed rates and any objection thereto, but in reaching its conclusions the Board is quite free to determine the rates as it deems best.

Under these circumstances it seems to me that a purely administrative function was given to the Board by Parliament, namely, to fix the rates which the plaintiff could legally charge for the use of its works; or at the most that it was of a quasi-judicial nature. If it be the former, it is not open to review by the Court; if it be the latter, all that

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was necessary was that those opposed in interest to that of the plaintiff should have had a fair opportunity to be heard in the dispute, and no suggestion to the contrary has been made.

In *The King v. Noxzema Chemical Company of Canada, Ltd.* (1), the Court considered the nature of a power conferred on the Minister of National Revenue by s. 98 of the Special War Revenue Act, which was as follows:

98. Where goods subject to tax under this Part or under Part XI of this Act are sold at a price which in the judgment of the Minister is less than the fair price on which the tax should be imposed, the Minister shall have the power to determine the fair price and the taxpayer shall pay the tax on the price so determined.

In that case, Davis J. said at p. 180:

The important question that arises upon this appeal is one of law, as to the position of the Minister under this section of the statute—that is, whether his act is purely an administrative act in the course of settling from time to time the policy of his Department under the statute in relation to the various problems which arise in the administration of the statute, or whether he is called upon under the section of the statute to perform a duty of that sort which is often described as a quasi-judicial duty.

My own view is that it is a purely administrative function that was given to the Minister by Parliament in the new section 98; to enable him to see, for instance, that schemes are not employed by one or more manufacturers or producers in a certain class of business which, if the actual sale price of the product is taken, may work a gross injustice to and constitute discrimination against other manufacturers or producers in the same class of business who do not resort to such schemes which have the result of reducing the amount on which the taxes become payable. If that be the correct interpretation, in point of law, of the section in question, then the administrative act of the Minister is not open to review by the Court. It is to be observed that no statutory right of appeal is given.

If, on the other hand, the function of the Minister under the section may be said to be of a quasi-judicial nature, even then all that was necessary was that the taxpayer be given a fair opportunity to be heard in the controversy; and to correct or to contradict any relevant statement prejudicial to its interests. Reliance has consistently been put by the courts since 1911 upon the language of Lord Loreburn in *Board of Education* v. *Rice*, [1911] A.C. 179, at 182:—

> In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial.

(1) [1942] S.C.R. 178.

They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. Provided this is done, there is no appeal from the determination of the Board under s. 7, sub-s. 3, of this Act. The Board have, of course, no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences that may arise, and as they arise, between the managers and the local education authority. The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari.

In the same case Kerwin, J. said at p. 186:

The legislature has left the determination of that matter and also of the fair prices on which the taxes should be imposed to the Minister and not to the court. In my view, section 98 confers upon the Minister an administrative duty which he exercised and as to which there is no appeal. In such a case the language of the Earl of Selborne in *Spackman* v. *Plumstead District Board of Works* (1885) 10 App. Cas. 229, at 235, appears to be particularly appropriate:—

> "And if the legislature says that a certain authority is to decide, and makes no provision for a repetition of the inquiry into the same matter, or for a review of the decision by another tribunal, prima facie, especially when it forms, as here, part of the definition of the case provided for, that would be binding."

In the case of *Pure Spring Co. Ltd.* v. *Minister of National Revenue* (1), the President of this Court considered the nature of the discretion conferred on the Minister of National Revenue by s. 6(2) of the Income War Tax Act. He held that the Minister's discretionary determination thereunder was an administrative act with quasi-legislative effect done in the course of administration and definition of public policy. It was held (Headnote 10):

10. That neither the opinion of the Minister nor the material on which it was based is open to review by the Court; it has no right to examine into or criticize the reasons that led the Minister to his opinion or question their adequacy or sufficiency; it is not for the Court to lay down the consideration that should govern the Minister's discretionary determination; Parliament requires the Minister's opinion, not that of the Court; the Court has nothing to do with the question whether the Minister's opinion was right or wrong; nor has it any right to decide that it was unreasonable. The accuracy or correctness of the Minister's discretionary determination is outside the Court's jurisdiction.

In the instant case it seems to me that Parliament gave to the Board the fullest possible discretion to determine

(1) [1946] Ex. C.R. 471.

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the "fees, charges or royalties" to be charged by societies such as the plaintiff and that it intended that such determination should be final and conclusive, without any right of review by the Court, where the procedure laid down in the Act has been fully and properly carried out. Statutory authority is given to the statements so certified, by the provisions of s. 10B (8) which I have quoted.

It becomes necessary, however, to consider the plea of *ultra vires* raised by the defendant. It does not deny the right of the Board to fix the fees, charges or royalties, but says that the Board has misused the powers delegated to it, in certifying statements which are not actually statements of fees, charges or royalties.

I am asked by counsel for the defendant to find that the words "fees, charges or royalties," as used throughout the sections quoted, refer only to such levies as are stated precisely in dollar amounts. I was referred to a large number of dictionary definitions of these words, but have been unable to reach the conclusion that they must be given the limited meaning contended for. "Fees" and "charges" are common words which have much the same significance and are used frequently both in reference to a fixed amount in dollars, or as a percentage or proportion of something, such as the amount recovered or the value of a thing sold or used. Royalties also may be expressed as a specific amount in dollars or cents and related to the number of articles manufactured, sold or used; or as a percentage of the total sale value of the articles in which royalties are reserved, or of the articles of which they form a part.

In my opinion, these words as used in the Act do not permit of a narrow interpretation. The raison d'etre of the legislation regarding performing rights societies was set out in the judgment of Duff, C.J. in *Vigneux* v. *The Canadian Performing Rights Society, Ltd.* (the predecessor of the plaintiff company), (1). At p. 353 he said:

> It is of the first importance, in my opinion, to take notice of this recognition by the Legislature of the fact that these dealers in performing rights, which rights are the creature of statute, are engaged in a trade which is affected with a public interest and may, therefore, conformably to a universally accepted canon, be properly subjected to public regulation.

The purpose of the enactment was to deprive performing rights societies of the right which they had therefore enjoyed of setting their own tolls for the use of works in

(1) [1943] S.C.R. 348 at 353-4.

which they held copyright in Canada. In the public interest, such tolls had to be controlled and regulated and the duty of fixing the tolls annually for each calendar year was placed on the Copyright Appeal Board. I think that Parliament must have understood the somewhat complex nature of the task assigned to the Board which would be required to fix the tolls for the use of its rights in a great many different ways, and that by using the words "fees, charges or royalties" there would be included every form of toll, be it a fee, a charge or a royalty, which would enable it to establish a suitable tariff of rates. It was concerned primarily with the establishment of such tariffs (and not with the name or names given to any particular part of the toll) as would constitute a suitable compensation—the word used in s. 10(2)—for the issue or grant of licences. In my opinion, "the statement of fees, charges or royalties" is equivalent to "statement of the tariff rates." I am unable to find that they mean only tolls or rates fixed at a specific amount in dollars and cents.

A further reason advanced for alleging that "the statement of fees, charges or royalties" must be in a specific amount of dollars and cents in that the Act implies that the tolls should be payable in advance and that unless the amount was known precisely to both licensor and licensee on January 1, 1952, the licensee would not know the proper amount to which it was entitled and likewise the licensee would not know how much it was required to tender or pay on that day—or at the earliest moment of that day—if it were to avoid a charge of infringement. It is pointed out that the stations operate daily and in many cases for as many as twenty hours each day. It is submitted that under the formula adopted in Tariff 2(1) (B), it would be impossible for any station whose fiscal year ended on December 31, 1951, to ascertain by the end of that day precisely what its gross revenue—as defined by P.C. 5234—would be for that year. It was stated that some 70 per cent of the private broadcasting stations had fiscal years corresponding to the calendar year. Further, it is contended that under the definition in P.C. 5234, the "gross revenue" must be "as set forth in the fiscal return to the Minister of Transport covering the operation of the station for the fiscal year of the licence," that such return in 1952 was not due until March 15, 1952, and was not actually filed by the defendant until June 15, 1952.

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As far as this defendant is concerned, however, this submission cannot be supported. Its fiscal year on which the licence toll was based ended on January 31, 1951, and its return to the Minister of Transport was presumably due on March 15 of that year, so that it had full knowledge as to its "gross revenue" many months before the 1952 tariff came into effect.

It is admitted, however, that approximately 70 per cent of the broadcasting stations affected have a fiscal year ending on December 31. Now while it is vigorously contended that it would be quite impossible for the companies to precisely ascertain their "gross revenue" on December 31, there is no evidence on the point. I think the difficulties suggested are not very substantial. The definition of gross revenue found in P.C. 5234 is well known to all broadcasting companies, as well as the items that are included and excluded in the necessary computation. If their accounts were kept completely up-to-date, the final computation would be readily completed. In any event, that was a matter for consideration by the Board and its reasonableness or otherwise is not for the Court to determine. In *Carltona Ltd.* v. *Commissioners of Works* (1), the Court of Appeal held that Parliament had committed to the Executive the discretion of deciding when an order for requisition under the Defence (General) Regulations, 1939, should be made, and with that discretion, if *bona fide* exercised, the Courts could not interfere. Lord Greene, M.R. said:

> All that the Court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction.

There is a further submission that a tariff based on the gross revenue of the defendant is not a fee, charge or royalty, it being contended that such a charge or rate bears no relation to the use made by a broadcasting company of the works controlled by the plaintiff. Now as I have pointed out above, the Act itself does not state the basis on which the Board shall fix the rates. That is left entirely to the Board's discretion and judgment. It is well settled, I think, that in addition to the powers conferred by statute, certain

(1) [1943] 2 A.E.R. 560.

additional powers may be implied. In Halsbury (2nd Ed.), Vol. 31, p. 501, it is stated:

> Para. 642. A duty imposed or a power granted by Parliament carries with it the power necessary for its performance or execution. Similarly, an authority given by statute to do certain work authorizes the doing not only of all things absolutely necessary for its execution, but of all things reasonably necessary. This is especially the case with enabling Acts.

It will be conceded, of course, that in carrying out its duties it was not absolutely necessary for the Board to base the rates on a percentage of the gross revenue of the broadcasting companies, but a consideration of the complex nature of the duties involved satisfies me that it was reasonably necessary to do so and that in the absence of any direction in the statute itself to the contrary, it could do so.

While it was the Board's duty to fix a fair compensation, it was also its duty to see that the tariffs established were applicable to all classes of users. A reference to Ex. J. shows that for the year 1952, sixteen different tariffs were established, and I think I may assume that in prior years approximately the same number of tariffs were in use. With respect to single performances of an individual work or an extract therefrom, no great difficulty would be encountered as the rate could be fixed at a specific dollar amount, as in Tariff 1. It seems to have been realized, however, by all parties, that it would be desirable to establish also tariffs for a general licence for the calendar year, a licence which would permit the licensee to use any or all of the plaintiff's works throughout the year and as often as desired. Such a licence would be a great advantage to both licensor and licensee and perhaps more particularly to the latter, as it would be much less expensive and would eliminate a great deal of work in keeping records as to the works used, the time involved, and computations of that sort.

But the establishment of tariffs based on an annual payment involves the necessity of considering the nature of the business carried on by the various classes of such licensee and the extent to which the use of music or musical works was involved. In some cases the licensee would operate for twelve months and in other cases for only a portion of the year, or at irregular intervals. When the various classes of users had been placed in designated groups, it became necessary to determine the basis on which the rates should be established for each group.

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The Board apparently decided that in cases where licensees derive income directly or indirectly from the use of the plaintiff's works, the rate would be based on the proportion of the income either actually or reasonably anticipated. In the case of theatres (Tariff 4) it was based on the seating capacity; for baseball parks, arenas and the like (Tariff 9) it was based on the capacity of the premises, and for steamships (Tariff 16) it was based on carrying capacity. For large exhibitions (Tariff 12), rates were fixed in accordance with the actual attendance. For ballrooms and rinks (Tariff 7) the rate was based on the receipts from admission charges and for cabarets, cafes, restaurants and taverns (Tariff 6), it was based on the amount paid for entertainment, the cost of which was no doubt included in the price paid for the food or beverages supplied. Had an attempt been made to base the fee for an annual licence on a purely "royalty" basis (and by "royalty" I mean here the charge based on the actual user by a licensee of all or any of the works or parts of the works owned or controlled by the plaintiff), the necessary records, checks and computations would have been extremely complicated and very expensive. The difficulties are apparent from the evidence that the defendant alone in one week of operations broadcasts approximately 1800 selections of an average duration of less than two minutes each, of which approximately 42 per cent are owned or controlled by the plaintiff. In my opinion, it was reasonable and necessary for the Board, in view of all the classifications involved, to base the rates for annual licences on the income or a proportion of the income of the annual licensees, that income reflecting to a greater or less degree the user by the licensee of the defendant's works and the number of persons who would hear the performances of the licensee's works. It was a relatively simple method, the details of which could be readily worked out from information in the possession of the licensees.

For the same reason, I think it was proper and reasonable to fix the rates for annual licences to broadcasting stations on a percentage of their gross revenue. In adopting the definition of gross revenue as defined in P.C. 5324, the Board was using a term well known to all commercial broadcasting stations. Each had to apply annually for a licence, the fee for which was based on its gross revenue for the preceding year and was required to furnish the Department

of Transport with the particulars necessary to ascertain its gross revenue. In effect, therefore, they were required to pay the plaintiff on the basis of the same formula as they were required to supply to the Department of Transport.

It is the fact that the defendant—and I assume all other broadcasting stations as well—derives its income from various sources, some of which do not involve the use of music. In a typical month such as September, 1952, 14.2 per cent of the defendant's revenue was from spot announcements containing music, and 14.5 per cent from programmes containing music, the balance being derived from sources such as newscasts and announcements and programmes which did not contain music. On the other hand, it is shown that in one week of the same month, the defendant's station was on the air approximately 123 hours, over 65 per cent of the time was made up of musical programmes of which 42 per cent were owned or controlled by the plaintiff, and 58 per cent by others. From these facts it appars to be well established that while not all the income of a broadcasting station is derived from the use of music, that such a user bears a direct (but perhaps not a definitely ascertainable) relationship to the income of such a station.

Finally, it is submitted that Tariff 2 is invalid because of the inclusion therein of the provision authorizing a representative of the plaintiff to examine the books of a licensee to such extent as may be necessary to verify any and all statements rendered by the licensee. It is contended that such a provision was *ultra vires* the Board, whose statutory powers were confined to certifying its statements of "fees, charges or royalties" in that such a provision for inspection of books forms no part of "fees, charges or royalties." It is said that such a provision constitutes an invasion of the common law rights of privacy of a licensee and that if such a power were to be conferred by the Board, the right to do so must be found in express terms in the Act itself.

This contention has caused me a good deal of concern. It is clear that the Board is not given any express power in the Act to incorporate such a provision in its approved statements. I have stated above that in my opinion the Board did have implied powers which were reasonably necessary to enable it to carry out the duties imposed upon it. Having found that the Board did have the power to

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fix a tariff of rates on the basis of the income or on the gross revenue of a licensee, it seems to me also that it must necessarily have power to impose reasonable conditions upon those licensees who desired to take advantage of an annual licence or other type of licence where the tariff was based in some way or other on income, on gross revenue, or in any way other than on a fixed dollar amount. The condition here imposed seemed not only reasonable, but absolutely necessary if suitable protection were to be afforded to the plaintiff. I do not suggest that any of the proprietors of the broadcasting stations are dishonest in any way. But it is patent that the plaintiff could be defrauded out of its just revenue by an unscrupulous proprietor unless it had an opportunity of verifying the licensee's statements and payments by inspection of its records. Indeed, counsel for the defendant, while arguing that the inclusion of this clause invalidated the whole of Tariff 2, practically conceded that if a tariff validly established were based on income, the Board must confer on the plaintiff some way of checking on the accuracy of the licensee's statements. It may well be that the broadcasting stations resent any one having knowledge of the particulars of their gross revenue, particularly as a substantial part thereof is derived from sources other than from the use of music. On the other hand, it is well known that in contracts providing for the use of patents or for the right to reproduce works in which copyright subsists, it is a very common, if not a general practice, to provide for verification of the amount of such user by conferring on the licensor the right to inspect the books of the licensee. In establishing a tariff for an annual licence under which the licensee was entitled to use any or all of the works of the plaintiff, the Board was conferring on the licensee something of a very useful and valuable nature. It was necessary in doing so that consideration should be given to the rights of the plaintiff and that was done by adding the clause in question. For these reasons I have reached the conclusion that it was not beyond the powers of the Board to append that clause to Tariff 2.

In the result I must hold that Tariff 2, including the concluding paragraph thereof, was *intra vires* the Board. The defendant in its counter claim also asked for a declaration that the whole of the statements certified by the Board as set out in Ex. J. were *ultra vires* the Board on the grounds

which I have already discussed in considering the validity of Tariff 2. For the reasons stated above, I find that the statements so certified were in their entirety within the powers of the Board.

In the result, the counter claim will be dismissed with costs.

There remains for consideration only the question of the plaintiff's claim against the defendant for a declaration that it is the owner of that part of the copyright in the musical works set out in para. 4 of the Statement of Claim, for a declaration that the defendant has infringed the plaintiff's copyright therein by the performance thereof or by authorizing the performance thereof in public without the consent of the plaintiff, for an injunction, damages in the sum of $500, and costs.

The defendant submits that the plaintiff's action should be dismissed on the ground of non-compliance with the provisions of s. 10(3) of the Copyright Amendment Act (*supra*). It alleges that the statement of fees, charges or royalties filed with the Minister in November, 1951, pursuant to the requirements of s. 10(2) does not contain a statement of the fees, charges or royalties which it proposed to collect during the following year, and that therefore, without the consent of the Minister, it was deprived of any right of action. The details of the proposed charges have been set out above. The first ground of attack is the same as in relationship to that made on the statement of fees, charges or royalties certified by the Board and for the reasons stated above I must reject it. The other ground of attack is that ss. (*a*) of s. 1 of the proposed Tariff 2 is not a statement of fees, charges or royalties inasmuch as it proposes not a fee to be charged to individual broadcasting stations for an annual licence, but a formula applicable to all the privately owned stations, "to be divided between them according to a schedule approved by the Copyright Appeal Board." That part of the schedule is as follows:

> (*a*) By the privately owned broadcasting stations to be divided between them according to a schedule approved by the Copyright Appeal Board fees at the aggregate rate of $.008 per capita of the population of Canada as latest reported by the Dominion Bureau of Statistics or the census authorities, plus the sum provided for in para. (*c*) hereunder written.

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In my view, s. 10(2) was enacted for the purpose of initiating the proceedings to be brought before the Board for its consideration. Without such a statement there would be nothing to communicate to parties opposed in interest and the Board would have nothing to consider. The society was therefore required to state the details of its proposed compensation and in the broad view that I have taken of the words "fees, charges and royalties," I cannot agree that the form in which they were proposed for the year 1952 is not within the intention of the subsection. In my opinion, the provisions of s. 10(3) could only be invoked when the society had failed to file an adequate statement so that the procedure laid down could be followed out. Moreover, the provisions of that subsection are entirely inapplicable after the board has certified its approved statements to the Minister, by virtue of the provisions of s. 10B(8) which confers on the Society the statutory right to sue for and collect the amounts so certified. Once the validity of the certified statements has been established, as has been done in this case, it is no longer open to a defendant to invoke the invalidity of the Society's proposed statement of charges. It may be noted also that for the previous five years at least the plaintiff's proposed charges had been based on a sum to be distributable between the various stations by themselves and that had been carried into effect. That was entirely a reasonable provision, the society being concerned with the total amount that it might collect rather than with the various amounts to be paid by each station. Only the broadcasting stations would have the necessary data to enable an equitable apportionment to be made as between themselves. I have little doubt that they were in no way concerned with or embarrassed by that part of the proposal until the tariff as fixed by the Board was based on "gross revenue" and it was desired to find some means of attacking that fixation. This defence must also be rejected.

In the agreed Statement of Facts, the defendant admits for the purpose of this action that the plaintiff is the owner of the public performing rights in the said musical works, that it performed by means of broadcasting over its station upon the dates mentioned the works referred to and that such a broadcasting was a performance in public within the meaning of the Copyright Act. It is admitted, also, that the defendant performed the said works without the

consent of the plaintiff and neither secured a licence from nor paid the plaintiff any fees in respect of the said performances. The validity of Tariff 2 having been established, it follows that the plaintiff has established its claim for a declaration that it is the owner of the performing rights for Canada in the works in question and that the defendant has infringed such rights.

The defendant, however, submits that the proceedings were taken as a test case to determine the validity of the tariff and that therefore the plaintiff is not entitled to an injunction or damages. By the terms of the agreement of May 14, 1952, between the plaintiff and a representative of the Canadian Association of Broadcasters (Ex. B), it was agreed that the plaintiff should institute proceedings against one of the members of the association to be mutually agreed upon "for the purposes of legally testing the validity of a tariff of fees, charges and royalties based upon a percentage of gross revenue." It was further agreed that the action should be based on infringement and that therein the plaintiff should not seek an *interlocutory* injunction against such broadcasting station. Certain other proceedings pending between some of the broadcasting stations and the plaintiff were to be discontinued without costs.

It was agreed, also, that the Canadian Association of Broadcasters should do its utmost to secure the undertakings of its members to do certain things, including payment by them to the plaintiff of a sum equivalent to that paid in 1951, pending the final outcome of the proposed litigation, which amount, if the chosen defendant were finally successful in the action, would be accepted in full settlement for the period of litigation; on the other hand, if the plaintiff succeeded in upholding the validity of the tariff, such stations would then pay such balance as might be due the plaintiff under the said tariff. The defendant herein, while a member of the Canadian Association of Broadcasters, was not a party to that agreement and has not paid the plaintiff any amount whatever in respect of the year 1952 as contemplated by the said agreement. Under the circumstances disclosed, I do not think that the claim for damages in the sum of $500 is excessive.

I have no doubt, however, that the failure of the defendant to enter into the undertaking contemplated in the agreement of May 14, 1952, and to pay the plaintiff on the basis of the 1951 tariff pending the litigation was deliber-

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ately for the purpose of putting it completely in default and not for the purpose of permanently evading its legal liability to the plaintiff. It is therefore essentially a test case mutually agreed upon for the purpose of avoiding a multiplicity of actions in this and other courts.

I think that the plaintiff has made out its claim to an injunction. There is ample evidence that after the performances on the dates mentioned, the defendant continued to use the works of the plaintiff to a very considerable extent without payment of any fee. Moreover, there is nothing in the agreement which provides that if the plaintiff be successful in the litigation it is not entitled to ask for an injunction at the trial.

The claim for an injunction will be allowed but under all the circumstances I propose to make it subject to the conditions and limitations set out below.

There will therefore be judgment

(*a*) declaring that the plaintiff is entitled to the declarations claimed in clauses (*a*) and (*b*) of para. 10 of the Statement of Claim;

(*b*) declaring that the plaintiff is entitled to damages against the defendant in the sum of $500;

(*c*) declaring that the plaintiff is entitled to the injunction as claimed in Clause (*d*) of para. 10 of the Statement of Claim, but subject to the following limitations:

(1) The said injunction shall be stayed and be of no effect until after the expiry of sixty clear days from the date of this judgment;

(2) Leave is given to the defendant to apply to a Judge of this Court (due notice of such application to be served upon the plaintiff or its solicitors) at any time prior to the expiry of sixty days from the date of this judgment for an order extending the stay of the injunction for such further period of time as the defendant may deem necessary and advisable;

(*d*) dismissing the counter claim with costs;

(*e*) that the plaintiff is entitled to its costs of the action.

Judgment accordingly.

1952
Nov. 25
1953
Apr. 14

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

BRITISH AND AMERICAN MOTORS TORONTO LIMITED ..... *Respondent.*

Revenue—Income Tax—The Income Tax Act, S. of C. 1948, c. 52, s. 20—Depreciable property—Minister not precluded from reconsidering previous assessment in light of subsequent evidence—Profit on sale of motor cars used as service cars and demonstrators—Whether capital profit—Whether inventory profit—Appeal from Income Tax Appeal Board allowed in part.

Respondent carried on the business of buying and selling new and used cars and trucks, automobile parts, operating also a service department and service station. In assessing respondent to income tax for 1949 appellant added to its declared income the profit on the sale of (*a*) a 1942 Chevrolet car purchased in 1944, used as a service car until sold in 1949 to a car wrecker and which was always treated as a capital asset and depreciation thereon claimed and allowed annually; (*b*) nine new Chevrolet cars acquired in 1948, assigned to the use of respondent's personnel in that year, shown in the latter's income tax return for 1948 as capital assets, on which depreciation was also claimed and allowed and which were sold in 1949 but no depreciation thereon being claimed for that year. On an appeal from the assessment the Income Tax Appeal Board held that the profits were realized on the sale of capital assets, were therefore capital profits, and consequently allowed the appeal. From that decision the Minister appealed to this Court submitting that the vehicles in question constituted part of respondent's inventory and the profits realized on the sales were income from respondent's business.

Held: That the mere fact that a concession in the nature of a depreciation on property has been made to a taxpayer in one year, does not, in the absence of any statutory provisions to the contrary, preclude the Minister from taking another view of the facts in a later year when he has more complete data on the subject matter. The provisions of s. 42(4) of the Income Tax Act, S. of C. 1948, c. 52, empowering the Minister to re-assess or make additional assessments in certain cases within a period of six years from the day of the original assessment would indicate that a previous assessment is not in all cases final and conclusive, but may be reconsidered in the light of subsequent evidence. *Gloucester Railway Carriage and Wagon Co.* v. *Inland Revenue Commissioners* [1925] A.C. 469 referred to.

2. That where it is clearly established that a motor vehicle has been bought for use as a capital asset in the necessary service of the taxpayer, has been used in the same manner and to the same extent as a capital asset would normally be used, and has been treated and recognized as a capital asset, the profit which may arise upon its disposition is not an inventory profit but a capital profit. The 1942 Chevrolet car sold by respondent in 1949 falls within that category.

3. That the fact the nine 1948 Chevrolet cars were purchased and sold as inventory, that they were used substantially for the personal convenience of the employees rather than in the service of respondent,

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that they were held in inventory until the end of 1948 and that they were sold after a short period of use, is sufficient evidence if viewed with the other facts of the case to indicate that they were always considered as part of the inventory which would later be sold in the normal course of business. They were not service cars or "plant" in any ordinary or proper sense and the profit realized on the sales was an inventory profit that was properly included in the assessment.

APPEAL from a decision of the Income Tax Appeal Board.

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

T. Z. Boles and *F. R. Duncan* for appellant.

H. F. Parkinson, Q.C., for respondent.

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

CAMERON J. now (April 14, 1953) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board dated January 19, 1952 (1), allowing an appeal by the respondent from an assessment to income tax for the taxation year 1949. In assessing the respondent the appellant had added to its declared income the following two items:

(*a*) Profit on sale of service automobile..	$ 622.40
(*b*) Profit on sale of demonstrators....	7,220.81
	$ 7,843.21

The Income Tax Appeal Board was of the opinion that the profits realized on the sales of the ten automobiles in question were realized on the sale of capital assets, were therefore capital profits, and consequently allowed the appeal.

On this appeal the Minister submits that the said motor vehicles constituted part of the respondent's inventory, and that the said sum of $7,843.21 was income from the respondent's business. For the respondent it is contended that the vehicles were at all times capital assets, and that the profit realized was a capital profit. There is no dispute as to the amounts involved.

(1) (1952) 5 Tax A.B.C. 411.

The respondent was in business in a large way. It held a franchise from General Motors for the sale of Oldsmobile and Chevrolet cars and trucks, and for the sale of General Motors parts over a large area. It was also engaged in the sale of used cars and trucks, and in the operation of a service department and of a service station.

When it commenced business in 1944, it acquired the assets of a predecessor company, including one 1942 Chevrolet car. Until that car was sold in 1949 it was always treated as a capital asset and depreciation thereon was claimed and allowed in each year. As of December 31, 1948, its net depreciated value in the company books was $127.60. In 1949, having outlived its usefulness, it was sold to a firm of auto wreckers for $750. In assessing the respondent for 1949, the Minister added the difference between the selling price and such net depreciated value ($622.45). That is the first item in dispute.

The second item of $7,220.81 relates to nine new Chevrolet cars acquired by the respondent in 1948 and assigned to the use of company personnel in that year. In its income tax return for 1948, the respondent showed them as capital assets under the heading "Service cars and trucks," claimed depreciation thereon at the rate of 25 per cent of costs, and that claim was allowed in the assessment. All nine cars were sold in 1949 but no depreciation thereon was claimed for that year. Again the Minister added to the respondent's declared income the difference between the proceeds of the sales and the net depreciated value as of December 31, 1948 ($7,220.81).

The first question that arises is whether or not the vehicles in question—or any of them—were "plant" in the proper sense. It is submitted by the respondent that as depreciation had been claimed and allowed in one or more previous years, the Minister could not now allege that what he had then admitted to be "plant" was now, in a subsequent year, "inventory." This submission has given me some concern, but after giving it the most careful consideration, I have reached the conclusion that the Minister is not so precluded. In processing and approving the respondent's 1948 return, the assessor would have no knowledge of the facts except that the cars were claimed to be capital assets under the category of "Service cars and

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trucks." It was not until the 1949 return was received in 1950 that the full facts of the case were revealed and it became known that the cars, instead of being retained as service cars, had, in fact, been sold after being used for an average period of six months. The 1948 assessment was made under the provisions of the Income War Tax Act, whereas the 1949 return had to be considered under the new Income Tax Act (which came into effect on January 1, 1949) and by the terms of which new principles regarding depreciable property were provided. In my view, the mere fact that a concession of this nature had been made to a taxpayer in one year, does not, in the absence of any statutory provisions to the contrary, preclude the Minister from taking another view of the facts in a later year when he has more complete data on the subject matter. The provisions of s. 42(4) of the Income Tax Act, empowering the Minister to reassess or make additional assessments in certain cases within six years from the day of the original assessment, would seem to be a fair indication that a previous assessment is not in all cases final and conclusive, but may be reconsidered in the light of subsequent evidence.

On this point, reference may be made to *Gloucester Railway Carriage and Wagon Co.* v. *Inland Revenue Commissioners* (1). In that case, certain wagons were let out on hire by the taxpayer and the cost of such wagons was capitalized in the books of the company; certain sums were written off each year for depreciation and were allowed as a deduction in computing the profits for income tax in each year. Subsequently, the wagons were sold at a figure substantially in excess of the figures at which they were then carried on the books of the company. In respect of that excess, the company was assessed to corporation profits tax. The special commissioners, in maintaining the assessment, stated at p. 472:

> We do not regard ourselves as precluded by the fact that as long as the wagons were let, they were treated "as plant and machinery" subject to wear and tear, from deciding that they are stock in trade when they are sold, even though let under tenancy agreements, for they seem to us to have in fact the one or other aspect according as they are regarded from the point of view of the users or the company.

(1) [1925] A.C. 469.

Rowlatt, J. affirmed the decision of the Commissioners and his decision was affirmed by the Court of Appeal, by a majority. On appeal to the House of Lords, the order of the Court of Appeal was affirmed.

The two items in dispute must receive separate consideration. The first item has already been mentioned. That vehicle—a used Chevrolet car—was purchased and paid for in 1944. Thereafter, until sold, it was used in the service of the company by one of the employees engaged in soliciting sales of parts to independent garages throughout Toronto. Throughout it was treated as a capital asset in the category of "Service cars and trucks," and depreciation was claimed and allowed annually. It was acquired for the purpose of being used as a service car and was used for that purpose and no other. When it was practically worn out it was sold to a firm of wreckers and the proceeds were credited to the inventory of used cars. Under these circumstances, it is conceded that normally it would be properly treated as a capital asset. But it is contended that as the main business of the respondent was the buying and selling of cars, the sale of this car was within the normal course of business and that any profit realized was therefore an "inventory" profit.

I am unable to agree with that contention. In my view, the question to be answered is this, "Upon the evidence adduced has it been established that the things sold were in fact plant in the proper sense?" If that question be answered affirmatively, then I do not think that the profit on such sale is converted from a capital profit to an inventory profit merely because the taxpayer happens—as here—to be a buyer and seller of the same commodity as the depreciable capital asset itself. In the *Gloucester Railway Wagon and Carriage* case, to which I have already referred, the taxpayer was engaged in the business of buying and selling wagons. Lord Dunedin found that the wagons which were sold (and which had previously been hired out) were not "plant" in the proper sense. At p. 475 he said:

> There is no similarity whatever between these wagons and plant in the proper sense, *e.g.*, machinery, or between them and investments the sale of which plant or investments at a price greater than that at which they had been acquired would be a capital increment and not an item of income.

I think it is evident that had he been of the opinion that the wagons sold were "plant in the proper sense," or

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machinery, he would have found that the profit realized on the sale was a capital increment and not an item of income notwithstanding that the taxpayer was engaged in the business of buying and selling wagons.

Moreover, an examination of the provisions of s. 20 of the Income Tax Act would seem to lead to the conclusion that no distinction is there drawn between taxpayers who dispose of depreciable property which is in the same class as the goods which they buy and sell, and other taxpayers who dispose of depreciable property but are not engaged in the buying and selling of that class of goods. The rights and obligations which follow from a disposal of depreciable goods would seem to be precisely the same in each case. However, as the precise point was not discussed on the appeal, I do not think it desirable to make any definite finding thereon.

It is my opinion that where it is already established that a motor vehicle has been bought for use as a capital asset in the necessary service of the taxpayer, has been used in the same manner and to the same extent as a capital asset would normally be used, and has always been treated and recognized as a capital asset, the profit which may arise upon its disposition is a capital profit.

I am satisfied upon the evidence that the 1942 Chevrolet car sold by the respondent in 1949 falls within that category. For these reasons I find that Item No. 1—the sum of $622.40—was not an inventory profit but a capital profit.

I turn now to the second item, the profit of $7,220.81 made upon the sale of the nine Chevrolet cars. The respondent employed a large staff and for some time there had been a practice of furnishing certain of its key personnel with cars owned by the company. It was in accordance with that practice that between August 11, 1948, and October 7, 1948, the company assigned to certain of its personnel those nine new cars; in some cases these cars replaced other company-owned cars which the employee had previously used; in other cases a new employee (such as the witness Ross) was supplied with a car upon joining the company. As I have noted above, the company in its 1948 return claimed and was allowed 25 per cent depreciation on these cars. All were sold between January 8 and April 9, 1949, and the employees were given new cars

to replace the ones sold. On an average the nine cars in question were used by the key personnel for about six months before being sold.

The item itself refers to these cars as "Inventory demonstrators." In view of the evidence, I think that term is incorrect for they were not used as demonstrators in the ordinary sense except possibly on very rare occasions. It is established that in 1948 and 1949 the demand for automobiles was much greater than the supply; salesmen were instructed not to "push" sales of cars and demonstrators were not needed. The term "demonstrators" arose, I think, because of the fact—as will appear later—that the nine cars were carried for a time in Account 242 "Inventory demonstrators."

There is abundant evidence to establish that these vehicles in the main were not used exclusively as service cars. As stated by the secretary-treasurer, they were supplied to selected personnel for their own use as part of the contract of employment. Mr. McConnan described the use of a car supplied to one of the sales managers as follows: "Well I would say strictly personal transportation. Perhaps some on business but for transportation purposes only." The car supplied to the manager of the Service Department was stated to be "strictly personal for transportation. He is on duty at all hours." Still another of the employees had a car for "transportation for him on company business or his own personal use." I think it is a fair inference from Mr. McConnan's evidence that in each case when a car was so supplied it was intended for personal use of the employee—who could use it in any way he desired—but that it would also be used on company business when he or other employees might at times require it. The cost of gas and oil was divided equally between the company and the employee. The witness Ross stated that as soon as he was supplied with a company car he at once sold his own. He said in regard to the company car, "I took it home at night and used it the same as if it were my own car." In some cases a car was supplied to an employee who held an "inside" job and whose use of the car for company purposes would be only on rare occasions. In other cases the use on company business would be somewhat greater.

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It may be noted here that at January 1, 1948, the company had claimed depreciation on eighteen cars and trucks under the heading, "Service cars and trucks." By the end of the year that number had increased to twenty-five, but no explanation is given as to why the increase was necessary.

The bookkeeping entries of the respondent are significant as to the manner in which the company regarded these cars. Under its franchise the company was required to follow a standard system of bookkeeping laid down by General Motors for all its dealers, and in the main it followed that system. These particular vehicles were not purchased from General Motors as service cars, but were invoiced and delivered to the respondent with many other cars acquired in the normal way for sale. There is no evidence to indicate that they were paid for at the time they were assigned to key personnel. In the company books the cost was entered as a credit to Accounts Payable and as a debit to Inventory Account 240 "New cars and trucks" in precisely the same way as cars and trucks acquired for sale. It is said that as each car was allocated to an employee (normally within three days of its acquisition), it was licensed for the use of the personnel. At the end of each month in 1948, during the period when these cars were allocated, an entry of a lump sum of money was made in Account 242 "Inventory demonstrators," the sum so entered corresponding to the total cost of the cars allocated to key personnel in that month. Nothing was done to place the nine cars in Account 294 "Service cars and trucks" until the year end. As each car was sold in 1949, Account 294 was relieved of that item and at the time of sale was carried back through Account 240 "Inventory new cars and trucks," to "Costs of sales." Mr. McConnan explained that the latter step was done at the request of General Motors, and, he added significantly, "to keep the unit count correct of the *stock on hand.*"

It will be seen, therefore, that the nine cars in question, from the time of their acquisition were carried in the accounts "Inventory new cars and trucks," and "Inventory demonstrators," until the end of the year. Then, for the first time—and at a time when the question of depreciation would naturally arise—they were transferred to "Service cars and trucks." All were later retransferred to "Inven-

tory new cars and trucks" upon sale. The first car was sold on January 8, 1949, and therefore was in Account 294 for a period of only eight days.

As I understand the evidence regarding the bookkeeping method laid down in the General Motors Manual, there are three main accounts which are here relevant. Account 240 is an inventory account of cars which are not put to any use but are held for immediate sale.

Account 242 is also an inventory account called "Inventory demonstrators." It is the inventory of "New cars and trucks which are *temporarily* in the use of employees of the business." The instructions therein state:

> Debit this account with the cost of all new cars put into company service *except service cars.*
>
> The balance in this account represents the actual cost value of all cars and trucks which have been set aside for use as demonstrators, courtesy cars, or any other company use, *except service cars and trucks.*
>
> When a new car is put into company service it should not be handled as a sale but as a transfer of inventory.
>
> The car when actually sold should be treated as a new car and should be recorded in the usual manner as explained under sales of new passenger cars.

Account 294 is called "Service cars and trucks." The instructions in regard to that account include the following:

> Debit this account with cost value of all trucks and commercial cars put into service use and used cars permanently set aside for company use.
>
> Any profit on the sale to be credited to other income.

In addition to the inventory account for cars and trucks on hand for immediate sale (240), the bookkeeping system provided specifically in Account 242 "Inventory Demonstrators" for cars which were temporarily set aside for company use in one way or another—such as demonstrators, courtesy cars and the like—but which would at the end of the temporary use be returned to Account 240 "Inventory new cars and trucks," and be sold in the ordinary way as part of the dealer's inventory for sale. The respondent chose to consider the nine cars in question as falling within that category and reported monthly to General Motors on that basis. Mr. McConnan stated that in placing the cars in these accounts he was merely following the requirements and instructions of General Motors, but I do not think that is so. It was for the company itself to determine whether a car was placed permanently in the category of "Service cars and trucks," in which case it would be shown

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in Account 294, or whether it was to be diverted for temporary use only as an "Inventory demonstrator" and later returned upon sale to Account 240. It was only when that decision was made that the bookkeeping instructions had to be followed. The fact that the respondent carefully carried out the directions in regard to "Inventory demonstrators" is a very strong indication that it considered the nine vehicles as falling within that class and as cars which would eventually be sold in the ordinary course of business. The only deviation from the directions was the placing of the car in Account 294 at the end of the year. Once they were in that account, it was contrary to the instructions to return them upon sale to Account 240. If there had been no intention of selling the cars, they would have been placed immediately in Account 294 upon assignment for use as service cars and would have remained there.

The evidence also indicates that in the company's financial statements, the purchase, maintenance cost, costs of sale and sales of the nine cars were not segregated in any way from its normal buying and selling operations, as would usually be the case with capital assets. All these items were treated in precisely the same way as were the cars and trucks purchased for sale and sold in the normal course of business. The cost of the nine cars is included in the cost of sales, the selling price is in the general account of total sales; sales commissions or bonuses were paid to the salesmen for some if not all of the nine cars when sold, and these items of expense were included in the item of salesmen's salaries and commissions under the general heading, "Car selling expense"; expenses incurred in the operation of the cars were included in "Variable expenses" in the appropriate section. Moreover, the profit realized from the sales is not in any way segregated but is included in the net operating profits of the business as a whole. It is only in the auditor's letter accompanying the income tax return that it is claimed as a capital profit.

Mr. Ferguson, a member of the firm of accountants responsible for the preparation of the company's income tax returns for 1948 and 1949 was of the opinion that while ordinarily it would be good accounting practice to segregate all transactions regarding capital assets from the

general business of the company, such a practice was not here practical or necessary as the amount involved was less than one per cent of the total volume of sales. He said, "If it had been a significant factor we definitely would have pulled it out and shown it separately." It may be noted, however, that the amount in question is a very substantial part of the net taxable income of the respondent.

A few other matters are worth noting. Mr. McConnan said that the decision as to the sale of the nine vehicles was a matter for the general sales manager, who, of course, would have charge of sales of stock in inventory. Again, no reason is assigned for the sale of a substantial number of cars which it is contended were capital assets, except that the demand for cars was very heavy. They were not worn out or obsolete and inasmuch as they seem to have been sold at prices approximately equal to that of new cars, they were apparently kept in first-class condition and presumably ready for sale.

Taking all these facts into consideration and more particularly that the cars were purchased and sold as inventory, that they were used substantially for the personal convenience of the employees rather than in the service of the company, that they were held in inventory until the end of 1948, and that they were sold after a very short period of use, I find it impossible to reach any other conclusion than that they were always considered as part of the inventory which would later be sold in the normal course of business. It is true that they were temporarily removed from the stock of cars immediately available for sale. For a short period they were held for use of the employees pending sale, but the primary purpose of the respondent was that they would be sold. I find that they were not service cars or plant in any ordinary or proper sense.

It follows, therefore, that the profit realized on the sale of the nine cars was an inventory profit and that that item was properly included in the assessment made upon the respondent. The appeal as to that item will therefore be allowed and the decision of the Board in regard thereto will be set aside.

The assessment will therefore be referred back to the Minister to reassess the respondent on the basis of my

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conclusions, namely, that the item of $622.40 is a capital profit and the item of $7,220.81 is an inventory profit. In respect to the first item, it may be necessary for the Minister to take into consideration the provisions of s. 20 and of the regulations passed under s. 11(1)(*a*) of the Income Tax Act, as well as the transitional provisions regarding depreciation. For that reason, I have refrained from stating that the item of $622.40 forms no part of the taxable income of the respondent.

Inasmuch as each party has been successful in part, but as the appellant has succeeded on the main issue, I direct that the appellant will be entitled to be paid by the respondent two-thirds of his taxed costs.

Judgment Accordingly.

1952

Dec. 2

1953

Mar. 6

BETWEEN:

DOMINION TAXICAB ASSOCIATION ..APPELLANT;

AND

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

Revenue—Income tax—The Income Tax Act, S. of C. 1948, c. 52—Contracts between a taxicab association and taxi owners—Moneys received as admission fees income under provisions of ss. 3 and 4 of the Act—Contract of simple deposit—Civil Code of the Province of Quebec, arts. 1795 and 1804—Money paid under contract neither a "security", "earnest" nor a "pledge"—Appeal from decision of Income Tax Appeal Board dismissed.

The appellant which was incorporated under Part III of the Quebec Companies Act without share capital entered into contracts with various taxi owners during 1949, under the terms of which it received from each the sum of $500 or a total amount of $40,500. The contracts read as follows:

CONTRAT

Contrat intervenu entre DOMINION TAXICAB ASSOCIATION et M..... demeurant à Montréal, au numéro.....

de la rue..... le .....19 .

Par les présentes, il est entendu et convenu ce qui suit: Le membre dépose la somme de $500 comme droit d'entrée pour obtenir le privilège de mettre un taxi en service dans ladite Association.

Le membre Consent à ce que ledit droit d'entrée devienne la propriété absolue de la Dominion Taxicab Association lors de son départ, à moins que les deux signataires des présentes consentent mutuellement au transfert dudit dépôt à un nouvel acquéreur.

La Dominion Taxicab Association s'engage à considérer ce droit d'entrée comme un dépôt sur lequel un intérêt pourra être payé quand le Bureau de Direction le jugera à propos. Je, soussigné, déclare avoir lu et bien compros les termes des présentes.

Membre

In its income tax return for 1949 the appellant did not report the total amount as income but described it in its balance sheet attached to the return as "Deferred Liabilities, Members' Deposits". In determining the appellant's taxable income the Minister took into account the amount so received and assessed the appellant accordingly. An appeal from the assessment was dismissed by the Income Tax Appeal Board and from that decision the appellant appealed to the Court.

Held: That the use in the contracts of the words "look upon the admission fee as a deposit" would, in the circumstances fail to make the admission fee "a deposit" if it, in fact, did not have the other qualities and incidence of a "deposit".

2. That the assessment was properly made because in the contract the moneys received as admission fees are nowhere stated to continue to be the property of the taxi owners.

3. That the money was not handed over to the appellant as either "security", "earnest" or a "pledge". *Robertson* v. *Minister of National Revenue* [1944] Ex. C.R. 170 referred to.

APPEAL from a decision of the Income Tax Appeal Board.

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

E. B. Fairbanks for appellant.

Raymond G. Decary and *J. C. Couture* for respondent.

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

ARCHIBALD J. now (March 6, 1953) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board dated the 15th day of May, 1952, in which decision the said Income Tax Appeal Board dismissed an appeal by the said Dominion Taxicab Association from the decision of the Minister of National Revenue dated the 18th day of October, 1951, in which he confirmed the assessment made on the 21st day of February, 1951, against the said Dominion Taxicab Association for the taxation year, 1952.

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DOMINION TAXICAB ASSOCIATION v. MINISTER OF NATIONAL REVENUE

Archibald J.

The appellant was incorporated without share capital on the 5th day of July, 1949, pursuant to part 3 of the Quebec Companies Act (R.S.Q. ch. 279).

In the Income Tax Appeal Board's decision there appears the following statement, namely:

Pursuant to the purposes of its charter, the association entered into contracts with 81 taxi owners during the year 1949. Under the terms of these contracts, the appellant received from each of the 81 taxi owners the sum of $500, or a total of $40,500. The provisions of the contracts entered into between the appellant and the taxi owners read as follows:

CONTRAT

Contrat intervenu entre DOMINION TAXICAB ASSOCIATION et M.....demeurant à Montréal, au numéro .....de la rue.....le.....19 .

Par les présentes, il est entendu et convenu ce qui suit: Le membre dépose la somme de $500 comme droit d'entrée pour obtenir le privilège de mettre un taxi en service dans ladite Association.

Le membre Consent à ce que ledit droit d'entrée devienne la propriété absolue de la Dominion Taxicab Association lors de son départ, à moins que les deux signataires des présentes consentent mutuellement au transfert dudit dépôt à un nouvel acquéreur.

La Dominion Taxicab Association s'engage à considérer ce droit d'entrée comme un dépôt sur lequel un intérêt pourra être payé quand le Bureau de Direction le jugera à propos. Je, soussigné, déclare avoir lu et bien compris les termes des présentes.

Membre

On the hearing of the appeal before me, counsel for the appellant and counsel for the respondent were unable to agree on the translation of this contract.

The learned chairman of the Income Tax Appeal Board has the following observation respecting this contract:

Counsel for the appellant submitted that the contract between the appellant and the taxi owner constituted a contract of *deposit* only; that the taxi owner remained the sole owner of the money deposited which never became the property of the Association, and that, at all events, the amount of $40,500 received by the appellant represents merely the contribution made by the members of the Association for the purpose of raising capital for capital expenditures and, as such, constitutes for the appellant a capital receipt and not an income receipt. I cannot agree with the learned counsel's submissions.

Sections 1795 and 1804 of the Civil Code of the Province of Quebec, where the contracts between the appellant and its members originated, read as follows:

1795. It is of the essence of simple deposit that it be gratuitous.

1804. The depositary is bound to restore the identical thing which he has received in deposit.

If the things have been taken from him by irresistible force and something given in exchange for it, he is bound to restore whatever he has received in exchange.

It is therefore of the essence of the contract of deposit that the deposit be gratuitous and that the thing which had been deposited be restored by the depositary to its owner. It is clear from the terms of the contract under consideration in this case that the necessary elements to a contract of deposit are missing: (*a*) the amount of $500 is not given by the taxi owner to the Association gratuitously, for in return for his contribution the member is to be given by the Association all the privileges which, according to its charter, it is entitled to give to its members, and (*b*) the Association is not obligated and never will be obligated to restore to the taxi owner the amount of $500 he has paid. The contract taken as a whole clearly indicates that the taxi owner is never to get back the amount of $500 paid by him to the Association.

I also fail to see how it could successfully be argued that the taxi owner remains the owner of the amount paid to the appellant when he loses absolutely all control over the said amount which is never to be returned to him. This amount must belong to someone and it seems that it would be concluding to absurdity to hold that the amount in question *would belong* to one who does not possess it, has no control whatsoever over it and is never to get it back, and that it *would* not belong to the one who has possession of it, can dispose of it at his will and is never bound to return it.

Having made the foregoing observation, the learned chairman of the Income Tax Appeal Board dismissed the appeal.

On the hearing before me, counsel for the appellant contended that the contract did not contemplate the "dépôt" as indicated in the relevant sections of the Civil Code of the province of Quebec, and that, because the provisions of the Civil Code of the province of Quebec relate to "simple deposits" only, obviously the deposit contemplated by the contract was much wider in its scope. In support of this argument, counsel for the appellant emphasized the provision in the so-called contract that the moneys deposited by a taxicab owner or by taxicab owners would become the *absolute* property of the Association in certain circumstances. Moreover, it is also provided as follows:

That the Dominion Taxicab Association agrees to look upon the admission fee as a deposit.

It must be observed, however, that the use of the words "look upon the admission fee as a deposit" would, in the circumstances, fail to make the admission fee "a deposit" if it, in fact, did not have the other qualities and incidence of a "deposit."

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I also conclude that the assessment was properly made because in the so-called contract, the moneys received as admission fees or deposits are nowhere stated to continue to be the property of the taxicab owners, in fact, the statement as to the ownership of the moneys so deposited is quite contrary to any such contention.

It must be remembered that the Dominion Taxicab Association had been in operation for a period of two months only before filing its income tax return for the taxable year of 1949. In the statement made by the appellant in support of its income tax return, the total moneys received by it from taxicab owners, namely, $40,500, is described as "deferred members deposits," but I am not of opinion that it could be considered as a liability merely by the insertion of the phrase "deferred liability" in its income tax return.

Counsel for the appellant endeavoured to support his argument by offering evidence that the Dominion Taxicab Association is now in the process of reorganization and, that the moneys paid by the taxicab owners may now either be refunded to them or converted into shares of capital stock in the reorganization.

I rejected evidence in this regard because my enquiry is as to the money that was paid to the appellant in 1949, not what is being done or proposed to be done in its reorganization. Neither is assistance to be received from this provision in the Articles of Association, namely:

> 1. To purchase, assume, take over or otherwise acquire, all or part of the assets, rights, franchises, concessions, privileges, and to succeed to the business known under the name *"Dominion Taxicab Association"* by acquiring all or any part of the assets, with the goodwill and all rights and contracts passed with the said *"Dominion Taxicab Association."*

In the absence of any provision in the contract to incorporate the foregoing provision as one of the terms of the contract, it cannot be said that this money should be treated as a "deferred liability." In the case of *Robertson* v. *Minister of National Revenue* (1), there is a discussion by the learned President of the Exchequer Court of Canada as to the meaning of the word "deposit." It cannot however in the instant case be argued that the money was handed over to the Association as either "security," "earnest" or a "pledge."

(1) [1944] Ex. C.R. 140.

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DOMINION TAXICAB ASSOCIATION v. MINISTER OF NATIONAL REVENUE

Archibald J.

In *Diamond Taxicab Association Limited* v. *The Minister of National Revenue* (1), the facts in which bore much similarity to those in the instant case, the deputy judge of the Exchequer Court of Canada, held that the moneys received by that Association were taxable as revenue. The decision so rendered was appealed to the Supreme Court of Canada and by that Court was dismissed on the 4th day of February, 1953.

This appeal will be dismissed with costs.

Judgment accordingly.

1953

Mar. 9

Mar. 14

BETWEEN:

THE MINISTER OF NATIONAL REVENUE .....APPELLANT;

AND

STOVEL PRESS LIMITED .....RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 6(n)—Interpretation Act, R.S.C. 1927, c. 1, s. 31(j)—Minister's discretion to allow depreciation deductions.

The respondent acquired land, buildings, machinery and equipment from a company which had a controlling interest in it and claimed a deduction in respect of the buildings, machinery and equipment, based on their cost to it. In the case of certain assets which had been fully depreciated in the hands of their former owner the Minister allowed no further deduction and in the case of the other depreciable assets he based his deduction allowance on their cost to their former owner and on his assessment added the difference to the respondent's taxable income. The Income Tax Appeal Board allowed the respondent's appeal from this assessment and the Minister appealed from this decision.

Held: That the issue in this appeal is substantially the same as that in *Minister of National Revenue* v. *Simpson's Limited* [1953] Ex. C.R. 93 and the reasons for judgment in that case are applicable, *mutatis mutandis*, in this one.

2. That the word assets in the first proviso to section 6(*n*) should be read as meaning asset when the occasion requires.

3. That the Minister was right in concluding that the first proviso in section 6(*n*) applied to some of the acquired assets and not to others.

4. That there was no valid reason why the Minister, in determining whether he should base his allowance of deductions in respect of depreciation of the assets in question on their cost to the former owner or on the amount for which they were acquired by the respondent, should not consider the proviso to section 6(*n*) and its possible effect in future.

5. That the Minister validly exercised the discretion vested in him.

(1) [1952] Ex. C.R. 331.

1953

MINISTER OF NATIONAL REVENUE v. STOVEL PRESS LTD.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the President of the Court at Winnipeg.

Irving C. Keith, Q.C. and *F. J. Cross* for appellant.

D. A. Thompson Q.C. and *D. C. McGavin* for respondent.

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

THE PRESIDENT now (March 14, 1953) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board (1), dated July 17, 1951, allowing the respondent's appeal from its income tax assessment for the taxation year ending December 31, 1947, on the ground that the Minister had not properly exercised his discretion under section 6(*n*) of the Income War Tax Act, R.S.C. 1927, chapter 97. The appeal relates to the nature and extent of the discretion vested in the Minister to allow deductions in respect of depreciation from what would otherwise be taxable income. So far as relevant to the appeal section 6(*n*) reads as follows:

6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

(*n*) depreciation, except such amount as the Minister in his discretion shall allow, including

. . .

Provided, however, that the Minister shall not allow a deduction in respect of depreciation of assets owned by an incorporated taxpayer from the income of the said taxpayer if he is satisfied that the said taxpayer directly or indirectly had or has a controlling interest in a company or companies previously the owner or owners of the said assets or that the said previous owner (which term shall include a series of owners) directly or indirectly had or has a controlling interest in the said taxpayer or that the said taxpayer and the previous owner were or are directly or indirectly subject to the same controlling interest and that the aggregate amount of deductions which have been allowed to the said taxpayer and/or the said previous owner in respect of the depreciation of such assets is equal to or greater than the cost of the said assets to the said previous owner or to the first of the previous owners where more than one;

(1) (1951) 4 Tax A.B.C. 359.

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MINISTER OF NATIONAL REVENUE v. STOVEL PRESS LTD.

Thorson P.

The facts are not in dispute. In 1947 the respondent purchased from Stovel Company Limited certain land, buildings, machinery and equipment for $1,300,000 of which $509,500 was allocated to the buildings and $692,000 to the machinery and equipment. The cost of these assets to Stovel Company Limited was $849,701.74, that of the buildings being $227,591.43 and that of the machinery and equipment $523,858.22. Prior to the date of the purchase the aggregate amount of the deductions in respect of depreciation of the said assets which the Minister had allowed to Stovel Company Limited was, except in respect of certain assets, less than their cost to Stovel Company Limited. There was an exception in the case of certain machinery and equipment which had been acquired by Stovel Company Limited prior to June 30, 1938, at a cost of $319,066.06, in respect of which an aggregate amount of $335,243.18 had been allowed as deductions for depreciation. There were also some other assets which had been fully depreciated except for the nominal amounts at which they were carried on the books of Stovel Company Limited.

At and subsequent to the date of the purchase of the said assets Stovel Company Limited had a controlling interest in the respondent.

In its income and excess profits tax return, dated April 30, 1948, for its taxation year ending December 31, 1947, the respondent claimed a deduction of $33,038.03 in respect of depreciation of the buildings, machinery and equipment which it had purchased from Stovel Company Limited, but the Minister in his assessment allowed a deduction of only $13,675.03. In doing so he did not allow any deduction in respect of the assets acquired by Stovel Company Limited prior to June 30, 1938, to which reference has been made, or in respect of the assets which had been fully depreciated as stated. In respect of the buildings and other machinery and equipment he based his allowance of deductions in respect of their depreciation on their cost to Stovel Company Limited. In doing so he allowed a rate of 10 per cent. on such base although the respondent had claimed only 7½ per cent. on the base on which it claimed its deductions. The amounts disallowed by the Minister were added back to the amount of taxable income reported by the respondent in its return.

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The respondent objected to the assessment and appealed against it to the Income Tax Appeal Board. The Board allowed the appeal and referred the assessment back to the Minister for reconsideration and reassessment by allowing depreciation based on the *cost to the appellant* (the respondent herein) of the plant and equipment purchased by it. The reasons for the Board's decision were given by Mr. W. S. Fisher, Q.C., with the Chairman, Mr. F. Monet, Q.C., concurring.

The issue in this appeal is substantially the same as that in *Minister of National Revenue* v. *Simpson's Limited*(1) in which I have just rendered judgment allowing the Minister's appeal from the Board's decision. The reasons for judgment in that case are applicable, *mutatis mutandis*, in this one and are incorporated herein without repetition of them.

I shall merely confine myself to the submissions made in this appeal that were different from those put before me in the *Simpson's Limited* case (*supra*). It was argued by counsel for the respondent that the Minister had no right to look at the assets in question separately and determine that the first proviso of section 6(*n*) applied to some of them, as he did in the case of the assets acquired by Stovel Company Limited prior to June 30, 1938, and the other assets that had been fully depreciated subject to the nominal amount left. It was his submission that the word assets in the first proviso of section 6(*n*) meant all the assets acquired in bulk and must be so considered by the Minister in determining whether the proviso applied and that it was not competent for him to decide that the proviso was applicable in the case of some of the acquired assets and not applicable in the case of other assets. That being so, the Minister had not exercised his discretion on proper legal principles. I do not agree with this interpretation of the proviso. Section 31(*j*) of the Interpretation Act, R.S.C. 1927, chapter 1, provides that words in the singular shall include the plural and words in the plural include the singular. Thus the word assets in the proviso should be read as meaning asset when the occasion requires. Moreover, it seems to me that the Minister in determining

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whether the proviso applies must, of necessity, consider each asset in respect of which a claim of a deduction for depreciation is made to see whether in respect of that asset the aggregate amount of the deductions in respect of the depreciation which have been allowed is equal to or greater than its cost to the former owner. The words of the proviso are, in my opinion, capable of this interpretation and it is the only interpretation that is consistent with the workability of the proviso. The adoption of the interpretation urged for the respondent would create such great difficulties of administration that they could not have been intended by Parliament. I am, therefore, of the opinion that the Minister's interpretation of the proviso was correct and that his disallowance of the deduction claimed in respect of the depreciation of the assets acquired up to June 30, 1938, was proper.

The other submission to which I shall refer relates to a letter, dated August 30, 1948, from the Director General of the Corporation Assessments Branch of the Taxation Division of the Department of National Revenue to the respondent's chartered accountants in which the following statement appears:

> We will not recognize for depreciation purposes the inflated value of the assets purchased by Stovel Press Limited from Stovel Company Limited. The amount of depreciation to be allowed will be calculated on the book value of the assets turned over by the latter Company. This is because of the fact that both Companies were controlled by the same interests at the time the sale of the assets was completed, and the first proviso of section 6(1)(*n*) is specific in this connection.

and also to paragraph 15 in the Notice of Appeal herein which alleged:

> 15. That, in exercising his discretion under paragraph (*n*) of section (1) of Section 6 of the Income War Tax Act to allow an amount for depreciation in respect of the buildings, machinery and equipment referred to in paragraph 5 hereof for the 1947 taxation year, the Minister properly had regard, in determining the amount of the allowance, to the fact that the first proviso to the said paragraph (*n*) would operate in some subsequent year to prohibit any further allowance.

It was stressed by Mr. Fisher in the decision *a quo* that until the time arrives when both of the conditions referred to in the proviso exist, the proviso can have no application and that, in the meantime, the Minister's discretion must be exercised without regard to any special provision which may be set forth in it. I have already in the *Simpson's*

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Limited case (*supra*) indicated my disagreement with this view. But counsel for the respondent urged that the Minister had no right to assume what would happen in the future and that in exercising his discretion with that assumption weighing on him he had not exercised his discretion on proper principles.

In my view there was no valid reason why the Minister in determining whether he should base his allowance of deductions in respect of depreciation of the assets in question on their cost to the former owner or on the amount for which they were acquired by the respondent should not consider the proviso and its possible effect in the future. But that is not the question before the Court. It is not so much concerned with why the Minister did what he did as with whether what he did was within his discretion to do. He may have been moved to his decision by considerations in respect of which there might be differences of opinion but the real question in this appeal as in the *Simpson's Limited* case (*supra*) is whether he acted within his discretion in basing his allowances of the deductions claimed in respect of depreciation of the acquired assets on their cost to the previous owner. If the Minister thought that in doing so he was acting consistently with the declared policy of Parliament as embodied in the proviso, as is by implication suggested, how can it be said that he exercised his discretion improperly? I do not think that he did. Indeed, I am unable to find any reason for holding that he was precluded from exercising his discretion as he did. His action, in my judgment, was a valid exercise of the discretion vested in him.

It follows from these reasons and those in the *Simpson's Limited* case (*supra*) that the appeal herein must be allowed with costs and the assessment appealed against restored.

Judgment accordingly.

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Sept. 24

1953

May 15

BETWEEN:

THE WAWANESA MUTUAL INSURANCE COMPANY ..... SUPPLIANT;

AND

HER MAJESTY THE QUEEN..... RESPONDENT.

Crown—Petition of Right—Action by insurance company to recover amount paid to its insured—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c)—Civil Code of Quebec, Arts 1155, 1156, 2584—Right of insurance company to transfer of rights of its insured against persons responsible for his loss.

The suppliant insured G. against certain perils in connection with his automobile including loss or damage by collision with $300 deductible. G. suffered a loss as the result of a collision between his taxi and a motorcycle driven in the course of his employment by a member of the Canadian Army due to the latter's negligence. The amount of the damage to G's taxi came to $721.41 of which the suppliant paid him $421.21 leaving him to pay the balance of $300 himself. By a petition of right G. successfully claimed this amount from the Crown, together with other damages, and the suppliant now brings this petition to recover the amount of $421.21 which it paid to G. under its policy.

Held: That when an insurance company has, pursuant to its policy of insurance, paid its insured part of the loss suffered by him as the result of the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment so that it has become entitled under Article 2584 of the Civil Code of Quebec to a transfer of his rights against the person who caused his loss to the extent of the amount paid it may file a petition of right against the Crown in its own name and recover the part of the loss which it has paid.

Petition of Right by an insurance company to recover the amount paid its insured for loss suffered by him as the result of a collision between his taxi and a motorcycle driven in the course of his employment by a member of the Canadian Army.

The action was tried before the President of the Court at Montreal.

R. Hodge for suppliant.

R. Ouimet Q.C. for respondent.

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

THE PRESIDENT now (May 15, 1953) delivered the following judgment:

The facts in this case are simple. On July 16, 1949, one Bernard Giborski suffered a loss as the result of a collision between his taxi driven by himself and a motorcycle driven

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in the course of his employment by Corporal H. Barnes, a member of His late Majesty's Canadian military forces. The collision occurred on Decarie Boulevard in Montreal, a short distance north of Dupuis Street. By a policy of insurance, dated November 4, 1948, the suppliant had insured the said Giborski against certain perils in connection with his automobile, including loss or damage by collision in an amount not exceeding $1,000 with the sum payable by the insured in respect of each separate claim being $300. The amount of the damage to Giborski's taxi came to $721.21 and pursuant to its policy the suppliant paid him the sum of $421.21, leaving him to pay the balance of $300 himself. By a petition of right filed in this Court on January 11, 1950, the said Giborski claimed damages from the Crown in the sum of $460, alleging that $300 of this amount represented the deductible portion of the damage to his taxi that he was obliged to pay, "the difference being paid by his assurers," and $160 his loss of revenue for a period of sixteen days pending repair of his taxi. The claim was made under section 19(*c*) of the Exchequer Court Act, R.S.C. 1927, chapter 34, on the ground that the loss resulted from the negligence of Corporal Barnes while acting within the scope of his duties. The claim came on for trial before me at Montreal and on December 6, 1950, I delivered judgment in favour of the said Giborski for $460 and costs and dismissed the Crown's counterclaim with costs. Subsequently, on January 30, 1951, the said Giborski acknowledged receipt from the Crown of the amount of the judgment in his favour in full settlement of his claims or rights in connection with the accident. Subsequently, on June 26, 1951, he acknowledged receipt from the suppliant of $421.21 in full settlement of his claims under the policy and assigned to it "all his rights against any and all persons responsible for the said accident, the whole up to the amount of four hundred and twenty one dollars and twenty one cents ($421.21)" and on the same date he signed a further acknowledgment and release in which he subrogated the suppliant into "all my rights and recourses against any and all persons responsible for the accident that occurred on July 16, 1949, and more especially against His Majesty the King represented by the Dominion of Canada, the whole up to the amount of $421.21." Then,

on September 6, 1951, the suppliant filed the present petition of right seeking to recover from the Crown the amount of $421.21, which it had paid to Giborski under its policy and in respect of which it had obtained an assignment and subrogation from him.

There is no dispute as to the facts. The sole issue in the case is a legal one, namely, whether, under the circumstances, a petition of right lies against the Crown in favour of the suppliant for recovery of the amount of the loss which it paid to Giborski under its insurance policy.

While the amount of the claim is not large it involves a principle of general public importance and raises a question that is not free from difficulty.

It cannot, strictly speaking, be said that the suppliant suffered any loss as the result of negligence on the part of an officer or servant of the Crown, within the meaning of section 19(*c*) of the Exchequer Court Act, for its loss arose out of its contract of insurance and would have been the same even if the collision against which it had insured Giborski had happened without any negligence. In this view of section 19(*c*) an insurance company could not come within its ambit merely by showing that it had paid its insured the amount of his loss resulting from the negligence of an officer or servant of the Crown.

But the weight of judicial opinion is against this limited view of the ambit of the section. That is clearly so in cases where the insurance company and the insured are joined as suppliants as in *Yukon Southern Air Transport Ltd. et al* v. *The King* (1). There the suppliants claimed the sum of $49,260.48 as the amount of the loss alleged to have been the result of negligence on the part of an officer or servant of the Crown. The loss arose from a collision between two aeroplanes, one belonging to the Crown and the other to the suppliant Yukon Southern Air Transport Limited whereby the latter was damaged, and the suppliant Phoenix Insurance Company Limited was added as a suppliant because it had paid its co-suppliant part of its loss pursuant to a policy of insurance. Angers J. held that the principle of subrogation applied and gave judgment in favour of the suppliants for $18,525.17, of which $13,000 was to be paid to the suppliant insurance company, being

(1) [1942] Ex. C.R. 181.

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the amount it had paid under its policy, and the balance to the other suppliant.

I followed this case in *Megarity and London Guarantee & Accident Company Limited* v. *The King* (June 10, 1944, unreported) but with some doubt. There I said:

> I find some difficulty in seeing on what grounds the suppliant insurance company can have a petition of right against the Crown. Its claim is not based on negligence but on a contract made with the insured. I shall, however, in this case follow the *Yukon Southern Air Transport* case, although I do so with doubt, and reserve the right to reconsider the whole question if it should arise again in a subsequent case.

There is now no ground for any such doubt in view of the decision of the Supreme Court of Canada in *The King* v. *Snell et al* (1). In that case a petition of right was filed for damages by reason of the death of Bertram Snell who was working in the course of his employment as a servant of one Dives in British Columbia. The death was caused by the negligence of a member of the Canadian military forces while acting within the scope of his duties. Prior to lodging the petition the widow had been awarded compensation for herself and her son by the Workmen's Compensation Board of British Columbia under the Workmen's Compensation Act, R.S.B.C. 1936, chapter 312. By section 11 of this Act the Board was subrogated to the claims of the widow and her son. The widow then filed her petition of right under section 19(*c*) of the Exchequer Court Act and the Board joined as a co-suppliant on the ground of its subrogation and also on an equitable assignment in writing from the widow. This Court granted the relief sought (2) and its judgment was confirmed on an appeal to the Supreme Court of Canada. There it was contended on behalf of the Crown, *inter alia*, that the provisions of the British Columbia Workmen's Compensation Act were not applicable to the Crown and that the suppliant Board could not acquire any right of action against the Crown by subrogation under it. This contention was rejected by the Supreme Court of Canada.

It was thus recognized that a person who had not suffered any direct injury as the result of the negligence of an officer or servant of the Crown within the meaning of section 19(*c*) of the Exchequer Court Act could nevertheless have a claim under the section through being subro-

(1) [1947] S.C.R. 219. (2) [1945] Ex. C.R. 250.

gated to the rights of a person who had been so injured. It is true that in the *Snell* case (*supra*) the subrogation was pursuant to a statute but there does not seem to be any valid reason for thinking that the situation would be otherwise in the case of a subrogation pursuant to or inherent in a contract.

While it was settled in the *Snell* case (*supra*) that a person who had been subrogated by statute to the rights of an injured person might validly join with such person as a co-suppliant in a claim under section 19(*c*) the question whether the subrogated person could bring action in his own name was not decided. Estey J., speaking for Taschereau J. as well as for himself, expressed the view that since both the subrogated person and the injured person were parties to the action it was unnecessary to determine some of the issues raised if the action had been brought in the name of the Board only. Kellock J. was of a similar view. But after the decision in that case the right of a subrogated Workmen's Compensation Board to file a petition of right against the Crown in its own name was recognized in this Court by Angers J. in *The Workmen's Compensation Board of the Province of Saskatchewan* v. *The King* (1). There the suppliant sought by a petition of right to recover from the Crown the sum of $8,715.92, being the capitalization of the compensation which it was liable to pay to one Mary Belanger, the widow of Joseph Belanger and their children, under the Workmen's Compensation (Accident Fund) Act (R.S.S. 1940, Chapter 303) as the result of the death of Joseph Belanger. It was alleged that the death was the result of the negligence of a member of His Majesty's Canadian Air Force, that the widow and her children became entitled to compensation under the Act referred to and that the Board was subrogated to the rights of the widow and children to claim damages on account of the death. Argument was made of the question of law whether the Board had the right to bring the petition and Angers J. held that it had.

In an earlier case, namely, *The Western Insurance Co.* v. *The King* (2) the suppliant brought a petition of right to recover the amount which it had paid to the owner of a scow which had been sunk as the result of alleged negli-

(1) [1947] Ex. C.R. 262.

(2) (1909) 12 Ex. C.R. 289.

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gence on the part of an officer or servant of the Crown on a public work. The suppliant claimed that it was subrogated to the rights of the owner of the scow. Cassels J. dismissed the petition on the ground that the suppliant had failed to prove a case of negligence but the right of the suppliant to bring the action does not appear to have been questioned.

On the other hand, I was advised by counsel for the respondent that in *The Wawanesa Mutual Insurance Company* v. *The King* (March 17, 1950, unreported) Angers J. dismissed the suppliant's claim on the ground that the fact that it had paid the loss suffered by its insured as the result of the negligence of an officer or servant of the Crown and was subrogated to his rights did not give it a status to bring a petition of right against the Crown, but there is no record in the file of any reasons for the decision.

In my opinion, the decision in the Saskatchewan *Workmen's Compensation Board* case (*supra*) was a sound one.

Moreover, in Quebec an insurance company that has paid its insured his loss has the benefit of Article 2584 of the Civil Code which provides:

> 2584. The insurer on paying the loss is entitled to a transfer of the rights of the insured against the persons by whose fault the fire or loss was caused.

While this Article appears in the portion of the Code dealing with the subject of fire insurance it has been applied in cases of accident insurance. Under it an insurance company that has paid its insurer his loss as the result of the negligence of a third party, being entitled to a transfer of his rights against the third party, can sue such third party. Of this there is no doubt.

That being so, I see no valid reason for assuming that a petition of right would not lie against the Crown in favour of an insurance company which had paid its insured the amount of his loss resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment. In the recent case of *The Queen* v. *Cowper et al* (1) I held that a claim to compensation for land taken under the Expropriation Act may validly be assigned, without the acquiescence of the Crown, and that when notice of the assignment has been duly given

(1) [1953] Ex. C.R. 107.

to the Crown the assignee is the person entitled to recover the compensation. It was my view that there was no sound reason why the Crown should have any right to question the assignment if it was valid as between the parties to it and due notice of it had been given to the Crown. The same reasoning is applicable where an insurance company which has paid its insured the amount of his loss has become entitled under Article 2584 to a transfer of his rights against the person who caused the loss. If such person was an officer or servant of the Crown and acting within the scope of his duties or employment there does not seem to be any sound reason for saying that the Crown is not answerable in damages to the insurance company to which the rights of the injured person have lawfully been transferred. It cannot make any difference to the Crown as a matter of public policy whether it is answerable to the person actually injured or to an insurance company which has become entitled by law to a transfer of his rights.

There is greater difficulty in a case such as this one where the insurance company did not pay the whole amount of the loss sustained by its insured but only part of it. Does a payment by an insurance company of part of the loss sustained by its insured give it a right under Article 2584 to a transfer of part of his rights against the wrongdoer and enable it to sue him in its own name for the amount which it has paid? A first reading of the Article suggests a negative answer. It speaks of the insurer paying a "loss", not "part of a loss", and of being entitled to a transfer of the "rights", not "part of the rights", of the insured and the argument may well be advanced that the rights of the insured against the wrongdoer are indivisible and not capable of partial transfer and, conversely, that the liability of the wrongdoer to the person whom he has injured is indivisible and that he ought not to be harassed more than once for the same cause: *nemo debet bis vexari pro una et eadem causa.*

The leading decision on the subject in Quebec is that of the Judicial Committee of the Privy Council in *The Quebec Fire Assurance Company* v. *Molson and St. Louis* (1). In that case the parish church of Boucherville had been largely destroyed by a fire occasioned by the negli-

(1) (1851) 7 Moore P.C. 286; 1 L.C.R. 222.

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gence of the respondent's servants. It had been insured against fire by the appellant. On payment by it of part of the amount of the loss the *curé* and one of the *marguilliers-en-charge* transferred to it the right to sue and claim from the respondents the amount which it had paid. It was held that this constituted a valid subrogation of the debt due to the insurers in right of the *fabrique* according to the French law prevailing in Lower Canada. I need not here deal with all the issues in this case but only with one of them. The question was raised whether the plaintiffs who sued as being subrogated to a part of the claim for damages, namely, so much as they were bound to pay and paid on the policy, could sue without joining the *fabrique,* as co-plaintiffs. To this Mr. Baron Parke made the following answer, at page 319:

> It seems to be reasonable that the Defendants, the *quasi* debtors, should not be liable to a double action by reason of the adoption of the equitable principle, that the assurers have a right to be subrogated. The Defendants, therefore, must have a remedy to prevent that injustice. In *Touillier, "Droit Civil"*, tit. 3, Art. 120, it is said, that the debtor has a right to require all to be united. But it appears to us to be clear that this defence is not available under the plea of "Not guilty", or the denial of the truth of all the matters alleged.

Thus in that case it was decided that an insurance company which had paid only a part of the loss suffered by the insured was subrogated to the rights of the insured and could maintain action in its own name against the person responsible for the loss for the part of the loss which it had paid.

The case which I have just referred to led to the adoption of Article 2584 of the Code and the Codifiers in their 7th report (Article 117, page 256) gave this explanation of it:

> Article 117 is based upon the authority of the doctrine held by the Courts in the case of the Quebec Fire Insurance and Molson and others. It would seem that the right of the insurer who pays is rather a right to obtain a transfer from the insured of his claim for damages, than a right of subrogation properly so called; for the insurer pays his own debt, which arises from the contract and is entirely a distinct thing from the claim of the insured, against a third party, for a contingency arising from a totally different cause. The article is submitted in accordance with this view.

Article 2584 was interpreted by the Court of King's Bench in Quebec in a comparatively recent case, namely, *Henry Morgan and Co. Ltd.* v. *North British and Mercantile Insurance Co. Ltd.* (1). In that case several insurance

(1) (1940) 69 B.R. 511.

companies had insured the Imperial Tobacco Company against fire. There was a fire loss amounting in the total to $8,649.74, of which the share of the North British and Mercantile Insurance Company came to $2,298.35. It paid this amount to its insured and obtained a transfer from it to that extent of its rights against Henry Morgan and Company Limited whose workmen had negligently caused the fire and succeeded in an action in the Superior Court of Quebec, obtaining a judgment for $2,383.65 which was made up of the sum of $2,298.35 which it had paid its insured and $85.30 which was its share of adjustment fees and expenses. On an appeal to the Court of King's Bench the amount of the award in the Superior Court was reduced to $2,298.35, the view of the majority of the Court being that the insurer could not have any greater right than his insured had and that since the adjustment fees and expenses had not caused the insured any loss the insurance company could not recover any portion of them. While that was the specific issue in the appeal the illuminating judgment of Rivard J., with whom Sir Matthias Tellier J. and St. Germain J. agreed, establishes several important propositions. One of these is that when several companies insure a property against fire the company that pays the amount of its indebtedness to the insured may bring an action against the author of the damage without joining the other insurance companies in the action. Another principle is that the insurer, as transferee of the rights of the insured, has a right of recourse against the wrongdoer but only such right as the insured had and within the limits of the transfer.

Thus in Quebec an insurance company which has paid its insured only a part of his loss is entitled to the benefit of Article 2584 and may bring an action against the wrongdoer in its own name for the portion of the loss which it has paid. If the provincial law permits this I see no reason why an insurance company, under similar circumstances, should not be entitled to file a petition of right against the Crown where the wrongdoer was its officer or servant and acting within the scope of his duties or employment.

Since the right of an insurance company is not, properly speaking, a right of subrogation but only a right to a transfer of rights it is not necessary to consider Article 1155 defining conventional subrogation or Article 1156 dealing

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with subrogation by operation of law. Nor does it matter that the transfer of rights was not made at the same time as the payment of the loss. Indeed, as I read Article 2584, the insurance company that comes within its benefits has a statutory right to a transfer of its insured's rights and it matters not when or, indeed, whether the transfer is made.

It should be noted that Giborski could have sued for the full amount of his loss and no deduction could have been made from the amount of his award for the portion of his loss which he received from the suppliant: *vide Herbert* v. *Rose* (1). But the fact that he sued for only that portion of his loss that he had to bear himself should not, in the absence of strong reason to the contrary, operate as a bar against the insurance company's claim for the portion of the loss which it paid or as a release of the Crown from its responsibility for such portion. Moreover, the Crown was informed in Giborski's petition of right that part of his loss had been paid by his insurance company. It could then have ascertained the name of the insurance company, if necessary by an examination of Giborski for discovery, and taken steps to have it joined as a co-suppliant, but it made no such attempt and it should not now be heard to complain of multiplicity of actions. It should have paid the suppliant's claim on the demand for payment being made.

In view of the decisions I have referred to I have come to the conclusion that the suppliant is entitled to succeed. In my judgment, they support the opinion that when an insurance company has, pursuant to its policy of insurance, paid its insured part of the loss suffered by him as the result of the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment so that it has become entitled under Article 2584 of the Civil Code of Quebec to a transfer of his rights against the person who caused his loss to the extent of the amount paid it may file a petition of right against the Crown in its own name and recover the part of the loss which it has paid.

There will, therefore, be judgment in favour of the suppliant that it is entitled to the sum of $421.21 and costs.

Judgment accordingly

(1) (1935) 58 B.R. 459.

BETWEEN:

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Oct. 23

Oct. 30

GENERAL SUPPLY COMPANY OF CANADA LIMITED ..... APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS and EXCISE, DOMINION HOIST & SHOVEL COMPANY LIMITED and DOMINION RUBBER COMPANY ..... RESPONDENTS.

Revenue—Customs and Excise—Goods subject to duty—The Customs Tariff Act, R.S.C. 1927, c. 44, s. 2(2), Schedule A, Tariff items 427, 431 and 438a—The Customs Act, R.S.C. 1927, c. 42 as amended, ss. 2(r) and 50—Tariff Board—Questions of law—Construction of a statutory enactment a question of law—Practice—An application cannot be considered to have been made until date fixed for hearing—Affidavit in support of application to extend time for applying for leave to appeal—Application for leave to appeal from decision of Tariff Board granted.

In 1951 appellant imported from the United States one Model 45 power shovel. The Deputy Minister of National Revenue ruled that it was dutiable under tariff item 427 of the Customs Tariff Act, R.S.C. 1927, c. 44, namely, "all machinery composed wholly or in part of iron or steel, n.o.p. and complete parts thereof". From that ruling the appellant appealed to the Tariff Board, contending that the imported article was within the term "shovel" in tariff item 431, or that it fell within tariff item 438a as being a conveyance and therefore within the definition of "vehicle" found in s. 2(r) of the Customs Act, R.S.C. 1927, c. 42; and further, and inasmuch it was powered by a motor, that it was a motor vehicle. The Tariff Board without giving any reason for its findings held that the shovel at issue was properly classifiable as machinery of iron or steel. An application by the appellant, under the provisions of s. 50 of the Customs Act, as amended, for leave to appeal to this Court from the decision of the Board on a question of law, was granted although it was not heard until after the expiry of thirty days from the date of the decision of the Board, the Court having accepted as a reasonable excuse for the delay the explanation given by appellant.

Held: That an application cannot be considered to have been made until at least the date fixed for its hearing. It is then only that the application comes before the Court for consideration, and the notice previously given is nothing more than an intimation that the application will be made on the date specified.

2. That an application for leave to extend the time for applying for leave to appeal should be supported by one or more affidavits explaining the reasons for requiring such extension.

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3. That the construction of a statutory enactment is a question of law. *Farmer* v. *Cotton's Trustees* [1915] A.C. 922; *Rogers Majestic Corporation Limited* v. *City of Toronto* [1943] S.C.R. 440; *Delhi* v. *Imperial Leaf Tobacco Company* [1949] O.R. 636 referred to and followed.

4. That in rejecting the appellant's submissions the Tariff Board must have interpreted the words "motor vehicles of all kinds" in tariff item 438a of the Customs Tariff Act as excluding the imported article and the words "conveyance of what kind soever" in s. 2(*r*) of the same act as excluding the somewhat limited conveyor operation performed by the imported article. The tariff items which the Board interpreted in this manner are part of the schedule to the Act and therefore part of the enactment itself. In construing these items the Board was dealing with questions of law, and under s. 50 of the Customs Act, R.S.C. 1927, c. 42, the appellant is given the right to appeal therefrom.

APPLICATION under s. 50 of the Customs Act for leave to appeal from a decision of the Tariff Board.

The application was heard before the Honourable Mr. Justice Cameron at Ottawa.

Gordon F. Henderson for the application.

Errol K. McDougall contra.

G. Douglas McIntyre for the Deputy Minister of National Revenue.

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

CAMERON J. now (October 30, 1952) delivered the following judgment:

This is an application for an Order (*a*) extending the time for applying for leave to appeal to this Court from a decision of the Tariff Board dated September 16, 1952; and (*b*) granting leave to appeal to this Court from the decision of the Board. No one appeared on behalf of the second named respondent, but counsel for the Dominion Rubber Company opposed both applications and counsel for the Deputy Minister of National Revenue held a watching brief only.

The application is brought under the provisions of s. 50 of the Customs Act, R.S.C. 1927, c. 42, as amended, the relevant parts of which are as follows:

50(1) Any of the parties to an appeal under section forty-nine, . . . may, upon leave being obtained from the Exchequer Court of Canada or a judge thereof, upon application made within thirty days from the

making of the order, finding or declaration sought to be appealed, or within such further time as the Court or judge may allow, appeal to the Exchequer Court upon any question that in the opinion of the Court or judge is a question of law.

(2) The appellant under subsection one shall give to the Tariff Board, and to the other parties to the appeal under section forty-nine, seven clear days' notice of his application for leave to appeal, and the Tariff Board and such other parties have the right to be heard by counsel or otherwise upon the application or upon the appeal, or both.

The first point to be determined is whether the application for leave to appeal was, in fact, made within thirty days from the making of the Order and, if not, whether the time should be extended. The decision of the Tariff Board was given orally on September 16, 1952, at the conclusion of the hearing, and the formal Order in writing was also signed on that date. The Notice of Appeal—or as I think it should be called, the Notice of Application for Leave to Appeal—is dated October 10, 1952, and was served on the second and third respondents on October 15. I was not advised as to the date when service was made on the first-named respondent, but will assume that it was served on or before October 15, 1952. It was returnable before this Court on October 23 and was heard on that date. Notice of the application was therefore prepared, served and filed before expiry of thirty days from the date of the decision, but the application did not come on for hearing until after the expiry of that period.

I do not think that an application can be considered to have been made until at least the date fixed for the hearing of the application. It is then only that the application comes before the Court for consideration, and the notice previously given is nothing more than an intimation that the application will be made on the date specified. Indeed, in the application now before me the opening words are, "Take notice that an application will be made . . ." My opinion, therefore, is that the application for leave to appeal was not "made within thirty days from the making of the Order."

That, however, does not conclude the matter for a very wide power is conferred by the words, "or within such further time as the Court or judge may allow." It is submitted that no substantial reason has been advanced to explain the delay and it is pointed out that at the opening

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of the hearing before the Tariff Board, the agent (not the counsel) for the appellant intimated that he then had instructions to appeal the Board's finding if its decision were not in his favour. It would be advisable, I think, that an application for leave to extend the time should be supported by one or more affidavits explaining the reasons for requiring such extension, but that was not done in this case. However, Mr. Henderson, counsel for the appellant, stated that the typewritten record of the proceedings before the Tariff Board was not available until two weeks after the hearing, that when it was received, the agent, Mr. Hooper, was away from his office, and that immediately upon his return the appeal proceedings were launched. In this case I shall accept that explanation as a reasonable one which accounts for the delay, more particularly as the practice has not heretofore been settled and as it was admitted that the respondents had not been prejudiced in any way. The application to extend the time for applying for leave to appeal will therefore be granted.

S. 50(1) gives leave to appeal to the Court only on a question of law and the next question is whether such a question is involved in this appeal. On February 14, 1951, the appellant imported into Canada from the United States one Model 45 power shovel of $\frac{3}{4}$ yds. capacity. The Deputy Minister of National Revenue ruled that it was dutiable under Tariff Item 427, namely, "All machinery composed wholly or in part of iron or steel, n.o.p. and complete parts thereof." From that ruling the appellant appealed to the Tariff Board, contending that it should have been classified either under Tariff Item 431, namely, "Shovels and spades, of iron or steel, n.o.p.," or under Tariff Item 438*a*, which includes "Automobiles and motor vehicles of all kinds, n.o.p." It was also contended that in interpreting the words "motor vehicles of all kinds," consideration should be given to the definition of "vehicle" contained in s. 2(*r*) of the Customs Act, which is as follows:

> (*r*) "Vehicle" means any cart, car, wagon, carriage, barrel, sleigh, air-craft, or other conveyance of what kind soever, whether drawn or propelled by steam, by animals, or by hand or other power, and includes . . ."

Then by s. 2(2) of the Customs Tariff Act, R.S.C. 1927, c. 44 as amended, it is provided:

2(2) The expressions mentioned in section two of the Customs Act, whenever they occur herein or in any Act relating to the Customs, unless the context otherwise requires, have the meaning assigned to them respectively by the said section two; and any power conferred upon the Governor in Council by the Customs Act to transfer dutiable goods to the list of goods which may be imported free of duty or to reduce the rates of duty on dutiable goods is not hereby abrogated or impaired. 1931, c. 30, s. 2.

The points of law on which the appeal is based are set out in the Notice of Application as follows:

(1) Are the words "or other conveyance of what kind soever" appearing in Section 2(*r*) of the said The Customs Act words limited in scope or are they words of enlargement to include anything that conveys and therefore the Power Shovel model 45 constituting the subject matter of the Customs Import Entry herein.

(11) Is the word "shovels" appearing in tariff item 431 of The Customs Tariff Act R.S.C. 1927, c. 44, which reads, "shovels and spades of iron or steel, n.o.p., used in its generic sense and therefore including the Power Shovel model 45 constituting the subject matter of the tariff entry herein or in the restricted sense of a hand shovel.

The decision of the Tariff Board is as follows:

Appeal No. 269

By General Supply Company of Canada Ltd., Ottawa, from a decision of the Deputy Minister of National Revenue that the Model 45 Power Shovel of ¾ cubic yard capacity imported under Montreal Customs Entry No. Z108570, February 10, 1951, is dutiable under tariff item 427. The appellant claimed the shovel should enter under tariff item 431 or under tariff item 438a as a vehicle as defined by Section 2(*r*) of the Customs Act.

The Power Shovel at issue, Model 45, is not properly classifiable under either tariff item 431 or tariff item 438a, but is properly classifiable as Machinery of Iron or Steel.

It will be noted that the Board gave no reason for its findings, but merely rejected the contention of the appellant that the entry should be classified either under Item 431 or 438(*a*) and found that it was properly classifiable under Item 427.

Is there any question of law involved in that decision? The respondent contends that all that was done by the Board was to consider the evidence as to the nature of the imported article and then to determine that it was neither a shovel nor a conveyance, but rather a machine composed wholly or in part of iron or steel, n.o.p.

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The difficulty that arises in some cases in distinguishing between questions of fact and questions of law was pointed out in *Farmer* v. *Cotton's Trustees* (1). In that case, Lord Parker of Waddington said at p. 932:

> My Lords, it may not always be easy to distinguish between questions of fact and questions of law for the purpose of the Taxes Management Act, 1880, or similar provisions in other Acts of Parliament. The views from time to time expressed in this House have been far from unanimous, but in my humble judgment where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only. The question in the present case is whether the facts found by the Commissioners with regard to a block of buildings situate in Princes Street, Edinburgh, and known as the "Windsor Buildings," entitle such buildings to the partial exemption from inhabited house duty provided by sub-s. 1 of the 13th section of the Customs and Inland Revenue Act, 1878. This question can only be determined by putting a construction on the sub-section in question, and, therefore, is one of law, on which the Court of Session had jurisdiction to reverse the determination of the Commissioners. The question before your Lordships is whether the Court of Session was right in so doing.

That and other leading cases were considered in *Rogers-Majestic Corp. Ltd.* v. *City of Toronto* (2), and more recently in the Ontario Court of Appeal in *Delhi* v. *Imperial Leaf Tobacco Co.* (3). In the latter case, Roach, J.A. summarized his opinion at p. 655 as follows:

> From what was said in the Supreme Court of Canada in the *Rogers-Majestic* case and in the House of Lords in the cases there cited and in the *Lysaght* case, it is manifest that in all cases similar to the one at bar two questions of law arise. The first involves the construction of the statute, and the second is the question of evidence or no evidence.

From a consideration of these cases, it appears to be well settled that the construction of a statutory enactment is a question of law.

In the present case the Board has simply declared its findings without making any expressed reference to the statute or giving reasons for its conclusions. It seems to me, however, that these conclusions necessarily involve the construction of certain portions of The Customs Tariff Act. Before the Board could reach the conclusion that the imported article was dutiable under Tariff Item 427 as being "machinery composed wholly or in part of iron or steel, not otherwise provided," it must have been of the opinion that

(1) [1915] A.C. 922. (2) [1943] S.C.R. 440.
(3) [1949] O.R. 636.

it did not fall within any other of the tariff items, and more particularly that it did not fall within either Items 431 or 438a. At the hearing before the Board, the appellant had submitted that the imported article, albeit a power shovel, was within the term "shovel" in Item 431. Obviously, the Board interpreted "shovel" as not including a power shovel. Alternatively, the appellant had submitted that the imported article fell within Item 438a as being a conveyance, and therefore within the definition of "vehicle" found in s. 2(*r*) of the Customs Act; and further, and inasmuch as it was powered by a motor, that it was a motor vehicle. In rejecting that submission, the Board must have interpreted the words "motor vehicles of all kinds" as excluding the imported article, and the words "conveyance of what kind soever" as excluding the somewhat limited conveyor operation performed by the imported article. The sections which they interpreted in this manner are part of the schedule to The Customs Tariff Act and therefore part of the enactment itself.

I am therefore of the opinion that in construing these sections or items they were dealing with questions of law, and that under s. 50 of The Customs Act, the appellant is given the right to appeal therefrom. No question is raised as to the form in which it is proposed that the points of law should be presented to the Court.

The application for leave to appeal will therefore be granted and the questions to be submitted will be as proposed in the Notice of Application for Leave to Appeal. Costs of the application will be costs in the cause.

Judgment accordingly.

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Dec. 20

Dec. 22

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

Owner, Master and Crew of the Ship *BONABELLE* ..... } PLAINTIFFS;

AND

The Ship *HAZEL* ..... DEFENDANT.

Shipping—Salvage.

Held: That where a ship is in some, though perhaps not immediate danger, another ship towing it to harbour is performing more than a mere towage service and is entitled to a salvage award.

ACTION by plaintiffs claiming an award for salvage.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

R. D. Plommer for plaintiff.

J. A. MacInnes, Q.C. for defendant.

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

SIDNEY SMITH D.J.A. now (December 22, 1952) delivered the following judgment:

The plaintiffs claim a salvage award for towing the defendant vessel a distance of 5 miles into Horse Shoe Bay, Howe Sound, the destination of both the tower and the towed. This was on the evening of 7th November, 1951.

The *Bonabelle,* then valued at $45,000, is a passenger motor vessel of 131 tons gross, carried a crew of five, including the Master, and had on board 65 passengers, together with mail and cargo.

The *Hazel* is a power landing barge valued at $4,000 with a speed of 8 knots. On board her on this occasion were her two owners and five logger employees.

The weather was fine but very dark. The *Bonabelle* proceeding south on her usual run from Britannia Beach, had seen a series of flashes (apparently from a flash light to attract attention) 2 to 3 points on her port bow, made towards them, and came up to the *Hazel* which had unfortunately struck a log and lost her propeller some half hour previously. The *Hazel's* position then was one-quarter

to one-half mile from the mainland which was there steep and rugged. The tide was ebbing and an eddy was setting to the north, and towards the shore.

The *Bonabelle* took the *Hazel* in tow and deviated somewhat to pick up the *Hazel's* dinghy, with two of the loggers. They had gone on shore and telephoned from a house on the mainland to Horse Shoe Bay, requesting a water-taxi be sent to their aid.

The time occupied in the towage service was 1 hour. The *Bonabelle* was due to leave Horse Shoe Bay on her return trip at 7.30 p.m., but did not get away till 8.21 p.m. On this return trip she carried 29 passengers.

There is little dispute on the facts, notwithstanding that the incidents recorded took place over a year ago. I think it proper however to say that in my opinion the flashes were quite likely directed to the *Bonabelle* as a signal for assistance and that that vessel responded willingly, promptly and efficiently. Moreover, there is no satisfactory evidence that a water-taxi was then on its way out to them, as suggested by one of the witnesses: although no doubt help would have been available from Horse Shoe Bay sooner or later. The subsequent discussion at Horse Shoe Bay is irrelevant.

It was pressed upon me that this was merely a towage service, but I hold that the *Hazel* was in some, though perhaps not immediate, danger and that the plaintiffs are entitled to a salvage award. The authorities have recently been considered by the Lords in *The Troilus* (1). In all the circumstances I think an award of One hundred dollars ($100) would meet the plain requirements of justice.

There will be judgment for that sum, with costs.

Judgment accordingly.

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(1) [1951] 2 All E.R. 40.

1953

Feb. 10, 11 & 12

Mar. 6

ONTARIO ADMIRALTY DISTRICT

BETWEEN:

THE KURTH MALTING COMPANY and McCABE GRAIN COMPANY LIMITED ..... } PLAINTIFFS;

AND

COLONIAL STEAMSHIPS LIMITED...DEFENDANT.

Shipping—Damage to cargo—Water Carriage of Goods Act, 1936, I Edw. VIII, c. 49, s. 2 & 3, articles III, IV—Failure of defendant to discharge onus of showing loss was caused by peril of the sea.

The action is one for damages for loss to a cargo of barley shipped in good order by plaintiffs on defendant's vessel. Defendant admits the cargo was damaged and pleads the bill of lading under which it was shipped and The Canadian Water Carriage of Goods Act, 1936, 1 Edw. VIII, c. 49. The Court found that the damage was due to a break in a steam pipe which had occurred some considerable time before the accident relied upon by defendant as a peril of the sea.

Held: That the defendant failed to discharge the onus of showing that the loss or damage suffered by the plaintiffs resulted from perils, danger and accidents of the sea.

ACTION by plaintiffs to recover damages for loss to a cargo of barley shipped on defendant's vessel.

The action was tried before the Honourable Mr. Justice Barlow, District Judge in Admiralty for the Ontario Admiralty District, at Toronto.

R. C. Holden, Q.C. and *H. L. Rowntree* for plaintiffs.

Peter Wright and *F. O. Gerity* for defendant.

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

BARLOW D.J.A. now (March 6, 1953) delivered the following judgment:

The plaintiffs' claim is for the sum of $55,441.59 by reason of loss suffered to a cargo of 291,835 bushels of No. 3 Canada Western 6 row barley shipped in good order and condition by bills of lading on the ship *Laketon* owned and operated by the defendant at Port Arthur, Ontario, on the 19th day of November, 1951, for delivery at Milwalkee where the said ship arrived on the 22nd day of November, 1951, at which time the cargo was found to be wet with the resultant loss and damage.

The defendant carrier admits that the cargo was received in good order and condition at Port Arthur and further admits that the cargo was wet upon arrival, causing damage in the sum of $55,441.59.

The defendant alleges that the cargo suffered damage as the result of perils, danger and accidents of the sea, for which it is not responsible and pleads the bills of lading under which the cargo was shipped and The Canadian Water Carriage of Goods Act, 1936, being Statutes of Canada 1936, 1 Edw. VIII, Chapter 49.

The bills of lading contained the following paragraph:

6. All the terms, provisions and conditions of The Canadian Water Carriage of Goods Act, 1936, and of the rules comprising the Schedule thereto are, so far as applicable, to govern the contract contained in this Bill of Lading, and this Bill of Lading is to have effect subject to the provisions of the rules as applied by the said Act. If anything herein contained be inconsistent with the said provisions, it shall to the extent of such inconsistency and no further be null and void.

The pertinent sections of The Water Carriage of Goods Act, and the Schedule of Rules made applicable by the above paragraph by the bills of lading are as follows:

2. Subject to the provisions of this Act, the rules relating to bills of lading as contained in the Schedule to this Act (hereinafter referred to as "the Rules") shall have effect in relation to and in connection with the carriage of goods by water in ships carrying goods from any port in Canada to any other port whether in or outside Canada.

3. There shall not be implied in any contract for the carriage of goods by water to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

Article III.

Responsibilities and Liabilities.

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,

(*a*) make the ship seaworthy;

(*b*) properly man, equip, and supply the ship;

(*c*) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

Article IV.

Rights and Immunities.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of

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the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

(*c*) perils, danger, and accidents of the sea or other navigable waters;

The defendant carrier having admitted the receipt of the cargo in good order and condition, and the loss suffered during the voyage, the burden of proving its defence that the loss was suffered by perils, danger and accidents of the sea falls upon the defendant carrier if it is to escape responsibility for the loss or damage. It was admitted by counsel for all parties that if the defendant satisfied this onus then the onus would be upon the plaintiff to show unseaworthiness of the vessel, to which the defendant's answer would be that it had exercised due diligence to make the ship seaworthy.

After the above admissions had become part of the record the defendant carrier proceeded to adduce evidence.

The *Laketon* is 436 feet long over-all, with a breadth of 50 feet and a depth in hold of 24 feet, and a moulded depth of 28 feet. The forward accommodation for the crew is heated by steam which is brought forward from the engine to the radiators by a $1\frac{1}{2}$ inch iron pipe passing through the holds under the deck on the port side. Another pipe of like size returns the condensate or surplus steam to the hot pit of the engine. This pipe also runs along the port side parallel to the steam pipe some 12 or 18 inches from it and about 3 feet from the port side.

The *Laketon* sailed from Port Arthur at 21.45 o'clock on the 19th of November, 1951, and arrived at Milwaukee at 12.32 o'clock on the 22nd November. When the *Laketon* arrived at Milwaukee it was noticed that vapour was rising along the port side of the deck and that the deck felt warm. Steam was rising from underneath the tarpaulins on the hatches. When the hatches were opened it was found that the grain in holds 2, 3 and 4 was wet, more particularly on the port side, and that the barley along the top of these holds had sprouted. It was then found that the pipe which returned the condensate or surplus steam to the engine had

split open in holds Nos. 2 and 3, and that a joint had pulled apart in hold No. 4 allowing the steam and condensate to escape and thus wetting the cargo of barley.

There is no direct evidence as to when the return pipe suffered damage, nor as to what caused the return pipe to break as it did. No breaks were found in the pipe which carried the steam forward. The defendant leads evidence to show that nothing unusual happened during the voyage on the 19th or 20th November but that on the 21st of November when in Lake Michigan the ship encountered heavy seas. On this day it became necessary to repair the hause pipe packing and in order to do so the vessel at 20.37 o'clock on the 21st was checked to half speed. She held her head until 20.48 when she fell off into the trough of the seas and was subjected to severe twisting and racking for about ten or fifteen minutes until, with full steam ahead she steadied herself and proceeded. The defendant alleges that this caused the breaks in the return pipe.

I am asked to infer from these facts that the heavy weather and the falling off into the trough of the seas caused the breaks in the return pipe. This incident of the voyage occurred about 16 hours before the vessel reached Milwaukee when the hatches were opened, disclosing the damage to the barley and the broken pipe.

Expert evidence is tendered by the defendant in an endeavour to show that the breaks in the return pipe could have occurred by reason of the twisting of the vessel when she fell off into the trough of the sea.

As stated above there is no direct evidence as to how the breaks occurred or when they occurred. The Captain says that he does not know when the breaks in the return pipe occurred.

Certain of the defendant's witnesses admit that internal pressure on the pipe may at least have played a part in causing the breaks.

The plaintiffs then adduced evidence which shows that when the vessel was loading at Port Arthur there were several degrees of frost, even down almost to zero. This fact, together with the nature of the breaks, leads certain of the witnesses to say that in their opinion ice forming in the return pipe could have caused the breaks. It is

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Barlow D.J.A.

significant that no breaks were found in the pipes carrying the steam forward, although this pipe ran parallel to the return pipe. Both pipes were covered with $\frac{3}{4}$ inch of asbestos. Further evidence adduced by the plaintiff satisfies me that there was some sprouting of the barley when the ship arrived at Milwaukee. If the defendant's contention as to the time of the breaking of the pipe is correct, then this sprouting must have occurred within sixteen hours of the breaking of the pipe and the wetting of the barley. Is this possible? I do not believe that it is.

While the experts called as to the sprouting of the barley did not make their tests under exactly the same conditions of steam heat, yet I am satisfied from their evidence that no sprouting of the barley would occur until more than twenty-four hours after the barley became wet.

The result of the evidence leaves me to conjecture when the return pipe broke, and how. Even if the evidence were evenly balanced as to the two theories of the breaking of the pipe, it would not be sufficient to satisfy the onus placed upon the defendant.

Upon the evidence I am of the opinion that the balance of evidence is in favour of the theory of the plaintiffs that the return pipe must have broken some considerable time before the accident in Lake Michigan on the 21st November, which is relied upon by the defendant as a peril of the sea.

The onus cast upon the defendant by The Water Carriage of Goods Act quoted above, must be satisfied by a preponderance of evidence which would satisfy me that the return pipe was broken by the incident set out above as to the heavy seas in Lake Michigan. As stated above, I am far from satisfied that the return pipe was broken as contended for by the defendant.

Since I have found that the onus upon the defendant to show that the loss or damage resulted from perils, danger and accidents of the sea has not been satisfied, it is unnecessary for me to discuss at any length the questions of unseaworthiness and due diligence. I do find upon the evidence that unseaworthiness has not been shown and that in any event the defendant carrier did exercise due diligence to make the ship seaworthy.

For references as to the case law, see *Gosse Millerd Limited* v. *Canadian Government Merchant Marine Limited, The Canadian Highlander* (1); *Carver, Carriage of Goods by Sea,* 9th Ed. (1952) pp. 118, 119, 185; *Toronto Elevators Limited* v. *Colonial Steamships Limited* (2); *"Fred W. Sargent": Spencer Kellogg & Sons, Inc.* v. *Great Lakes Transit Corporation* (3); *Morris and Morris* v. *The Oceanic Steam Navigation Co. Ltd.* (4); *The Catania* (5); *Micks, Lambert & Co. et al* v. *United States Shipping Board* (6); *Imperial Sugar Co.* v. *Bright Star S.S. Co.* (7); *Sewaram* v. *Ellerman Lines, Ltd.* (8); *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (9); *Jane Wakelin* v. *London & South Western Railway Co.* (10); *Jones* v. *Great Western Railway Co.* (11); and *Imperial Smelting Corporation, Ltd.* v. *Joseph Constantine Steamship Line Ltd.* (12).

For the above reasons judgment will go for the plaintiff for $55,441.59 and costs.

Judgment accordingly.

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(1) [1929] A.C. 223 at 234.
(2) [1950] Ex. C.R. 371.
(3) [1940] A.M.C. 670.
(4) (1900) 16 T.L.R. 533.
(5) (1901) 107 Fed. Rep. 152.
(6) (1923) 16 LL. L.R. 276.
(7) [1950] A.M.C. 2076.
(8) (1930) 37 LL. L.L.R. 97.
(9) [1940] A.C. 152.
(10) (1887) 12 A.C. 41.
(11) (1930) 42 T.L.R. 39.
(12) (1940) 66 LL. L.L.R. 147.

1951
Oct. 10
1953
June 29

BETWEEN:

HER MAJESTY THE QUEEN on the Information of the Deputy-Attorney General of Canada ..... PLAINTIFF,

AND

THE STEEL COMPANY OF CANADA, LIMITED ..... RESPONDENT.

Revenue—Sales Tax—Special War Revenue Act, R.S.C. 1927, c. 179, s. 86(1)—The Sale of Goods Act, R.S.M. 1940, c. 185, ss. 18, 19(1), 19(2), 20, 33(1)—Contract made where acceptance of offer communicated—Meaning of term "F.O.B. Hd. of Lakes"—Delivery under 86(1) (a) of Special War Revenue Act means actual physical delivery —Passing of property in unascertained goods by unconditional appropriation of goods to contract.

The defendant sold steel and other metal goods to purchasers in Winnipeg, Port Arthur, Calgary and Edmonton. The purchasers ordered the goods from the defendant's sales office in Winnipeg which sent them to its Montreal plant for filling and then sent post card acknowledgments to the purchasers. The goods were to be carried by Canada Steamship Lines Limited to the head of the lakes as soon as navigation opened and by rail from there to their destination. The invoices for the goods showed that the freight was to be collect but carried a notation "F.O.B. Hd. of Lakes" and showed allowances for freight deducted from the price of the goods. In April, 1944, the defendant delivered the goods to Canada Steamship Lines Limited in packages addressed to or otherwise identified as consigned to the purchasers and Canada Steamship Lines Limited issued bills of lading for them in the names of the purchasers without any reservation to the defendant of the right of disposal. The defendant sent the invoices and bills of lading to the purchasers. On May 5, 1944, while the goods were still in the Ottawa Street shed of Canada Steamship Lines Limited in Montreal they were destroyed by fire. The plaintiff claimed sales tax on the sale price of the goods.

Held: That a contract is made where the acceptance of an offer is communicated.

2. That the contract between the defendant and its purchasers was made in Winnipeg and that the law applicable to it is the law of Manitoba as found in The Sale of Goods Act.

3. That the delivery contemplated by paragraph (*a*) of section 86(1) of the Special War Revenue Act means actual physical delivery and that since there was no such delivery paragraph (*a*) is not applicable.

4. That the contract between the defendant and its respective purchasers was a contract for the sale of unascertained or future goods by description, that goods of that description and in a deliverable state were unconditionally appropriated to the contract within the meaning of Rule 5 of section 20 of The Sale of Goods Act, that the property in the goods thereupon passed to the purchasers and that the case falls within the ambit of the second proviso to section 86(1) of the Special War Revenue Act.

INFORMATION to recover sales tax under the Special War Revenue Act.

The action was tried before the President of the Court at Ottawa.

J. A. Prud'homme Q.C. for plaintiff.

A. Forget Q.C. for defendant.

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

THE PRESIDENT now (June 29, 1953) delivered the following judgment:

This is an action to recover consumption or sales tax on the sale price of certain steel and other metal goods manufactured and produced by the defendant and sold by it to certain purchasers.

The information shows that the defendant sold certain goods to The J. H. Ashdown Hardware Company Limited of Winnipeg in Manitoba in March and April of 1944, to Marshall Wells Company Limited of Port Arthur in Ontario, Winnipeg in Manitoba and Calgary in Alberta in April and May of 1944, to North Hardware Company Limited of Edmonton in Alberta in May of 1944 and to Walter Woods Limited of Winnipeg in Manitoba in May of 1944. Particulars of invoice numbers, dates, prices and nature of goods are given in paragraphs 2, 3, 4 and 5 of the information and are not in dispute.

It is contended that the tax is due and payable under section 86(1) of the Special War Revenue Act (now the Excise Tax Act), R.S.C. 1927, chapter 179, as amended in 1936, Statutes of Canada, 1936, chapter 45, section 5, the relevant portions of which read as follows:

86. (1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods,—

(a) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof.

Provided . . .

Provided further that in any case where there is no physical delivery of the goods by the manufacturer or producer, the said tax shall be payable when the property in the said goods passes to the purchaser thereof.

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The facts are not in dispute. I shall deal first with the sales to The J. H. Ashdown Hardware Company Limited. These were of nails, staples and barbed wire. The orders for the goods were placed with the defendant's sales office in Winnipeg and transmitted by it to the defendant's Montreal plant for filling. It was the practice of the Winnipeg sales office to send post card acknowledgments to its customers for less than carload quantities and letter acknowledgments in the case of carload lots (Exhibit 2). The details of the sales are set out in the defendant's invoices dated from March 14, 1944, to April 14, 1944. Under the heading Route the invoices carried the following notations, namely, "CSL when navigation opens" or "Canada Steamship Lines Ltd." or "Canada Steamship Lines" or "CSL & Rail" or simply "CSL". All the goods were to be shipped when navigation opened. Under the heading F.O.B. all the invoices except one carried the notation "Hd. of Lakes". The invoices also specified that the goods were sold to "The J. H. Ashdown Hardware Co. Ltd. Winnipeg, Man." and that they were to be shipped to "Winnipeg, Man." All the invoices except one called for the freight to be "collect" but there was also an item in them providing for freight allowances under various captions, namely, "Allce Freight Montreal to Head of Lakes" or simply "Allce Freight". In each case the amount of the allowances was deducted from the price of the goods. The invoices were sent by the defendant's Montreal office to The J. H. Ashdown Hardware Company Limited at Winnipeg. On various dates the defendant caused the goods covered by the invoices to be delivered by a carter to Canada Steamship Lines Limited for shipment to its purchaser. The dates of the receipts by Canada Steamship Lines Limited are set out in Exhibit P 3. The defendant also made out the bills of lading covering the goods in triplicate for signature by Canada Steamship Lines Limited. These were dated at Montreal, April 17th, 1944, or April 18th, 1944. The bills of lading show that the goods covered by them were consigned to "The J. H. Ashdown Hdwe Co. Ltd." with destination "Winnipeg" and route "C.S.L. Port Arthur & C.N.R." or "C.S.L. Fort William & C.P.R." or

destination "Port Arthur" and route "C.S.L." or destination "Fort William" and route "C.S.L.". The bills of lading also showed that the goods covered by them were addressed to or otherwise identified as the goods consigned to the consignee named in the bill of lading. One copy of each bill of lading was retained by Canada Steamship Lines Limited and two copies signed by it were delivered back to the defendant. It kept one of these and sent the other to The J. H. Ashdown Hardware Company Limited at Winnipeg along with the invoices.

The facts are similar with respect to the sales to Marshall Wells Company Limited, North Hardware Company Limited and Walter Woods Limited.

On or about May 5, 1944, all the goods referred to in the information, while still at the Ottawa Street shed of Canada Steamship Lines Limited in Montreal, were destroyed by fire.

On these facts the question arises whether the goods, prior to their destruction, had been delivered by the defendant to the purchasers within the meaning of paragraph (*a*) of section 86(1) of the Special War Revenue Act or whether the property in them had passed to the purchasers within the meaning of the second proviso.

It is an elementary principle that a contract is formed by the acceptance of an offer and that an offer is accepted when the acceptance is made in a manner prescribed or indicated by the offeror: *vide* Anson's Law of Contract, 20th Edition, page 34. And the same author says, at page 39, that the rule that a contract is made *when* the acceptance is communicated involves as a result the further rule that a contract is made *where* the acceptance is communicated and points out that this may be of importance in determining what law governs the validity of the contract or the procedure by which it may be enforced. In the present case it is clear that the offer to buy the goods was made to the defendant at its sales office in Winnipeg. That is where the orders for the goods were placed. While the evidence as to the acceptance of the offer and its communication to the purchasers is not as precise as would be desirable it was the practice of the defendant's sales office at Winnipeg to transmit the orders to the defendant's office in

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Montreal and then send a post card or letter in confirmation of them to the purchasers and there is no reason to assume that this practice was not followed in the present case. I am, therefore, of the view that the contract between the defendant and its purchasers was made in Winnipeg and that the law applicable to it is the law of Manitoba as found in The Sale of Goods Act, R.S.M. 1940, chapter 185.

It was contended for the defendant that it was not liable for any tax under section 86(1) of the Special War Revenue Act either under paragraph (*a*), because there was never any delivery of the goods to the purchasers within the meaning of the paragraph, or under the second proviso, because it was intended by the parties that the property in the goods should not pass to the purchasers until they had been delivered F.O.B. head of the lakes and no such delivery had been made.

Counsel for the defendant submitted that it was an essential term of the contract between the defendant and its purchasers that it should deliver the goods F.O.B. head of the lakes, that this meant that it was obliged to deliver them to the head of the lakes, that is to say, Port Arthur or Fort William and there place them free on board and that since this term of the contract had not been complied with it could not be said that there had been any delivery of the goods to the purchasers within the meaning of paragraph (*a*) and that it was, therefore, not applicable.

On the other hand, counsel for the plaintiff relied upon section 33(1) of The Sale of Goods Act which provides that where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer and contended that when the defendant delivered the goods to Canada Steamship Lines Limited for the purpose of transmission to the purchasers it had delivered the goods to the purchasers within the meaning of paragraph (*a*) of section 86(1) of the Act. Counsel also submitted that the term "F.O.B. Hd. of Lakes" meant only that the goods should be free from freight charges at the head of the lakes or, in other words, that the defendant was to absorb the freight in them up to the head of the lakes.

I am unable to agree with the defendant's construction of the term "F.O.B. Hd. of Lakes". It was clearly intended by the parties that carriage of the goods was to be by water from Montreal to the head of the lakes and by rail from there to their destination and that the defendant should deliver the goods to Canada Steamship Lines Limited at Montreal for carriage by it to the head of the lakes as soon as navigation opened. The point of delivery by the defendant to a carrier for the purpose of transmission to the buyer was, therefore, Montreal, not the head of the lakes. It also seems clear to me that the carriage of the goods by water was to be free from freight charges to the purchasers. The invoices show that the freight was to be "collect" but the defendant gave its purchasers a freight allowance up to the head of the lakes and deducted it from the price of the goods. It is thus clear that it was agreed between the parties that each should pay a share of the freight, that the defendant should absorb it up to the head of the lakes so that the goods should be free of freight when they got there and that the purchasers should pay the rail freight on the goods from the head of the lakes to their final destination.

There was thus a delivery of the goods to a carrier for the purpose of transmission to the buyer within the meaning of section 33(1) of The Sale of Goods Act and, therefore, a *prima facie* delivery of the goods to the buyer. If paragraph (*a*) of section 86(1) stood by itself and was not qualified, as I think it was, by the second proviso I would accept the submission of counsel for the plaintiff that there had been a delivery of the goods to the purchasers within the meaning of paragraph (*a*). But it appears to me from the proviso, which qualifies paragraph (*a*), *vide The King* v. *Dominion Engineering Co. Ltd.* (1), that the delivery contemplated by paragraph (*a*) means actual physical delivery rather than a constructive or "deemed" delivery within the meaning of section 33(1) of The Sale of Goods Act and that since there was no actual physical delivery of the goods to the purchasers paragraph (*a*) of section 86(1) is not applicable.

Thus to make the defendant liable for tax it must appear that the facts bring the case within the ambit of the second

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proviso of section 86(1), that is to say, that the property in the goods had passed to the purchasers prior to their destruction by fire.

It was contended for the plaintiff that if there had been no delivery of the goods to the purchasers within the meaning of paragraph (*a*) the property in them had passed to the purchasers and the second proviso was applicable.

But counsel for the defendant argued that by the term "F.O.B. Hd. of Lakes" the parties had expressed their intention that the property in the goods should not pass until they had been delivered at the head of the lakes and that since there had not been any such delivery the property had not passed and the second proviso was not applicable.

I am unable to agree that the term expresses or implies any such intention.

At the time of the agreement between the defendant and the respective purchasers the goods which were the subject of it were unascertained goods. The agreement was, therefore, an agreement to sell the goods and not a sale of them. Section 18 of The Sale of Goods Act provides that where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained. Then section 19(1) states that when there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. The intention of the parties is paramount. This may be expressed or implied and section 19(2) provides that for the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case. Then section 20 lays down certain rules for ascertaining the intention of the parties. It opens with the following statement:

> 20. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

And then five rules are given of which the first three read as follows:

> (*a*) Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial

whether the time of payment or the time of delivery, or both, be postponed;

(*b*) Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing is done, and the buyer has notice thereof;

(*c*) Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weight, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done, and the buyer has notice thereof.

These three rules have no bearing on the question in issue for the contracts between the parties were not for the sale of specific goods. And Rule 4 of section 20 need not be referred to. But Rule 5 is important. It reads as follows:

(*e*) Rule 5.—Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller the property in the goods thereupon passes to the buyer. The assent may be express or implied, and may be given either before or after the appropriation is made. Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

In my judgment, the facts of this case bring it squarely within Rule 5. The contract between the defendant and its respective purchasers was a contract for the sale of unascertained or future goods by description. The defendant put goods of that description into a deliverable state by packing them in kegs or otherwise, as indicated by the invoices, and unconditionally appropriated them to the contract by identifying them by marks, tags or otherwise as the goods intended for the respective purchasers, as shown by the bills of lading. It was clearly intended by the purchasers that the defendant should deal with the goods in this way. There was thus an implied assent by them to the appropriation of the goods to the contract. It was also intended by the parties that the defendant should deliver the goods to Canada Steamship Lines Limited for the purpose of transmission to the purchasers and the defendant made such a delivery and did not reserve any right of disposal of the goods.

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Thus all the facts required for the application of Rule 5 are present. Under the circumstances, I have no hestitation in finding that the defendant unconditionally appropriated the goods to the contract with its respective purchasers within the meaning of Rule 5 and that the property in the goods thereupon passed to the purchasers.

It must be noted that Rule 5 applies only if a different intention does not appear. In my opinion, there is no reasonable ground for assuming any different intention. On the contrary, the facts negative a different intention. When the goods were delivered to Canada Steamship Lines Limited it acknowledged receipt of them and issued bills of lading for them in favor of the purchasers which the defendant sent to the purchasers along with the invoices for the goods. These became documents of title to the goods in the names of the respective purchasers and they had sole control over them. There is no substance in the contention that the bills of lading were not intended to be documents of title until the goods were delivered at the head of the lakes. There is nothing in the facts to warrant such a submission. If there had been any such intention the bills of lading would have been taken out in the name of the defendant or some other indication of it other than the term "F.O.B. Hd. of Lakes" would have been given.

For the reasons stated I have come to the conclusion that the property in the goods passed from the defendant to the several purchasers of them, at the latest, at the time of their delivery to Canada Steamship Lines Limited for the purpose of transmission to the purchasers and the case therefore falls within the ambit of the second proviso to section 86(1) of the Special War Revenue Act and the defendant is liable for the tax claimed.

There is no dispute as to the amount of tax if the claim is well founded or as to the amount of the penalties under section 106 of the Act, the former being $1,659.22 and the latter $781.38, making a total of $2,440.60.

There will, therefore, be judgment in favour of the plaintiff as against the defendant for $2,440.60 and costs.

Judgment accordingly.

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

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AND

79 WELLINGTON WEST LIMITED ... RESPONDENT.

Revenue—Income Tax—The Income War Tax Act, S. of C. 1948, c. 52, ss. 11(1)(a), 20 and 127(5)—Capital cost of property—Depreciation —Persons deemed not "to deal with each other at arms length"—An Act to Amend the Income Tax Act and the Income War Tax Act, S. of C. 1949, 2nd Sess. c. 25, ss. 8(1)(a)(i), 8(3)(a)(b)(i)(ii)—Depreciable property, whether acquired before or after January 1, 1949—Property transactions prior to 1949 between persons not dealing at arms length—Interpretation of words "one person"—The Interpretation Act, R.S.C. 1927, c. 1, ss. 21(2) and 31(j)—Appeal from Income Tax Appeal Board allowed.

In 1945 two brothers purchased a property at 79 Wellington St. W., Toronto, and sold it later in the year for a greater price than they had paid for it to the respondent company in which they were the controlling shareholders. As a result of an appeal to the Income Tax Appeal Board from an assessment for the taxation year 1946 the respondent was allowed depreciation under the Income War Tax Act for that year and, also, for the years 1947 and 1948, on the basis of the capital cost of the property to the company. On January 1, 1949, the Income Tax Act came into effect, replacing the Income War Tax Act. Because of its entirely new provisions as to the deductibility of depreciation it was necessary to enact certain transitional provisions which are found in Chap. 25, S. of C. 1949, 2nd Sess, an Act to Amend the Income Tax Act and the Income War Tax Act. In its returns for the taxation years 1949 and 1950 the respondent claimed under s. 8(1) of that Act depreciation on the same basis as that allowed in the three previous years. The Minister contending that respondent came within the provisions of s. 8(3) (which applies only to property transactions prior to 1949 between persons not dealing at arms length) assessed the company on the basis of the actual cost of the property to the two original owners—the two brothers. An appeal from the assessment was taken to the Income Tax Appeal Board which held that s. 8(3) of that Act was inapplicable to the case as the property had belonged to two original owners and not to *one person*. The Minister appealed from this decision.

Held: That the facts of the case bring the parties to that transaction within the provisions of s. 127(5) of the Income Tax Act and, therefore, they must be deemed not to have dealt with each other at arms length.

2. That the word "one" in s. 8(3) of C. 25, S. of C. 1949, 2nd Sess. is not so clear and unambiguous that it must necessarily be interpreted as a numeral. When read in its context it can and does have another possible meaning, namely, that it is used in its partitive sense as the antithesis of another. The nature of the enactment required that reference be made to two distinct classes: the original owner who was the "one person" and a subsequent owner—taxpayer—who was the other.

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3. That the intention of Parliament is better effectuated by giving to the words "une personne" in the French version, the meaning "a person" rather than by construing the words "one person" in the English version as one person only. Such a construction disposes of all cases involving non-arms-length transactions and place all taxpayers whose property has been at the same time transferred on other than an arms length transaction in precisely the same position in determining their capital costs. That must have been the intention of Parliament as disclosed in the legislation itself.

APPEAL from a decision of the Income Tax Appeal Board.

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

George B. Bagwell, Q.C. and T. Z. Boles for appellant.

G. W. Mason, Q.C. for respondent.

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

CAMERON J. now (June 27, 1953) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board dated July 25, 1952 (6 T.A.B.C. 403), by which the Board allowed the appeals of the respondent herein from assessments to income tax for the taxation years 1949 and 1950. The dispute has to do with certain capital cost allowances claimed by the respondent for those years.

The facts are not in dispute. In April, 1945, two brothers named Greisman purchased the lands and buildings at 79 Wellington St. W., Toronto; on June 6 of the same year the respondent company was incorporated and on the same date the brothers sold the property to it for a consideration greatly in excess of what they had paid for it. It is admitted that immediately upon incorporation and at all times thereafter relevant to this appeal, the said brothers were the controlling shareholders of the respondent company, practically all its shares having been issued to them as part consideration for the transfer of the said lands and premises. As apportioned by the respondent, the cost to it of the building (apart from the land) was $155,514.00, and based upon the same method of apportionment, the capital cost of the building to the two brothers was $100,636.85.

For its taxation year 1946 the respondent claimed depreciation on the building on the basis of the capital cost to it. The Minister, however, assessed the respondent on the basis of the capital cost to the two brothers. An appeal was taken to the Income Tax Appeal Board, and by its decision (2 T.A.B.C. 351) the Board, being of the opinion that the first proviso in s. 6(1)(*n*) of the Income War Tax Act did not apply to the facts of that case, found that the respondent was entitled to have any depreciation which might be allowed based upon the actual cost of the building to it. In the result the respondent claimed and was allowed depreciation under the Income War Tax Act for the years 1946, 1947 and 1948, on the basis of the capital cost to it of the said building.

On January 1, 1949, the Income Tax Act came into effect, replacing the Income War Tax Act. It contained entirely new provisions as to the deductibility of depreciation from the income of a taxpayer, basing it on such part of or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation (s. 11(1)(*a*)). The new provisions regarding depreciation were referable to all depreciable property, whether acquired before or after January 1, 1949, and in order that the capital cost of such property as had been previously acquired should be ascertained as of that date, it was necessary to enact certain transitional provisions relating thereto. They are found in s. 8 of c. 25, Statutes of Canada, 1949, 2nd Sess., an Act to Amend the Income Tax Act and the Income War Tax Act.

Subsections (1) and (3) thereof are relevant to this issue and in the English version are in part as follows:

8. (1) Where a taxpayer has acquired depreciable property before the commencement of the 1949 taxation year, the following rules are applicable for the purpose of section twenty of The Income Tax Act and regulations made under paragraph (*a*) of subsection one of section eleven of The Income Tax Act:

(*a*) except in a case to which paragraph (*b*) applies, all such property shall be deemed to have been acquired at the commencement of that year at a capital cost equal to

(i) the actual capital cost (or the capital cost as it is deemed to be by subsection (3) or (4)) of such of the said property as the taxpayer had at the commencement of that year,

minus the aggregate of . . .

(3) Where property did belong to one person (hereinafter referred to as the original owner) and has by one or more transactions prior to 1949 between persons not dealing at arms length become vested in a taxpayer

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who had it at the commencement of the 1949 taxation year (or who acquired it during his 1949 taxation year from a person whose 1948 taxation year had not expired at the time of the acquisition), the capital cost of the property to the taxpayer shall, for the purpose of subparagraph (i) of paragraph (*a*) of subsection one, be deemed to be the lesser of the actual capital cost of the property to the taxpayer or the amount by which

(*a*) the capital cost of the property to the original owner exceeds

(*b*) the aggregate of

(i) the total amount of depreciation for the property that, since the commencement of 1917, has been or should have been taken into account in accordance with the practice of the Department of National Revenue, in ascertaining the income of the original owner and all intervening owners for the purpose of the Income War Tax Act, or in ascertaining a loss for a year when there was no income under that Act, and

(ii) any accumulated depreciation reserves that the original owner or an intervening owner had for the property at the commencement of 1917 and that were recognized by the Minister for the purpose of the Income War Tax Act.

In making its return for the taxation year 1949, the respondent proceeded under s. 8(1) of that Act, computing its capital costs as the actual cost to it of the building in question, less the depreciation claimed and allowed for the taxation years 1946, 1947, 1948, and deducted from its income the rate thereon provided for in Class 3. In its return for the year 1950, the same procedure was followed, due allowance being made for the depreciation claimed in 1949.

In each case, however, the appellant herein, being of the opinion that the respondent came within the provisions of s. 8(3), assessed the respondent on the basis of the actual capital cost of the building to the two original owners—the Greisman brothers—less the actual depreciation previously allowed the respondent.

For the respondent, it is contended that s. 8(3) has here no application. The first submission is that it has not been proven that the parties to the sale and purchase in 1945 were persons not dealing at arms length. In my opinion, the admitted facts which I have set out above clearly bring the parties to that transaction within the provisions of s. 127(5) of the Income Tax Act, and they must therefore be deemed not to have dealt with each other at arms length.

The main problem, however, is the interpretation of the words "one person" in the opening words of ss. (3): Where property did belong to one person (hereinafter referred to

as the original owner) and has by one or more transactions prior to 1949 between persons not dealing at arms length become vested in a taxpayer. . .

Mr. Fisher of the Income Tax Appeal Board held that the subsection was inapplicable to the instant case as the property in question had belonged to two original owners—the Greisman brothers—and not to *one person.* He held that the words "one person" should be held to mean "one individual," "one corporation" or "one owner," but that they could not be referable to "two or more persons," "two or more corporations," or "two or more individuals." In so holding, he adhered to his dissenting opinion in *Storrar Dunbrik Ltd. v.* M.N.R. (1), in which precisely the same point arose, and in which the other two members of the Board reached the conclusion for the reasons therein given that:

> A careful perusal of the material words leads me to believe that the words 'one person' in the first line were intended to be read in contrast to, or as distinguishable from, the words 'a taxpayer' in the fourth line and as though the subsection read:
>
> 'When property did *belong to one person* (hereinafter referred to as the original owner) and has by one or more transactions prior to 1949 between persons not dealing at arms length become vested in *another person . . .*'
>
> This conclusion lends sense to the wording found in the subsection and, at the same time, avoids an unreasonable interpretation of Parliament's intention.

In the *Storrar Dunbrik* case, Mr. Fisher was of the opinion that the words "one person" were plain and unambiguous, that a taxing Act must be construed with strictness, that in a taxing Act it is improper to assume any governing purpose of the Act, and he therefore reached the conclusion that as the original owner in that case consisted of more than one person, the appeal should be allowed.

Before me counsel for the Minister submitted that 'one' is not here used as a specific numeral, but in its partitive sense as the antithesis of another later referred to—in this case, the taxpayer; that it is equivalent to, and in view of the context should be read as, the indefinite article 'a'; and that therefore, by s. 31(*j*) of the Interpretation Act, it includes the plural.

(1) 6 T.A.B.C. 163.

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Counsel for the respondent frankly admits that if the expression "a person" had been used in s. 8(3) of c. 25, Statutes of Canada, 1949, 2nd Sess., the appeal must be allowed. That would necessarily follow in view of the provisions of s. 31(*j*) of the Interpretation Act, by which in every Act, unless the contrary intention appears, words in the singular include the plural. He submits, however, that the word 'one', when given its plain and ordinary meaning, refers to the specific numeral 'one'. The argument is that if the expression were "two persons," the subsection would be applicable only to cases in which "the original owner" comprised two persons. Similarly, he says that when "one person" is used, it cannot refer to two or more. Therefore it is said as the original owner here was comprised of two persons, the provisions of s. 8(3) have no application to this case. He contends, also, that s. 31(*j*) of the Interpretation Act cannot be invoked, the word 'one' being so specific and limiting, that the context requires it to be read as excluding the plural. Finally, he points out that by construing 'one' in this manner, the provisions of the subsection are not rendered abortive but would merely be limited in their application to those cases in which the original owner was "one person."

It may be noted here that by s. 32 of c. 29, Statutes of Canada, 1952, the expression "one person" was deleted and the expression "a person" substituted therefor. It is as follows:

> 32. For greater certainty, it is hereby declared that paragraph (*j*) of subsection one of section thirty-one of the *Interpretation Act* is applicable to the interpretation of the expression 'one person' where it appears in the part of subsection two of section twenty of The Income Tax Act preceding paragraph (*a*) thereof and where it appears in the part of subsection three of section eight of chapter twenty-five of the statutes of 1949 (Second Session) preceding paragraph (*a*) thereof; and the said expression is deleted and the expression 'a person' is substituted therefor; but nothing in this section is applicable in respect of any matter in respect of which an appeal is pending before the Income Tax Appeal Board or before a court when this Act comes into force.

Admittedly, the amended wording is not applicable to this case, this appeal being then before the Income Tax Appeal Board. Counsel for the respondent submits, however, that that amendment was a recognition by Parliament that "one person" was not equivalent to "a person" and that therefore it was necessary to change the language to support the construction of the section now put forward by

the appellant. In my opinion, however, the provisions of s. 21(2) of the Interpretation Act, R.S.C. 1927, c. 1, negative any such inference, that section being as follows:

21. (2) The amendment of any Act shall not be deemed to be or to involve a declaration that the law under such Act was, or was considered by Parliament to have been, different from the law as it has become under such Act as so amended.

In my view, the terms of the amendment or the fact that the amendment was made can have no bearing on the question which I have to determine, so far as this case is concerned.

With respect, I am unable to agree that the word 'one' is so clear and unambiguous that it must necessarily be interpreted as a numeral. When read in its context it seems to me that it can and does have another possible meaning, namely, that it is used in its partitive sense as the antithesis of another. The nature of the enactment required that reference be made to two distinct classes, namely, the original owner who was the "one person" and a subsequent owner-taxpayer, who was the other.

But even if there be any doubt that the word 'one' is ambiguous in the English version, there can be no doubt whatever that the corresponding expression in the French version is ambiguous. It is clear that a statute in the English version must be read with the statute in the French version (*Composers, Authors and Publishers Assoc. Ltd. v. Western Fair Assoc.* (1); *The King v. Dubois* (2)).

The French version of the first part of s. 8(3) is in part as follows:

8. (3) Lorsque des biens ont effectivement appartenu à une personne (ci-après appelée le proprietaire initial) et qu'à la suite d'une ou plusieurs opérations survenues antérieurement à mil neuf cent quarante-neuf, entre personnes ne traitant pas à distance, ils sont dévolus à un contribuable qui le savait au commencement de l'année d'imposition mil neuf cent quarante-neuf (ou qui les a acquis pendant son année d'imposition mil neuf cent quarante-neuf, d'une personne dont l'année d'imposition mil neuf cent quarante-huit n'était pas expirée au moment de l'acquisition), . . .

It will be noted that in the first line the phrase "à une personne" is used, the corresponding words in the English version being "to one person"; and that in the eighth line the phrase "d'une personne" is used, the corresponding words in the English version being "from a person." The

(1) [1951] S.C.R. 596 at 598. (2) [1935] S.C.R. 378 at 402.

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French word 'un' (and its feminine 'une') is sometimes used as a numeral, meaning in English 'one'; it is also used as an indefinite article, meaning in English 'a' or 'an' (Harraps Standard French and English Dictionary, 1945 Ed., Part One, p. 869). I am of the opinion that the phrase "à une personne", as here used would normally be translated into English as "to a person." It is possible, however, to translate it either as "to a person" or "to one person." In the French version of the subsection the phrase is therefore ambiguous, being capable of more than one interpretation.

It is well settled that when an ambiguous word is used in the statute it is to be interpreted in accordance with the context and object of the statute (Halsbury, 2nd Ed., Vol. 31, p. 481).

In Maxwell on Interpretation of Statutes, 9th Ed., p. 20, the principle is thus stated:

> Where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system. (*Shannon Realties v. St. Michel*, (1924) A.C. 185 at 192).

Reference may also be made to *Caledonian Ry. v. North British Ry.* (1) where Lord Selborne said: The mere literal construction of a statute ought not to prevail if it is opposed to the intention of the Legislature *as apparent by the statute* and if the words are sufficiently flexible to admit of some other construction by which the intention can be better effectuated. (Italics are mine.)

What then is the intention of the Legislature as disclosed by the statute itself? The overall intention of the transitional provisions was to establish the capital cost of such property as had been acquired before the new Act came into effect on January 1, 1949. For the purpose of establishing the values required to implement s. 20 and s. 11(1)(*a*) of the Act, para. (*a*) of this s. 8(1) sets out the formula for the determination of the capital cost of depreciable property then on hand. Subject to one exception, it provided that all such property should be deemed to have been acquired at January 1, 1949, at a capital cost equal to its actual capital cost (less the depreciation stated) or the capital cost as it is deemed to be by subsection (3) or (4). Subsection (4) is not here relevant.

(1) (1881) 6 A.C. 114 at 122.

Subsection (3) is designed specifically to provide a similar formula, but applicable only to a special class, namely, that in which there had been at some stage a change in ownership of the depreciable property and in which the vendor and purchaser were not dealing at arms length. In such a case the capital cost of the property to the taxpayer was to be deemed to be the lesser of its actual cost to him, or the amount by which the capital cost to the original owner exceeded the aggregate of the deductions for depreciation mentioned in ss. (3)(*b*)(i) and (ii). Its purpose, I think, is to prevent a taxpayer for tax purposes in such a case from setting up a capital cost which exceeds the net book value of the asset as such book value would have existed had the asset been retained by the original owner and depreciated in accordance with standard depreciation practices.

Careful perusal of s.s. (3) leads me to believe that Parliament was here dealing with the entire problem of non-arms-length transactions in relation to depreciation. It laid down the general principle that such transactions were to be dealt with in a manner differing from that accorded to other transactions which were between persons dealing at arms length. Parliament must have known that there are cases in which "the original owner" consisted of one person and others in which "the original owner" comprised two or more persons. In this subsection the primary object was to place in a special category those cases in which the depreciable property had changed hands and in which the parties were not dealing at arms length in order that the capital cost should be based on a fair market value, such as would be the case in a transaction between persons dealing at arms length. The emphasis is on the nature of the transaction—a transfer of depreciable property from one person to another in circumstances involving a non-arms-length transaction—and not on the number of parties participating in the sale.

It is obvious that if "one person" be interpreted as meaning "one person only," the result would be that when the original owner comprised two or more persons, the taxpayer would be exempt from the limitations provided for in s. 8(3) and placed at a very distinct advantage in relation to similar cases involving a non-arms-length transaction in which the original owner was but a single person.

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Cameron J.

By which of the two interpretations advanced by the appellant and respondent respectively can the intention of the Legislature be better effectuated? I can find nothing in the transitional provisions which would suggest that Parliament was not dealing with *all* non-arms-length transactions as a whole, except for the meaning which respondent's counsel urges should be placed on the word 'one' in the English version. I know of no reason—and counsel did not suggest any—why any distinction should be made between cases in which the original owner was one person and others in which the original owner comprised two or more persons. The Courts in dealing with taxing Acts will not presume in favour of any special privilege of exemption from taxation. In Craies on Statute Law, 5th Ed., p. 109, reference is made to *Hogg v. Parochial Board of Auchtermuchty* (1), where Lord Young said:

> I think it proper to say that, *in dubio,* I should deem it the duty of the Court to reject any construction of a modern statute which implied the extension of a class privilege of exemption from taxation, provided the language reasonably admitted of another interpretation.

For these reasons I have reached the conclusion that the intention of Parliament, as I conceive it to be, is better effectuated by giving to the words "une personne" in the French version, the meaning "a person," rather than by construing the words "one person" in the English version as one person only. Such a construction disposes of all cases involving non-arms-length transactions and places all taxpayers whose property has been at the same time transferred on other than an arms length transaction in precisely the same position in determining their capital costs. That I believe to have been the intention of Parliament as disclosed in the legislation itself.

The appeal of the Minister will therefore be allowed, with costs, the decision of the Board set aside, and the assessments made upon the respondent affirmed.

Judgment accordingly.

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(1) (1880) 7 Rettie (Sc) 986.

1953

May 13

BETWEEN:

ADOLPHE GUILLET .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Negligence—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c)——Amount received by suppliant from insurance company not deductible from amount of award for damages.

The suppliant claimed damages for loss through a collision between his automobile and an army truck due to the negligence of the driver of the truck while acting within the scope of his employment. It was contended for the respondent that the amount which the suppliant had received from his insurance company which had insured his automobile against loss or damage through collision should be deducted from any award that the Court might make in his favour.

Held: That where a suppliant has suffered loss through a collision between his automobile and a Crown vehicle due to the negligence of a servant of the Crown while acting within the scope of his employment the amount which he has received from an insurance company which had insured his automobile against loss or damage through collision should not be deducted from the amount of his award for damages. *Hebert* v. *Rose* (1935) 58 B.R. 459 *followed.*

PETITION OF RIGHT for damages for loss or injury resulting from the negligence of a servant of the Crown while acting within the scope of his employment.

The action was tried before the President of the Court at Quebec.

A. Gagnon for suppliant.

J. Dumoulin Q.C. for respondent.

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

THE PRESIDENT on the conclusion of the trial (May 13, 1953) delivered the following judgment:

As in most cases of collision there is contradictory evidence. In this case the important fact to be determined is the position of the suppliant's car immediately before the collision and the speed at which it was going. The evidence for the suppliant shows that his car was proceeding as near to the right hand side of the travelled portion of the bridge as was reasonably safe. I am satisfied that it had come practically to a stop or, at any rate, that it was

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travelling at a very low rate of speed. I accept the evidence for the suppliant on this point and reject the contradictory evidence of the respondent's witnesses. In particular I do not believe the evidence of the witness Picard.

I am also satisfied that the military truck did not keep as close to its side of the travelled portion of the road as it could and should have done with the result that its driver did not give the suppliant's car sufficient room to pass in safety.

In my opinion, there is no evidence to warrant a finding of "faute commune". The collision was solely due to the failure of the driver of the military truck to keep as close to his right as he should have done. This failure was negligence on his part within the meaning of section 19 (*c*) of the Exchequer Court Act under which this claim is made.

I am unable to allow the item of $98.20 but, otherwise, I find that the amount of the suppliant's claim is sufficiently proved.

The evidence shows that the suppliant received the sum of $314 from his insurance company and counsel for the respondent contended that this amount should be deducted from any award that the Court might make in favour of the suppliant. The decision of the Quebec Court of King's Bench in *Hebert* v. *Rose* (1) is against this contention. There the head note reads as follows:

> Where a certain sum is found to be due for damages caused to an automobile through a collision, an amount received by the plaintiff from an insurance company which had insured his automobile against loss or damage through collision, cannot be deducted from the award.

The facts in that case were that the trial judge assessed the damages suffered by the plaintiff at $604.35 but deducted from this amount the sum of $400 which he had received from an insurance company which had insured his automobile against loss or damage through collision and awarded him only the sum of $204.35. On an appeal to the Court of King's Bench this deduction of $400 was disallowed and judgment given for the full amount of the damages.

(1) (1935) 58 B.R. 459

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I am unable to distinguish this case from that of *Hebert* v. *Rose*. There is thus no reason for deducting from the amount of the suppliant's claim the amount which he received from his insurance company.

After deducting the sum of $98.20 from the amount of the suppliant's claim there is a balance of $425.52. There will, therefore, be judgment that the suppliant is entitled to the sum of $425.52 and costs.

Judgment accordingly.

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Mar. 31

Apr. 4

BETWEEN:

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

AND

REDIFFUSION, INC.,..... RESPONDENT.

Revenue—Customs and Excise—Goods subject to duty—The Excise Tax Act, R.S.C. 1927, s. 116, Schedule I, item 6—Tariff Board—Leave to appeal to Exchequer Court from decision of Tariff Board—Questions of law—Whether a "Subscriber's Termination Unit" falls within either of terms "telecast receiving set" or "apparatus for receiving radio broadcast and music"—Whether Tariff Board's finding a question of fact only—Construction of terms of a statutory enactment a matter of law only—Application for leave to appeal from decision of Tariff Board granted.

The application herein is one by appellant, under the provisions of the Excise Tax Act, R.S.C. 1927, c. 179, s. 116, for leave to appeal, on a question of law, from a decision of the Tariff Board declaring that a certain telecommunication apparatus described as a "Subscriber's Termination Unit" was not subject to excise tax under Item 6 of Schedule I of the Act, which is as follows:

"Phonographs, record playing devices, radio broadcast or telecast receiving sets and tubes therefor, apparatus for receiving radio broadcast and music . . . fifteen per cent."

Neither "Subscriber's Termination Unit", "telecast receiving set" nor "apparatus for receiving radio broadcast and music" are defined in the Act. Respondent opposed the application on the ground that no question of law is involved.

Held: That the Tariff Board's finding that the "Subscriber's Termination Unit" did not fall within either of the terms "telecast receiving set" or "apparatus for receiving radio broadcast and music", is not a question of fact only. After ascertaining the facts as to the nature of the "Subscriber's Termination Unit" it was necessary for the Board to construe the meaning of the words "telecast receiving set" and

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"apparatus for receiving radio broadcast and music" before reaching a conclusion as to whether the imported article did or did not fall within either category.

2. Such construction on the part of the Tariff Board upon the provisions of Item 6 of Schedule I of the Act is a construction of the terms of a statutory enactment and, therefore, a matter of law only. *Loblaw Groceterias Co. Ltd.* v. *City of Toronto* [1936] S.C.R. 249; *Rogers-Majestic Corporation Ltd.* v. *City of Toronto* [1943] S.C.R. 440; *General Supply Company of Canada Ltd.* v. *The Deputy Minister of National Revenue, Customs and Excise, et al* [1953] Ex. C.R. 185 referred to and followed.

3. That the question proposed by appellant involves a question of law.

APPLICATION under s. 116 of the Excise Tax Act for leave to appeal from a decision of the Tariff Board.

The application was heard before the Honourable Mr. Justice Cameron at Ottawa.

D. W. Mundell, Q.C. for the application.

Gordon F. Henderson contra.

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

CAMERON J. now (April 4, 1953) delivered the following judgment:

This is an application for leave to appeal from a decision of the Tariff Board, dated February 17, 1953 (Appeal No. 279), declaring that Subscriber's Termination Units are not subject to Excise Tax under s. 80 of the Excise Tax Act (ch. 179, R.S.C. 1927). The application is made under the provisions of s. 116 of that Act, which is as follows:

116. 1. Any of the parties to proceedings under section one hundred and fifteen, namely,

. . . . . .

may, upon leave being obtained from the Exchequer Court of Canada or a judge thereof, upon application made within thirty days from the making of the declaration sought to be appealed, or within such further time as the Court or judge may allow, appeal to the Exchequer Court *upon any question that in the opinion of the Court or judge is a question of law.*

Section 80(1) imposes excise tax on goods mentioned in Schedule 1. The appellant contended before the Tariff Board that the goods in question, namely, Subscriber's Termination Units, were subject to tax under Item 6 of Schedule 1, which is as follows:

6. Phonographs, record playing devices, radio broadcast or telecast receiving sets and tubes therefor, apparatus for receiving radio broadcast and music . . . fifteen per cent.

The Board allowed the appeal of the respondent, its decision being as follows:

The telecommunication apparatus at issue in this Appeal was described in evidence as a "Subscriber's Termination Unit," as supplied by Rediffusion Inc., Montreal, to all persons subscribing to its services. This apparatus has been held by the Excise Tax authorities to constitute, in each installation, a "telecast receiving set" and hence to be liable to tax under Schedule I(6) of the Excise Tax Act. It was contended by the appellant that the "Subscriber's Termination Unit" will not perform as does a "telecast receiving set", does not include many of the components necessary in a "telecast receiving set", and would not be acceptable as a "telecast receiving set" as those words are ordinarily understood.

Even if the "Subscriber's Termination Unit" is not a "telecast receiving set", the Crown argued, it is "apparatus for receiving radio broadcast and music". The Board is persuaded that this equipment does, in fact, receive radio broadcasts and music. The Board does not, however, consider that the "Subscriber's Termination Unit" is properly described simply as "apparatus for receiving radio broadcast and music", and could not, under such an incomplete description, be said to attract the tax.

The Board is equally persuaded that the "Subscriber's Termination Unit" is not a "telecast receiving set" as that phrase is understood by the trade and by the public.

Accordingly, the Appeal is allowed.

The question of law submitted by the appellant is as follows:

What is the meaning of the words "6. Phonographs, record playing devices, radio broadcast or telecast receiving sets and tubes therefor, apparatus for receiving radio broadcast and music" in so far as the meaning of those words is relevant for the purpose of determining whether the telecommunication apparatus known as a "Subscriber's Termination Unit" as supplied by the Respondent to persons subscribing to its services is subject to Excise Tax under Section 80 of the Excise Tax Act? or on such other question arising in the said appeal as in the opinion of this honourable Court or a Judge thereof is a question of law.

The respondent opposes the application for leave to appeal, on the ground that no question of law is involved. It is submitted that the Board's finding that the Subscriber's Termination Unit did not fall within either of the terms "telecast receiving sets" or "apparatus for receiving radio broadcast and music," is a finding of fact only, and that therefore the application should be dismissed. I am unable to agree with that submission. It seems to me that one of the problems before the Board—and possibly the main problem—was to place a proper construction upon the provisions of Item 6 of Schedule I of the Statute. After ascertaining the facts as to the nature of the imported goods, namely, Subscriber's Termination Units (a term

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which is not defined in the Act), it was necessary for the Board to construe the meaning of the words in Item 6, namely, "Telecast receiving set" and "apparatus for receiving radio broadcast and music" (neither of which terms is defined in the Act), before reaching a conclusion as to whether the imported articles did or did not fall within either category. It is well settled that the construction of the terms of a statutory enactment is a matter of law only.

In *Loblaw Groceterias Co. Ltd.* v. *City of Toronto* (1), the sole question for determination was whether or not the land and building of the appellant came within the words "distribution premises" in Clause (*cc*) of s. 9(1) of the Assessment Act, R.S.O. 1927, c. 238 as amended. The Supreme Court of Canada unanimously rejected the contention that the finding in the courts below that the land and building in question were used as distribution premises was a finding of fact which should not be interfered with; and it held that the question raised was the proper construction of the statute. In that case Davis, J., in delivering the judgment of the Court, said at p. 254:

> It is argued that, the courts below having reached the conclusion that the land and building were used as distribution premises, this is a finding of fact with which we ought not to interfere. But it is a question of law that is made the subject-matter of the right of appeal from the County Judge upon a stated case and we are bound to determine upon the proper construction of the amendment whether or not, upon the facts stated, the land and building are caught by the increased rate of assessment. Questions of this sort are constantly before the House of Lords on taxing statutes and are dealt with as raising the proper construction to be put upon the language of the statutes. For instance, in *Sedgwick* v. *Watney*, (1931) A.C. 446, above mentioned the question was whether a bottling store occupied by brewers in which beer brewed by them elsewhere was matured, carbonated, filtered and bottled, and from which, after the bottles had been corked and labelled, it was distributed to the trade, was "an industrial hereditament" under sec. 3 of *The Rating and Valuation Apportionment Act*, 1928, or was primarily occupied and used for the purposes of "distributive wholesale business" within an exception in the Act. The rating authority had put the premises on the special list as an industrial hereditament and their decision was upheld by the Assessment Committee. Appeal being taken to Quarter Sessions, a special case was stated to the King's Bench Division which reversed the court below. From that judgment, appeal was taken to the Court of Appeal which reversed the judgment of the King's Bench Division and restored the judgment of the Assessment Committee. The House of Lords then considered the matter and the judgment of the House was read by Viscount Dunedin, pp. 460-465, and while it said that "after all, the

(1) [1936] S.C.R. 249.

question is an individual one as to each particular hereditament," the appeal was determined upon the proper construction to be put upon the words of the statute.

The *Loblaw* case was referred to and followed in *Rogers-Majestic Corporation, Ltd.* v. *City of Toronto* (1). In the latter case reference was made to *Farmer* v. *Cotton's Trustees* (2). There Lord Parker of Waddington said at p. 932:

My Lords, it may not always be easy to distinguish between questions of fact and questions of law for the purpose of the Taxes Management Act, 1880, or similar provisions in other Acts of Parliament. The views from time to time expressed in this House have been far from unanimous, but in my humble judgment where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only. The question in the present case is whether the facts found by the Commissioners with regard to a block of buildings situate in Princes Street, Edinburgh, and known as the "Windsor Buildings," entitle such buildings to the partial exemption from inhabited house duty provided by sub-s. 1 of the 13th section of the Customs and Inland Revenue Act, 1878. This question can only be determined by putting a construction on the sub-section in question, and, therefore, is one of law, on which the Court of Session had jurisdiction to reverse the determination of the Commissioners. The question before your Lordships is whether the Court of Session was right in so doing.

In the same case, Lord Sumner, although dissenting in the result, said at p. 938:

In this case the Commissioners have furnished a description of the building in question, partly in words and partly by plans, so full that your Lordships know as much about it as they did. The rest is a matter of law.

Reference may also be made to *General Supply Company of Canada, Ltd.* v. *The Deputy Minister of National Revenue, Customs and Excise, et al,* (3), in which on October 30, 1952, I allowed an application for leave to appeal from a decision of the Tariff Board, such decision having been based on a similar provision in s. 50 of the Customs Act, R.S.C. 1927, c. 42, as amended.

For these reasons, I am of the opinion that the question proposed by the appellant involves a question of law. The application for leave to appeal will therefore be granted. Costs of the Motion will be costs in the cause.

Judgment accordingly.

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(1) [1943] S.C.R. 440. (2) [1915] A.C. 922.
(3) [1953] Ex. C.R. 185.

1952
Dec. 22, 23
1953
Jan. 5
Mar. 19

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

GOODWIN JOHNSON LIMITED .....PLAINTIFF;

AND

THE SHIP (SCOW) *A.T. & B. No. 28*
THE SHIP (SCOW) *E.S.M. No. X* ....
THE SHIP (SCOW) *Marpole II* ..... } DEFENDANTS.

Shipping—Tug and tow—Liability damage caused to property of third parties—Wrong tow joined as defendant in action in rem—Tow under control of independent contractors—Owners of tow not liable.

Held: That no claim for damages against one tow joined as defendant in an action *in rem* in error for another tow can be maintained even though both tows are in the same ownership.

2. That a tow under the control of independent contractors cannot be held liable for damage done by her to property of third parties caused by the negligence of the tug.

3. That a tow cannot be made liable for charges in an action *in rem* when her owners are not personally responsible; a ship is not liable for the negligence of the servants of a charterer by demise.

ACTION by plaintiff claiming compensation for damage done to its booming ground allegedly caused by defendant scows.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

H. R. Bray, Q.C. for plaintiff.

John I. Bird for defendants.

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

SIDNEY SMITH D.J.A. now (March 19, 1953) delivered the following judgment:

In this case the plaintiff claims compensation for damage done to its booming ground at Moodyville, Vancouver Harbour, by three registered scows named respectively, *A.T. & B. No. 28* (owned by James Aitken, Jr.), *E.S.M. No. X* (owned by Canadian Forest Products Limited) and *Marpole II* (owned by Marpole Towing Company Limited). The suit is brought *in rem* for the enforcement of a maritime

lien in each case, and the statement of claim alleges negligence on the part of the "owners and/or operators of the said scows, their servant or servants, agent or agents". The scows are usually referred to in the books as "dumb barges"; they are rectangular in form, without motive power, without steering power and without crew. They are towed by tugs from place to place. The misadventure out of which the claims arose was brought about in this way:

The said scows with others were moored at a scow pool immediately to the westward of the plaintiff's booming ground on 2 December, 1949, which was a day of high westerly winds increasing at times to gale force. About 8 a.m. the tug *Goblin* owned by the Gulf of Georgia Towing Co. Ltd., arrived at the scow pool to take the scow *E.S.M. No. X* in tow. The tug's engineer stepped on board the scow, cast off her mooring lines, and was about to make fast the tug's towing hawser when her Master saw another scow, the *I.T. 40,* loaded with ties drifting towards the booming ground. Leaving the engineer on the scow, the Master made towards *I.T. 40* with the intention of towing her to safety. Thus abandoned, the *E.S.M. No. 10,* with the *Marpole* scow fast alongside, drifted towards and into the booming ground where the *I.T. 40* had already arrived. This resulted in damage to the booming ground which consists of floats enclosing spaces in which log booms are made up, with houses and machinery necessary for that work. Two other tugs came to the assistance of the *Goblin,* viz., the *Gnome* also owned by Gulf of Georgia Towing Co. Ltd., and the *Green Point* owned by the Marpole Towing Company Ltd. By about 10 a.m. these three tugs had succeeded in clearing the three scows from the booming ground. But that did not quite end the matter; for shortly afterwards the scow *I.T. 40,* scow *A.T. & B. No. 28* and the *Marpole* scow again broke loose and again drifted into the booming grounds doing further damage. But by noon, with the help of the two other tugs, the scows were again returned to the scow pool, and this time remained there.

I shall deal first with the *Marpole* scow for, unfortunately for the plaintiff, the action was brought against the wrong scow, due to certain confusion in the reading of her name. The plaintiff arrested scow *Marpole II* which was elsewhere

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Sidney Smith D.J.A.

at the time. The scow involved in the mêlée was the *Marpole XI*. This is established conclusively by the evidence. The claim against the *Marpole II* therefore cannot be maintained notwithstanding that she and the *Marpole XI* are in the same ownership. 30 Hals. 947, note (*d*).

The same result must be reached with respect to the scow *E.S.M. No. X*. The evidence is clear that at all material times this scow was under the control of independent contractors, namely, the Gulf of Georgia Towing Co. Ltd., the owners of the tug *Goblin*. There was nothing here in the nature of master and servant relationship between those in charge of the tug and the owners of the tow; so no liability can be fastened on the innocent scow for any damage done by her to property of third parties caused by the negligence of the tug. 30 Hals. 847. This claim also fails.

The legal position of scow *A.T. & B. No. 28* is somewhat different. She was under charter to the Vancouver Tugboat Co. Ltd. by way of charter by demise. This Company was accordingly in sole control of the scow's movements and if there was negligence in properly securing her in the scow pool, or otherwise, it was the negligence of the charterers or their servants, and not of her owners. This raises the question whether the scow can be made liable in an action *in rem* though her owners are not personally responsible. There are many cases one way and the other. The principal ones answering in the affirmative are *The Ticonderoga* (1); *The Lemington* (2); *The Tasmania* (3) and *The Ripon City* (4). The contrary view is expressed in such cases as *The Parlement Belge* (5); *The Castlegate* (6); *The Utopia* (7) and *The Sylvan Arrow* (8).

The decisions and dicta of these and similar authorities have been much discussed in the relevant text-books, but in the view I take it becomes unnecessary to consider the various contrasting judgments. I do not seek to travel beyond the particular issue that concerns me here, namely, whether in a damage action a maritime lien is enforceable

(1) (1857) S.W. 215.
(2) (1874) 2 Asp. 475.
(3) (1888) 13 P.D. 110.
(4) (1897) P. 226.
(5) (1880) 5 P.D. 197.
(6) (1893) A.C. 38.
(7) (1893) A.C. 492.
(8) (1923) P. 220.

against an innocent vessel under a voluntary charter by demise where the negligence, if any, is on the part of the charterer's servants or agents. For my present purpose the most helpful case is *The Utopia, supra.* This is the most recent relevant decision of the Judicial Committee. It concerns a collision between two ships, and not the less so because one of them, *The Utopia,* was submerged with only her funnel and masts above water. In consequence of the *Utopia's* showing improper lights the other vessel collided with her. But the port authorities in Gibraltar Bay, where this took place, had taken charge of her, so that they were to blame and not the Master. The Judicial Committee held that the ship was not liable because her owners were not personally responsible, and stated the general principle thus at p. 499:

> It was suggested in argument that, as the action against the Utopia is an action *in rem,* the ship may be held liable, though there be no liability in the owners. Such contention appears to their Lordships to be contrary to principles of maritime law now well recognized . . . The foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved no lien comes into existence, and the ship is no more liable than any other property which the owners at the time of collision may have possessed.

This principle was approved by the High Court of Australia in *Rosenfeld Hillas & Co. Proprietary Ltd.* v. *The Fort Laramie* (1).

The decision in the *Utopia* would appear the governing authority. There is nothing in the letter or spirit of the language I have quoted to justify the proposition that the ship is liable for the negligence of the servants of a charterer by demise. On the contrary, there is affirmation of the principle that the liability of the ship and the liability of the shipowner must march together, But in *The Ripon City, supra,* Mr. Justice Gorell Barnes deals with the case of a chartered ship in this language (p. 244):

> The principle upon which owners who have handed over the possession and control of a vessel to charterers . . . are liable to have their property taken to satisfy claims in respect of matters which give rise to maritime liens, may, in my opinion, be deduced from the general principles I have above stated and thus expressed. As maritime liens are recognized by law, persons who are allowed by those interested in a vessel to have possession of her for the purpose of using or employing her in the ordinary manner, must be deemed to have received authority from those interested in her to subject the vessel to claims in respect of

(1) (1923) 31 Com. L.R. 56 at 63.

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> which maritime liens may attach to her arising out of matters occurring in the ordinary course of her use or employment, unless the parties have so acted towards each other that the party asserting the lien is not entitled to rely on such presumed authority. In my opinion, it is right in principle and only reasonable, in order to secure prudent navigation, that third persons whose property is damaged by negligence in the navigation of a vessel by those in charge of her should not be deprived of the security of the vessel by arrangement between the persons interested in her and those in possession of her . . . The persons interested in a vessel in placing her in the possession and control of other persons, to be used or employed in the ordinary way, must contemplate that claims may arise against her in respect of rights given by the maritime law, and may be taken to have authorized those persons to subject the vessel to those claims.

The *Ripon City* concerned the enforcement of a Master's lien for disbursements, and the learned judge, at p. 239, thought the decision in *The Utopia* did not affect the question before him. Nevertheless, it has been dealt with in the text-books as authority for the general proposition that a ship may be liable *in rem* though there be no liability in her owners, so that no judgment could be obtained against them personally. With the greatest deference to the learned judge, I doubt if the principle he lays down would be followed in a final Court of Appeal. The assumption made by the learned judge is far-reaching and raises, it seems to me, an unusual conception of agency. If the servants of a charterer may be regarded as the agents of the shipowner so as to create a maritime lien upon the vessel, why may they not be so regarded for the purpose of imposing personal liability on the shipowner? This is contrary to all that was said in *The Utopia, supra.*

The only later case touching the point is the *Sylvan Arrow* (1). That was a case of collision in which the chartered vessel had been surrendered by compulsion of law to the U.S. government, and those on board were the servants of that government at the time of the collision. The question was whether the sovereign charter by demise carried total immunity. Hill J., in a valued judgment, held that as the transfer of possession and control was brought about by force of law no action *in rem* could be brought against the ship, even after she had been freed from requisition. He was therefore in the happy position of being able to reconcile his judgment with all the authorities I have mentioned. But he thought that some day

(1) (1923) P. 220.

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what I have called the "affirmative" cases, would have to be re-examined by a higher Court "in the light of the principles so clearly laid down . . . by the Privy Council in *The Utopia*".

It is my opinion that in the circumstances here a maritime lien did not arise and so could not be enforced against the scow *A.T. & B. No. 28*.

The action must therefore be dismissed with costs.

Judgment accordingly.

BETWEEN:

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Sept. 28

Sept. 30

INTERNATIONAL FRUIT DISTRIBUTORS LIMITED ..... } APPELLANT;

AND

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

Revenue—Income Tax—The Income Tax Act, S. of C. 1948, c. 52 ss. 36(4)(b)(i), 36(5), 127(1)(a b), 127(5)—Meaning of related corporations—Term person in s. 36 (4)(b)(i) includes foreign corporation.

All the issued shares of the appellant and another Canadian company were owned by a United States company and the appellant was assessed for 1949 as a related corporation within the meaning of s. 36(4)(b)(i) of The Income Tax Act, as amended.

Held: That it is not a proper approach to the construction of The Income Tax Act to regard it as necessarily consistent in the use of its various terms throughout the Act or to assume that inconsistency in their use necessarily results in ambiguity in their meaning.

2. That the term "person" in section 36(4)(b)(i) of the Act includes a foreign corporation and that the appellant was a related corporation within the meaning of the section.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the President of the Court at Toronto.

J. B. Hamilton Q.C. and *W. D. Lyon* for appellant.

T. Z. Boles for respondent.

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

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INTERNATIONAL FRUIT DISTRIBUTORS LIMITED v. MINISTER OF NATIONAL REVENUE

THE PRESIDENT now (September 30, 1953) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board (1), dated March 5, 1952, which dismissed the appellant's appeal from its income tax assessment for 1949. The issue is whether the appellant was a related company within the meaning of section 36(4)(*b*)(i) of The Income Tax Act, Statutes of Canada 1948, chapter 52, as amended by section 11 of Chapter 51 of the Statutes of 1951, assented to on June 30, 1951, and made applicable to 1949 and subsequent taxation years, the relevant parts of which read as follows:

36. (4) For the purpose of this section, one corporation is related to another in a taxation year if, at any time in the year, . . .

(*b*) 70 per cent or more of all the issued common shares of the capital stock of each of them is owned directly or indirectly by

(i) one person . . .

The facts of the case are simple and not in dispute. The appellant was incorporated under the laws of Canada and has its head office at North Bay in Ontario. Another company to which it is said to be related, namely, Gamble Robinson Limited, was also incorporated under the laws of Canada and has its head office at North Bay. All the issued shares of each of these companies were at all times relevant to this appeal owned by Pacific Gamble Robinson Company, a company incorporated under the laws of Delaware, one of the United States of America, and having its head office at Seattle in the State of Washington.

On these facts it was contended for the respondent that the appellant was a related company within the meaning of section 36(4)(*b*)(i) of the Act and properly assessed accordingly.

The submission of counsel for the appellant, put shortly, is that the term "person" in section 36(4)(*b*)(i) does not extend to a corporation or, alternatively, does not extend to a foreign corporation. It was urged that if it was read as extending to a corporation then section 36(5), which reads as follows:

36(5) When two corporations are related, or are deemed by this subsection to be related, to the same corporation at the same time, they shall, for the purpose of this section, be deemed to be related to each other.

(1) (1952) 6 Tax A.B.C. 155.

would be unnecessary surplusage, that the specific reference in it to corporations has the effect of excluding a corporation from the meaning of the term "person" in section 36(4)(*b*)(i), that this creates an ambiguity in its meaning and that such ambiguity should be resolved in the appellant's favor.

I am unable to agree. It is not a proper approach to the construction of The Income Tax Act to regard it as necessarily consistent in the use of its various terms throughout the Act or to assume that inconsistency in their use necessarily results in ambiguity in their meaning.

In my judgment, there is a complete answer to the apellant's submission in the definition of "person" in section 127(1)(*a b*) which reads as follows:

127. (1) In this Act,

(*a b*) "person" or any word or expression descriptive of a person, includes any body corporate and politic, and the heirs, executors, administrators or other legal representatives of such person, according to the law of that part of Canada to which the context extends;

As I understand this definition the term "person" in section 36(4)(*b*)(i) of the Act clearly includes a corporation. Indeed, it includes "any" corporation and there is no reason for holding that it does not extend to a foreign corporation such as Pacific Gamble Robinson Company. I am unable to find any ambiguity in its meaning by reason of the use of the term "corporations" in section 36(5). Nor can the appellant derive any assistance from the arms length provisions of section 127(5).

In my opinion, the appellant was clearly a related corporation within the meaning of section 36(4)(*b*)(i) of the Act and properly assessed accordingly. It follows that its appeal must be dismissed with costs.

Judgment accordingly.

1950
Apr. 26-29
May 16-18
June 27-28
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July 29

BETWEEN:

CAMPBELL MANUFACTURING CO. LIMITED ..... } PLAINTIFF;

AND

THORNHILL INDUSTRIES LIMITED and SLAZENGERS CANADA (1936) LIMITED ..... } DEFENDANTS.

Patents—Trade marks—Infringement—Passing off—Process for weighting badminton shuttlecocks—Anticipation—Prior user—Lack of subject matter—Combination—Commercial success—"Blue Goose", "Snow Goose" and "Blue Hawk"—Onus on plaintiff to show reasonable probability of confusion.

The plaintiff brought action for infringement of its patent for a process for weighting badminton shuttlecocks, infringement of its trade mark Blue Goose by the use of the names Snow Goose and Blue Hawk and for passing off. The validity of the patent was attacked for lack of novelty and subject matter and infringement of the trade mark and passing off were denied.

Held: That claims 1 and 2 of the patent in suit are too wide.

2. That claims 3 and 4 are invalid for lack of subject matter.

3. That in an action for infringement of a trade mark by the use of a similar mark the onus is on the plaintiff to show that the use of the two marks at the same time and in the same area in association with similar wares is likely to result in confusion.

4. That the name Snow Goose is confusingly similar to the plaintiff's trade mark Blue Goose but that the name Blue Hawk is not.

Action for infringement of patent and trade mark and for passing off.

The action was tried before the President of the Court at Toronto and Ottawa.

A. S. Patillo Q.C. and *A. J. MacIntosh* for plaintiff.

J. M. Godfrey for defendants.

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

THE PRESIDENT now (July 29, 1953) delivered the following judgment:

This is an action for infringement of the plaintiff's Canadian patent No. 343,728 dated August 7, 1934, for "badminton shuttlecocks and process of making same" brought against both defendants and for infringement of the plaintiff's trade mark "Blue Goose" and for passing off brought against the defendant Thornhill Industries Limited.

I shall deal first with the claim for infringement of the patent. The specification opens with the following statements:

This invention relates to Badminton Shuttlecocks and more particularly to the weighting thereof.

It is essential that Badminton Shuttlecocks be of consistent weight. A variation of 1 grain in the weight of a shuttlecock means an approximate variation of one foot in a full back line serve. Tests of leading imported makes show a variation in weight of as much as 7½ grains, with the result that expert players and tournament players make a practice of testing shuttlecocks before using them and rejecting those which are off weight. Frequently only eight or more shuttlecocks in a carton of twelve shuttlecocks made by ordinary processes are accepted for use by such players. It will, therefore, be seen that it is of the highest importance that there should be a minimum of variation in the weight of Badminton shuttlecocks.

The ordinary practice in weighting shuttlecocks is to make up the base and add sufficient weight to bring the base up to a predetermined weight, say 47 grains. The feathers, string and glue, size, lacquer or other adhesive or cement are then added to bring the completed shuttlecock up to the required total weight, say 77 grains. Owing to variations in the size and weight of the feathers and string and the amount of lacquer, adhesive or cement used, however, there is, as stated above, variation of from 7 to 8 grains in the total weight of the finished shuttlecock made by the ordinary methods of construction described above.

It is thus disclosed that the object of the invention was to attain a minimum of variation in the weight of badminton shuttlecocks, commonly called "birds", and the extent of the variation in the case of shuttlecocks made according to the ordinary practice whereby weight was added to the base before the feathers, string, glue and lacquer were added is pointed out.

Then the inventor declared that this large variation in weight is avoided by his construction whereby the weight is added after the base has been made up and the feathers added thereto as more particularly described and illustrated. Certain drawings are annexed to the specification and the inventor then describes his process in detail. His description with the omission of the numbers identifying the elements with those shown on the various figures of the drawings is as follows:

To the base, which is ordinarily of fine textured cork, is applied a kid covering extending to about ¼" from the top and which is suitably secured to the base by glue or other adhesive. The top and the upper end of the side walls are reinforced with a cap which may be made of strong textured pasteboard or kid. Besides forming a finish for the upper end of the base, this cap provides a firm surface through which to drill holes for receiving the quills or stems, feathers or other flight steadying devices, and the

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weight, as hereinafter described, and forms, a substantial support for the walls of the base which prevents splitting or breaking away when the holes are being drilled or when the feathers are struck when the shuttlecock is used in play.

A plurality of holes or receptacles for the feathers are bored preferably by an automatic multiple drill around the periphery of the top of the base. This drill has a tolerance of approximately only 1/1000 of an inch, and each hole is substantially identical in length, width and angle in order to ensure a perfect setting for each feather.

In the center of the top of the base there is now drilled a cylindrical hole, cavity or receptable in practice measuring about ¼" x ⅜".

The feathers which have previously been washed, bleached and treated, and stamped out in uniform size and shape, are then assembled in jigs to secure proper alinement and setting, and their stems or quills are inserted in the holes which have been bored in the base as above described.

The feathers are then stitched in a known manner by stitchings adjacent the base and approximately midway of the length of the feathers about 1" from the base.

The feathers are now lacquered, and the upper portion of the base at the junction of the cap and the kid covering is strapped with an adhesive ribbon. The shuttlecock is now placed on a highly sensitive weighing machine together with a frustro-conical plug, the diameter of the smaller end of which is substantially the same as the diameter of the central hole and the diameter of the larger end of which is slightly larger than the diameter of the hole, and the length of which is slightly less than the depth of said hole. The scale is counterbalanced by a weight which equals the desired total weight of the shuttlecock, usually about 77 grains. Weighting material in the form of fine lead pellets or other suitable material is then poured on to the scale until the shuttlecock, plug and weighting material balances the weight on the other pan of the scale. The shuttlecock is then removed and the weighting material poured into the central hole. Glue or cement is then applied to the hole and/or the plug which is then inserted with its smaller end first and forced into position with its top level with the top of the base and just below the cap. When the plug is forced in the hole the cork of the base is slightly expanded by the larger end of the plug. This causes pressure to be exerted against the ends of the feathers anchoring them more firmly in the base. The stiffly lacquered cap slightly overlaps the top of the plug and effectively prevents it from coming out of the hole. Over the top of the plug is then secured a seal of paper or similar thin material which seals the plug and the hole.

The centre of gravity of an unweighted shuttlecock is located substantially at the top of the base, where the weighting material is located in the conventional shuttlecock. It will be observed that according to my invention the weight is located below the centre of gravity which gives the shuttlecock a steadier flight.

It is clear from this description that the necessary weight required to bring the finished shuttlecock up to a predetermined weight is, except for a thin paper seal and a small amount of glue or cement, added last.

The specification ends with 14 claims of which the first 4 read as follows:

1. A process of making a shuttlecock, provided with a base and a flight steadying device, which consists in first securing the flight steadying device to the base, and then adding weighting material thereto.

2. A process of making a shuttlecock, provided with a base and a flight steadying device, which consists in first securing the flight steadying device to the base, then weighing the shuttlecock, and finally adding weighting material thereto to bring it up to a predetermined weight.

3. A process of making a shuttlecock, provided with a base and a flight steadying device, which consists in forming a cavity in the top of the base to receive weighting material, securing the flight steadying device to the base, inserting weighting material in the cavity, and applying a closure to said cavity.

4. A process of making a shuttlecock, provided with a base, and a flight steadying device, which consists in covering the base, forming a cavity in the top of the base, applying the flight steadying device, then inserting weighting material in the cavity, and finally closing the cavity.

The claims in suit which are alleged to have been infringed are claims 2, 3 and 4 but claim 1 is set forth because the defendant asks for a declaration under section 60 of The Patent Act, 1935, Statutes of Canada 1935, chapter 32, that the claims in suit and claim 1 are invalid.

Mr. D. H. Pollitt, the plaintiff's president and general manager and its chief witness, claimed that he was the inventor of the process covered by the patent in suit, the date of the invention being some time prior to March 14, 1934, the date of the specification. His evidence was that the plaintiff began to make shuttlecocks about the middle of 1933. At that time most of the shuttlecocks came from England, the only Canadian companies making them being the Badminton Manufacturing Company which made the Blue Goose shuttlecock, the National Games Company which was in the process of winding up and Spalding's in Brantford. According to Mr. Pollitt, in all cases where weight was added to a shuttlecock the addition was made before the feathers were applied and there were no shuttlecocks in which weight was added after the feathers were put on. There was a call at the time for a shuttlecock that was uniform and consistent in flight. Mr. Pollitt weighed shuttlecocks made by competitors, of whom he considered Ayers of England and the Badminton Manufacturing Company of Toronto the main ones, and found a substantial variation in weight. The English makers such as Ayers

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appeared to be more concerned with the spread of the feathers than with uniformity of weight but Mr. Pollitt considered that uniformity in the weight of shuttlecocks would make for uniformity and consistency of flight. It was while he was working on the problem of uniformity and consistency of flight that he devised his process of adding weight to a shuttlecock to bring it up to a predetermined weight and adding it last by putting it into a cavity and then closing the cavity. At first the cavity was made in the top shroud that covered the base but later the shroud was left off. I pass over all the various arrangements made by the plaintiff and the personal animosities that developed and come to 1947. In that year the defendant Slazengers Canada (1936) Limited sold a shuttlecock called the Falcon Crown, which had been made for it by the defendant Thornhill Industries Limited, and about six months later the latter defendant put out other shuttlecocks under the names Snow Goose, Blue Hawk and others. In all of these the necessary weight to bring the shuttlecock up to the desired weight was put into a well in the centre of a plastic crown on top of the cork base, the weight being added after the feathers had been assembled and the completed shuttlecock had been weighed. The plaintiff contended that the manufacture and sale of these shuttlecocks constituted an infringement of its patent and complained to the defendants accordingly.

In the course of his evidence Mr. Pollitt emphasized the fact that he added the necessary weight last in order to bring his shuttlecock up to a predetermined weight, but counsel for the plaintiff realized, of course, that there could not be an invention in the idea of adding the necessary weight last. There is nothing novel in such an idea. It has been embodied in several processes such as, for example, that of adding weight to a tennis racquet in order to bring it up to a desired weight. If there is any invention it must be in a particular process of adding weight last. This is what was claimed . This process is described in the specification and consists, to put it briefly, in making a cavity in the top of the cork, adding the requisite number of lead pelletts to bring the shuttlecock up to the predetermined weight and then closing the cavity with a plug and covering

it with a seal. Thus the addition of the weight is the last part of the process of manufacture, except for the closing of the cavity by the plug and covering it with a seal.

The defendant Thornhill Industries Limited attacked the validity of the patent for lack of novelty and lack of subject matter, as the English cases put it. In other words, it was contended that the invention was anticipated by prior publication and prior user of it and that no exercise of inventive ingenuity was required to bring it into existence. Both defendants denied infringement.

In support of the argument that the plaintiff's invention had been anticipated by a prior publication counsel for the defendants relied on United Kingdom patent No. 333,342, dated August 14, 1930, issued to N. E. Snow. *In The King* v. *Uhlemann Optical Company Limited* (1) I set out the requirements that must be met before an invention should be held to have been anticipated by a prior publication as follows:

> The information as to the alleged invention given by the prior publication must, for the purposes of practical utility, be equal to that given by the subsequent patent. Whatever is essential to the invention or necessary or material for its practical working and real utility must be found substantially in the prior publication. It is not enough to prove that an apparatus described in it could have been used to produce a particular result. There must be clear directions so to use it. Nor is it sufficient to show that it contained suggestions which, taken with other suggestions, might be shown to foreshadow the invention or important steps in it. There must be more than the nucleus of an idea which, in the light of subsequent experience, could be looked on as being the beginning of a new development. The whole invention must be shown to have been published with all the directions necessary to instruct the public how to put it into practice. It must be so presented to the public that no subsequent person could claim it as his own.

And I referred to *inter alia* to *Pope Appliance Corporation v. Spanish River Pulp and Paper Mills Ld.* (2) where Viscount Dunedin, at page 52, put the test in these words:

> Would a man who was grappling with the problem solved by the Patent attacked, and having no knowledge of that patent, if he had had the alleged anticipation in his hands have said, "That gives me what I wish"?

and later, at page 56:

> Does the man attacking the problem find what he wants as a solution in the prior so-called anticipations?

(1) [1950] Ex. C.R. 142 at 157. (2) [1929] R.P.C. 23.

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The requirements are thus seen to be very exacting. In my judgment, they are not met in the present case by the Snow patent. It is true that the process described in it is very similar to that described in the patent in suit as will be seen from the following description in the Snow patent specification:

> In the manufacture of the base of the shuttlecock, which base may be made of cork, cork composition, rubber, rubber composition or other material suitable for the purpose, I form a centrally-disposed cavity in said base, which opens at the top thereof and extends down beyond the centre of gravity of said base. Into said cavity are inserted metal (for instance lead) or other discs, or alternatively, pellets, flakes or the like, which are caused to lie at the bottom of said cavity, and constitute weighting means, the number inserted being such as to bring the total weight of the shuttlecock up to a predetermined standard. When the desired total has been thus obtained a plug of cork or other suitable material and which closely fits into the cavity, is inserted therein as far as possible so as to bear on the aforesaid weighting elements, and is secured in place by adhesive. The exposed end of said plug, which may be trimmed off if projecting, is finally covered by the kid or other covering material applied to the base so that the shuttlecock has an absolutely normal appearance.

While the process thus described is similar to the Pollitt process the Snow patent does not disclose that the weight required to bring the shuttlecock up to a predetermined weight is to be added last. This, in my opinion, disposes of it as an anticipation of the patent in suit.

I now come to the allegations of prior user of which there were said to be two instances. Mr. M. Fried who started the National Games Company in Toronto in 1929 said that they started manufacturing shuttlecocks in 1932, that at first they used lead discs like tinfoil for weighting them but found this process unsatisfactory and that later they came across the idea of using brass darts of three different sizes to bring the shuttlecocks up to the uniform weight demanded by the Badminton Association. Mr. Fried stated that after the shuttlecock was completely assembled they weighed it and then added the necessary weight to bring it up to the specified weight by pressing the proper sized dart right into the cork flush with the top of it and then covering it with an identifying seal or sticker. Mr. Fried said that he used this process late in January 1933. This was prior to the date of Mr. Pollitt's invention. Against Mr. Fried's statement there is the evidence of Mrs. Kilby who was employed in the National Games Company

plant to cut and sew feathers that the darts were put in under the kid shroud on top of the cork before the feathers were put on. And Miss Winston's evidence is to a similar effect. This is confirmed by the fact that the only samples of shuttlecocks made by the National Games Company with darts in them that were produced as exhibits showed that the darts had been put into the cork underneath the kid shroud. It is also significant that there were no samples of shuttlecocks made as Mr. Fried described produced at the trial. In my opinion, he was mistaken in his statement that the darts were added last and I reject it.

The second alleged prior user gives me more concern. Mr. S. Gillespie said that he started the Badminton Manufacturing Company in 1929, 1930 or 1931 and made shuttlecocks. His evidence was that after he had assembled the shuttlecock he inserted a tack in the centre to bring it up to the proper weight and covered it with a seal of tin foil. The tacks which he used were of different weights. He put the unweighted shuttlecock on a scale with the tin foil and then added a tack of the proper weight to bring the shuttlecock up to the predetermined weight. The tack was then inserted into the top of the cork with a plunger. Mr. Gillespie's evidence received support from Mr. F. Shuttleworth who said that he saw shuttlecocks on the premises of the Badminton Manufacturing Company with a tack put in the centre and covered with a seal. There were cartons of these shuttlecocks up to the ceiling. The tack was put in last except for the seal. And Mr. E. Purkis said that in 1935 he saw shuttlecocks with tacks put in last except for a covering label. He obtained samples of them from a person who had been manufacturing them, who must have been Mr. Gillespie. Mr. Purkis turned these over to his patent solicitor who died soon afterwards. Against this evidence there is the positive statement of Mrs. Kilby who was with Mr. Gillespie all the time that he was at the Badminton Manufacturing Company that the additional weights were applied before the feathers were put in and the evidence of Miss Winston that while she worked with the Badminton Manufacturing Company tacks were used under the kid shroud. There is also the statement of Mr. Morrow that the tacks were placed under the top shroud before the feathers were put on. But for the evidence of Mr. Purkis

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I would have no difficulty in not accepting the statements of Mr. Gillespie and Mr. Shuttleworth but the weight of his evidence is reduced by the fact that no sample of a shuttlecock with a tack put in the top was produced and there is no evidence that any one ever used such a shuttlecock. It is strange, if there was such a shuttlecock, that one of them did not find its way into Mr. Lawson's extensive collection. Under the circumstances, it seems to me that the Court ought not to invalidate a patent for prior user of the invention covered by it except on evidence that is more convincing than that in this case, even if the use of tacks last could otherwise be regarded as prior user of the invention in suit.

The attacks on the ground of anticipation of the invention by prior publication or by prior user, therefore, fail.

There remains the challenge of lack of subject matter but before I deal with it some of the claims in suit may be summarily disposed of. Claim 1 cannot stand. It is plainly too wide in that it purports to cover any process of adding weighting material to a shuttlecock after securing the flight steadying device to the base and is not even limited to adding weight for the purpose of bringing the shuttlecock up to a predetermined weight.

There was a difference of opinion regarding claim 2. Counsel for the defendants considered it the basic claim but counsel for the plaintiff conceded that it was too wide. I agree. It is narrower than claim 1 in that it is restricted to adding weight last to bring a shuttlecock up to a predetermined weight but it is too wide in that it covers any process by which weight is added last for such a purpose. The claim is not restricted to any particular process of adding weight last and is, in effect, tantamount to claim for the idea of adding weight last to bring the shuttlecock up to a predetermined weight. As already stated there is no novelty in this idea.

Claims 3 and 4 remain. These are limited to a particular process of adding the necessary weight last, namely, that of forming a cavity in the top of the base, inserting weighting material in it and closing it. Counsel for the plaintiff relied upon claim 4 as the basic one in that it specified the order in which the various steps are to be taken, namely, that a cavity is formed in the base and the

flight steadying device is applied, that then the weighting material is inserted in the cavity and that finally the cavity is closed. It should be noted that there is no reference in claims 3 or 4 to adding weight to bring the shuttlecock up to a predetermined weight and there is no indication otherwise as to the amount of weight that should be added. It will be seen that the process adopted by Mr. Pollitt is very similar to that which was disclosed in the Snow patent. Indeed, the Snow process would have been an anticipation of the Pollitt process except for the fact that in the latter the weight is added last or almost last. But although this difference is sufficient to prevent the Snow patent from being considered as an anticipation of the patent in suit it does not dispose of it entirely for the process of making a cavity, putting the weighting material in it and then closing it was disclosed by the Snow patent and was, therefore, not new. This raises the question whether the adding of the weight last or almost last can make the process, which was otherwise not a novel one, patentable, particularly since the idea of adding weight last to an object in order to bring it up to a predetermined weight is itself not a novel one. Counsel for the plaintiff realized, of course, that neither the particular process of adding weight by creating a cavity, putting the weight into it and then closing it nor the idea of adding the weight last was novel but contended that claim 4 was a combination claim and that although the elements in the combination were not new the combination itself was new. It is, of course, not necessary to the validity of a combination invention that its elements should be new. Indeed, all of them may be old. If it is the combination that is the invention it is immaterial that the elements are old: *vide British United Shoe Machinery Company Ld.* v. *A. Fussell & Sons Ld.* (1); *Baldwin International Radio Co. of Canada Ltd.* v. *Western Electric Co. Inc. et al* (2); Terrell on Patents, 8th Edition, pages 78-81. In *The King* v. *American Optical Co.* (3) I summarized the tests of a valid combination invention as follows:

> It is essential to the validity of a patent for a combination invention, apart from considerations of novelty and inventive ingenuity, that the combination should lead to a unitary result rather than a succession of results, that such result should be different from the sum of the results

(1) (1908) 25 R.P.C. 631 at 656, 657. (2) [1934] S.C.R. 94 at 104.
(3) [1950] Ex. C.R. 334 at 355.

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of the elements and that it should be simple and not complex. The elements may interact with one another provided they combine for a unitary and simple result that is not attributable to any of the elements but flows from the combination itself and would not be possible without it.

Even if it be conceded that the combination claimed by the plaintiff meets these tests and that a unitary result did flow from the combination, namely, shuttlecocks of greater uniformity of weight than those produced by previous process, and even if it be admitted that there was novelty in the combination, if the evidence as to the last use of darts or tacks to bring shuttlecocks up to a predetermined weight is not accepted, in that prior to the invention there had never been a process whereby weight was added to a shuttlecock to bring it up to a predetermined weight by putting the weight into a cavity and doing so last except for the closing of the cavity, this is not enough. It must also be shown that in addition to the combination being a novel one it required the exercise of inventive ingenuity to bring it about. In my opinion, this essential requirement is missing in the present case. The idea of adding weight last to an object in order to bring it up to a predetermined weight is an obvious one. That being so, it seems to me that any person skilled in the art and having the knowledge which such a person ought to have, including the knowledge of the process disclosed in the Snow patent, would in the course of working on the problem of producing shuttlecocks of uniform weight obviously adopt the Snow patent process and add the necessary weight last or almost last. Moreover, if Mr. Pollitt started with the idea of attaining the desired uniform weight by adding the necessary weight last and knew of the other methods of applying weights, as a person skilled in the art should have done, it seems to me that he would obviously select the Snow patent process as the one to adopt for the purpose of adding the necessary weight last or almost last.

Under the circumstances, I find no difficulty in concluding that claim 4 is invalid for the reason that it did not require any inventive ingenuity to devise the combination covered by it. The claim falls for lack of subject matter. And claim 3 falls with it.

Counsel for the plaintiff relied upon the commercial success of the shuttlecock produced by the process covered by the patent as evidence of invention. The circumstances under which the commercial success of a new device may be regarded as evidence of invention are set out in *The King* v. *Uhlemann Optical Company* (1) and *The King* v. *American Optical Company* (2). In my opinion, the evidence of the commercial success of the plaintiff's shuttlecock falls far short of the kind of evidence required. Mr. Pollitt said that the plaintiff survived in a very competitive field, that English makes of shuttlecocks had been selling to the trade at $54 or $55 per gross but that by 1935 the plaintiff's shuttlecocks had brought the price down to $28.50, that the plaintiff and its licensee had become the only manufacturers in Canada and supplied 90 per cent of the Canadian consumption, that the plaintiff did the greater portion of the shuttlecock business in New Zealand and sold extensively in the United States and that the plaintiff's pre-eminence continued during and after the war. The survival of the plaintiff is of little importance. Mr. Pollitt considered Ayers and the Badminton Manufacturing Company the plaintiff's only serious competitors and the evidence is that the former passed out of the picture in Canada because of defective sales organization and that the plaintiff bought out the latter. Moreover, there is no substantial evidence that serious work was being done on the problem that Mr. Pollitt was dealing with. Mr. Pollitt said that to his knowledge nobody was working on it. The English manufacturers were more concerned with securing consistency of flight by the spread of wings than by seeking uniformity of weight and the plaintiff's device has not been adopted in England. And I have already commented on the alleged efforts in Canada to deal with the problem. Moreover, the plaintiff's success such as it was may be due to reasons that have nothing to do with the question of invention, such as the substantial reduction in the price of the shuttlecocks and the plaintiff's superior organization and merchandising ability.

(1) [1950] Ex. C.R. 142 at 163; [1952] S.C.R. 143 at 152.

(2) [1950] Ex. C.R. 344 at 367.

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In view of the finding that the claims in suit are invalid it is not necessary to deal with the evidence relating to infringement for there can be no infringement of an invalid patent.

The plaintiff's action must, therefore, so far as it relates to infringement of the plaintiff's patent be dismissed with costs as against both defendants and the defendant Thornhill Industries Limited is entitled to a declaration that claims 1 to 4 inclusive of the patent in suit are invalid.

The plaintiff's claim for infringement of its trade mark "Blue Goose" may be dealt with briefly. This trade mark was originally registered by the Badminton Manufacturing Company on March 14, 1934, as No. N.S. 2796 in Register 8 and used by it in association with its shuttlecocks. In 1936 the Badminton Manufacturing Company sold its assets, including the goodwill of its business and its trade mark, to the plaintiff and on July 27, 1936, the plaintiff became its registered owner pursuant to an assignment dated July 21, 1936. Since then the plaintiff has used the trade mark "Blue Goose" on the shuttlecocks made and sold by it and it is recognized by the trade as being associated with the plaintiff's products. The validity of the trade mark and the plaintiff's title to it are not challenged.

In the late summer of 1948 the defendant Thornhill Industries Limited put out several shuttlecocks under various names one of which was Snow Goose and another Blue Hawk. Mr. Miller explained that these names had been taken out of books on ornithology. On September 17, 1948, the plaintiff's solicitors wrote to the defendant claiming that the use of the names infringed the plaintiff's trade mark. Thereupon, the defendant almost immediately discontinued and abandoned the use of the name Snow Goose but continued to use the name Blue Hawk for a few months. The evidence is that it discontinued and abandoned the use of the name Snow Goose in October, 1948, and that the last sale of a shuttlecock under the name Blue Hawk was on April 20, 1949. Notwithstanding these facts the plaintiff continued the proceedings as, of course, it was entitled to do.

It is well established that in an action for infringement of a trade mark by the use of a similar mark the plaintiff must show that the use of the two marks at the same time

and in the same area in association with similar wares is likely to result in confusion of the kind referred to in section 2(*k*) of The Unfair Competition Act, 1932, Statutes of Canada 1932, chapter 38. The onus is on the plaintiff to show reasonable probability of such confusion: *vide Pepsi-Cola Company of Canada Limited* v. *Coca-Cola Company of Canada Limited* (1). There was no evidence of actual confusion. Indeed, Mr. S. S. M. Lawson said that he would not be misled and he did not know of any confusion. When the defendant brought out its shuttlecock under the name Snow Goose he was not struck with the similarity between it and the name Blue Goose which he associated with the plaintiff but he fairly explained that he would not be confused because of his familiarity with shuttlecocks. But evidence of actual confusion is not necessary. The tests of similarity of trade marks have been dealt with in many cases, one of the latest in this Court being *Freed & Freed Ltd.* v. *Registrar of Trade Marks et al* (2) where several of the leading cases were referred to. There it was stated that the proper test to be applied has been laid down by high authority and reference was made inter alia to *Aristoc, Ld.* v. *Rysta, Ld.* (3) in which the House of Lords decided that the question whether two marks are similar must be answered by the judge on whom the responsibility lies as a matter of first impression. This test was expressly approved by the Supreme Court of Canada in *Battle Pharmaceuticals* v. *The British Drug Houses Ltd.* (4). While it may be easier to apply the test of first impression to single words, such as those in question in the *Aristoc* case (*supra*), than to word marks consisting of more than one word the principle is the same.

Applying this test and with full appreciation of the subjective approach involved in it I have reached the conclusion that the name Snow Goose is confusingly similar to the plaintiff's trade mark "Blue Goose" but that the name Blue Hawk is not.

In the course of the hearing counsel for the defendant stated that he was prepared to consent to an injunction against the use of the words Snow Goose or Blue Hawk without any enquiry as to damages or costs. If the plaintiff

(1) [1940] S.C.R. 17 at 32.
(2) [1950] Ex. C.R. 431.
(3) [1945] A.C. 68.
(4) [1946] S.C.R. 50 at 53.

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so elects it may have judgment to that effect. But otherwise, there will be judgment dismissing the plaintiff's claim for infringement of its trade mark so far as the use of the name Blue Hawk is concerned but allowing it in respect of the use of Snow Goose with an injunction restraining such use and an enquiry as to damages, if the parties are not able to agree on an amount, and judgment accordingly. In respect of this portion of the plaintiff's case the plaintiff is entitled to costs as against the defendant Thornhill Industries Limited, which I fix at the sum of $100 inclusive of disbursements and the costs of the inquiry if it is proceeded with, such costs to be offset against the costs of the action for infringement of the patent.

There is no evidence, in my opinion, sufficient to justify any finding of passing off.

There will, therefore, be judgment dismissing the plaintiff's claim for infringement of its patent as against both defendants with costs but with only one set of counsel fees and declaring claims 1 to 4 inclusive of the patent invalid and, if the plaintiff does not elect to accept the defendant's offer, judgment in respect of the claim for infringement of its trade mark as stated.

Judgment accordingly.

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Oct. 15

Oct. 19

BETWEEN:

RELIABLE PLASTICS COMPANY LIMITED ..... PLAINTIFF;

AND

LOUIS MARX & COMPANY INCORPORATED and LOUIS MARX & COMPANY OF CANADA LIMITED DEFENDANTS.

Practice—General Rules and Orders, Rule 114—Motion to strike out allegations in statement of claim—Impertinent or irrelevant matter in pleadings—Rule 114 not applicable in doubtful cases.

Held: That on a motion under Rule 114 for an order to strike out certain paragraphs in a statement of claim as being impertinent or irrelevant, if it is far from clear that the allegations complained of are impertinent or irrelevant the Court, at this stage of the proceedings, ought not to make such an order and determine issues which should be ruled on at the hearing of the action, when all the facts are before the Court. *Rothschild et al* v. *The Custodian of Enemy Property* [1945] Ex. C.R. 44 referred to and followed.

MOTION under Rule 114 to strike out paragraphs in a statement of claim as being impertinent or irrelevant.

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

Eric L. Medcalf for the motion.

Gordon F. Henderson contra.

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

FOURNIER J. now (October 19, 1953) delivered the following judgment:

This is a motion by counsel for the defendants for an order to strike out paragraphs 7, 8, 9, 10, 11, 12 and paragraphs (*c*) and (*d*) of the prayer of the statement of claim on the grounds that they are impertinent or irrelevant, that they disclose no reasonable cause of action in this Court and that they tend to prejudice, embarrass and delay the fair trial of this action.

The motion repeats the terms of Rule 114 of the General Rules and Orders of the Exchequer Court of Canada.

The action is brought for a declaration by the Court that letters patent 494,447 are invalid and have always been null and void, that the said letters patent have not been

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infringed by the plaintiff, who claims damages for reasons alleged in paragraphs 7 and 9 of his statement of claim and an injunction enjoining defendants, servants, agents and employees from threatening under said letters patent, his customers and purchasers.

At the hearing of argument it was agreed that plaintiff would amend paragraph 7 by adding that the letters written to the customers of and purchasers from the plaintiff were written in bad faith or male fide. The plaintiff consented also to strike out of paragraph 9 the following words: "which had not at that time been affirmed by the Court".

A lengthy argument was heard in support of the motion. The contention of counsel for defendants was that the Court lacked jurisdiction to hear cases based on the Statute of Monopolies, (1624) 21 Jac. I, c. 3—section 4—and if the Court had jurisdiction, plaintiff was barred by section 6 of said statute to seek the remedy provided for in section 4: that the jurisdiction of this Court was to be found in section 22, paragraph (*c*), of the Exchequer Court Act. It was also argued that the paragraphs complained of were frivolous and irrelevant.

Decisions and authorities cited were at such variance that the Court has real doubts about the questions raised. It is far from clear that the allegations in paragraphs 8, 9, 10, 11 and 12 are impertinent, irrelevant and immaterial—or that the Court lacks jurisdiction. It should be left to the Court to determine at the hearing of the action the "bien-fondé" of the arguments of both parties, when all the facts are before the Court.

The guiding decision in motions of this nature may be found in *Rothschild et al. v. The Custodian of Enemy Property* (1), in which it was held:

That while the Exchequer Court Rule 114 provides that the Court or a Judge may, upon application, order to be struck out or amended any matter in the pleadings which may be deemed impertinent or irrelevant or which may tend to prejudice, embarrass or delay the fair trial of the action, such an order should not be made unless the matter complained of is clearly impertinent or irrelevant or is clearly a breach of the rules of pleading.

2. That impertinent matter in a pleading is such matter as is not pertinent to the questions in issue and can have no bearing upon them. Matter ought not at the commencement of a suit to be treated as impertinent which may at the hearing be found relevant.

(1) [1945] Ex.C.R. 44.

3. That disputed issues of law are not to be tried on a motion under Rule 114.

On this motion, the Court cannot agree that at this stage of the proceedings, it should declare that the allegations complained of are impertinent or irrelevant and determine issues which should be ruled on at the hearing of the action.

As mentioned above, paragraphs 7 and 9 will be amended.

Paragraphs 8, 10, 11, 12 and paragraphs (*c*) and (*d*) of the prayer of the statement of claim will stand.

The plaintiffs are to file their amended statement of claim within five days from the date hereof. The defendants will have ten days from the filing and delivery of the statement of claim as amended within which to file their statement of defence herein.

This application is therefore dismissed.

The order will be with costs in the cause.

Judgment accordingly.

BETWEEN:

W. A. SHEAFFER PEN COMPANY OF CANADA LIMITED ..... APPELLANT;

AND

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

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 2(l), 2(w), 5(p)—S. of C. 1944-1945, c. 43, ss. 4(5), 4(6)—Deduction of losses from profits—Meaning of words "year" and "taxation year"—Meaning of word "year" in s. 5(p)—Context in which word appears always to be considered.

The appellant's fiscal year coincided with the calendar year up to the end of 1945 but thereafter its fiscal year ended on February 28. In 1945 and in the two-month period ending February 28, 1946, it earned profits but in the taxation year ending February 28, 1947, it sustained a loss. It sought to deduct from the amount of its profits in 1945 the amount of loss sustained in the calendar year 1946.

Held: That a taxpayer cannot succeed in claiming a deduction from what would otherwise be taxable income unless his claim comes clearly within some provision of the Income War Tax Act permitting the deduction: he must show that every constituent element necessary to the right of deduction is present in his case and that every condition required by the permitting provision has been complied with. If he cannot clearly bring his claim within the express terms of the provision conferring the right of deduction he is not entitled to it.

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2. That a word defined by section 2 of the Act must be read according to its statutory definition wherever it appears in the Act unless the context otherwise requires and, conversely, it must not be read in its statutory meaning if the context in which it appears requires otherwise. It is thus a cardinal rule of interpretation that the context in which a word in the Act appears must always be considered in order to ascertain its true meaning.

3. That the word "year" in the expression "year immediately following the taxation year" in section 5(*p*) must be read as meaning "taxation year".

APPEAL under the Income War Tax Act.

The appeal was heard before the President of the Court at Toronto.

W. Z. Estey for appellant.

G. Beaudoin Q.C. and *J. D. C. Boland* for respondent.

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

THE PRESIDENT now (October 5, 1953) delivered the following judgment:

This is an appeal against the appellant's income and excess profits tax assessment for the taxation year ending December 31, 1945.

The facts are not in dispute. Up to the end of the calendar year 1945 the appellant's fiscal year coincided with the calendar year. But on December 21, 1945, it applied to the Inspector of Income Tax at Toronto for approval of a change in its fiscal year so that it would end on February 28. The reason given for the change was that there had been a change in the ownership of the shares and it was desirable to have the appellant end its fiscal year on February 28 in order to coincide with the end of the fiscal year of the Sheaffer Pen Company in the United States. The appellant's application was approved and thereafter its fiscal year ended on February 28.

The appellant's taxable income for the taxation year ending December 31, 1945, amounted to $101,496.91, as appears from the notice of assessment for 1945, dated February 23, 1948. The appellant filed an income and excess profits tax return for its new taxation year ending February 28, 1946, that is to say, for the period from December 31, 1945, to February 28, 1946, and its taxable income for that taxation period came to $2,739.95, as

appears from the first notice of assessment for 1946, dated March 23, 1948. But in its first full new fiscal year ending February 28, 1947, it sustained a loss of $50,894.31, as appears from the profit and loss statement for that taxation year prepared by its auditors, and on August 22, 1947, it filed its return for the taxation year ending February 28, 1947, showing the said loss. Subsequently, it was allowed to deduct part of this loss, namely, $2,739.95 from what would otherwise have been its taxable income for the taxation year ending February 28, 1946, leaving it with no taxable income for that taxation year, as appears from the amended notice of assessment for 1946, dated March 11, 1950.

Thus far there is no difficulty. The issue arises from the appellant's contention that it is entitled to deduct from the amount of its profits in the taxation year ending December 31, 1945, the amount of the loss sustained by it in the calendar year 1946. This claim is put forward under section 5(*p*) of the Income War Tax Act, R.S.C. 1927, chapter 97, as amended by section 4(5) of chapter 43 of the Statutes of 1944-1945, assented to on August 15, 1944, which reads in part as follows:

> 5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*p*) amounts in respect of losses sustained in the three years immediately preceding and the year immediately following the taxation year, . . .

The appeal turns on the meaning of the word "year" in the expression "the year immediately following the taxation year". It was contended for the respondent that the word means "taxation year" which is defined in section 2(*w*) of the Act as follows:

> 2. In this Act, and in any regulations made hereunder, unless the context otherwise requires,
>
> (*w*) "taxation year" or "taxation period" means a year or other fiscal period upon the income of which tax is, by this Act, required to be assessed, levied or paid and a reference to the taxation year or taxation period of a certain calendar year is a reference to the taxation year or taxation period, as the case may be, ending in that calendar year.

Thus a taxation year may be less than a year in the ordinary meaning of the word. On the application of this definition it follows that the taxation year immediately following the taxation year under review herein, namely,

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the taxation year ending December 31, 1945, was the taxation year ending in 1946, that is to say, the two-month period from December 31, 1945, to February 28, 1946.

It was properly conceded by counsel for the appellant that if the word "year" in section 5(*p*) had been preceded by the word "taxation" the appellant would have no case but it was contended that since it was not so preceded it must be read according to its statutory definition in section 2(*l*) of the Act, which is as follows:

> 2. In this Act, and in any regulations made hereunder, unless the context otherwise requires,
>
> (*l*) "year" means the calendar year.

and it was submitted that under this reading of section 5(*p*) the appellant was entitled to deduct from the amount of its profits in the taxation year ending December 31, 1945, the amount of the loss sustained by it in the calendar year 1946, that being the year immediately following the taxation year under review herein, less, of course, the amount deducted from the amount of its profits in the two-month taxation year ending February 28, 1946.

Alternatively, the submission was that the word year in its ordinary acceptance means a period of 365 days and that the appellant was entitled to deduct the loss sustained in the period of 365 days immediately following the taxation year ending December 31, 1945, and was not confined to deduction of the loss sustained in the 59 day period ending February 28, 1946, as would be the case if the contention on behalf of the respondent is right.

While the appellant's submission appears attractive at first sight and merits consideration I am of the opinion that it is unsound and must be rejected. There are several reasons for this conclusion. While it is well established that all charges must be imposed by clear and unambiguous language and that a person is not to be subjected to tax unless the words of the taxing statute expressly impose it and he is caught by them; *vide Partingdon* v. *Attorney-General* (1) and *Tennant* v. *Smith* (2) and numerous decisions of this Court such as *Connell* v. *Minister of National Revenue* (3); *David Fasken Estate* v. *Minister of National Revenue* (4); it should be noted that in the present case

(1) (1869) 4 E & I App. 100 at 122.
(2) [1892] A.C. 150 at 154.
(3) [1946] Ex. C.R. 562 at 566.
(4) [1948] Ex. C.R. 580 at 588.

there is no question of imposition of any charge. Here the appellant seeks the benefit of a right of deduction to which it would not be entitled except for section 5(*p*) the opening words of which refer to the exemptions and deductions to which what would otherwise be taxable income is subject. The manner in which an exempting provision in a taxing statute should be construed has been dealt with in a number of cases. In *Lumbers* v. *Minister of National Revenue* (1), which was affirmed by the Supreme Court of Canada (2), I held that it is a well established rule that the exemption provisions of a taxing act must be construed strictly and cited the statement to that effect of Sir W. J. Ritchie C. J. of the Supreme Court of Canada in *Wylie* v. *City of Montreal* (3) where he said:

> I am quite willing to admit that the intention to exempt must be expressed in clear unambiguous language; that taxation is the rule and exemption the exception, and therefore to be strictly construed;

Then I put the rule of construction of an exempting provision of the Income War Tax Act as follows:

> Just as receipts of money in the hands of a taxpayer are not taxable income unless the Income War Tax Act has clearly made them such, so also, in respect of what would otherwise be taxable income in his hands a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions of some exempting section of the Income War Tax Act: he must show that every constituent element necessary to the exemption is present in his case and that every condition required by the exempting section has been complied with.

A similar rule of construction should be applied in the case of a statutory right of deduction such as that conferred by section 5(*p*) from which it follows that if a taxpayer cannot clearly bring his claim for deduction within the express terms of the provision conferring the right of deduction he is not entitled to it.

In the case at bar the appellant encounters an initial difficulty. It has not proved and cannot prove what amount of loss, if any, it sustained in the calendar year 1946. For the first two months of that calendar year it had a profit of $2,739.95. In the taxation year ending February 28, 1947, it sustained a loss of $50,894.31, due to a fire on its premises and the moving of its plant, both of which events occurred in 1946, but it did not maintain its accounts in such a way as to show its income position as at December 31, 1946.

(1) [1943] Ex. C.R. 202. (2) [1944] S.C.R. 167.
(3) (1885) 12 Can. S.C.R. 384 at 386.

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Nor did it keep its accounts in such a way as to show its profit or loss at the end of any month. It could not, therefore, prove what portion, if any, of the $50,894.31 loss was sustained in the ten-month period from February 28, 1946, to December 31, 1946. Mr. C. A. Patterson sought to meet this difficulty by apportioning or pro-rating the loss for the whole fiscal year on a daily basis and then computing it for the period of 306 days from February 28, 1946, to December 31, 1946. This came to $42,667.56 from which the sum of $2,739.95 was deducted to offset the profit in the taxation year ending February 28, 1946, leaving $39,927.61 as the balance of the loss for the calendar year 1946 claimed as deductible under section 5(*p*) from the profits of $101,496.61 in the taxation year ending December 31, 1945. There is no statutory authority for any apportionment or pro-rating of the loss sustained in a taxation year for a portion of a year except in a case such as that specifically provided for by section 21(2) of chapter 55 of the Statutes of 1946 where there was a change in the rates of tax during the year. Strictly speaking, therefore, I am of the opinion that the appellant has not proved that it sustained a loss in the calendar year 1946 or, alternatively, has not proved and cannot prove the amount of its loss, if any, in the calendar year 1946.

But there is a much stronger reason for rejecting the appellant's submission. It must be kept in mind that the Income War Tax Act is not necessarily consistent throughout the Act in the use of its various terms, that is to say, that its words do not necessarily convey the same meaning wherever they appear in it. This is true even when a word has been given a statutory definition by section 2 or some other section. Indeed, section 2 itself recognizes this fact in its opening statement to the effect that the words defined by it have the meaning specified by it "unless the context otherwise requires". Consequently, a word defined by section 2 must be read according to its statutory definition wherever it appears in the Act unless the context otherwise requires and, conversely, it must not be read in its statutory meaning if the context in which it appears requires otherwise. It is thus a cardinal rule of interpretation that the context in which a word in the Act appears must always be considered in order to ascertain its true meaning. Here the

meaning of the word "year" in the expression "year immediately following the taxation year" in section 5(*p*) must be determined and the context in which it appears must be considered.

Counsel for the respondent contended that such context requires that the word be read as meaning "taxation year". In my opinion, this contention is correct. In support of it counsel referred to the amendments of 1944 which brought section 5(*p*) in the terms specified into effect. I have already referred to section 4(5) of chapter 43 of the Statutes of 1944-1945 but section 4(6) of the 1944 amendments should also be considered. Its relevant provisions are as follows:

> 4. (6) Paragraph (*p*) of the said section five, as enacted by subsection five of this section, is applicable only with reference to the deduction of
> . . .
> (*c*) losses sustained in the nineteen hundred and forty-four taxation year and all subsequent years by any person carrying on farming or any other business.

While it is true that the draughtsmanship of this section leaves room for improvement it is clear that the term "subsequent years" means "subsequent taxation years". There would be no sense in assuming otherwise. In my view, it necessarily follows that the word "year" in the expression "year immediately following the taxation year" in section 5(*p*) must be read as meaning "taxation year" for section 5(*p*) was made applicable only with reference to the deduction of losses sustained in the 1944 taxation year and in the subsequent taxation years. The only losses that are made deductible are those that are sustained in taxation years commencing with the 1944 taxation year. Thus the context sets the meaning of the word "year" in the expression under consideration as "taxation year", for the whole scheme of deductibility of losses applies only in the case of losses sustained in taxation years. In my view, section 4(6)(*c*) of the 1944 amendment is conclusive in favour of the respondent's contention. This opinion is supported by the fact that the interpretation put forward for the appellant would make section 5(*p*) unworkable and defeat its purpose in the case of taxpayers whose fiscal years end otherwise than at the end of the calendar year. For example, if the appellant sustained a loss between February 28 and December 31 in any year it could not deduct

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the amount of such loss from the taxable income of the taxation year ending on February 28 of such year for there would not in that event be a loss sustained in the "calendar year immediately following the taxation year" but only a loss sustained in the ten-month period following such taxation year in respect of which there is no statutory right of deduction.

The turn of events has been unfortunate for the appellant. If no question of excess profits tax were involved it is unlikely that this appeal would have been taken for the amount of the unused portion of the loss sustained by it in the taxation year ending February 28, 1947, may be deductible in the future from its taxable income in a subsequent taxation year. If it had deferred its decision to alter the end of its fiscal year until after the end of the calendar year 1946 it would then have been able to show what loss it sustained in such year, for that year would have coincided with its fiscal year and it would have kept its accounts accordingly. It would then have been able to deduct the amount of whatever loss it sustained in the calendar year 1946 from the amount of its taxable income in the taxation year ending December 31, 1945 for the calendar year 1946 would then have been the taxation year immediately following the taxation year under review. This might have resulted in a substantial saving of excess profits tax as well as of income tax. Unfortunately for it, it cannot now make any saving of excess profits tax for by its own act in changing the end of its fiscal year from December 31 to February 28 it interposed the new two-month taxation year ending February 28, 1946, between the taxation year ending December 31, 1945, in which it made a profit and the taxation year ending February 28, 1947, in which it sustained a loss. It is true that this intervening taxation year ending February 28, 1946, consisted of a period of only two months but it is a taxation year within the meaning of section 2(*w*) of the Act. Thus since the word "year" in the expression "year immediately following the taxation year" in section 5(*p*) of the Act means "taxation year" it follows that the taxation year immediately following the taxation year ending December 31, 1945, was the two-month taxation year ending February 28, 1946, in which the appellant did not sustain any loss. It is, therefore, not entitled to

any deduction from its income for the taxation year ending December 31, 1945, of loss sustained by it in the taxation year following such taxation year for it did not sustain any in such immediately following taxation year. It has, therefore, failed to prove that the assessment appealed against was erroneous and its appeal must be dismissed with costs.

Judgment accordingly.

BETWEEN:

ST. CATHARINES FLYING TRAINING SCHOOL LIMITED ..... APPELLANT;

AND

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

Revenue—Income Tax—The Income War Tax Act, R.S.C. 1927, c. 97, ss. 4(e), 4(h)—Construction of exempting provision—Meaning of "non-profitable purposes"—Meaning of "association" in s. 4(h)—Meaning of "inured" in s. 4(h).

The appellant was incorporated under Part I of The Companies Act, 1934 of Canada to operate an elementary flying school for prospective pilots under the British Commonwealth Air Training Plan and entered into a contract with the Canadian Government for the conduct of such a school. It was prohibited by its charter from declaring dividends and from distributing any profits during hostilities or the period of its contract. Except for a small amount its capital was raised by donations. Under a second contract extending the first one it agreed that its surplus should be paid to a flying club approved by the Minister of National Defence or revert to the Crown. Approval was held up at the request of the Department of National Revenue that its interests should be protected. The appellant earned a substantial profit while operating its school and contended that such profit was not liable to taxation under the Income War Tax Act.

Held: That the term "association" in its ordinary meaning is wide enough to include an incorporated company and does not exclude an incorporated company such as the appellant.

2. That the purposes referred to in the term "non-profitable purposes" as used in section 4(*h*) are purposes that are carried out without the motive or intention of making a profit, that is to say, purposes other than that of profit making.

3. That the appellant was an association that was organized and operated solely for non-profitable purposes within the meaning of section 4(*h*).

4. That no part of the appellant's income inured to the benefit of any of its stockholders or members.

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APPEAL under the Income War Tax Act.

The appeal was heard before the President of the Court at Toronto.

H. H. Stikeman Q.C. and *A. L. Bissonette* for appellant.

J. Singer Q.C. and *J. D. C. Boland* for respondent.

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

THE PRESIDENT now (November 17, 1953) delivered the following judgment:

The appellant appeals against its income and excess profits tax assessments for the years 1941 to 1945 inclusive, claiming that its income was not liable to taxation under section 4(*h*) or, in the alternative, section 4(*e*) of the Income War Tax Act, R.S.C. 1927, chapter 97, which sections read as follows:

> 4. The following incomes shall not be liable to taxation hereunder:—
> (*h*) The income of clubs, societies and associations organized and operated solely for social welfare, civic improvement, pleasure, recreation or other non-profitable purposes, no part of the income of which inures to the benefit of any stockholder or member;
> (*e*) The income of any religious, charitable, agricultural and educational institution, board of trade and chamber of commerce, no part of the income of which inures to the personal profit of, or is paid or payable to any proprietor thereof or shareholder therein;

The facts are not in dispute. The appellant was incorporated as a private company under Part I of The Companies Act, 1934 of Canada by Letters Patent, dated September 12, 1940. The reason for its incorporation was given by Mr. A. M. Seymour who prior thereto had been the president and later the vice-president of the St. Catharines Flying Club, incorporated under The Companies Act of Ontario, and afterwards the president of the appellant. When war broke out in 1939 some of the flying clubs in Canada were doing pilot training for the Royal Canadian Air Force and when the British Commonwealth Air Training Plan was under consideration the Canadian Flying Clubs Association, of which Mr. Seymour was the president, made representations to the Air Force and the Canadian Government that since the flying clubs were the only bodies that had experience in elementary flying training they should be entrusted with the responsibility of conducting the elementary stage of flying training during the war.

After lengthy negotiations the Government adopted this suggestion and announced its decision to that effect in December of 1939. It was decided that separate corporate entities, to be called schools, should be organized and sponsored by the flying clubs and it was in pursuance of this policy that the St. Catharines Flying Club caused the appellant to be incorporated. The Government also decided that in order that the schools should be able to operate successfully they should have a substantial capital. At first the capital requirement was set at $300,000 but later this was reduced to $35,000. It was intended that this amount should be raised by the sponsoring flying club and the Government felt that this would have to be done through the sale of preferred or common stock. Mr. Seymour, as president of the Canadian Flying Clubs Association, objected to incorporation under Part I of The Companies Act and also took the stand that the necessary capital support should be obtained from the public as a war effort rather than as an investment but the Minister of National Defence insisted on incorporation under Part I and this practice was followed throughout Canada. In the case of the appellant it obtained the necessary capital from donations by industrial and commercial corporations in St. Catharines and vicinity without the issue of any shares except twelve, one to each of the directors who subscribed $5 each. Six of the directors were members of the executive of the St. Catharines Flying Club and six represented the donor companies. Prior to the incorporation of the appellant Mr. Seymour, on behalf of the St. Catharines Flying Club, renewed his representation that the school should be incorporated under Part II of The Companies Act but this was again refused. He then asked for a special provision in the charter to prohibit the declaration of dividends. This was granted in the following terms:

> And it is further ordained and declared that the company shall be prohibited from declaring dividends and shall also be further prohibited from distributing any profits during hostilities or during the period that the company is required to carry on elementary training under the British Commonwealth Air Training Plan.

Mr. Seymour then stated that, since the capital had been donated and the St. Catharines Flying Club was the sponsoring club, it was felt that the directors should make a declaration of trust that the capital should be held in trust

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to be returned to the donor companies without interest or increase and that the shares should be held in trust for the sponsoring St. Catharines Flying Club so that it might be beneficiary of any surplus and this declaration was signed by the twelve directors in November 1940. It shows the names of the donors and the amounts contributed by each, the total amount being $37,850. The donors were allowed to deduct the amounts of their donations from what would otherwise have been their respective taxable incomes. The directors did not receive any remuneration for their services. Mr. Seymour stated that the appellant was not incorporated or organized or operated for the purposes of profit. The Letters Patent describe its purposes and objects as follows:

> To establish, maintain, conduct and operate a school or schools for instruction and training in flying to be operated for the purposes of and in conjunction with the British Commonwealth Air Training Plan.

On its incorporation the appellant entered into a contract with His late Majesty the King, dated September 12, 1940, to carry out the training of Royal Canadian Air Force personnel until March 31, 1943, and this contract was renewed on March 23, 1943, to extend to March 31, 1945. The details of these contracts, the syllabus of training, and the various schedules of payment for services appear in Exhibits 5, 6 and 7. It was provided in the second contract, *inter alia,* that any amounts retained by the appellant should be held by it in a reserve account until the termination of the contract and should then be paid to a flying club approved by the Minister of National Defence, failing which it should revert to the Crown. The St. Catharines Flying Club has not been approved by the Minister of National Defence. It first applied for a uniform charter in 1943 and again in 1946 but its application has been consistently refused on the ground that the Department of National Revenue has requested that its interests should be protected.

On the termination of the second contract the appellant had on hand approximately $83,000 in excess of its subscribed and donated capital. It has not returned any of this money to the Minister of National Defence. There were negotiations between the financial adviser to the Minister of National Defence for Air and the various schools in the course of which he proposed that each school

should surrender to the Government all surpluses earned by it over and above $5,000 per year of operation which it should be able to retain free of income and excess profits tax in return for which certain equipment belonging to the Crown would be turned over to the sponsoring club. All the elementary flying training schools in Canada, except the appellant, accepted this proposal but it refused to do so in the belief that it was not liable to income or excess profits tax and that its sponsoring flying club was entitled to approval.

According to Mr. C. Mapp, the appellant's auditor, the appellant held in its own bank account the sum of $37,910, being the $37,500 donated by the companies referred to, which it intends to return to them, and the $60 subscribed by the twelve shareholders, and its surplus amounting to $83,506.21 has been transferred to trustees under a trust agreement, dated March 7, 1951.

Mr. Seymour admitted on his cross-examination that the payments made by the Government to the schools, including the appellant, were more generous than had been requested and that they were deliberately made generous so that the schools could operate with a surplus that could be used to revive the activities of the sponsoring flying clubs after the war as they were all closed up during the war. Mr. Seymour went even further and admitted that the payments were so generous that if a school had any sort of efficient management there could not be any loss in its operation.

When it became clear that the appellant adhered to its position the taxing authorities took steps to have it assessed for income and excess profits tax. On August 19, 1947, it made a standard profits claim pursuant to section 5 of The Excess Profits Tax, 1940 for a reference to the Board of Referees to determine its standard profits at $25,000. The claim was referred to the Board and on November 18, 1948, the Board, under section 5(3) of the Act, ascertained its yearly standard profits at $20,000 and this decision was duly approved by the Minister. The Minister then assessed the appellant for income and excess profits tax for the years in question. All the necessary steps prior to appeal to this Court have been taken.

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On the facts which I have stated it was contended for the appellant that it was entitled to the benefit of the exemption conferred by section 4(*h*) or, alternatively, section 4(*e*) of the Income War Tax Act and that its income was not liable to taxation under it.

The manner in which an exempting provision of the Income War Tax Act should be construed has been discussed in several cases, including *Lumbers* v. *Minister of National Revenue* (1). There I put the rule as follows:

> a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions of some exempting section of the Income War Tax Act: he must show that every constituent element necessary to the exemption is present in his case and that every condition required by the exempting section has been complied with.

Consequently, unless the appellant can bring its claim for exemption squarely within one of the sections relied upon it is not entitled to it.

It is also clear that if the appellant is within the ambit of section 4(*h*) then section 4(*e*) does not have to be dealt with. It is only if section 4(*h*) is not applicable that section 4(*e*) need be considered.

To succeed in its claim under section 4(*h*) the appellant must show, first, that it was an association that was organized and operated solely for non-profitable purposes within the meaning of the section and, secondly, that no part of its income inured to the benefit of any stockholder or member. Counsel for the appellant realized this and contended that both of these constituent elements existed in the appellant's case and that all the conditions required by the section had been complied with.

I shall deal first with the question whether the appellant was an association that was organized and operated solely for non-profitable purposes within the meaning of the section. Counsel for the appellant argued that it was. He contended that the term "non-profitable purposes" meant the same as "non-commercial purposes", that Parliament intended to make the non-commercial profits of organizations of the kinds referred to in the section non-taxable and that the purpose of the appellant in operating a school for the elementary flying training of prospective pilots under the British Commonwealth Air Training Plan pursuant to its contract with the Government was a non-commercial

(1) [1943] Ex. C.R. 202 at 211.

purpose and, therefore, a non-profitable one within the meaning of the section. It was also contended that before it could properly be said that an organization was organized and operated for profitable purposes it must appear that such profit as it made was a profit to it which it could keep or dispose of as it saw fit and that since the appellant was prohibited by its Letters Patent from declaring dividends or distributing profits and was required by its contract to pay its profits to a club approved by the Minister of National Defence or to the Minister it never really owned its profit in the true sense. The essence of the submission was that the test of whether an organization was organized and operated for profitable purposes was whether its profits were such that it could keep and enjoy them or pass them on as it chose, that this test could not be met in the appellant's case and that the fact that it could never keep its profits or distribute them as it chose showed conclusively that it was not organized and operated for profitable purposes from which it followed that it was organized and operated for non-profitable purposes within the meaning of the section. It was also submitted that Mr. Seymour's statement that the appellant was not incorporated or organized or operated for the purposes of profit and the facts that it did not pay any salaries or declare any dividends or distribute any profits supported the view that it was organized and operated solely for non-profitable purposes.

One of the contentions of counsel for the respondent was that section 4(*h*) did not apply to the appellant at all, the submission being that it was not a club or a society and that the term association excluded a company incorporated, as the appellant was, under Part I of The Companies Act, 1934. This submission cannot be accepted. The term "association" in its ordinary meaning is wide enough to include an incorporated company. Moreover, the reference in the latter part of the section to "any stockholder or member" clearly indicates that it was contemplated that the term "association" might include an incorporated company and I cannot find any indication that it was intended that it should exclude companies such as the appellant because of their incorporation under Part I of The Companies Act, 1934. I am, therefore, of the opinion that the term association in section 4(*h*) does not exclude an incorporated company such as the appellant.

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The other contentions for the respondent present more difficulty. It was submitted that the appellant, being incorporated under the same part of The Companies Act, 1934 as ordinary commercial companies, was organized in the same way as they were, that the Letters Patent and the contract with the Government assumed that the appellant would make a profit and that it did in fact make a profit. Moreover, it had ancillary powers so that it was not confined to the purpose of conducting an elementary flying training school but could avail itself of its ancillary powers and, being a Letters Patent company, could do anything that a natural person could do. These facts, it was urged, indicated that the appellant was not organized and operated for non-profitable purposes.

It might also have been contended, on the basis of the admissions made by Mr. Seymour on his cross-examination, to which I have referred in my statement of the facts, that it was intended by the Government, in its insistence on incorporation under Part I of The Companies Act, 1934 that the appellant should operate in the same way as a commercial company, that it was also intended by the Government by its generous payments that the appellant should operate at a profit so that after the war this might be turned over to its sponsoring flying club to revive its activities, that the appellant concurred in the Government's intentions and operated as intended by the Government and that it could not, therefore, be said that it was organized and operated for non-profitable purposes.

My first inclination was towards the view that the appellant was not organized and operated solely for non-profitable purposes and, therefore, not entitled to the benefit of the exemption conferred by the section but on further consideration I have reached a different conclusion. The fact that the Letters Patent and the contract with the Government assumed that the appellant would make profits and that it did so has little, if any, bearing on the question whether it was an association that was organized and operated for non-profitable purposes. It is quite possible for such an association to make profits. The fact of profits is, therefore, not the test. Indeed, section 4(*h*) assumes that the organizations referred to in it will have incomes, within the meaning of section 3 of the Act, which could include profits, that would be taxable under the Act except for the

exemption conferred by it, for otherwise there would be no need for the section. It does not follow, therefore, from the fact that the appellant made profits that it was not organized and operated for non-profitable purposes. The enquiry must go further.

For a similar reason the term "non-profitable purposes", which is not as precise as would be desirable, cannot mean that the purposes must be such that profit does not result from carrying them out, for the section assumes the possibility of making profits in the course of carrying out non-profitable purposes. The term must, therefore, mean something other than purposes from the carrying out of which profit might possibly result.

In my judgment, the purposes referred to must be purposes that are carried out without the motive or intention of making a profit, that is to say, purposes other than that of profit making. That being the meaning of the term, I am satisfied that the appellant was organized and operated solely for non-profitable purposes. Its purpose was the conduct of a school for the elementary flying training of prospective pilots under the British Commonwealth Air Training Plan. It was organized and operated for that purpose and it had no other purpose. It was not part of its purpose to make profits and it operated without any profit making motive or intention. Mr. Seymour's evidence to that effect was clear. Moreover, it is supported by the fact that the appellant could never keep any of its profits or distribute them to its stockholders or members. How could it properly be said that it was in the business of conducting its school for the purpose of making a profit when it was quite impossible for it to keep or distribute any profit that might come to it in the course of carrying out the purpose for which it was organized and operated? The question answers itself.

Nor does the fact that the Government deliberately made generous payments to the appellant so that with any sort of efficient management it could not sustain a loss have any bearing on the question. The reason for the generous treatment can be found in the Government's stated concern that the appellant should be able to conduct its school successfully.

Under all the circumstances I am satisfied that the plaintiff was not in the business of conducting its school for profit

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even although it actually did make profits. Consequently, I find that the appellant was an association that was organized and operated solely for non-profitable purposes within the meaning of section 4(*h*): *vide* in this connection the decision of the Saskatchewan Court of Appeal in *In re Regina Elementary Flying School Limited* and *City of Regina* (1).

There remains the second question under section 4(*h*), namely, whether any part of the appellant's income inured to the benefit of any stockholder or member. This presents no difficulty. It was not intended that any of the appellant's stockholders or members, of whom there were only twelve, should ever receive any portion of the appellant's income or any benefit from it and it was impossible that they should ever do so. It is true that six of them represented or were members of the St. Catharines Flying Club, the appellant's sponsoring club, and it was submitted that if the appellant's surplus should go to its sponsoring club these six members would benefit thereby and that, consequently, part of the appellant's income inured to their benefit. I am unable to agree with this submission. That is not the kind of benefit contemplated by the section. Moreover, there is no evidence that any of the six representatives or members would ever derive any personal benefit even if the appellant's surplus should be turned over to the sponsoring club for the purpose of doing so would be to revive its activities. I find, therefore, that no part of the appellant's income inured to the benefit of any of its stockholders or members.

The result is that the constituent elements necessary to the exemption conferred by section 4(*h*) are present in the appellant's case and it is entitled to the benefits of the section.

Since the appellant's claim for exemption falls within the ambit of section 4(*h*) there is no need to consider whether section 4(*e*) is applicable.

It follows that the appellant's income for the years in question is not liable to income or excess profits tax and its appeal against the assessments for 1941, 1942, 1943, 1944 and 1945 must be allowed with costs.

Judgment accordingly.

(1) (1944) 3 W.W.R. 479.

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BETWEEN:

ELI LILLY AND COMPANY (CANADA) LIMITED ..... } APPELLANT;

AND

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

Revenue—Income Tax—The Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 5(jj)—Foreign exchange profit—Validity of assessment—Profit from trade or business.

The appellant bought all its raw material from its parent company in the United States and for the period from Sept. 15, 1939, to Dec. 31, 1945, its indebtedness amounted to $640,978.29 in United States dollars. During this period the United States dollar was at a premium of 10½ per cent over the Canadian dollar, the total amount of the exchange necessary to bring the indebtedness in United States dollars up to the indebtedness in Canadian dollars being $67,302.77. On July 5, 1946, the Canadian dollar rose to parity with the United States dollar and on October 22, 1946, the appellant was able to pay the above indebtedness with $640,978.29 in Canadian dollars, by the issue of additional shares, without payment of any exchange. In its profit and loss statement for 1946 the appellant showed the exchange as an item of income but in its income tax return claimed it as a deductible capital profit. The Minister in assessing the appellant for 1946 added the exchange back to the amount reported by it in its income tax return as an item of taxable income. An appeal to the Income Tax Appeal Board was dismissed and an appeal from its decision to this Court was taken.

Held: That the validity of an assessment does not rest on what a taxpayer has done in the past or what the taxing authorities have allowed him to do but must be determined in the light of the existing facts and the applicable law.

2. That the foreign exchange profit was received by the appellant in 1946 as a profit from its trade or business within the meaning of section 3 of the Income War Tax Act and was properly added back as an item of taxable income to the amount reported by it on its income tax return.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the President of the Court at Toronto.

R. B. Law, Q.C. for appellant.

J. Singer, Q.C. and *Miss H. Currie* for respondent.

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

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THE PRESIDENT now (November 30, 1953) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board, *sub nom. No. 12* v. *Minister of National Revenue* (1), dated February 16, 1951, which, except for two items, dismissed the appellant's appeal from its income tax assessment for 1946.

In assessing the appellant the Minister added back to the amount reported by it on its income tax return, *inter alia*, the sum of $99,339.48 as foreign exchange profit and the sum of $3,145.00 as donations in excess of the 1940-41 average. The sum of $99,339.48 was made up of four items of foreign exchange on the indebtedness of the appellant, namely, $67,302.77 on its indebtedness to its parent company, Eli Lilly and Company of Indianapolis in the State of Indiana, one of the United States of America, for goods purchased from it in the period from September 15, 1939, when Foreign Exchange Control came into effect, to December 31, 1945, on open account, $3,140.21 on its indebtednes to its parent company for goods purchased from it in the period prior to September 15, 1939, on a prior account, $3,675.00 on its indebtedness to its parent company for money lent by it on its loan account and $25,084.16 on its indebtedness to another United States company, the Eli Lilly International Corporation for goods purchased from it during the year 1946. The Income Tax Appeal Board allowed the appellant's appeal to it in respect of the item of $3,675.00 and referred the item of $3,140.21 back to the Minister for reconsideration. On this appeal it is admitted that these two items should not have been included in the assessment. And counsel for the appellant abandoned its appeal in respect of the item of $25,084.16, so that the only amount of foreign exchange remaining in dispute in this appeal is the sum of $67,302.77.

The appellant also appealed against the addition of $3,145.00 to its assessment only to the extent that it included the sum of $2,500.00 which it paid in 1946 to the Foundation for the Advancement of Pharmacy. On the hearing of the appeal it was submitted that it had the right to claim this amount as an operating expense although it had never made any such claim in its income tax return

(1) (1950-51) 3 T.A.B.C. 387.

and could not, in view of Mr. Forster's evidence, have sustained such a claim if it had made one. It was plainly a donation. That being so, it was beyond the limit of the deductible donations allowed by section 5(jj) of the Income War Tax Act, R.S.C. 1927, chapter 97, and properly disallowed as a deduction.

Thus the only matter now in dispute is whether the sum of $67,302.77 was properly included in the appellant's assessment for 1946 as an item of taxable profit. This issue is a narrow one and the facts giving rise to it may be stated briefly. The appellant was incorporated on July 12, 1938, for the purpose of manufacturing, importing and selling drugs and chemical and biological products. Except for the qualifying shares of its directors it is the wholly owned subsidiary of Eli Lilly and Company of Indianapolis in the State of Indiana, one of the United States of America, which owned 45 shares in it of the par value of $100 each. Up to the end of the year 1945 it bought all its raw materials from its parent company and also borrowed some money from it. The purchases were in two accounts, one called the prior account, for the period up to September 15, 1939, and the other called the open account, for the period from September 15, 1939, to the end of 1945. As at December 31, 1945, the indebtedness of the appellant stood at $29,907.57 in its prior account, $640,978.29 in its open account and $46,646.86 in its loan account, making a total indebtedness of $717,532.72. The amounts of these items of indebtedness are all stated in terms of United States dollars. In this appeal only the indebtedness of $640,978.29 need be considered.

During the period of the open account in which this indebtedness was incurred the United States dollar was at a premium of 10½ per cent over the Canadian dollar. The build-up of the indebtedness is given in detail in Exhibit 1. This shows the indebtedness of the appellant to its parent company in each of the years 1939 to 1945 inclusive in Canadian dollars, in United States dollars and the amount of exchange necessary to bring the indebtedness in United States dollars up to the indebtedness in Canadian dollars. In its financial statements for these years the appellant showed its indebtedness to its parent company in United States dollars plus the exchange at 10½ per cent necessary

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to show it in Canadian dollars. In each of its income tax returns for these years it claimed the amount of this exchange as a deductible operating expense and this deduction was allowed by the taxing authorities although no expenditure was actually made. As at December 31, 1945, the total amount of the items of exchange thus claimed as deductible operating expenses came to $67,302.77. On that date the indebtedness of the appellant to its parent company amounted to $640,978.29 in United States dollars which, with the exchange, meant an indebtedness of $708,281.06 in Canadian dollars.

On July 5, 1946, the Canadian dollar rose to parity with the United States dollar and the appellant could then, if it had had the money, have paid its indebtedness to its parent company with $640,978.28 in Canadian dollars without any exchange. Instead, it allotted additional shares to its parent company in payment of its indebtedness and for a further advance of cash. On October 22, 1946, it allotted 7,450 shares of its capital stock to its parent company at the par value of $100 each making a total of $745,000. This paid off its total indebtedness of $717,532.72, which included the indebtedness of $640,978.29 on its open account, and a cash advance of $27,467.28. The appellant thus paid its indebtedness to its parent company with $640,978.28 in Canadian dollars. In its profit and loss statement for 1946, which it filed with its income tax return, it showed the sum of $99,339.48, which included the sum of $67,302.77, as an item of income under the head of "Foreign exchange premium reduction" but on its income tax return it claimed that it was entitled to deduct this amount as a capital profit from what would otherwise have been its taxable income. Then, as I have stated, the Minister added the sum of $99,339.48 back as an item of taxable income. The appellant objected to this on the ground that the rise in the Canadian dollar was in the nature of a fortuitous gain or a gain of a capital nature and the appellant then appealed to the Income Tax Appeal Board with the result which I have stated.

Counsel for the appellant contended that its indebtedness to its parent company was in United States dollars and that it paid this in kind with the issue of shares, that there were

no business transactions between it and its parent company in 1946, that the rise in value of the Canadian dollar in 1946 had nothing to do with its business in that year and was not a trade or business profit, that whatever benefit it received from exchange was in the years prior to 1946 when it was able to deduct the exchange as an operating expense and that it received no benefit in 1946. He also submitted that if the appellant did receive any benefit it was not a trading or business profit or an item of taxable income within the meaning of section 3 of the Income War Tax Act but a fortuitous or capital gain. He also urged that what the parent company did in 1946 in taking shares in the appellant since it already owned all its issued shares, except the qualifying ones, really amounted to a forgiveness of its indebtedness and was not income to it.

Counsel for the appellant relied strongly on the decision in *The British Mexican Petroleum Company Limited* v. *Jackson* (1) and, indeed, based his case on it. The appellant in that case in 1919 entered into a contract with an oil-producing company in Mexico for the purchase of petroleum for a minimum period of 20 years. It was adversely affected by the slump in the petroleum business in 1921 and unable to meet its liability under the contract. Its accounts were made up for the year ending June 30, 1921, and for the 18 months ending December 31, 1922. As at June 30, 1921, it owed the oil producing company £1,073,281 and by September 30, 1921 this had grown to £1,270,232. Under an agreement dated November 25, 1921, it paid the oil-producing company the sum of £325,000 and was released from its liability to pay the balance of £945,232. The Crown contended that the released amount should be brought into account in computing the appellant's profits either in the account for the 18 months ending December 31, 1922 or, alternatively, in the account for the year ending June 30, 1921, that account to be reopened for the purpose. The Special Commissioners held that the released amount should be brought into the appellant's profit and loss account for the 18 months ending December 31, 1922, but their decision was reversed by Rowlatt J. in the Kings Bench Division who held that the forgiveness in the 18 months period of a past indebtedness could not add to the

(1) (1929-32) 16 T.C. 570.

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profits of the 18 months period and that there was no justification for reopening the account of the year ending June 30, 1921. His decision was unanimously confirmed by the Court of Appeal and the House of Lords. Lord Thankerton was of the opinion that the account for the year ending June 30, 1921. could not be reopened since the amount of the liability there stated was correctly stated and he was unable to see how the release from a liability, which had been finally dealt with in the previous account, could form a trading receipt in the account for the year in which it was granted. Viscount Dunedin and Lord Atkin concurred in his opinion. Lord Macmillan was of the view that the circumstance that the appellant's creditor forgave part of its debt did not justify the reopening of the account for the year in which it was legally incurred and he could not see how the extent to which a debt was forgiven could become a credit item in the trading account for the period within which the concession was made. Thus the decision stands as authority for the proposition that the forgiveness or release of an admitted past indebtedness does not justify the reopening of the account of the debtor for the period in which the indebtedness was lawfully incurred or constituted a trading receipt of the debtor in the year of the forgiveness or release.

In my judgment, the decision in this case is not applicable to the facts of the case at bar. Here there was no release or forgiveness of an indebtedness by a creditor. The appellant paid its indebtedness to its parent company in full without any remission. When the appellant issued additional shares of its capital stock to its parent company in full payment of its indebtedness of $717,532.72, which included the indebtedness of $640,978.29 in its open account, its transactions were in terms of Canadian dollars which had increased in value to parity with United States dollars. The position is the same as if the appellant had sold the additional shares to some one other than the parent company and then paid it with the Canadian dollar proceeds of the sale which Canadian dollars had then become equal in value to United States dollars. It is plain, therefore, that the appellant received no concession or release from its parent company. To the extent, therefore, that its case is based on the applicability of the *British Mexican Petroleum Company* case (*supra*) it falls to the ground.

Nor can the submission that the appellant received no profit from the rise in value of the Canadian dollar in 1946 be accepted. In its own profit and loss statement for the year 1946 it admitted the receipt of $99,339.48, which included the sum of $67,302.77, as an item of income under the head of "Foreign exchange premium reduction" and it should not now be heard to say that it did not receive any such income. Then in its income tax return it claimed a deduction of this amount from what would otherwise have been its taxable income treating it as an item of capital profit. It has, therefore, admitted that it received a profit in 1946 from the rise in value of the Canadian dollar. Indeed, it never had any doubt that it did so. That being so, the only question in issue is the nature of the profit so received.

In my judgment, the answer to this question ought not to depend on the fact that in the years prior to 1946 the appellant received a benefit from the fact that it was allowed to deduct not only the cost of the goods which it bought from its parent company in United States dollars but also the amount of the exchange necessary to bring such cost up to the cost in Canadian dollars as operating expenses, notwithstanding that they were not actually laid out or expended, for the right to such deduction could have been challenged: *vide Trapp* v. *Minister of National Revenue* (1). The validity of an assessment does not rest on what a taxpayer has done in the past or what the taxing authorities have allowed him to do. I am, therefore, not impressed with the argument advanced for the Minister that because the appellant received a tax benefit in the year when foreign exchange was against it it should carry a tax burden when the exchange is in its favor for, otherwise, through blowing hot and cold, it would be unjustly enriched. The validity of the assessment must be determined in the light of the existing facts and the applicable law.

Thus the matter resolves itself into the question whether the profit of $67,302.77 which the appellant received in 1946 was an item of taxable income within the meaning of section 3 of the Income War Tax Act. This question is not free from difficulty and I have not been able to find any Canadian or English decisions that are directly helpful.

(1) [1946] Ex. C.R. 245.

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Thorson P.

There are United States decisions, although not directly in point, such as that of the Supreme Court of the United States in *United States* v. *Kirby Lumber Co.* (1), which indicate that such a profit as the appellant received in this case would be considered taxable income: *vide* also Magill on Taxable Income, Revised Edition, page 256.

I am unable to accept the contention for the appellant that its profit was a fortuitous or capital gain and had nothing to do with its trade or business. The fact is that it was the result of the rise in value of the Canadian dollar as compared with the United States dollar and came to the appellant in the course of its business. It realized the profit when it was able, in the course of its business, to discharge its indebtedness to its parent company of $708,281.06 in Canadian dollars with $640,978.29 in Canadian dollars with their enhanced value or, to put it otherwise, was able to discharge its indebtedness of $640,978.29 in United States dollars with the same number of Canadian dollars without payment of any exchange. By eliminating the exchange it increased the amount of its distributable profits without affecting its capital position. The fact that its indebtedness was incurred prior to 1946 makes no difference in view of the improvement in its Canadian dollar position since it was incurred, with which the parent company had nothing to do. It does not matter that it did not purchase any goods from its parent company in 1946. That did not end its trading transactions with it for it still had to pay its indebtedness for the goods supplied to it and it paid this indebtedness in full in 1946 with fewer Canadian dollars than would have been required if the Canadian dollar had not risen to parity with the United States dollar. In so doing it realized a profit of $67,302.77. In my judgment, this profit, which might well be called a foreign exchange profit, as the Minister described it, was received by the appellant in 1946 as a profit from its trade or business within the meaning of section 3 of the Income War Tax Act and was properly added back as an item of taxable income to the amount reported by it on its income tax return. That being so, the appeal must be dismissed with costs.

Judgment accordingly.

(1) (1931) 284 U.S. 1.

BETWEEN:

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Sept. 30
Oct. 5

JOSEPH REBUS ..... APPELLANT;

AND

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

Revenue—Income—The Income Tax Act 11-12 Geo. VI, c. 52, s. 13—Income or capital—"Amount received by the taxpayer dependent upon use of or production from property"—Royalty—Character of payment not affected by provincial order in council or provincial statute.

Appellant was entitled to receive in cash a certain percentage of the leased substances produced, saved and marketed from certain lands. This royalty was received from the producer and distributed to appellant and others also entitled to a portion thereof by the National Trust Company. Due to a well drilled on the property going out of control the Petroleum and Natural Gas Conservation Board set up by the Province of Alberta immediately took control of the property, brought the well under control, salvaged and sold the large quantities of oil which were produced while the well was out of control.

Pursuant to an order in council passed by the Government of Alberta and to a statute enacted by the Legislative Assembly of Alberta the National Trust Company received a cheque from the Board for a large sum of money "being payment in full of the Rebus royalty arrears". The appellant's share of this after certain deductions was added by respondent to his declared income for the taxation year 1949. An appeal from such assessment was taken to this Court.

Held: That the amount received by the appellant in the taxation year 1949 was income and taxable in that year.

2. That no property rights of appellant were expropriated and he received full compensation for all royalties to which he was entitled.

3. That the payment to appellant related to his claim for royalty only and was not by way of damages or solatium for not receiving the contractual payments or as payment for a general release of existing and future claims.

4. That no provincial enactment can convert into capital that income which The Income Tax Act has declared to be taxable income.

5. That the Petroleum and Natural Gas Conservation Board was a statutory custodian or trustee of the property of the oil company following the taking of possession and the trust funds representing the proceeds of the sale of the salvaged oil for and on behalf of those who might establish a valid claim against the company, the balance to belong to the company itself and had there been no disaster and had the payments been made in the ordinary course by the company the whole of the amount in dispute would have constituted taxable income: the temporary custodianship of the Board or any provisions of the order in council or the statute or of the release executed by appellant did not affect the true nature and quality of the amount he received.

6. That the money received by appellant was dependent upon the use of or production from property and therefore part of appellant's taxable income.

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APPEAL under the Income Tax Act.

The appeal was heard before the Honourable Mr. Justice Cameron at Edmonton.

W. G. Morrow for appellant.

D. B. MacKenzie, Q.C. and *T. E. Jackson* for respondent.

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

CAMERON J. now (October 5, 1953) delivered the following judgment:

In this matter the appellant appeals from an assessment to income tax dated September 25, 1951, in respect of the taxation year 1949. There is no dispute whatever as to the facts, all of which have been agreed to by the parties and are set out in the Agreement filed as Exhibit 1.

By the terms of a certain Petroleum and Natural Gas Lease dated July, 1947, and which forms part of Exhibit 2, there was reserved to the lessor therein, one John D. Rebus, a gross royalty in cash of twelve and one half per cent of production of the leased substances produced, saved and marketed from the lands mentioned, namely the northwest quarter of Section 23, Township 50, Range 26 west of the 4th Meridian in the Province of Alberta. By the terms of a supplementary agreement dated August 16, 1947, which also forms part of Exhibit 2, the members of the Rebus family settled their differences as to their respective interests in the said property and in the royalty reserved in the said lease. *Inter alia* it was agreed that the said royalty should thereafter be paid to the National Trust Company as trustee, which company was thereupon to divide the same in ten equal shares between the ten individuals named therein, of whom the present appellant was one. The appellant thereupon became beneficially entitled to one-tenth of the twelve and one-half per cent gross royalty reserved in the lease.

Oil was found upon the property and in the years 1947 and 1948 the appellant received certain royalties which were duly accounted for in his income tax returns for those years. In his return for the year 1949, the appellant stated that in that year he had received the sum of $26,109.13 *as royalty receipts.* For the reason which will later be referred

to, he claimed that $21,760.00 of that amount was referrable to royalties in respect to the excess of oil produced beyond the amount which had been fixed by the Petroleum and Natural Gas Conservation Board of the Province of Alberta for that property in that year, an amount generally referred to as the "allowable." In respect to that amount of $21,760 he claimed "exhausted depletion" of 75 per cent, or the sum of $16,320, and stated his taxable royalties at $9,789.13. The respondent, in assessing the appellant, added that sum of $16,320 to the declared income on the ground that that income was taxable in the year in which it was received, and assessed him accordingly. The present appeal followed.

The lease in question was at all relevant times held by the Atlantic Oil Company Limited. By 1948, two wells had been drilled and brought into production. In that year when a third well, Atlantic No. 3, was being drilled, it blew out of control. The Petroleum and Natural Gas Conservation Board (hereinafter to be called the 'Board') under powers conferred on it, immediately took over control of the property, brought the well under control, salvaged and sold the very large quantities of oil which were produced while the well was out of control.

On December 21, 1948, Alberta Order in Council No. 1495/48 was passed. After reciting the powers previously held by the Board under The Oil and Gas Resources Conservation Act and that the Board had taken possession of the property in and about Atlantic No. 3 well for the purpose of bringing it under control and controlling and conserving the gas and the flow of oil, and had marketed the oil and placed the proceeds in a special trust account, and that it was desirable to pay the costs incurred by the Board and to endeavour to settle all claims against the company and to settle claims of persons entitled to a royalty on production from wells 1, 2 and 3, the Order in Council proceeded to confer on the Board power to

(1) Pay out of the fund now held in the name of the Petroleum and Natural Gas Conservation Board in trust and representing the proceeds of the sale of petroleum from Atlantic No. 3 well the costs and expenses of and incidental to the proceedings taken by the Board to control the gas flow in the said well and the flow of petroleum therefrom;

(2) Pay out of the said funds such sums as may be required to give effect to any settlement approved by the Board arrived at between the Atlantic Oil Company Limited and any claimant and claimants that may

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have a claim against the Atlantic Oil Company Limited arising directly or indirectly from the Atlantic No. 3 well blow-out, whether recoverable as a debt or damages or otherwise howsoever, other than a claim arising from an interest in mines and minerals;

(3) Pay out of the said fund to any person entitled to a royalty on production from the Numbers 1, 2 and 3 wells of the Atlantic Oil Company Limited such royalty as in the opinion of the Board would have been received by such person if the Atlantic Number 3 Oil Well had not blown out of control and if the said wells had produced at a rate equivalent to the actual rate of production allowed by the Board to similar wells belonging to other companies in the same field at the same time.

The said additional powers were expressly stated to be subject to ratification by the Legislature at its next regular sittings. At that session there was enacted An Act to Determine All Claims Arising from the Atlantic Number 3 Oil Well Disaster (Chapter 17). The preamble recites that numerous claims had arisen directly and indirectly from the disaster and from the measures taken by the Board to bring it under control, the technical difficulties involved in the determination of liability and the assessment of damages common to many of the claims, the impracticability of dealing with them individually and the desirability in the public interest to determine all such claims. It further recites that the Board had held meetings attended by representatives of the company and other producers in the field affected by the disaster for the purpose of determining all such claims; and that it was desirable and expedient to implement the settlement of claims adopted at such a meeting held on January 26, 1949.

Certain specific powers were conferred upon the Board. It was authorized to make provision out of the trust fund, into which the proceeds of the sale of oil had been placed, for its own past and future expenses, and, out of the same fund, to provide for payment of

3. (*c*) The payment of such sums of money as may be required to give effect to any settlement approved by the Board and arrived at between the company and any claimant who may have a claim against the company, provided that if the parties cannot agree upon a settlement the Board may, in its discretion, pay to the claimant such amount, if any, in settlement of the claim as the Board may consider to be just and equitable;

(*d*) The payment to the company from time to time of such sums of money as the Board in its discretion deems it advisable to advance, having regard to the protection of the interests of claimants under this section of whose claims it has notice in writing prior to such advance.

And then subsection (3):

(3) The money remaining in the trust fund, if any, after payment of all claims, costs and expenses authorized to be paid pursuant to this Act shall belong and be paid to the company.

Then by section 7 the Order in Council to which I have referred was validated and confirmed and attached as a Schedule to the Act.

The Board in April, 1949, proceeded to carry out the powers so conferred upon it. On April 22 it forwarded to the National Trust Company a cheque for $317,213.24, "being payment in full of the Rebus Royalty arrears as per the attached statement." The Board required the Trust Company to hold the monies undisbursed until all those individuals entitled to the royalties, including the present appellant, had completed the releases enclosed. The appellant and all the other royalty holders duly completed such releases, a copy thereof forming part of Exhibit 1. The appellant's share, after allowance for depletion, amounted to $26,109.13, and as I have said above, he received that amount in 1949.

I turn now to the law applicable to the case. Under the provisions of The Income Tax Act 11-12 George VI, Chapter 52, section 3:

3. 'Income' includes income for the year from all businesses, property and offices and employment.

Section 6(*j*) thereof is as follows:

6. Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year

(*j*) amounts received by the taxpayer in the years that were dependent upon use of or production from property whether or not they were instalments of the sale price of the property, but instalments of the sale price of agricultural land shall not be included by virtue of this paragraph.

One of the alternative grounds of appeal was that the sums received by the appellant were receipts from the sale of an interest in agricultural land, but at the trial that ground of appeal was abandoned and obviously could not be supported.

Counsel for the appellant further admitted that had there been no such disaster, and consequently no interference or taking over by the Board, the whole of the said sum of $26,109.13 would have been taxable income under the provisions of section 6(*j*).

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The onus is, of course, upon the appellant to establish the existence of facts or law showing the error in relation to the taxation imposed upon him. (*Johnson* v. *The Minister of National Revenue* (1)).

The first submission is based upon the provisions of sections 2 and 3 of the Order in Council which I have set out above. It is submitted that by the terms of section 3 all that the Board was entitled to pay to royalty holders was such royalty as, in the opinion of the Board, would have been received by such persons if well No. 3 had not blown out of control and if the said wells 1, 2 and 3 had produced at a rate equivalent to the actual rate of production allowed by the Board to similar wells in the same area. It is argued that that amount only (and I am not furnished with any information as to what that amount was) constitutes taxable income and that the remainder is not income but capital. It is said that by the Order in Council the nature and quality of the appellant's right to a royalty has been altered, that only a portion thereof has the quality of taxable income and that the balance is damages or a return of capital or compensation for present and future losses. The nature of this submission is expressed in a variety of ways in the Notice of Appeal, but inasmuch as most of these points are dealt with in considering the next submission and in view of the facts as I consider them to be, I need not further mention them at this point. I may add, however, that in my opinion no provincial enactment could convert into capital that income which the Income Tax Act has declared to be taxable income.

Before dealing with the next submission, I think it is desirable to state my findings as to what the Board actually did. Section 3, subsection (1)(*c*) of the Act gave the Board power to pay such sums as might be required to give effect to any settlement approved by the Board and arrived at between the company and any claimant against the company, and by the Interpretation Section thereof a claim includes a claim of a holder of a gross royalty out of the production of petroleum from Well No. 3, and, therefore, included the appellant. If no such settlement was reached, the Board had a discretion to pay the claimants such amount in settlement as it considered just and equitable.

(1) [1948] S.C.R. 486.

It is quite apparent that a settlement was arrived at between the company and the appellant and approved by the Board, and that that settlement was the entire claim of the appellant for his percentage of the royalty up to the time of the settlement. The settlement with the claimant was made under the terms of the Act and not restricted to the provisions of section 3 of the Order in Council.

The next submission is based upon the provisions of The Atlantic Claims Act. Section 3, as I have indicated, authorized the Board to dispose of the trust fund in the manner stated. Then section 4 provides for restrictions as to production and drilling on the lands in question, and is as follows:

> 4. The Atlantic No. 3 Oil Well shall be deemed to have over-produced to the extent of five hundred and sixty-five thousand one hundred and ninety-five barrels of oil during the period it was flowing out of control and the Board may,—
>
> (*a*) restrict the production of the company's No. 1 and No. 2 wells to an amount which shall not exceed two-thirds of the normal allowable production as set from time to time by the Board; and
>
> (*b*) prevent the drilling of further wells on legal subdivisions 11 and 12 of Section 23, Township 50, Range 26, west of the 4th Meridian;
>
> until such time as the Board may consider it necessary in order to compensate, in the opinion of the Board, for the over-production of Atlantic Number 3 Oil Well.

By that section the over-production by Well No. 3 was determined and the Board was empowered to restrict the production and further development of the property until other producers in the area had been compensated for the over-production. In the result, Well No. 3 was capped and has not been allowed to recommence production. Wells 1 and 2 have subsequently recommenced production, which has been and still is limited to two-thirds of normal allowable production. No other wells have been drilled or allowed to be drilled on the lands in question, although I understand that in the normal course of events a fourth well would have been drilled. In a letter of the Board to the appellant's solicitors dated February 18, 1950, it was stated that no change was contemplated in the near future.

In his Notice of Appeal the appellant alleged that the total sums received in 1949 were capital "as being damages for loss of future development of property to its full scope," or "capital as compensation upon giving up right to drill on the remaining two well sites," and as capital "because of

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the act of the Alberta Government in interfering and in effect expropriating what might have been income under other circumstances and converting it into a capital payment or compensation for present and future losses."

In my view, none of these contentions is tenable and I must reject them. No property or rights of the appellant were expropriated and he received full compensation for all royalties he was entitled to. It is possible that by reason of the restrictions on production imposed by the Board, his annual income may be less than if full production and development had been allowed. But such restrictions were imposed by competent statutory authority and no possible right to damages would accrue to the appellant against the Board or the company by reason thereof. The appellant surrendered no rights in respect to these matters and no part of the monies which he received in 1949 were paid to him because of such restrictions. The settlement of his claim had nothing whatever to do with the restrictions imposed by the Board and he was not asked to approve or disapprove of them.

Moreover, the fixation in the Act of the amount of the over-production could not affect the character of the payments which he received. It was done merely for the purpose of fixing with precision the amount of the over-production as a guide for the Board in determining when and to what extent the restrictions should later be altered.

Another submission is that, while the receipt signed by the appellant is for the precise amount of royalty to which he is entitled, it is also a release of all claims and demands. It is contended that the total receipts are capital "as being damages or solatium for not receiving the contractual payments, or as payment for a general release of existing and future claims, or as payments not depending on production from property, or as payments made by statutory authority and by the Board which was not a contracting party."

Now, there is no evidence whatever that the appellant had any valid claim against the company except for his share of the royalty reserved; nor is there any evidence that he ever asserted any other claim. On July 8, 1948, the National Trust Company as trustees for the Rebus family, wrote the Board as to the *gross royalties* that family was entitled to from the company. On April 22, 1949, the Board

forwarded its cheque to the Trust Company for $317,213.34, "being payment in full of the Rebus royalty arrears as per the attached statement." That statement is entitled "Gross Royalties Statement re Rebus et al", and the computation therein relates to royalties only. The document which the appellant signed on April 26, 1949, upon receiving his share of that cheque is called a "release." It recites that he is entitled to a share of the royalty payable by the Atlantic Oil Company and acknowledges receipt of such share in the following words:

> That I have received full payment and satisfaction of all of my share of all arrears of royalty payable by said Atlantic Oil Company Limited in respect of the production of leased substances from the said lands up to and including the 31st day of March, 1949, by virtue of payment by the Petroleum and Natural Gas Conservation Board of the Province of Alberta on behalf of said Atlantic Oil Company Limited to National Trust Company Limited at its office in the City of Edmonton in the Province of Alberta of the sum of $317,213.34 for the account of myself and other persons entitled to share in the said royalty under the terms of a certain agreement dated the 16th day of August, 1947, made between Norman George Lacy, Michael Rebus and others therein named.

Then follows the release clause in these words:

> And I do hereby release and forever discharge the said Atlantic Oil Company Limited and said Petroleum and Natural Gas Conservation Board and their and each of their successive successors and assigns from all manner of actions, causes of actions, claims or demands which I or my executors, administrators or assigns or any of them have had, now have or can or shall or may hereafter have against Atlantic Oil Company Limited and/or said Petroleum and Natural Gas Conservation Board for or in respect of any share of production of leased substances from the said lands or proceeds thereof payable to me or to the said National Trust Company Limited for my account up to and including the said 31st day of March, 1949.

It is most apparent that the payment related solely to the appellant's claim for royalty. Even if the terms of the general release were wide enough to constitute a release of other claims (and I do not think they are), that is *nihil ad rem*. The actual payment was and was clearly stated to be on account of royalty only.

Again it is submitted that the payment was a capital payment inasmuch as it was paid by the Board, a non-tracting party, and not by the company. I do not think that is of any importance whatever. The release itself states that the monies were received by the appellant from the Board *on behalf of the Atlantic Oil Company Limited.* Section 6(*j*) (*supra*) does not require that the amount

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received shall have been paid by a contracting party. All that is required is that it shall be an amount *received* by the taxpayer in the year that was dependent upon use of or production from property.

In my view, the Board was a statutory custodian or trustee of the property of the company following the taking of possession and of the trust funds representing the proceeds of the sale of the salvaged oil, for and on behalf of those who might establish a valid claim against the company, the balance to belong to the company itself. As I have said, there can be no doubt—in fact, it is admitted—that had there been no disaster and had the payments been made in the ordinary course by the company, the whole of the amount in dispute constituted taxable income as falling within the provisions of section 6(*j*). I am quite unable to find that the temporary custodianship of the Board or any provisions in the Order in Council or The Atlantic Claims Act or in the release executed by the appellant in any way affected the true nature and quality of the amount he was entitled to and did receive. It was clearly an amount received by the appellant that was dependent upon the use of or production from property and was, therefore, properly included by the respondent as part of the appellant's taxable income.

The appeal must fail on all grounds and will be dismissed with costs, and the assessment made upon the appellant is affirmed.

Judgment accordingly.

BETWEEN: 1953

THE ROYAL TRUST COMPANY .....APPELLANT; Oct. 14, 21

AND

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

Revenue—Succession Duty—The Dominion Succession Duty Act, S. of C. 1940-1941, c. 14, s. 11A—"Duties otherwise payable under this Act"—Deduction of duties.

Held: That under s. 11A of the Dominion Succession Duty Act, Statutes of Canada 1940 and 1941, c. 14 the Minister is to make two computations, that of the duties payable by each successor on his succession in one or more provinces, and also ascertain the amount of one-half of the duty otherwise payable under the Dominion Succession Duty Act which must include the total duty otherwise payable by the appellant to the respondent in respect of his whole succession whether or not subjected to a tax by a province.

2. That "duties otherwise payable under this Act" means the amount which, but for the provisions of s. 11A, would be payable under the Act.

APPEAL under the Dominion Succession Duty Act.

The appeal was heard before the Honourable Mr. Justice Cameron at Vancouver.

R. C. Plommer for appellant.

R. V. Prenter for respondent.

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

CAMERON J. at the conclusion of the trial delivered the following judgment:

This appeal is taken under the provisions of Part VI of the Dominion Succession Duty Act, Statutes of Canada, 1940 and 1941, Ch. 14 as amended.

The appellant is the duly appointed executor of the estate of Andrew Jacobson, late of New Denver, British Columbia, who died on November 24, 1950.

The gross estate of the deceased amounted to $131,844.77, of which assets situated in the Province of British Columbia totalled $51,952.42. The balance of $79,892.36 was composed of assets situate without the Province of British Columbia and consisted of shares in corporations having their head offices in the Province of Ontario.

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The liabilities of the deceased amounted to $1,228.92, leaving a net estate of $130,615.86. It is agreed that the total amount of Dominion Succession duties *before taking into consideration the provisions of s. 11-A* is $21,390.56.

The sole difference between the parties is the construction to be placed on s. 11-A, which is as follows:

> Each successor may deduct from the duties otherwise payable by him under this Act in respect of a succession derived from a predecessor dying after the 31st day of December 1946, the lesser of
>
> (*a*) The duty or duties payable by him under the laws of any province or provinces in respect of such succession, or
>
> (*b*) Fifty per centum of the duty otherwise payable by him under this Act in respect of such succession.

No succession duties were payable to the Province of British Columbia on any of the assets in the estate. To the Province of Ontario succession duties aggregating $14,592.90 were paid on the various successions as shown on Ex. 1. In computing the deductions to be allowed the appellant under s. 11-A, the respondent took the position that ss. (*b*) thereof —namely, 50 per cent of the duty otherwise payable under the Act in respect of such succession—meant only that portion of the Dominion Succession Duty which was referrable to successions which had also been subject to succession duties in a province—in this case, the Province of Ontario. His computation in respect of such successions is shown on Ex. 1. From that statement it will be seen that the Dominion Succession duties on the shares of the assets which were taxed also by the Province of Ontario aggregated $13,016.60, 50 per centum of that amount, or $6,508.30, being less than the duties of $14,592.50 paid to the Province of Ontario, the respondent allowed a deduction of that amount, namely, $6,508.30. At the trial, counsel for the Minister took the position that the computation so made was properly made under the provisions of s. 11-A.

Counsel for the appellant, however, contends that under the clear wording of that section there is no power to make any such computation. He submits that the section requires the Minister to make two computations. First he must ascertain the duty or duties payable by each successor on his succession, to one or more provinces. Then he must ascertain the amount of one-half of the duty otherwise payable by each successor under the Dominion Succession Duty

Act, and by that he means not the duty payable to the respondent in respect only of assets in his succession which have been taxed by a province, but the total duty payable by him to the respondent in respect of his whole succession, whether or not it has been subjected to tax by a province. Each successor, he says, is then entitled to deduct the lesser of these two amounts from the duties otherwise payable by him under the Act.

Ex. 2 is the schedule prepared by counsel for the appellant, and sets out the computation which he says is to be made under s. 11-A. It shows that in the case of one beneficiary, no amount of duty was payable to the Province of Ontario, but $255.00 was payable to the respondent. No deduction is claimed in respect of that beneficiary. However, in respect of all other beneficiaries who were liable to any succession duties, the computation under part (*b*) of s. 11-A was less than that under part (*a*). The total deduction so claimed amounted to $10,440.28. There is no dispute as to the figures contained in Ex. 2, it being admitted that if the appellant's contention is well founded, it is entitled to a deduction of $10,440.28 from the total Dominion duties otherwise payable, of $21,390.56.

S. 11-A was not a part of the original Act, but was added thereto by Statutes of Canada, 1946, ch. 46, s. 2. So far as I am aware, it has not been judicially considered heretofore. In my view, it permits of only one possible interpretation, and that is the one contended for by the appellant. Prior to coming into effect of s. 11-A, the duty payable under the Act on a succession was computed with reference to the whole of the property in, or deemed to be included in, a succession; and it was not affected in any way by the fact that the assets in the succession were in one or in several provinces, or that some of such assets had been subjected to provincial succession duties and others had not. The question of provincial succession duties did not enter into the matter at all. The amount so computed under the provisions of the Act in respect of each succession was the duty payable by him under the Act. Now, no change was made in that computation by adding s. 11-A to the Act. The duty payable under the other provisions of the Act—or, as it is worded in s. 11-A, "the duty otherwise payable by him under the Act"—remained exactly the same. The correct

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computation of that amount for each succession in this case is shown in Column 2 of Ex. 2, and, as I have said, totals $21,390.56. That figure is accepted as correct in para. 4 of the Statement of Defence, and while it is there called "Dominion Succession Duty Assessment," there is no doubt in my mind that it is the total of the Dominion duties computed prior to the application of the provisions of s. 11-A. All that that section did was to permit the deduction therefrom of the lesser of (*a*), the provincial succession duties, or (*b*) one-half of the duty otherwise payable by the individual successor under the Act.

The phrase "duties otherwise payable under this Act" means nothing more than the amount which, but for the provisions of this section, would be payable under the Act.

Were I to give effect to the interpretation placed by counsel for the respondent upon the concluding part of s. 11-A, it would be tantamount to striking out of the last line thereof, the words "of such succession" and substituting therefor, "of that part of such succession only as had been subjected to the payment of a provincial succession duty," so that part (*b*) would then read, "50 per centum of the duty otherwise payable by him under this act in respect of that part of such succession only as had been subjected to the payment of a provincial succession duty."

To do so would be to do violence to the very words of the section, which, in my view, are clear and unambiguous.

The cardinal rule for the construction of acts of Parliament is that they should be construed according to the intention of Parliament which passed them. If the words of the section are themselves clear and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. (Craies on Statute Law, Fifth Edition at p. 64).

In my opinion, the language used in s. 11-A is so clear and explicit that it permits of one interpretation only. I can find nothing in part (*b*) which authorizes the respondent in making the computation therein provided for, to limit that allowance to that part of the succession on which duty has been paid to a province. It relates to the whole of the duty otherwise payable under the Dominion Act.

But it is submitted that if part (*b*) be interpreted in the manner I have indicated, inequities and inequalities may

result. But when the words of an Act are plain, the Court will not make any alteration in them because injustice may otherwise be done. In *Warburton* v. *Loveland* (1) it was stated:

> Where the language of the Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the Legislature.

Again, in a more recent case, *King Emperor* v. *Benoari Lal Sarma* (2), Viscount Simon said in the Privy Council:

> Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used.

It may well be that Parliament, in enacting s. 11-A, considered that all successions under the Dominion Act would also be subject to duty under a Provincial Succession Duty Act, and therefore made no provision for cases, such as the instant one, in which a substantial part of a number of successions paid no provincial duty. But a statute may not be extended to meet a case for which provision has clearly and undoubtedly not been made.

In *London and India Docks Co.* v. *Thames Steam Tug* (3), Lord Atkinson said at p. 23:

> The intention of the Legislature, however obvious it may be, must, no doubt, in the construction of statutes, be defeated where the language it has chosen to use compels to that result, but only where the language compels to it.

Again, in *Attorney-General* v. *Earl of Selborne* (4), the Master of the Rolls said at p. 396:

> Therefore the Crown fails if the case is not brought within the words of the statute, interpreted according to their natural meaning; and if there is a case which is not covered by the statute so interpreted that can only be cured by legislation, and not by any attempt to construe the statute benevolently in favour of the Crown.

I may note here that s. 11-A in the form in which I have set it out above was replaced by a new section 11-A by Statutes of Canada, 1952, ch. 24, s. 6. It may well be that, as now framed, it would authorize the Minister to treat cases arising after it came into effect in the manner now contended for by his counsel. It is not retroactive, however, and can have no bearing on this case.

It appears from the record that the appellant has paid the full amount of the assessment made upon it.

(1) (1831) 2 D. & C., H. of L. 480 at 489.
(2) [1945] Law Reports 72, Ind. App. 57 at 71.
(3) [1909] A.C. 15.
(4) [1902] 1 K.B. 388.

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For these reasons the appellant must succeed.

There will therefore be judgment allowing the appeal and declaring: (*a*) that the appellant is entitled to deduct from the Dominion duties otherwise payable by it under the Act—namely, the sum of $21,390.56—the deductions authorized by part (*b*) of s. 11-A as it was in 1950, namely, a total of $10,440.28, the net duty payable by the appellant being therefore $10,950.28; and (*b*) that the appellant is entitled to be repaid by the respondent the sum of $9,049.72, being the difference between the sum of $20,000 paid by it to the respondent and the sum of $10,950.28, being the amount of duty for which it is liable, less, of course, any portion thereof, if any, that may have been refunded to the appellant in the meantime; (*c*) that the appellant is entitled to the costs of the appeal, after taxation.

Judgment accordingly.

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Oct. 19

Oct. 21

BETWEEN:

TRANS-CANADA INVESTMENT CORPORATION LIMITED ..... } APPELLANT;

AND

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

Revenue—Income—The Income Tax Act 11-12 Geo. VI, c. 52, s. 27(1)—Dividends received from a Canadian Corporation—Appeal from Income Tax Appeal Board allowed.

Held: That in the circumstances of this case dividends from a Canadian Corporation are deductible by virtue of s. 27(1) of the Income Tax Act notwithstanding the fact that such dividends are paid in the first instance to a trustee-corporation and by it paid to the receiving corporation.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cameron at Vancouver.

K. E. Meredith for appellant.

J. L. Farris, Q.C. and *T. E. Jackson* for respondent.

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

CAMERON J. now (October 21, 1953) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated April 9, 1953, which disallowed an appeal by the appellant from an assessment made upon it for its taxation year 1950. By that assessment, dated February 1, 1952, there was added to the declared income of the appellant the sum of $737.26 received by it in that year from the Yorkshire and Canadian Trust Limited, under the circumstances presently to be mentioned, and which amount the appellant had claimed as a deduction under s. 27(1) of the Income Tax Act.

The facts are not in dispute. The appellant is a company incorporated under the laws of the Province of British Columbia, and carries on business as the administrator of certain fixed investment trust known as Trans-Canada Shares, Series "A", Series "B", and Series "C". The trust known as Trans-Canada Shares Series "B" was constituted and is governed by an agreement dated September 1, 1944 (Exhibit 1), the parties thereto being (*a*) the Administrator of the Trust, the appellant herein; (*b*) the Trustee, the Yorkshire and Canadian Trust Limited; and (*c*) the holders of certificates representing Trans-Canada Shares Series "B".

The plan of operation was as follows. The appellant, as administrator of the Trust, from time to time purchased a fixed number of common shares in fifteen selected Canadian corporations (called a "Trust Unit"), endorsed the share certificates in favour of the Yorkshire and Canadian Trust Limited (hereinafter to be called "the Trustee"), and delivered them so endorsed to the Trustee, which thereupon registered them in its own name. Upon the deposit with it of one "Trust Unit" as aforesaid, the Trustee issued certificates representing 1,000 undivided one-thousandths' interest in the "Trust Unit", each of such interests being termed a Trans-Canada Share Series "B". These certificates, so issued by and in the name of the Trustee, were in two forms:

(*a*) certificates which are registered on the books of the Trustee in the name of the registered owner; and

(*b*) bearer certificates which are not registered on the books of the company, but which are negotiable and passed by delivery. Attached to these is a series of coupons which

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entitle the holder thereof, upon surrender on the semi-annual dates mentioned, to receive the proportion of the income from the "Trust Unit" to which he is entitled.

The certificates when issued by the Trustee were in the denominations requested by the administrator, were then delivered by the latter to the various purchasers thereof. Exhibits 2 and 3 are respectively samples of the registered and bearer certificates so issued.

The Trustee, as the registered owner of the shares in the fifteen companies (which I shall hereafter refer to as the "underlying companies"), received all dividends paid thereon, and on March 1 and September 1 in each year, as required by the said Trust Agreement, distributed its net income therefrom to the holders of the Series "B" certificates, after deducting therefrom the various charges specified in the agreement, which were as follows:

(*a*) a fixed fee to the administrator;

(*b*) its own charges;

(*c*) taxes and other Governmental charges;

(*d*) a reserve fund for contingent tax liability. I understand, however, that no such reserve was set up at any time.

In the case of registered owners of the Series "B" certificates, payment was made by the special cheque of the Trustee, which was headed "Trans-Canada Shares Series 'B' —semi-annual distribution of income." In the case of those holding bearer certificates, payment was made to an individual, bank or trust company surrendering the semi-annual coupon.

In 1950, the appellant held as its own property a certificate for 1,000 shares of Series "B", and in respect thereof received from the Trustee the sum of $737.26. These cheques (Exhibit 4) are for an amount in excess of that figure, but nothing hinges on that difference. In its tax return it showed the receipt of that amount but claimed that it was deductible under the provisions of s. 27(1) of the Income Tax Act, which is as follows:

27. (1) Where a corporation in a taxation year received a dividend from a coporation that

(*a*) was resident in Canada in the year and was not, by virtue of a statutory provision, exempt from tax under this Part for the year, . . .

an amount equal to the dividend minus any amount deducted under subsection (2) of section 11 in computing the receiving corporation's income may be deducted from the income of that corporation for the year for the purpose of determining its taxable income.

The respondent, however, being of the opinion that the said sum was not a dividend or the sum of dividends received from the corporation that was resident in Canada, disallowed the said deduction and added that amount to the appellant's taxable income. Then followed the appeal to the Income Tax Appeal Board, and later to this Court.

At the hearing it was conceded that each of the "underlying companies" which paid the dividends to the Trustee was a corporation that was resident in Canada in 1950, and was not, by virtue of a statutory exemption, exempt from taxation under Part 1 of the Act for the year 1950. It follows, therefore, that if the appellant corporation had been the registered owner of the shares in the "underlying companies," and as a consequence had received the dividends directly from them, it would have been entitled to deduct the amount of such dividends in computing its taxable income. Is its position otherwise because of the particular facts of this case?

Counsel for the appellant—on whom the onus lies—submits that, notwithstanding the intervention of the Trustee, that which the appellant received was a dividend from a corporation resident in Canada and that the appellant received it from that corporation. The respondent denies that when received by the appellant it had the quality or characteristics of such a dividend; and that even if it were found to be such, the appellant received it from the Trustees and not from the "underlying companies."

Firstly, was it a *dividend* from a Canadian corporation not exempt from taxation? In considering this question, I must elaborate somewhat on the facts disclosed in evidence. The Trust established under the provisions of the Trust Agreement (Exhibit 1) is a fixed investment trust. The names of the "underlying companies" and the number of shares in each, which together make up a "Trust Unit," are set out in the agreement. They cannot be changed by the Trustee except upon the direction of the administrator who has certain limited powers to direct sales of portions thereof, and in that case the proceeds are held on deposit in a chartered bank or invested in Government bonds until the

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administrator directs the Trustee to purchase therewith shares in some one or more of the named "underlying companies," but not otherwise. By Clause 34 of the agreement, it is provided that the holder of certificates representing in the aggregate 200 Series "B" shares, or any multiple thereof, is entitled upon surrender of his certificates to the Trustee to require the latter to either—

(*a*) sell forthwith the shares of stock in the "underlying companies" then constituting one-fifth of a "Trust Unit," or the proper multiple thereof, and pay over the proceeds to him; or

(*b*) to transfer to him duly endorsed, stock certificates representing one-fifth (or the proper multiple thereof), representing the proportionate part applicable to his shares of stock in the "underlying companies" held by the Trustee.

These facts were known to a purchaser of the Series "B" certificates, not only because he became a party to the agreement upon subscribing for shares, but also because the information was given to him in a summary forming part of the certificate itself. At the time of the semi-annual distribution of income, a registered owner of the certificate was furnished with a statement showing precisely the shares held by the trustee in respect of each "Trust Unit."

It is also shown that the Trustee took meticulous care to ensure that the stocks in the "underlying companies" represented in each "Trust Unit" were kept separate from all others. When dividends were received, they were immediately placed in a special Series "B" Trust Account and all distributions made, whether to registered owners or to those holding bearer certificates, were paid out of that account.

From these facts, and particularly because he could at any time demand that the Trustee deliver to him his proper proportion of the shares in the "underlying companies," it seems to me that the holder of the Series "B" certificate was, in fact, the beneficial owner of the basic shares represented thereby. While he was not the registered owner, and although the administrator had the right to vote the said shares at any meeting of the "underlying companies," no one other than the holder of Series "B" certificates had any beneficial interest in such shares. The number of shares to which he was entitled in each company was fixed at the time he purchased the certificates, remained the same

throughout, and he was entitled to physical possession thereof, upon demand.

Under these circumstances I do not think that the amounts which the appellant received were other than dividends from the "underlying companies." The majority decision of the House of Lords in *Archer-Shee* v. *Baker* (1), strongly supports that view. There the appellant's wife, resident in the United Kingdom, was the life tenant of a trust fund under an American will, the trustees of which were resident in New York. The trust fund consisted entirely of foreign government securities, foreign stocks and shares, and other foreign property, the trustees having powers of sale and reinvestment. The income from the fund was paid by the trustees to the order of the appellant's wife, at a New York bank. The issue in the appeal against the assessment levied against the appellant in respect of his wife's income was whether such income arose from the specific securities, stocks and shares, and other property constituting the trust fund or from "possessions out of the United Kingdom other than stocks, shares or rents." The House of Lords, reversing the Court of Appeal, held that the appellant's wife was the beneficial owner of the securities, stocks and shares, and other property constituting the trust fund and was entitled to receive and did receive the interest and dividends thereof. In coming to this view they assumed that the law of trusts on this point was the same in New York as in England. That this assumption was erroneous was shown by their subsequent decision in *Garland* v. *Archer-Shee* (2). That fact, however, does not affect the applicability of the decision in the first *Archer-Shee* case (*supra*) to the facts of the present case, it being assumed that the law of trusts on this point in British Columbia is the same as that of England as laid down in the first *Archer-Shee* case.

In the first *Archer-Shee* case, Lord Wrenbury said at p. 866:

> I have to read the will and see what is Lady Archer-Shee's right of property in certain ascertained securities, stocks and shares now held by the Trust Company 'to the use of my said daughter.' It is, I think, if the law of America is the same as our law, an equitable right in possession to receive during her life the proceeds of the shares and stocks of which she is tenant for life. Her right is not to a balance sum, but to the dividends subject to deductions as above mentioned. Her right under the will is 'property' from which income is derived.

(1) [1927] A.C. 844. (2) (1930) 15 T.C. 693; [1931] A.C. 212.

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And Lord Carson, in the same case, said at p. 870:

> In my opinion upon the construction of the will of Alfred Pell once the residue had become specifically ascertained, the respondent's wife was sole beneficial owner of the interest and dividends of all the securities, stocks and shares forming part of the trust fund therein settled and was entitled to receive and did receive such interest and dividends. This, I think, follows from the decision of this House in *Williams* v. *Singer* (1921) 1 A.C. 65, and in my opinion the Master of the Rolls correctly stated the law when he said ((1927) 1 K.B. 123) 'that in considering sums which are placed in the hands of trustees for the purpose of paying income to beneficiaries, for the purposes of the Income Tax Acts, you may eliminate the trustees. The income is the income of the beneficiaries; the income does not belong to the trustees.'

And, at p. 871:

> My Lords, I am unable to understand why or how the character of the sum paid to the respondent's wife ever became changed or, as the Master of the Rolls graphically says, 'was no longer clothed in the form in which it was originally received, having no trace of its ancestry,' simply because the deductions due by law have been made and because it has been mixed up with other trust moneys by the trustees. It is, in my view, in the same position as if the trustees had arranged to have the interest and dividends paid direct to the respondent's wife and she had discharged the necessary outgoings in accordance with the law. Whether the necessary outgoings according to law were discharged by the trustees or by the cestui que trust cannot, in my opinion, make any difference. I think the appeal should be allowed, . . .

Reference may also be made to *Pan-American Trust Company* v. *M.N.R.* (1), in which the President of this Court considered the first *Archer-Shee* case and followed the principles therein laid down. Reference may also be made to *Kemp* v. *Minister of National Revenue* (2); to *Nelson* v. *Adamson* (3); and to *Syme* v. *Commissioner of Taxes* (4).

On the principles laid down in these cases, I reach the conclusion that what the appellant was entitled to receive and did, in fact, receive, was the dividends of the various Canadian companies.

The second question is whether, being a dividend as I have found it to be, it was received *from* a Canadian corporation. Counsel for the respondent contends that the language of the section requires that it must have come directly from a Canadian corporation to the appellant, and that as it was paid in the first instance to the Trustee, and then by the latter to the appellant, it was not, in fact, received *from* a Canadian corporation. He submits that

(1) [1949] Ex. C.R. 265.
(2) [1948] 1 D.L.R. 65.
(3) [1941] 2 K.B. 12.
(4) [1914] A.C. 1013.

while it may have been derived from a Canadian corporation, it was not *received from* a Canadian corporation.

I agree that it is possible to interpret the language of the section as requiring that the dividend must have been received directly from the paying corporation. But in my view, there is another interpretation that may be put upon it, an interpretation which I think is more consonant with the intention of Parliament as I deem it to be from the language itself.

In *Caledonian Railway* v. *North British Railway* (1), Lord Selborne said at p. 122:

> The more literal construction of a statute ought not to prevail if it is opposed to the intentions of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which the intention can be better effectuated.

Again, in *Shannon Realties* v. *St. Michel* (2), it was stated that if the words used are ambiguous, the Court should choose an interpretation which will be consistent with the smooth working of the system which the statute purports to be regulating.

Now, from a perusal of the words of the section, it seems clear that the purpose of the enactment was to reduce the number of taxes on corporate earnings. Such earnings are ordinarily subject to taxation when earned by a corporation, and again when ultimately distributed by way of dividend to shareholders who are individuals. Were it not for the provisions of s. 27(1), there would be a further tax on such earnings when they were passed from one corporation to another by way of dividends.

To carry out that intention it was necessary to limit the deduction to corporations—and that was done. It was also necessary to provide that it related to a dividend, and that that dividend issued or came from a corporation resident in Canada and which was not exempt from tax—and that was done in apt language. If the purpose of Parliament was as I have stated, then it was not necessary in order to carry out that purpose, to require that the dividend must have been received directly from the paying corporation. In fact, such a requirement would have drastically curtailed the relief to corporate taxpayers which I think it was intended to grant to them.

(1) (1881) 6 A.C. 114. (2) [1924] A.C. 192.

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It seems to me that counsel for the respondent, in submitting that the dividend must have been "received from" a corporation, has placed the emphasis in the wrong place. In my view, the important matter is that the dividend shall have come from a Canadian corporation and that the emphasis should therefore be placed on "a dividend from a corporation."

In my opinion, the appellant did receive a dividend from Canadian corporations—namely, the "underlying companies"—notwithstanding the fact that the dividends were paid in the first instance to the Yorkshire and Canadian Trust Limited, which company, in my opinion, was nothing more than a trustee for the appellant and other owners of Series "B" certificates to hold the shares to which they were severally entitled, to receive the dividends thereon, to distribute the income semi-annually, and upon demand made to deliver the proper numbers of shares in the "underlying companies," or their proceeds if sold, upon the instructions of the holder.

For these reasons the appellant is entitled to succeed.

I should note that in the Notice of Appeal the appellant, as an alternative to its main appeal, submitted that if it were not successful in the main appeal, it was entitled to a deduction for depletion in respect of the said dividends in the sum of $50.87. While that right was denied in the respondent's reply, his counsel at the trial conceded that he could not support the finding of the Income Tax Appeal Board on that point and conceded the appellant's right to that deduction. I merely note that matter for, in view of my finding that the appellant is entitled to the full deduction of its main claim, it cannot receive the deduction for depletion also.

There will therefore be judgment allowing the appeal on the main issue; the decision of the Income Tax Appeal Board will be set aside, and the matter referred back to the respondent to re-assess the appellant in accordance with my findings.

The appellant is entitled to its costs after taxation.

Judgment accordingly.

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COPYRIGHT—*Action for infringement of copyright, damages and an injunction—Copyright Appeal Board—The Copyright Amendment Act, 1931, S. of C. 1931, c. 8, ss. 10(1) (2) (3), 10(B) (6) (6) (a) (7) (8) (9)—An Act to amend the Copyright Amendment Act, 1931, and the Copyright Act, S. of C. 1938, c. 27, s. 3—The Copyright Act, R.S.C. 1927, c. 32—Radio broadcasters—Validity of tariff of "fees, charges or royalties" established by the Copyright Appeal Board—Tariff No. 2 including provision authorizing inspection of licensee's books and records and statements certified by the Copyright Appeal Board* intra vires *the Board—Counterclaim dismissed.* Pursuant to the provisions of the Copyright Amendment Act, 1931, 21-22 Geo. V, c. 8, S. of C. 1931, plaintiff which carries on in Canada the business of acquiring performing rights in musical works and deals with the grant of licences for the performance in Canada of such works duly filed at the Copyright Office within the time specified in the Act what purported to be the statement of all fees, charges or royalties it proposed to collect during 1952 in compensation for the grant of said licences. In due course the Copyright Appeal Board proceeded to consider the statement and objections thereto, and after hearing the interested parties, certified its approved statements to the Minister, notice thereof being given in the *Canada Gazette*. Defendant performed over its station certain of plaintiff's works without its consent and without securing a licence or paying any fees. The action is one for infringement of copyright, damages and an injunction but, actually, was brought to test the validity of the tariff of "fees, charges or royalties" established by the Board as those which plaintiff might charge radio broadcasters for a general licence for the calendar year 1952 (Tariff No. 2). In its counterclaim defendant asked for a declaration that the tariff was *ultra vires* the Board, mainly on the ground that being based on the "gross revenue" of the broadcasting companies it is not a statement of "fees, charges or royalties" within the meaning to be attributed to those words in the Act. *Held:* That under the provisions of the Copyright Amendment Act a purely administrative function was given to the Board by Parliament, namely, to fix the rates which the plaintiff could legally charge for the use of its works; or at the most that it was of a quasi-judicial nature. If it be the former, it is not open to review by the Court; if it be the latter, all that was necessary was that those opposed in interest to that of the plaintiff should have had a fair opportunity to be heard in the dispute. *The King* v. *Noxzema Chemical Company of Canada* [1942]

REVENUE—*Income tax—The Income Tax Act, S. of C. 1948, c. 52, ss. 3, 5, 55(2)—Meaning of "income from employment"*. On July 21, 1938, Dr. J. K. McGregor, the owner of the McGregor Clinic at Hamilton, made an agreement with the appellant, who was his brother and a surgeon employed at the clinic, that if the appellant should be on the permanent staff of the clinic at the time of his death or discontinuance of the clinic the appellant would be entitled to one-sixth of the amount realized from the accounts receivable outstanding on the books of the clinic at the date of such death or discontinuance. At the date of Dr. J. K. McGregor's death on January 22, 1946, the appellant was on the permanent staff of the clinic and in due course received from his brother's executor in 1949 the sum of $7,125 as part of his entitlement under the agreement. In his return for 1949 the appellant claimed this amount as a legacy but the Minister in his assessment added it to the amount of taxable income reported by the appellant in his return. From this addition the appellant appealed directly to this Court. *Held:* That the amount received by the appellant was not compensation for the loss of an office.

REVENUE—*Continued*

Fullerton v. *Minister of National Revenue* [1939] Ex. C.R. 13 distinguished. 2. That the appellant earned the amount in his character as an employee. It thus came to him from his employment and was remuneration for it and was income from employment. 3. That the amount was received under a profit sharing arrangement and was remuneration because of and for employment and, as such, income from employment. DOUGLAS U. MCGREGOR v. MINISTER OF NATIONAL REVENUE.... 15

2.——*Income Tax—The Income War Tax Act, R.S.C. 1927, c. 97, s. 6(1) (o)—Para. (o) of s. 6(1) of the Income War Tax Act intra vires of Parliament—Order in Council P.C. 5948, dated December 23, 1948, intra vires of Governor in Council—"Additional charge" and "contribution" paid to the Province of Quebec under provisions of "An Act to Ensure the Progress of Education" S. of Q. 1926, 10 Geo. VI, c. 21 are taxes and within definitions of "corporation tax" and "specific corporation tax" in P. C. 5948 but not within definitions of "rental and "royalty" therein—Such taxes not deductible under s. 6(1) (a) of the Income War Tax Act—Appeal from Income Tax Appeal Board allowed.* In its income tax return for the taxation year 1947 the respondent deducted an amount of $316,087.16 which it had paid to the Minister of Hydraulic Resources for the Province of Quebec under the provisions of "An Act to Ensure the Progress of Education". S. of Q., 10 Geo. VI, c. 21, enacted in 1946 by the Legislature of that Province. The deduction was disallowed by the appellant on the ground that it was a corporation tax as defined by P.C. 5948 dated December 23, 1948, and passed under the authority of s. 6(1) (o) of the Income War Tax Act, R.S.C. 1927, c. 97, and, therefore, under the provisions of that subsection was not deductible. On an appeal from the assessment the Income Tax Appeal Board held that the Quebec *Education Act* did not impose a corporation tax, that P.C. 5948 was *ultra vires* the Governor in Council and that, in any event, a portion of the deduction was within the exceptions provided for in the Order in Council as being rents or royalties in respect of natural resources. The Board referred the assessment back to the Minister for re-assessment and to allow the full amount of the deduction "as it was an expense wholly, exclusively and necessarily laid out for the purpose of earning the income for the year 1947". From that decision the Minister appealed to this Court. *Held:* That para. (o) of s. 6(1) of the Income War Tax Act, R.S.C. 1927, c. 97, is *intra vires* of Parliament. In exercising the power of "raising money by any mode or system of taxation", as provided in s. 91(3) of the British North America Act, Parliament could in enacting or amending an Income Tax Act specify those expenses or outlays which would be deductible and those which would not be deduct-

the Board on a question of law, was granted although it was not heard until after the expiry of thirty days from the date of the decision of the Board, the Court having accepted as a reasonable excuse for the delay the explanation given by appellant. *Held:* That an application cannot be considered to have been made until at least the date fixed for its hearing. It is then only that the application comes before the Court for consideration, and the notice previously given is nothing more than an intimation that the application will be made on the date specified. 2. That an application for leave to extend the time for applying for leave to appeal should be supported by one or more affidavits explaining the reasons for requiring such extension. 3. That the construction of a statutory enactment is a question of law. *Farmer* v. *Cotton's Trustees* [1915] A.C. 922; *Rogers Majestic Corporation Limited* v. *City of Toronto* [1943] S.C.R. 440; *Delhi* v. *Imperial Leaf Tobacco Company* [1949] O.R. 636 referred to and followed. 4. That in rejecting the appellant's submissions the Tariff Board must have interpreted the words "motor vehicles of all kinds" in tariff item 438a of the Customs Tariff Act as excluding the imported article and the words "conveyance of what kind soever" in s. 2(*r*) of the same act as excluding the somewhat limited conveyor operation performed by the imported article. The tariff items which the Board interpreted in this manner are part of the schedule to the Act and therefore part of the enactment itself. In construing these items the Board was dealing with questions of law, and under s. 50 of the Customs Act, R.S.C. 1927, c. 42, the appellant is given the right to appeal therefrom. GENERAL SUPPLY COMPANY OF CANADA LIMITED v. THE DEPUTY MINISTER OF NATIONAL REVENUE, CUSTOMS AND EXCISE, DOMINION HOIST & SHOVEL COMPANY LIMITED AND DOMINION RUBBER COMPANY.... **185**

8.——*Sales Tax—Special War Revenue Act, R.S.C. 1927, c. 179, s. 86(1)—The Sale of Goods Act, R.S.M. 1940, c. 185, ss. 18, 19(1) 19(2), 20, 33(1)—Contract made where acceptance of offer communicated—Meaning of term "F.O.B. Hd. of Lakes"—Delivery under 86(1) (a) of Special War Revenue Act means actual physical delivery—Passing of property in unascertained goods by unconditional appropriation of goods to contract.* The defendant sold steel and other metal goods to purchasers in Winnipeg, Port Arthur, Calgary and Edmonton. The purchasers ordered the goods from the defendant's sales office in Winnipeg which sent them to its Montreal plant for filling and then sent post card acknowledgments to the purchasers. The goods were to be carried by Canada Steamship Lines Limited to the head of the lakes as soon as navigation opened and by rail from there to their destination. The invoices for the goods showed that the freight was to be collect

but carried a notation "F.O.B. Hd. of Lakes" and showed allowances for freight deducted from the price of the goods. In April, 1944, the defendant delivered the goods to Canada Steamship Lines Limited in packages addressed to or otherwise identified as consigned to the purchasers and Canada Steamship Lines Limited issued bills of lading for them in the names of the purchasers without any reservation to the defendant of the right of disposal. The defendant sent the invoices and bills of lading to the purchasers. On May 5, 1944, while the goods were still in the Ottawa Street shed of Canada Steamship Lines Limited in Montreal they were destroyed by fire. The plaintiff claimed sales tax on the sale price of the goods. *Held:* That a contract is made where the acceptance of an offer is communicated. 2. That the contract between the defendant and its purchasers was made in Winnipeg and that the law applicable to it is the law of Manitoba as found in The Sale of Goods Act. 3. That the delivery contemplated by paragraph (*a*) of section 86(1) of the Special War Revenue Act means actual physical delivery and that since there was no such delivery paragraph (*a*) is not applicable. 4. That the contract between the defendant and its respective purchasers was a contract for the sale of unascertained or future goods by description, that goods of that description and in a deliverable state were unconditionally appropriated to the contract within the meaning of Rule 5 of section 20 of The Sale of Goods Act, that the property in the goods thereupon passed to the purchasers and that the case falls within the ambit of the second proviso to section 86(1) of the Special War Revenue Act. HER MAJESTY THE QUEEN v. THE STEEL COMPANY OF CANADA LIMITED..... **200**

9.——*Income Tax—The Income War Tax Act, S. of C. 1948, c. 52, ss. 11(1)(a), 20 and 127(5)—Capital cost of property—Depreciation—Persons deemed not "to deal with each other at arms length"—An Act to Amend the Income Tax and the Income War Tax Act, S. of C. 1949, 2nd Sess. c. 25, ss. 8(1)(a)(i), 8(3)(a)(b)(i)(ii)—Depreciable property, whether acquired before or after January 1, 1949—Property transactions prior to 1949 between persons not dealing at arms length—Interpretation of words "one person"—The Interpretation Act, R.S.C. 1927, c. 1, ss. 21(2) and 31(j)—Appeal from Income Tax Appeal Board allowed.* In 1949 two brothers purchased a property at 79 Wellington St. W., Toronto, and sold it later in the year for a greater price than they had paid for it to the respondent company in which they were the controlling shareholders. As a result of an appeal to the Income Tax Appeal Board from an assessment for the taxation year 1946 the respondent was allowed depreciation under the Income War Tax Act for that year and, also, for the years 1947 and

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1948, on the basis of the capital cost of the property to the company. On January 1, 1949, the Income Tax Act came into effect, replacing the Income War Tax Act. Because of its entirely new provisions as to the deductibility of depreciation it was necessary to enact certain transitional provisions which are found in Chap. 25, S. of C. 1949, 2nd Sess, an Act to Amend the Income Tax Act and the Income War Tax Act. In its returns for the taxation years 1949 and 1950 the respondent claimed under s. 8(1) of that Act depreciation on the same basis as that allowed in the three previous years. The Minister contending that respondent came within the provisions of s. 8(3) (which applies only to property transactions prior to 1949 between persons not dealing at arms length) assessed the company on the basis of the actual cost of the property to the two original owners—the two brothers. An appeal from the assessment was taken to the Income Tax Appeal Board which held that s. 8(3) of that Act was inapplicable to the case as the property had belonged to two original owners and not to *one person*. The Minister appealed from this decision. *Held:* That the facts of the case bring the parties to that transaction within the provisions of s. 127(5) of the Income Tax Act and, therefore, they must be deemed not to have dealt with each other at arms length. 2. That the word "one" in s. 8(3) of c. 25, S. of C. 1949, 2nd Sess. is not so clear and unambiguous that it must necessarily be interpreted as a numeral. When read in its context it can and does have another possible meaning, namely, that it is used in its partitive sense as the antithesis of another. The nature of the enactment required that reference be made to two distinct classes: the original owner who was the "one person" and a subsequent owner—taxpayer—who was the other. 3. That the intention of Parliament is better effectuated by giving to the words "une personne" in the French version, the meaning "a person" rather than by construing the words "one person" in the English version as one person only. Such a construction disposes of all cases involving non-arms-length transactions and places all taxpayers whose property has been at the same time transferred on other than an arms length transaction in precisely the same position in determining their capital costs. That must have been the intention of Parliament as disclosed in the legislation itself. MINISTER OF NATIONAL REVENUE v. 79 WELLINGTON WEST LIMITED..... **209**

10.——*Customs and Excise—Goods subject to duty—The Excise Tax Act, R.S.C. 1927, S. 116, Schedule I, item 6—Tariff Board—Leave to appeal to Exchequer Court from decision of Tariff Board—Questions of law—Whether a "Subscriber's Termination Unit" falls within either of terms "telecast receiving set" or "apparatus for receiving radio broadcast and music"—Whether Tariff Board's finding a question of fact only—Construction of terms of a statutory enactment a matter of law only—Application for leave to appeal from decision of Tariff Board granted.* The application herein is one by appellant, under the provisions of the Excise Tax Act, R.S.C. 1927, c. 179, s. 116, for leave to appeal, on a question of law, from a decision of the Tariff Board declaring that a certain telecommunication apparatus described as a "Subscriber's Termination Unit" was not subject to excise tax under Item 6 of Schedule I of the Act, which is as follows:

> "Phonographs, record playing devices, radio broadcasts or telecast receiving sets and tubes therefor, apparatus for receiving radio broadcast and music . . . fifteen per cent."

Neither "Subscriber's Termination Unit", "telecast receiving set" nor "apparatus for receiving radio broadcast and music" are defined in the Act. Respondent opposed the application on the ground that no question of law is involved. *Held:* That the Tariff Board's finding that the "Subscriber's Termination Unit" did not fall within either of the terms "telecast receiving set" or "apparatus for receiving radio broadcast and music", is not a question of fact only. After ascertaining the facts as to the nature of the "Subscriber's Termination Unit" it was necessary for the Board to construe the meaning of the words "telecast receiving set" and "apparatus for receiving radio broadcast and music" before reaching a conclusion as to whether the imported article did or did not fall within either category. 2. Such construction on the part of the Tariff Board upon the provisions of Item 6 of Schedule I of the Act is a construction of the terms of a statutory enactment and, therefore, a matter of law only. *Loblaw Groceterias Co. Ltd.* v. *City of Toronto* [1936] S.C.R. 249; *Rogers-Majestic Corporation Ltd.* v. *City of Toronto* [1943] S.C.R. 440; *General Supply Company of Canada Ltd.* v. *The Deputy Minister of National Revenue, Customs and Excise, et al* [1943] Ex. C.R. 185 referred to and followed. 3. That the question proposed by appellant involves a question of law. THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE v. REDIFFUSION INC..... **221**

11.——*Income Tax—The Income Tax Act, S. of C. 1948, c. 52 ss. 36(4)(b)(i), 36(5), 127(1)(a b), 127(5)—Meaning of "related corporations"—Term "person" in s. 36(4)(b)(i) includes foreign corporation.* All the issued shares of the appellant and another Canadian company were owned by a United States company and the appellant was assessed for 1949 as a related corporation within the meaning of s. 36(4)(b)(i) of The Income Tax Act, as amended. *Held:* That it is not a proper approach to the construction of The Income Tax Act to regard it as necessarily consistent in the use