1969

CANADA
LAW REPORTS

RAPPORTS JUDICAIRES
DU CANADA

Exchequer Court of Canada

Cour de l'Échiquier du Canada

PAUL A. RAYMOND, C.R.
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91301—1

JUDGES
OF THE
EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

THE HONOURABLE WILBUR ROY JACKETT
(*Appointed May 4, 1964*)

PUISNE JUDGES:

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

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

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

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

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

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

THE HONOURABLE RODERICK KERR
(*Appointed November 1, 1967*)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

The Honourable VINCENT JOSEPH POTTIER, Nova Scotia Admiralty District—appointed February 8, 1950.

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

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

The Honourable GEORGE ERIC TRITSCHLER, Manitoba Admiralty District—appointed October 19, 1962.

GORDON R. HOLMES, Q.C., Prince Edward Island Admiralty District—appointed May 24, 1963.

The Honourable HAROLD GEORGE PUDDESTER, Newfoundland Admiralty District—appointed June 4, 1963.

The Honourable JAMES DOUGLAS HIGGINS, Newfoundland Admiralty District—appointed May 28, 1964.

The Honourable LOUIS MCCOSKERY RITCHIE, New Brunswick Admiralty District—appointed February 15, 1968.

DEPUTY JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

His Honour REGINALD D. KEIRSTEAD, New Brunswick Admiralty District—appointed February 28, 1957.

The Honourable CHARLES WILLIAM TYSOE, British Columbia Admiralty District—appointed January 31, 1963.

The Honourable YVES BERNIER, Quebec Admiralty District—appointed November 17, 1965.

The Honourable ANDRÉ DEMERS, Quebec Admiralty District—appointed February 14, 1967.

The Honourable GORDON S. COWAN, Nova Scotia Admiralty District—appointed April 6, 1967.

The Honourable ARTHUR MIFFLIN, Newfoundland Admiralty District—appointed March 7, 1968.

SURROGATE JUDGE IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

ALFRED S. MARRIOTT, Q.C., Ontario Admiralty District—appointed February 21, 1957.

ATTORNEY-GENERAL OF CANADA:
THE HONOURABLE JOHN TURNER

SOLICITOR GENERAL OF CANADA:
THE HONOURABLE G. J. MCILRAITH

JUGES

DE LA

COUR DE L'ÉCHIQUIER DU CANADA

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

PRÉSIDENT:

L'HONORABLE WILBUR ROY JACKETT

(*nommé le 4 mai 1964*)

JUGES PUÎNÉS

L'HONORABLE JACQUES DUMOULIN

(*nommé le 1er décembre 1955*)

L'HONORABLE ARTHUR LOUIS THURLOW

(*nommé le 29 août 1956*)

L'HONORABLE CAMILIEN NOËL

(*nommé le 12 mars 1962*)

L'HONORABLE ANGUS ALEXANDER CATTANACH

(*nommé le 27 mars 1962*)

L'HONORABLE HUGH FRANCIS GIBSON

(*nommé le 4 mai 1964*)

L'HONORABLE ALLISON ARTHUR MARIOTTI WALSH

(*nommé le 1er juillet 1964*)

L'HONORABLE RODERICK KERR

(*nommé le 1er novembre 1967*)

JUGES DE DISTRICT EN AMIRAUTÉ DE LA COUR DE L'ÉCHIQUIER DU CANADA

L'honorable VINCENT JOSEPH POTTIER, district d'amirauté de la Nouvelle-Écosse—nommé le 8 février 1950.

L'honorable ROBERT STAFFORD FURLONG, district d'amirauté de Terre-Neuve—nommé le 8 octobre 1959.

L'honorable DALTON COURTWRIGHT WELLS, district d'amirauté d'Ontario—nommé le 28 janvier 1960.

L'honorable GEORGE ERIC TRITSCHLER, district d'amirauté du Manitoba—nommé le 19 octobre 1962.

GORDON R. HOLMES, C.R., district d'amirauté de l'Île du Prince-Édouard—nommé le 24 mai 1963.

L'honorable HAROLD GEORGE PUDDESTER, district d'amirauté de Terre-Neuve—nommé le 4 juin 1963.

L'honorable JAMES DOUGLAS HIGGINS, district d'amirauté de Terre-Neuve—nommé le 28 mai 1964.

L'honorable LOUIS MCCOSKERY RITCHIE, district d'amirauté du Nouveau-Brunswick—nommé le 15 février 1968.

JUGES ADJOINTS EN AMIRAUTÉ DE LA COUR DE L'ÉCHIQUIER DU CANADA

Son honneur REGINALD D. KEIRSTEAD, district d'amirauté du Nouveau-Brunswick—nommé le 28 février 1957.

L'honorable CHARLES WILLIAM TYSOE, district d'amirauté de la Colombie-Britannique—nommé le 31 janvier 1963.

L'honorable YVES BERNIER, district d'amirauté de Québec—nommé le 17 novembre 1965.

L'honorable ANDRÉ DEMERS, district d'amirauté de Québec—nommé le 14 février 1967.

L'honorable GORDON S. COWAN, district d'amirauté de la Nouvelle-Écosse—nommé le 6 avril 1967.

L'honorable ARTHUR MIFFLIN, district d'amirauté de Terre-Neuve—nommé le 7 mars 1968.

JUGE SURROGÉ EN AMIRAUTÉ DE LA COUR DE L'ÉCHIQUIER DU CANADA

ALFRED S. MARRIOTT, C.R., district d'amirauté d'Ontario—nommé le 21 février 1957.

PROCUREUR GÉNÉRAL DU CANADA:
L'HONORABLE JOHN TURNER

SOLLICITEUR GÉNÉRAL DU CANADA:
L'HONORABLE G. J. MCILRAITH

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EN SA JURIDICTION DE COUR
DE PREMIÈRE INSTANCE

ET

EN SA JURIDICTION D'APPEL

91297—1

Québec
1967
21 mars
Ottawa
28 avril

ENTRE:

SA MAJESTÉ LA REINE .....DEMANDERESSE;

ET

MARCHÉ DE QUÉBEC INC. (maintenant SODOR INC.) } DÉFENDERESSE;

ET

GASTON BÉGIN .....DÉFENDEUR.

Loi sur les douanes, S.R.C. 1952, c. 58, arts. 181(2)(3), 203(1)(2)(3)—Tarif des douanes, S R.C. 1952, c. 60—Oléomargarine américaine—Interdiction d'importation—Défense—Ignorance de la loi—«Excuse légitime»—Question de droit—Règle 149 des Règles de la Cour de l'Échiquier du Canada.

Les défendeurs qui sont des négociants et distributeurs de produits alimentaires, ont été poursuivis pour avoir acheté et vendu de l'oléomargarine de fabrication américaine, illégalement importée au Canada. Entre autres moyens de défense, les défendeurs ont invoqué leur ignorance de la loi quant à l'interdiction d'importation de margarine américaine, tel facteur d'exonération étant consenti par la loi aux infracteurs présumés, soit «une excuse légitime dont la preuve incombe à l'accusé». Sur une motion de la demanderesse et non contestée par les défendeurs, la Cour ordonna qu'il soit procédé à l'audition et disposition, avant l'instruction, des questions suivantes, savoir:

(1) «L'information de la demanderesse démontre-t-elle une cause d'action contre les défendeurs?»

(2) «En présumant vrais les faits allégués dans le plaidoyer des défendeurs, ces faits constituent-ils une défense à l'action de la demanderesse?»

La Cour répondit affirmativement à ces deux questions.

Jugé: La loi n'ayant pas défini l'excuse légitime, il incombe donc au tribunal d'interpréter l'intention du législateur. Ici, au stade de la procédure, la Cour ne peut concevoir qu'une double éventualité de cette excuse: l'ignorance «honnête» de la loi et la déception qui attribuerait les qualités de produit canadien à de l'oléomargarine américaine, la loi entendant accorder ce moyen d'exonération aux clients de bonne foi qui se procurent ces comestibles dans le cours ordinaire et régulier de leur approvisionnement commercial ou de leurs achats domestiques.

Une «excuse légitime» est matière de sens commun, beaucoup plus que «l'excuse légale», celle-ci impliquant des limitations formelles et rigides [1]

Les faits allégués dans la défense sont suffisamment plausibles et ne sont pas dépourvus des éléments essentiels d'une «excuse légitime»; partant, leur exactitute, si une preuve l'établit, constituerait «une défense à l'action de la demanderesse».

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[1] Black's Law Dictionary, 4th Edition, 1951.

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INSCRIPTION en droit au sens de l'article 149 des *Règles et Ordonnances générales de la Cour de l'Échiquier du Canada.*

Paul Coderre pour la demanderesse.

Stanislas Germain, c. r. pour les défendeurs.

DUMOULIN J.:—Avant d'aborder l'étude objective de cet incident, il importe d'en déterminer la classe: une inscription en droit au sens de l'article 149 des *Règles et Ordonnances générales de la Cour de l'Échiquier du Canada,* règle citée dans sa rédaction anglaise, la traduction française étant à se parachever:

> Rule 149. No demurrer, as a separate pleading, shall be allowed, but any party shall be entitled to raise by his pleading any point of law; and any point so raised shall be disposed of by the Court at or after the trial; provided that by consent of the parties, or by order of the Court, on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

A la différence de la procédure civile appliquée dans la province de Québec, depuis le 1er septembre 1966, où l'inscription en droit a pour objet, advenant sa réception, d'éviter la production d'un plaidoyer au fond (voir les articles 159 et 165(4), nouveau Code), la règle 149 de notre Cour, on vient de le voir, fait découler d'une telle pièce de plaidoirie ou de pièces subséquentes l'irrecevabilité de la demande ou même de la défense.

Conformément à cette pratique le sous-Procureur général du Canada, le 9 mars 1967, fit signifier un avis de motion sollicitant une ordonnance de procéder avant l'instruction «à l'audition de la question de droit soulevée au paragraphe A de la Réponse de la demanderesse, Sa Majesté la Reine». Cette question de droit soumet que:

> A. Sans préjudice à sa réponse ci-après particularisée, la demanderesse dit, qu'en supposant même vrais les faits allégués au plaidoyer des défendeurs, abstraction faite de toute argumentation, ces faits ne peuvent donner ouverture aux conclusions dudit plaidoyer.

Un résumé de ces allégations suivra bientôt, car je crois opportun, à ce stade, de ne pas interrompre l'ordre des pièces introductives du débat.

Par entente préalable, apparemment, puisque le consentement des défendeurs, Gaston Bégin et Sodor Inc., porte

aussi la date du 9 mars, ces derniers ne s'opposent pas à la motion de la demanderesse, et

> ... aux fins de cette audition en droit seulement, les défendeurs—
>
> 1. Admettent tous les faits allégués dans l'information de la demanderesse, incluant la valeur de l'oléomargarine en question, *mais ils nient:*
>
> *a*) que c'est sans excuse légitime que les défendeurs ont eu en leur possession, gardé, caché, achèté et vendu l'oléomargarine dont il est fait mention au paragraphe deuxième de l'Information.
>
> . . .

Par ce motif d'une excuse légitime, les défendeurs dénient toute responsabilité en droit pour leur dérogation en faits aux prescriptions de la *Loi sur les douanes*, S.R.C. 1952, chapitres 58 et 60.

Sur le vu de ces procédures, la Cour, le 13 mars 1967, émit une Ordonnance dont voici le dispositif:

> IL EST ORDONNÉ qu'il sera procédé à l'audition de et disposé avant l'instruction des questions suivantes à savoir:
>
> 1) «L'information de la demanderesse démontre-t-elle une cause d'action contre les défendeurs?»
>
> (Cette question fut proposée d'office par la Cour.)
>
> 2) «En présumant vrais les faits allégués dans le plaidoyer des défendeurs, ces faits constituent-ils une défense à l'action de la demanderesse?»
>
> IL EST DE PLUS ORDONNÉ qu'advenant le maintien de l'action de la demanderesse sur cette audition en droit, cette Cour pourra tenir pour avérés tous les faits allégués dans l'information de la demanderesse, et rendre jugement en conséquence.

Quant aux actes matériels qui ont occasionné cette poursuite, ils n'offrent guère de complexité; non plus, du reste, que toute autre plainte du même ordre, pour introduction au pays d'effets ou articles prohibés, contrebande ou complicité dans la perpétration de ces offenses.

L'information allègue que:

> 2°. Durant la période de temps s'étendant entre le 1er janvier et le 1er novembre 1962, de l'oléomargarine de fabrication américaine d'une valeur de $17,544.60 a été achetée aux États-Unis d'Amérique et illégalement transportée au Canada, et de ce fait illégalement importée au Canada;
>
> 3°. L'importation de l'oléomargarine au Canada est prohibée suivant la liste «C», numéro 1204 du Tarif des douanes, S.R.C. (1952) chapitre 60;
>
> 4°. Durant la même période de temps, soit du 1er janvier au 1er novembre 1962, les défendeurs Gaston Bégin, qui agissait alors comme mandataire et agent de la défenderesse, le Marché de Québec Inc, (depuis remplacé par Sodor Inc.) et cette dernière, ont, sans

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excuse légitime, eu en leur possession, gardé, caché, acheté et vendu l'oléomargarine dont il est fait mention au paragraphe deuxième, et ce, contrairement aux dispositions de la *Loi sur les Douanes*; (S.R.C. 1952, ch. 58, articles 181(2) et (3) et 203(1)(2)(3).)

5° En conséquence des actes susmentionnés quant à l'oléomargarine illégalement importée au Canada, tel que susdit, les défendeurs, Gaston Bégin et le Marché de Québec Inc., (maintenant Sodor Inc.) sont devenus, cette oléomargarine n'ayant pas été découverte, passibles et sont tenus de remettre à Sa Majesté la Reine, conformément aux dispositions de la *Loi sur les douanes* la valeur de cette oléomargarine, soit la somme de $17,544 60.

Dans leur exposé de défense, de pas moins de 78 paragraphes, les deux défendeurs conviennent, sans réticence aucune, des faits matériels de la plainte intentée. Ils expliquent, cependant, qu'en leur qualité de distributeurs de produits alimentaires à Québec, ils achètent «. . .régulièrement des marchandises de fabrication étrangère en provenance tant des États-Unis que de Nouvelle-Zélande ou d'Australie. . .sans jamais songer à mettre en question la légalité ou la régularité de leur importation et (ont) naturellement présumé la bonne foi des fournisseurs et leur fidélité aux lois» (art. 38). Ils ajoutent à l'article suivant, (39), de façon un peu péremptoire, «qu'un négociant, non importateur, n'a pas à exiger d'aucun fournisseur de marchandise importée un document douanier ou autre faisant preuve de la légalité de l'importation et, dans la pratique, cela ne se fait pas».

Les défendeurs achetèrent cette oléomargarine de provenance américaine d'un certain Fernand Ouellette, qu'ils ne connaissaient pas antérieurement, et qui «s'est présenté à eux comme un fournisseur de produits alimentaires» (art. 59), normalement et sans se cacher (art. 43).

Aucun soupçon d'importation illégale n'effleura l'esprit des négociants incriminés, bien que l'origine américaine de cette oléomargarine ne leur fut pas inconnue (art. 45). «Les prix offerts (par le vendeur Ouellette) étaient normaux: légèrement supérieurs aux prix canadiens alors que les prix américains des marchandises sont en général moins élevés, ils impliquaient donc que des droits de douane avaient dû être ajoutés et réglés» est-il dit à l'article 46 de la défense. Enfin «aucun indice n'a pu induire (les défendeurs) à soupçonner que le vendeur, Fernand Ouellette, pouvait être un contrebandier et, aucun acheteur au détail de l'oléomargarine américaine n'a posé la moindre ques-

tion, marqué la moindre surprise susceptibles d'éveiller un doute sur la légalité de la possession ou de la vente du produit américain» lisons-nous aux articles 42 et 47.

Les transactions précitées continuèrent jusqu'au début de novembre 1962, alors que «la Gendarmerie Royale, au cours d'une entrevue avec le défendeur (Gaston Bégin) et ses associés, leur imputa le fait de détenir et de vendre de la margarine américaine» (art. 12). C'est ainsi «que le défendeur et ses associés (son père, Ernest Bégin, et son frère, Claude) apprirent l'existence d'une interdiction d'importation de cette marchandise, *interdiction qu'ils ignoraient totalement*» (art. 13. Toutes les italiques dans ces notes sont de moi.)

Afin d'isoler, à ce point de mon travail, les admissions de faits des excuses de droit maintes fois alléguées dans ce plaidoyer très précis, je ne ferai que mentionner les motifs qui, selon les défendeurs, les induisirent à se reconnaître coupables des offenses relatées dans une dénonciation déposée, le 21 juin 1963, à la Cour des Sessions de la Paix, à Québec, par le caporal Réal Cardinal de la Gendarmerie Royale.

Les défendeurs, admettant spontanément les actes de possession et de vente de la margarine prohibée, Réal Cardinal leur aurait alors déclaré qu'ils ne pourraient «échapper à une condamnation de ce chef». . . «mais que le maximum de la peine à encourir était une amende de $800» (arts. 20-21).

Sur la foi de ces assertions, il est expliqué à l'article 25 de l'exploit de défense que:

> 25°. L'affirmation du caporal Cardinal que l'affaire serait ainsi définitivement réglée et classée par le paiement d'un maximum de $800.00, jointe à la perspective que le défendeur se faisait des frais, pertes de temps et autres ennuis réels ou supposés, s'il faisait l'expérience d'une contestation judiciaire, le conduisit à se ranger aux incitations que lui faisait le caporal d'opter pour un plaidoyer de culpabilité.

Le dénouement de cet aveu, toutefois, dépassa, pécuniairement, les prévisions optimistes que le constable Cardinal aurait fait miroiter au sens pratique des inculpés qui, le 26 juin 1963, furent condamnés à une amende de $800 et aux frais «ce dont ils s'acquittèrent sur-le-champ» (art. 28), et, en outre, à la confiscation de deux véhicules automobiles dont le recouvrement entraîna un second déboursé de $800 (art. 30), double pénalité à laquelle vinrent s'ajouter la

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saisie et confiscation par la Sûreté provinciale de 17,000 livres d'oléomargarine colorée de fabrication canadienne (désignée sous la rubrique de «Spread»), à 22 sous la livre, soit une valeur de $3,540 (art. 31), et, de surcroît, le paiement par les messieurs Bégin des amendes de $200 chacune encourues, à la même occasion et pour mêmes causes, par deux de leurs employés, Jean-Claude Fortier et Jacques Coutellier (art. 33). Compte tenu de la confiscation du produit domestique, rendue possible par les perquisitions initiales de la Gendarmerie Royale, cette malencontreuse entreprise se solda par un passif global de $5,540.

Il convient, enfin, je pense, de consigner le certificat d'honorabilité commerciale, que se décernent, aux articles 6 et 7, ces négociants importants, mention que la demanderesse a simplement ignorée, comme n'étant pas pertinente au litige; je cite:

> 6°. Le Marché de Québec Inc. (maintenant Sodor Inc.) est une entreprise d'achat, de préparation et de vente de produits alimentaires, fondée en 1925 par monsieur Ernest Bégin, auquel se sont associés ses deux fils, à savoir Claude Bégin en 1949 et Gaston Bégin en 1952;
>
> 7°. Au cours de ses quarante ans d'existence, ni l'entreprise, ni aucun des trois associés, n'ont eu devant les Tribunaux le moindre démêlé se rapportant à leurs actes commerciaux et se sont appliqués fidèlement à observer toutes les lois et règlements affectant leur commerce.

Ce minutieux récit de l'affaire soumet d'autres particularités que l'on pourrait qualifier de connexes, étroitement reliées aux incidents tantôt mentionnés, et qui, suivant les défendeurs, dissiperaient les doutes sérieux que soulèveraient autrement certaines inscriptions aux livres et telles précautions insolites.

Voici ce dont il s'agit, selon le texte même de la défense, dont je crois sage de ne pas m'écarter afin d'éviter l'inexactitude toujours possible des résumés de faits, quelque soin que l'on ait de les relater fidèlement.

A l'article 14 du plaidoyer il est dit que les défendeurs n'ignoraient pas «la prohibition de vente de margarine colorée, plus habituellement désignée sous le nom de «Spread» », interdiction décrétée par l'autorité provinciale, et la seule exclusion dont ils eussent connaissance. Mais, ils se hâtent d'ajouter, à l'article 16, que:

> La loi à cet égard était alors et est encore très mollement appliquée contre les distributeurs, étant donnée la difficulté éprouvée par les autorités provinciales à empêcher la fabrication de margarine colorée, et surtout son importation des autres provinces, au point

que les inspecteurs du gouvernement provincial déclaraient ouvertement aux distributeurs de s'arranger tout simplement pour qu'ils ne la voient pas.

Cette affirmation de l'ignorance de la loi prohibitive permettrait, *a priori,* d'expliquer les précautions rapportées aux articles 17, 53 et 54 (ci-après reproduits), rendues nécessaires, apparemment, sinon même suggérées, par la tolérance avouée des inspecteurs provinciaux. Et, tout d'abord, à l'article 17 nous lisons ceci:

> 17°. Eu égard à cet état de fait, les défendeurs ne gardaient pas la margarine colorée en leurs magasins mais l'entreposaient dans un endroit privé;

Assez éloignés du précédent, les articles 53 et 54 s'efforcent corollairement de rendre un compte plausible de rubriques commerciales par ailleurs inexactes:

> 53°. Il est vrai que ledit produit apparaît désigné comme «*lard a*» mais voici l'explication de cette appellation;
>
> 54°. Vu la tolérance des autorités provinciales et pour permettre aux inspecteurs de fermer les yeux, il était de convenance que l'oléomargarine *colorée* fut appelée «lard» et en fait les factures de l'oléomargarine canadienne la désignaient comme «*lard c*» et les factures de l'oléomargarine américaine comme «*lard a*»;

Si l'on excepte ces appellations fictives, la comptabilité des défendeurs consignait «tous et chacun des achats et toutes et chacune des ventes dudit produit américain au prix réel et d'ailleurs normal»; les factures et registres afférents furent remis volontiers au constable Cardinal (arts. 27-50).

Ce récit des faits allégués, fastidieux peut-être, mais que j'ai cru utile à une meilleure compréhension du problème, me conduit au seuil de la question de droit.

L'information conclut à l'imposition de sanctions répressives prévues aux articles 181(2)(3) et 203(1)(2)(3) de la *Loi sur les douanes* (S.R.C. 1952, ch. 58) pour toute infraction à l'article 12 du *Tarif des douanes* (S.R.C. 1952, ch. 60) qui décrète la confiscation des effets introduits au Canada contrairement aux interdictions de la cédule «C», dont l'item 1204 mentionne l'oléomargarine.

Ce rappel me dispensera d'intercaler ces dispositions statutaires où les pénalités s'accumulent avec une rigueur inhabituelle et presque déconcertante, pour ne retenir, aux fins de l'inscription en droit, que le facteur d'exonération consenti aux infracteurs présumés, soit, «*une excuse légitime dont la preuve incombe à l'accusé*».

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En l'occurrence, «*l'excuse légitime*» invoquée avec réitération par les défendeurs, et plus spécifiquement aux articles 13 et 57, n'est autre que leur ignorance de la loi, comme il est redit au paragraphe 57:

> 57°. Il est également évident que le défendeur ignorait absolument l'interdiction d'importation de margarine des États-Unis;

Demandons-nous, comme première considération, si semblable excuse est admissible en dérogation au principe transcendant que l'ignorance de la loi ne saurait être un moyen de défense. La réponse est qu'une loi particulière peut toujours modifier, dans des cas spéciaux, la loi générale. Habituellement, une mesure d'exception ne souffre aucune ambiguïté; elle énonce sans équivoque son objet, ses conditions ou circonstances d'applicabilité. Ces indications faisant défaut ici, il faudra alors procéder par déduction, puisque le statut ne définit point les modalités de l'excuse légitime, uniquement valable dans les cas d'importation illégale et refusée en toute autre conjoncture, celle, par exemple, de la contrebande à l'article 190.

Selon la présomption de droit public, le législateur se propose, en légiférant, une fin réalisable; suivant l'expression populaire «il ne parle pas pour rien dire». Or, je ne puis concevoir, présentement, qu'une double éventualité d'excuse légitime: l'ignorance «honnête» de la loi, et la déception qui attribuerait la qualité de produit canadien à de l'oléomargarine américaine. Je ne saurais imaginer autre chose, sinon que la loi entend accorder ce moyen d'exonération aux clients de bonne foi qui se procurent ces comestibles dans le cours ordinaire et régulier de leur approvisionnement commerciale ou de leurs achats domestiques.

A n'en pas douter, les Bégin savaient que l'autorité provinciale interdisait la vente de l'oléomargarine colorée, dite «Spread», interdiction apparente plutôt que réelle, mais ils limitent à cela leur notion des règlements prohibitifs.

Dans la ligne, toujours, de l'inscription en droit, devrais-je tenir que, le règlement provincial leur étant connu, ils ne pouvaient ignorer la réglementation fédérale? Je n'oserais me ranger à cette conclusion. J'ajouterai qu'il ne semble pas exagéré de prétendre qu'une «excuse légitime» soit matière de sens commun, beaucoup plus que «l'excuse légale», celle-ci impliquant des limitations for-

melles et rigides. Cette opinion se réclame d'un excellent répertoire de terminologie légale, *Black's Law Dictionary*, au vocable «Lawful», où nous lisons que:

> ...Further, the word "lawful" more clearly implies an ethical content than does "legal". The latter goes no further than to denote compliance with positive, technical or formal rules; while the former usually imports a moral substance of ethical permissibility.

Une fois encore, il ne s'agit point, pour le moment d'élucider les soumissions de faits des défendeurs à la lumière de la preuve que l'audition subséquente de la cause pourra rapporter; nous n'en sommes pas à cette phase ultérieure du litige. Je ne dois que répondre aux deux questions posées par l'ordonnance de Cour du 13 mars écoulé; l'affirmative pour la première ne souffrant aucun doute, je passe à la seconde ainsi libellée:

> 2. *En présumant vrais les faits allégués dans le plaidoyer des défendeurs,* ces faits constituent-ils une défense à l'action de la demanderesse?

Ces allégations, que je dois tenir pour véridiques, me paraissent suffisamment plausibles et ne sont pas dépourvues des éléments essentiels d'une «excuse légitime», selon mon interprétation de l'intention de la loi à ce sujet partant, leur exactitude, si une preuve l'établit, constituerait «une défense à l'action de la demanderesse».

Dans ces conditions, je n'ai pas à me prononcer sur ce que l'abstention par un tribunal «de juridiction compétente», en l'espèce la Cour des Sessions de la Paix, de condamner les accusés «*en sus de toute autre amende à verser une somme égale à la valeur de ces effets*» (la margarine américaine vendue avant les perquisitions) ne m'enlèverait pas ma compétence à l'imposer.

Quant à la «valeur des effets» (ici fixée à $17,544.60), la lecture comparée des articles 181(2) et 203(1) et (2) semblerait autoriser l'exorbitante possibilité d'une triple imposition. S'il en était ainsi, une telle frénésie de voracité punitive exigerait un correctif approprié.

Vu l'aveu par les défendeurs des faits allégués dans l'information, et l'admissibilité, *a priori,* de leur plaidoyer d'excuse légitime, je réponds affirmativement aux deux questions de l'ordonnance du 13 mars 1967.

La demanderesse devra payer aux défendeurs tous les frais encourus sur cette contestation incidente.

Québec
1967
8, 9, 10, 11 août et 12 & 13 sept.
Ottawa
3 novembre

ENTRE:

NORTH SHIPPING AND TRANSPORTATION LIMITED ..... } DEMANDERESSE;

ET

LE CONSEIL DES PORTS NATIONAUX ..... } DÉFENDEUR.

Couronne—Hivernement de navire—Conseil des Ports nationaux—Agent de la Couronne—Autorisation d'ester en justice—Action nulle par défaut de forme—Prescription de l'action—Pouvoir de la Cour d'amender la procédure—Loi sur le Conseil des Ports nationaux, S.R.C. 1952, c. 187, articles 3(2), 3(3)—Loi sur la Responsabilité de la Couronne en matières d'actes préjudiciables et de sauvetage civil, 1-2 Elizabeth II, c. 30, articles 3(1)(a), 4(2), 7(1), 10(2) et 23—Loi concernant la Cour de l'Échiquier du Canada, S.R.C. 1952, c. 98, article 36(1)—Règle 119 de la Cour—Code civil, articles 2226, 2261.

La demanderesse, propriétaire de deux navires, réclame du défendeur certains dommages subis par un de ses navires au cours de l'hiver et du printemps 1962-63, lors de son hivernement dans le port de Québec, dommages qui auraient été causés par la pression des marées sur ce navire contre une excroissance de glace et de neige faisant saillie le long d'un quai. A cette action, le défendeur a opposé deux défenses:

(1) quant aux faits, la persistance de la demanderesse à hiverner ses navires le long du quai en question, nonobstant l'avertissement du maître du port de Québec du danger de ce faire à l'endroit susdit et malgré la suggestion de celui-ci de les placer ailleurs, et que tel hivernement à cet endroit comportait, à la connaissance de la demanderesse, des risques;

(2) comme moyens de droit, l'incompétence de la Cour d'instruire la cause telle que libellée et la prescription de l'action.

Assumant qu'elle était légalement saisie de la réclamation et que l'action n'en était pas prescrite, la Cour procéda à entendre la cause sur le mérite et conclua, sur les faits apportés en preuve, que la demanderesse n'avait pas établi le principal grief allégué à l'appui de sa réclamation, savoir, celui d'avoir déversé ou soufflé de la neige entre son navire et le quai.

Jugé: Bien que l'article 3(3) de la *Loi sur le Conseil des Ports nationaux*, S.R.C. 1952, c. 187, autorise celui-ci à ester en justice, cette disposition ne peut cependant écarter l'article 7(1) de la *Loi sur la Responsabilité de la Couronne*, 1-2 Elizabeth II, c. 30, qui assigne à cette Cour «une juridiction exclusive de première instance pour entendre et décider toute réclamation en dommages-intérêts», telle réclamation devant, en tout temps, être exercée contre la Couronne par la Pétition de Droit. *National Harbours Board v. Workmen's Compensation Commission, pp.* 389 *et seq.* [1937] B.R. 388; *MacKenzie-Kennedy v. Air Council* [1927] 2 K.B. 517.

Même si la procédure adoptée ici ne fut pas la bonne, la Cour, d'elle-même (Règle 119) aurait pu permettre un amendement susceptible de

corriger l'informalité et, de la sorte, saisir la Cour de la réclamation comme si celle-ci avait été instituée par la procédure requise. *Hunt et al v. The Queen* [1967] 1 R.C. de l'É. 101, p. 102.

La prescription que l'article 2261 C.C. fixe à deux ans pour dommages résultant d'un délit ou quasi-délit, aurait été interrompue du fait que les dommages ont été produits d'une façon progressive—du mois de février 1963 au 24 mars 1964—alors que l'action fut instituée le 17 mars 1965, soit moins de deux ans après le dernier bris subi par le navire, mais plus de deux ans après le commencement des dommages. (*cf. Gingras v. Cité de Québec* [1948] B.R. 171).

Du fait que la demanderesse n'a allégué qu'un seul chef de faute contre le défendeur (d'avoir déversé ou soufflé de la neige entre son navire et le quai) elle ne peut se réclamer que de la *Loi sur la Responsabilité de la Couronne*, 1-2 Elizabeth II, c. 30, article 3(1)(*a*) conditionné par l'article 4(2). Bien que ce dernier article exige que l'acte ou l'omission d'un ou des préposés ait, indépendamment du Statut, donné un recours délictueux ou quasi-délictueux contre ce ou ces préposés, il n'est pas nécessaire, cependant, qu'on puisse identifier ces préposés fautifs pourvu que le rapport entre l'acte dommageable et les attributions du préposé de l'État soit si étroit que la faute ne puisse être considérée comme détachable de la fonction. (*cf. Levy Brothers v. The Queen* (Thurlow J.) [1960] R.C. de l'É. 61, confirmé par la Cour Suprême [1961] R.C.S. 189).

La demanderesse devait, cependant, établir que l'acte ou l'omission commis par les préposés de la Couronne «eût entraîné une cause d'action, *in tort*» contre ce ou ces préposés.

ACTION en recouvrement de dommages-intérêts.

Raynold Langlois pour la demanderesse.

Paul M. Ollivier, c.r. et *Gaspard Côté* pour le défendeur.

NOËL J.:—La demanderesse, propriétaire du navire *Ste-Foy,* enregistré au port de Québec sous le numéro matricule 313956, réclame du Conseil des ports nationaux des dommages au montant de $24,413.01 subis par son navire au cours de l'hiver et du printemps de l'année 1962-63 pendant son hivernement dans le port de Québec.

Ces dommages, d'après la demanderesse, furent causés lorsque son navire, pressuré sous l'action de la marée montante et descendante, contre une excroissance de glace et de neige qui faisait saillie le long du quai, enfonça ses plaques d'acier situées de son côté tribord, permettant ainsi à l'eau de s'infiltrer dans sa coque, endommagea son côté bâbord en donnant de la bande contre son autre navire le *D'Vora* qui mouillait à côté et brisa son hélice.

La demanderesse déclare que le ou vers le 10 décembre 1962, elle réclama du défendeur, conformément aux articles 57 et 60 (1) du règlement A-1 (P.C. 1954-1981) du Conseil

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des ports nationaux, un endroit pour l'hivernement de ses navires le *Ste-Foy* et le *D'Vora*. Elle allègue que le défendeur l'informa alors que le seul endroit disponible dans le port de Québec pour l'hivernement de ses navires était un bassin situé à l'ouest du quai de la Pointe à Carcy connu sous le nom de «Customs Pond» ajoutant que le défendeur lui donna instructions d'y hiverner ses deux navires. Conformément à ces instructions, dit-elle, elle amarra le côté tribord du *Ste-Foy* au côté du bassin des Douanes comme suit: un raban et une amarre arrière furent attachés au quai est du bassin; une amarre bâbord traversait l'embouchure du bassin au quai est dudit bassin et un raban bâbord au quai nord. Elle amarra également son autre navire le *D'Vora* par son côté bâbord le long du *Ste-Foy* comme suit: une amarre avant par le travers au *Ste-Foy* et une amarre arrière par le travers au *Ste-Foy*.

Elle soutient que pendant les mois de janvier et février 1963, le quai est du «Customs Pond» fut nettoyé plusieurs fois par le défendeur ou ses agents ou préposés, au moyen de souffleuse à neige et de grattes; que malgré les avertissements du gardien en fonction sur le *Ste-Foy*, on souffla ou déversa de la neige entre le *Ste-Foy* et le quai, laquelle neige avec la marée montante et descendante et le froid, forma une projection de glace qui fit en sorte qu'une pression s'exerça sur le côté tribord de la coque du navire *Ste-Foy* chaque fois qu'elle montait et descendait avec la marée. Elle ajoute que le ou vers le 28 février 1963, voyant que le *Ste-Foy* donnait de la bande à bâbord et était accoté solidement contre l'excroissance de glace sur le côté du quai, elle requit les services d'un brise-glace afin de libérer ses navires dans le bassin du «Customs Pond» mais cette tentative n'eut aucun succès. Elle déclare ensuite qu'elle notifia le défendeur de ces faits immédiatement.

Elle allègue enfin que ses deux navires furent finalement libérés vers le 30 mars 1963 et la coque de son navire le *Ste-Foy* était endommagée, tel qu'il appert d'un rapport en date du 15 juillet 1963 par Hayes, Stuart & Co. Limited, évaluateurs pour le compte des assurances. On y fit des réparations temporaires pour permettre au navire *Ste-Foy* de se rendre à Sorel afin de l'entrer au chantier naval et le réparer. Les réparations au navire furent terminées à la satisfaction des parties le 13 avril 1963, date à laquelle il partit pour Montréal.

La demanderesse soutient que les dommages à son navire furent causés exclusivement par la négligence et la conduite imprudente et téméraire du défendeur et de ses agents et préposés agissant dans l'exécution de leurs fonctions.

Elle allègue de plus qu'elle a, conformément à l'article 10, sous-paragraphe (1) de la *Loi sur la responsabilité de la Couronne en matière d'actes préjudiciables et de sauvetage civil* (1-2 Elizabeth II, chapitre 30) transmis un avis de 90 jours de la présente réclamation au défendeur.

Conformément à l'article 147 des règlements de cette Cour, la demanderesse somma le défendeur d'admettre certains faits et les faits suivants furent admis:

FACTS ADMITTED

1. The Plaintiff was at material times a duly incorporated company having its Head Office at 2308 Mont Royal Avenue, Ste Foy, Quebec.

2. Plaintiff, at material times, was the owner of the Motor Vessel "Ste Foy", registered at the Port of Quebec under official number 313956, and of the Motor Vessel "D'Vora", registered at the Port of Halifax under official number 186392.

3. On/or about December 10, 1962, the Plaintiff requested from the Defendant a wintering berth in the Harbour of Quebec to lay up the Motor Vessels "Ste Foy", and "D'Vora" for the Winter, the whole in accordance with sections 57 and 60, paragraph 1 of National Harbours Board By-Law A-1 P.C. 1954-1981.

4. The Motor Vessel "Ste Foy" was tied up to the eastern side of the Customs Pond.

5. The Motor Vessel "D'Vora" was tied up alongside, starboard side to the Motor Vessel "Ste Foy".

Le défendeur d'autre part soulève plusieurs moyens de droit et de fait. Il prétend d'abord que cette Cour n'a pas juridiction pour entendre cette cause telle que libellée et qu'à tout événement, l'action est prescrite. Quant aux faits, il soutient que lorsque la demanderesse demanda la permission d'hiverner ses navires dans le bassin du «Customs Pond», elle fut avertie par le maître du port du temps, soit le capitaine Fraser, que ce bassin n'était pas un endroit sûr pour y hiverner un navire à cause des conditions de glace qui y prévalaient et le capitaine Fraser suggéra de placer ses navires soit dans le bassin intérieur soit extérieur où il y avait suffisamment de place pour les loger. Il allègue que malgré cet avertissement, la demanderesse persista à vouloir hiverner ses navires dans le bassin du «Customs Pond» bien qu'elle fut avisée qu'elle le faisait à

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ses risques et périls. Il ajoute que durant l'hiver 1962-63, en aucun moment ses agents ou préposés ont soufflé ou déversé de la neige entre le *Ste-Foy* et le quai auquel était amarré le *Ste-Foy*.

La seule fois, dit-il, où de la neige fut soufflée fut le 22 février 1963 et à cette occasion elle le fut au bout du quai au-delà de l'arrière des navires de la demanderesse.

Il allègue que si le navire *Ste-Foy* fut endommagé tel qu'allégué, ce qu'il nie, ces dommages ne furent aucunement causés par la faute du défendeur ou ses agents ou préposés mais bien par la propre négligence ou faute de la demanderesse elle-même ou ses préposés ou agents en ce que entre autres:

a) elle ne maintint pas un gardien compétent sur son navire tel que requis par le règlement A-1 (P.C. 1954-1981);

b) le navire n'était pas bien amarré et les lignes d'attache étaient défectueuses;

c) de plus, ces lignes d'amarre ne furent pas bien entretenues par les agents ou préposés de la demanderesse;

d) elle ne prit pas les soins voulus pour empêcher le navire de prendre de la bande ni n'y a-t-elle remédié quand cette bande devint apparente.

Le défendeur soumet de plus que si le navire fut endommagé, ces dommages furent causés par les glaces amenées par le jeu des marées et que de toute façon ils sont grandement exagérés.

Avant d'entreprendre l'analyse des faits révélés par une longue enquête, je voudrais traiter de l'objection soulevée par les procureurs du défendeur à l'effet que cette Cour n'a pas juridiction pour entendre cette cause telle que libellée, l'action étant prise par le moyen d'une simple déclaration et à l'encontre du Conseil des ports nationaux, au lieu de l'avoir été par une pétition de droit prise contre Sa Majesté la Reine tel que le veut l'article 36(1) de la *Loi sur la Cour de l'Échiquier*, S.R.C. 1952, chapitre 98.

Il est d'abord sûr que le Conseil des ports nationaux est un agent de la Couronne et l'article 3(2) du chapitre 187 des Statuts Revisés du Canada 1952 le dit expressément

lorsqu'il déclare qu'il «est un corps constitué et politique, et, pour toutes les fins de la présente loi, il est et est censé être le mandataire de Sa Majesté du chef du Canada».

Le procureur de la demanderesse soutient cependant que l'article 3(3) (qui déclare que «Le Conseil est habile à passer des contrats ainsi qu'à ester en justice en son propre nom» (to sue and be sued in the name of the Board)) ainsi que l'article 10(2) de la *Loi sur la responsabilité de la Couronne (supra)* (qui déclare que les procédures y prévues «peuvent être intentées au nom du procureur général du Canada ou, dans le cas d'un organisme de la Couronne contre lequel une loi du Parlement autorise à engager des procédures au nom de l'organisme, peuvent être intentées au nom dudit organisme») le justifient d'avoir intenté ses procédures comme il l'a fait.

Je dois faire remarquer que l'article 10 précité de la *Loi sur la responsabilité de la Couronne* ne s'applique qu'aux procédures qui peuvent être prises contre la Couronne, ou contre un organisme de la Couronne, devant les cours provinciales et se limitent ici à une réclamation pour une somme d'au plus mille dollars, ce qui n'est pas le cas présentement. L'article 23 de la *Loi sur la responsabilité de la Couronne* permet cependant aussi la poursuite devant les tribunaux provinciaux d'une agence de la Couronne en son nom, quel que soit le montant réclamé, dans toute cause d'action relevant de l'article 3 de cette loi à condition qu'une loi du Parlement le permette. Dans un tel cas, cependant, l'agent de la Couronne n'est pas l'employeur de ses employés, mais ces derniers sont des employés de la Couronne et ils ne peuvent engager la responsabilité de l'agent dans tous les cas où il s'agit d'une responsabilité pour faute d'autrui (vicarious) comme celle du maître ou employeur pour ses employés à moins, évidemment, que la loi constitutive de l'agent en fasse ses propres employés.

Il est cependant clair que malgré l'article 3(3) de la *Loi sur le Conseil des ports nationaux* qui dit qu'il peut être poursuivi ou qu'il peut poursuivre en son nom, cet article ne peut mettre de côté l'article 7(1) de la *Loi sur la responsabilité de la Couronne* qui donne à la Cour de l'Échiquier du Canada «une juridiction exclusive de première instance pour entendre et décider toute réclamation de dommages-intérêts» sous le régime de la présente loi et,

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dois-je ajouter, qui doit toujours être exercée contre la Couronne et par une pétition de droit. (Voir *National Harbours Board v. Workmen's Compensation Commission*[1] aux pages 389 *et seq.* ainsi que *MacKenzie-Kennedy v. Air Council*[2].

Il semble que la demanderesse n'ait pas pris les procédures requises pour réclamer ses droits et l'on peut se demander si, dans un cas comme celui-ci où cette Cour aurait juridiction pour entendre la réclamation si elle avait été poursuivie par le bon moyen et contre la Couronne, un amendement pourrait corriger ces informalités.

Je serais porté à accepter la solution adoptée par le Président de cette Cour dans *Hunt et al v. The Queen*[3] lorsqu'il dit à la page 102:

> I doubt whether a Petition of Right is the appropriate procedure to raise that question for determination, but, as I have no doubt that the Court has jurisdiction to determine that question and as the parties were agreed that the Court should determine that question in these proceedings, I propose to determine the question as though it had been raised by whatever procedure would have been appropriate

J'aurais en effet volontiers adopté cette solution si une question de prescription de l'action ne s'était présentée dans cette cause. L'article 2226 du *Code civil* dit bien, en effet, que: «Si l'assignation de la procédure est nulle par défaut de forme; ... Il n'y a pas d'interruption» de la prescription. L'on pourrait par conséquent se demander (si cette règle du *Code civil* s'appliquait devant cette Cour) si par un amendement à l'action à ce stage, la demanderesse pourrait faire revivre un droit qui est maintenant éteint par prescription et dont l'action, telle que prise, nulle par défaut de forme, n'a pu interrompre.

Il ne m'est pas nécessaire, cependant, de trancher cette question ni d'ailleurs de déterminer si la présente poursuite est prescrite, bien qu'à ce sujet j'aurais cru (non pas cependant sans une certaine hésitation, étant donné la déclaration du capitaine Duval à l'effet qu'à la fin de février 1963 son navire était sérieusement endommagé) qu'elle ne l'était pas au moment de la prise de cette action, étant donné les circonstances dans lesquelles les dommages sont surve-

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[1](1937) 63 B.R. 388.
[2][1927] 2 K.B. 517.
[3][1967] 1 R.C. de l'É. 101.

nus. Ces dommages au navire de la demanderesse ont été, en effet, produits d'une façon progressive à partir du mois de février 1963 jusqu'au 24 mars 1964 quand ils devinrent tels que l'eau s'infiltrait dans la cale. L'action fut prise le 17 mars 1965, soit moins de deux ans (l'action pour dommages résultant de délits et quasi-délits se prescrivant par deux ans en vertu de l'article 2261 C.C.) après le dernier bris subi par le navire, mais plus de deux ans après le commencement des dommages. (Voir *Gingras v. Cité de Québec*[4]).

Il ne m'est pas nécessaire d'apporter une solution à ces moyens de défense parce que je crois que cette cause peut être déterminée sur son seul mérite si, à cette fin, j'assume que cette Cour en est légalement saisie et que l'action n'en est pas prescrite.

S'il fallait s'en tenir aux allégués de la demande, l'on pourrait croire que le défendeur donna tout simplement ordre à la demanderesse de placer ses navires à la pointe à Carcy, qu'elle paya le montant prévu par les règlements du Conseil des ports nationaux pour y placer ses navires pendant l'hiver et que pendant cette période, les préposés ou agents du défendeur soufflèrent ou jetèrent de la neige entre le quai et son navire et causèrent ainsi les dommages réclamés.

La réalité, cependant, est bien autre et pour bien apprécier la façon que les dommages ont été occasionnés, il faut d'abord remonter au début des arrangements, soit au mois de décembre 1962, quand le capitaine Duval, propriétaire ou principal actionnaire de la demanderesse, demanda au maître du port, le capitaine Aurèle Fraser, de loger ses navires dans le port de Québec.

> (Ici le savant juge fait une revue de la preuve et continue).

La demanderesse dans ses procédures, n'allègue qu'un seul chef de faute contre le défendeur, soit celui d'avoir déversé ou soufflé de la neige entre son navire et le quai et bien que son procureur ait soulevé verbalement d'autres griefs dans son plaidoyer oral, c'est sur l'allégué tel que précisé dans les procédures écrites que cette cause doit se

[4] [1948] B.R. 171.

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décider. Il déclara en effet que, en plus du grief reproché au défendeur d'avoir déversé de la neige entre le navire et le quai, son maître de port, le capitaine Fraser, aurait été fautif et négligent en omettant d'avertir le capitaine Duval des dangers qu'il pouvait y avoir d'hiverner un navire à la Pointe à Carcy et aussi d'être resté inactif tout «en regardant le drame se dérouler».

Notons tout d'abord que, étant donné le libellé de ses procédures, le seul article de la *Loi sur la responsabilité de la Couronne,* 1-2 Elizabeth II, chapitre 30, dont peut se réclamer la demanderesse serait l'article 3(1) (*a*) qui se lit comme suit:

> 3. (1) La Couronne est responsable *in tort* des dommages dont elle serait responsable si elle était un particulier en état de majorité et capacité,
>
> *a*) à l'égard d'un acte préjudiciable commis par un préposé de la Couronne,

Le sous-paragraphe *b*) de cet article se lit comme suit:

> *b*) à l'égard d'un manquement au devoir afférent à la propriété, l'occupation, la possession ou le contrôle de biens.

Elle ne peut, cependant, se réclamer de ce sous-paragraphe *b*) car elle n'a allégué aucun chef de faute contre le défendeur comme propriétaire ou occupant du quai et du bassin.

Quant à l'article 3(1)(*a*) il est conditionné par l'article 4(2) de la même loi qui déclare que:

> 4. ...
>
> (2) Il ne peut être ouvert de procédures contre la Couronne, en vertu de l'alinéa *a*) du paragraphe (1) de l'article 3, relativement à quelque acte ou omission d'un préposé de la Couronne, à moins que l'acte ou omission, indépendamment des dispositions de la présente loi, n'eût entraîné une cause d'action *in tort* contre le préposé en question ou son représentant personnel.

Bien que cet article exige que l'acte ou l'omission d'un ou des préposés ait, indépendamment du Statut, donné un recours délictueux ou quasi-délictueux contre ce ou ces préposés, il n'est pas nécessaire, cependant, qu'on puisse identifier ces préposés fautifs pourvu que le rapport entre l'acte dommageable et les attributions du préposé de l'État soit si étroit que la faute ne puisse être considérée comme détachable de la fonction. Cette règle fut adoptée dans un cas de vol attribué à un employé non identifié du ministère

des Douanes d'un colis contenant des diamants. (*cf. Levy Brothers v. The Queen*[4] (Thurlow J.) confirmé par la Cour suprême[5].)

Il faut quand même, cependant, que l'acte ou l'omission commis par les préposés de la Couronne «eût entraîné une cause d'action, *in tort*» contre ce ou ces préposés et il appartenait à la demanderesse de se conformer à cette exigence.

Avant d'entrer dans l'examen de la preuve dans cette cause et de choisir entre les deux versions de faits qu'on y a présentés, je me dois, je crois, de souligner ici un certain état de faits dont je dois tenir compte dans la décision que j'ai à rendre.

> (Ici le savant juge fait une revue de la preuve et continue).

En face d'une telle situation, on peut se demander en quoi le défendeur peut être responsable des dommages subis par le navire de la demanderesse qu'elle a consenti à laisser à cet endroit tout l'hiver bien qu'elle avait été avertie par le maître du port que ce n'était pas un endroit pour y hiverner et lorsque le capitaine Duval, le propriétaire de la demanderesse, savait, ou aurait dû savoir, qu'il ne pouvait y laisser hiverner ses bateaux sans risque de dommage.

La responsabilité du défendeur, dans ces circonstances, ne pourrait être engagée que si le navire de la demanderesse ayant été placé à une distance suffisante du quai de la Pointe à Carcy pour ne pas être endommagé par l'effet des marées, la pression des glaces du bassin et la croissance des glaces le long du quai, les préposés du défendeur avaient créé, par la neige qu'ils auraient jetée ou soufflée entre le quai et le navire ou sur l'excroissance de glace que l'on trouve le long de tous les quais l'hiver, un état de chose anormal qui aurait causé les dommages réclamés. C'est ce que prétendent la demanderesse et le capitaine Duval et c'est ce qu'elle a tenté de prouver dans cette cause.

> (Ici le savant juge fait une revue de la preuve et continue).

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[5] [1961] R.C. de l'É 61 [6] [1961] R.C.S. 189.

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Il semble donc, suivant la preuve, que s'il y a eu de la neige qui a déboulé en bas du quai, ce ne pouvait être que pendant le déblayage du chemin qui se rendait à la passerelle et qui n'était pas assez large pour permettre à un camion de tourner; ce chemin, d'ailleurs fut ouvert pour le bénéfice de Duval et son équipage.

Les versions, tant de la demande que de la défense, quant à la neige qui serait tombée entre le navire et le quai sont contradictoires et la preuve à ce sujet est loin d'être convaincante.

Il m'est impossible, de cette preuve, de conclure que le peu de neige qui soit tombé ait pu affecter les dimensions de l'excroissance de glace le long du quai au point de causer les dommages subis par le navire de la demanderesse.

> (Ici le savant juge fait une revue de la preuve et continue).

Il me semble que les dommages subis par le navire de la demanderesse soient dus au seul fait que le capitaine Duval, propriétaire de la demanderesse, décida d'hiverner ses bateaux dans un bassin extérieur qui n'était pas destiné à cette fin; ayant ainsi pris sur lui d'y rester avec ses navires, il aurait fallu qu'il les place à une distance plus éloignée du quai 22 qu'il ne l'a fait pour se protéger de la pression des glaces à la marée baissante et qu'il les garde à cette distance pendant toute la durée de l'hiver. Marin et navigateur d'expérience, il devait savoir que placer son navire à une distance de six pieds du quai 22 n'était pas suffisant. Fraser, en effet, nous dit qu'un bateau ne s'hiverne pas le long d'un quai à une distance moindre que 20 à 30 pieds, et dans le bassin intérieur, à moins de 100 pieds et Duval, ayant été le maître du port pendant huit ans, devait connaître ces exigences. D'ailleurs si Duval ne connaissait pas les conditions du port, il me semble que la prudence la plus élémentaire exigeait qu'il s'en informe auprès des autorités du port, ce qu'il ne fit pas.

Enfin, la demanderesse, en plaçant son navire dans le port de Québec le faisait à ses risques puisque l'article 7 (de C.P. 1960-271) de la *Loi sur le Conseil des ports nationaux,* qui traite de la responsabilité de ce Conseil en cas de perte, d'avarie ou de destruction, déclare que:

> ...tout navire à l'amarrage ou au mouillage dans un port l'est aux seuls risques de son propriétaire.

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Elle a cependant pris aussi le risque de placer ses navires dans le bassin de la Pointe à Carcy et de les y garder pendant tout l'hiver, quand ils y avaient été placés que pour quelques semaines. Elle peut, dans ces circonstances, difficilement se plaindre des dommages que ses navires y ont subis. Au surplus, n'ayant pu établir que la neige déversée ou soufflée entre son navire et le quai par les préposés du défendeur ait causé ses dommages, il m'est impossible d'accueillir cette action.

Elle est, par conséquent, rejetée avec dépens.

Regina
1968

Apr. 23-25

Ottawa

Aug. 1

BETWEEN:

WILBOUR LEE CRADDOCK .....APPELLANT;

AND

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

AND BETWEEN:

STANLEY CURTIS ATKINSON .....APPELLANT;

AND

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

Income Tax—Federal—Income Tax Act, R.S.C. 1952, c. 148, 137(2)—"Dividend stripping"—"Surplus stripping"—Indirect payments or transfers—Whether taxable benefit conferred on shareholders in series of transactions including sale of their shares with payment therefor being made by the new shareholders with funds withdrawn from the company as liquidating dividends—Whether any legitimate business purpose.

The appellants were shareholders of a Saskatchewan corporation which had undistributed income of $101,448.61. By a series of transactions which took place on May 2, 1963, at Regina, an equivalent sum was paid to the appellants but not directly by the said corporation. This corporation was then wound-up. In the same series of transactions, all the business assets of this corporation were transferred to a newly incorporated corporation which carried on the business and which was under the same management and control as obtained in the corporation which was wound-up

The appellants were re-assessed for income tax purposes on the basis that this constituted a so-called "Dividend Stripping" or a "Surplus Stripping" transaction of the corporation which was wound-up and from that it then resulted a benefit being conferred on the appellants within the meaning of section 137(2) of the *Income Tax Act*.

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Held: That a benefit was conferred on the appellants in 1963 within the meaning of section 137(2) of the *Income Tax Act* and that such benefit was taxable as income under Part I of the *Act;* and that such benefit was equal to the undistributed income of the company which was wound-up namely, $101,448 61 minus the fees paid to the tax advisers employed in the series of transactions, namely, $2,000.00, and minus the share capital, namely, $200.00, or $99,448.61 in all, of which $69,614 03 was conferred on the appellant Craddock and $29,834.58 on the appellant Atkinson.

That the appeals be dismissed with costs.

APPEAL from assessments of the Minister of National Revenue.

Allan D. McEachern and *John G. Smith* for appellant.

W. B. Williston, Q.C., A. D. Givens, Q.C., and *G. W. Ainslie* for respondent.

GIBSON J.:—The appellants appeal from income tax reassessments for the taxation year 1963. The subject matter is a so-called "dividend stripping" or "surplus stripping" transaction of Allied Heating Supply Ltd., (a company incorporated under the laws of the Province of Saskatchewan). The respondent alleges such "stripping" took place on May 2, 1963, at Regina; and that the *quantum* of undistributed surplus involved was $101,448.61.

Prior to May 2, 1963, the appellants held all of the common shares except two in Allied Heating Supply Limited, which had the said undistributed surplus of $101,448.61. During the early months of 1963, they consulted Mr. Melville Neuman, a lawyer practising in Regina, and an accountant Mr. E. N. Forbes of Clarkson, Gordon & Co., Regina, and employed them to cause this company to distribute its surplus to them without paying income tax.

Mr. Neuman conceived the plan which was finally adopted and he and Mr. Forbes acted as agents for the appellants and the said company in implementing the plan.

The appellant W. L. Craddock also had a subsidiary reason for retaining Mr. Neuman and have him do some of the things he did in this case, and that was to cause certain corporate action to be taken to enable his son and son-in-law each to purchase a greater equity interest in the business carried on through this company. But this matter is of no significance in the adjudication of these appeals.

Pursuant to the plan finally adopted, (a) certain preliminary steps were taken prior to May 2, 1963, and (b) certain steps were taken on May 2, 1963, that is to say:

Steps taken prior to May 2, 1963

1. Early in 1963, the appellant Atkinson (who was going then to Europe for an extended holiday) transferred his shares in Allied Heating Supply Ltd., to his solicitor Robert M. Barr in trust who thereafter held the same for him and acted on his behalf.
2. On April 19, 1963, the appellants caused to be incorporated Allied Heating Supply (1963) Ltd., (herein sometimes called the "new company"), the share ownership of which was substantially the same as that of Allied Heating Supply Ltd. (herein sometimes called the "old company").
3. The preference shares of the old company were redeemed.
4. On April 19, 1963, also, the old company's common shares were split into Class A (voting) and Class B (non-voting), with proportionate ownership unchanged.
5. On April 22, 1963, 19,800 Class B shares of the old company were issued to the holders of the Class A shares in their same respective proportions, namely 13,800 to the appellant Craddock and 5,940 to the appellant Atkinson (per his attorney Barr), such that the issued shares each owned were in substantially the same proportions as before April 1963, except that the shares had been split 100 for 1 and into voting and non-voting classes.
6. On April 22, 1963, also, the old company entered into an agreement with the new company whereby the latter agreed to buy the net assets and undertaking of the former, computed as at April 15, 1963. This price, to be payable in cash when later determined, was established April 30, 1963 by agreement at $101,448.61.

Steps taken on May 22, 1963

1. The new company, even though it had no assets of any substance, in exchange for the former operating assets of the old company, presented to the old company a cheque for $101,448.61, purporting to be in payment for these assets of the old company.

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2. The appellant Craddock and Robert M. Barr transferred their Class A voting shares of the old company to Robert McColl and James Balfour, and their Class B non-voting shares in equal proportions to Kilkenny Enterprises Ltd. and Donegal Enterprises Ltd.

3. The old company distributed its assets (it having discontinued business at April 15, 1963) by way of liquidating dividends, which (after payment of $1,000 fees to Clarkson, Gordon & Co. (auditors) and $1,000 to Neuman, Pierce & Co. (Solicitors)) amounted to $99,448.61.

4. McColl, Balfour, Kilkenny and Donegal aforesaid presented cheques to the appellant Craddock and to Robert M. Barr respectively, for $67,513.60 and $28,934.39, in payment for the shares of the old company. A balance of $3,000.62 remained with McColl, Balfour, Kilkenny and Donegal. This sum was their net fee (after paying out the said $2,000) for carrying out their part of the whole transaction.

5. The appellant Craddock and Robert M. Barr (for the appellant Atkinson) advanced as loans to the new company the amounts of $67,513.60 and $28,934.39 aforesaid.

All the financial arrangements heretofore mentioned were in the complete control of the Bank of Montreal, North End Branch, Regina, Saskatchewan, where this closing on May 2, 1963, took place. New bank accounts at that Branch were opened solely for the closing as needed and, except for the said fees of $3,000.62 (paid for the said services mentioned) and the fees of $2,000 (paid to the said solicitor and accountant to liquidate and wind-up the old company after this closing) no funds were in fact released to any party. No loan in any amount was made by the Bank of Montreal.

The amount of $67,513.60 paid to the appellant Craddock for his shares in the old company was credited to him as the single incoming entry in a new account, and debited as the single outgoing entry on the occasion of the advance by way of loan to the new company. All cheques passing on this closing were exchanged internally by the Bank and remained entirely within its control, which control was

essential to the Bank for its own protection, since in order to accomplish this closing the Bank participated in the creation of a certified cheque drawn on the bank account of the new company which had no funds in it to honour it, and which cheque was intended to be and was offset by a "round-robin" series of cheques, so to speak, through a number of accounts, all of them, at all times in the Bank's control, of the same amount of funds (less $5,000.62 the amount of the total said fees paid to the purchasers for their part in implementing the transactions on May 2, 1963) the final cheque of which series was deposited to the account upon which that certified cheque was first drawn. There was no risk to or loan by the Bank at any time. The entire series of cheques and deposits of them, in terms of dollars was a "wash" transaction, so to speak.

On May 2, 1963, also, the old company after declaring the said liquidating dividend, issued the following dividend cheques to these respective receivers:

Donegal Enterprises Limited	$49,674 58
Kilkenny Enterprises Limited	$49,674 57
Robert A. C. McColl	49 73
R. James Balfour	49 73
	$99,448.61

(See Exhibit A-1)

Recapitulating, therefore, the said undistributed surplus of $101,448.61 of Allied Heating Supply Ltd., in this series of inter-related transactions was used as follows:

1. Allied Heating Supply Ltd., the old company, received a cheque from the new company for $101,448.61 for the sale of its working assets to the latter.

2. The old company issued cheques equivalent to this sum as follows:

Liquidating dividends	$99,448 61
Clarkson, Gordon & Co. (Chartered Accountants)	$ 1,000 00*
Neuman, Pierce & Co. (Solicitors)	$ 1,000 00*

*(These sums were for fees for services rendered in winding-up Allied Heating Supply Ltd., after this series of transactions and were part of the total of $5,000.62 paid in fees.)

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3. Cheques representing $99,448.61, in this said "round-robin" exchange of cheques, were issued and received as follows:

	Donegal Enterprises Ltd.	Kilkenny Enterprises Ltd.	R.A.C. McColl	James Balfour	Total
Cheques for liquidating dividend received	49,674 58	49,674 57	49 73	49 73	99,448 61
Cheques issued for purchase of shares of old company from appellants	48,175.77	48,175.78	48.22	48.22	96,447 99*
Fees received ..	$1,498.81	$1,498 79	$1.51	$1.51	$3,000.62

(See Exhibit R-1, pages 19, 20 and 21)—
*(There was a 62 cent error made).

On these facts, counsel for the appellants submitted, among other things, that it was not necessary to establish a legitimate business reason for these series of transactions but that in any event, there was such a reason in this, namely to enable the said son and said son-in-law of the appellant Craddock to purchase an equity in the business; that the legal form of the transactions should govern, which was critical here because all the transactions were real and none artificial; that the appeals are against the assessments which were based on a deemed dividend under section 81(1) of the *Income Tax Act* and therefore section 137(2) of the Act could not be considered in deciding whether or not the appellants are taxable as a result of what was done here; that alternatively if section 137(2) of the Act could be considered, that subsection was not a "gateway" into section 81(1) of the Act; that alternatively, also, if a "gateway", section 81(1) of the Act was inapplicable because the "benefit" referred to in section 137(2) of the Act must be conferred on shareholders of a corporation and at the time of the liquidation dividend the appellants were not shareholders of Allied Heating Supply Ltd.; that in any event, section 137(2) of the Act deals with taxes on "benefits" and in these inter-related transactions there was either a *quid pro quo* or a loss, and therefore no "benefit"; and that the tax advantage obtained cannot be the "benefit" because a tax advantage cannot be conferred by anyone in that it arises by operation of law.

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The submission of counsel for the respondent, among other things, was that the facts of this case established that the amounts received by the appellants as the result of this series of transactions should be included in their income for the taxation year 1963 on the principles enunciated in *Smythe v. M.N.R.*[1].

The issue for decision in this case, therefore, is whether or not the amounts received by the appellants purporting to be the purchase monies for the shares sold, are to be included in their income in the year 1963, the year of such sale.

In *Smythe v. M.N.R.* (*supra*) I had occasion to consider whether or not monies received in a so-called dividend or surplus "stripping" inter-related transaction was income within the meaning of that term in the *Income Tax Act*. I expressed certain views then, some of them *obiter*. Since, I have had occasion to consider further what I believe to be the applicable principles and have come to certain conclusions. I now state them.

I am of opinion that in any factual situation which may be referred to as a "dividend stripping" or "surplus stripping" transaction, the following propositions should be taken into account for the purpose of determining the income tax consequences of such a transaction.

—A—

1. Firstly, by reason of the words employed in section 137(2) of the *Income Tax Act*, the "result" (or in other words, the financial consequences) should be ascertained.

   The "result" to be ascertained is whether or not a "benefit" is conferred on a person.

   The "benefit" to be looked for is a sum of money equivalent to the monies or other assets that belonged to a company immediately prior to a so-called "dividend stripping" or "surplus stripping" transaction, and which ceased to belong after.

2. Secondly, it should be ascertained whether the following two premises can be established:

   (a) (i) either that the sale of the shares was pursuant to, or as part of, an inter-related transaction;

[1] [1968] 2 Ex. C.R. 189; [1967] C.T.C. 498.

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or

(ii) that all of the parts of such an inter-related transaction of which the sale of shares was one part, had no legitimate business purpose and had been entered into as a means of avoiding the taxation consequences under other sections of the *Income Tax Act*, (and in that sense were not *bona fide*);

or

(iii) that one or more inter-related parts of such a transaction was entered into between persons not dealing at arm's length.

(See section 137(3) of the Act);

and

(b) that the result of the whole series of inter-related transactions was the same as if the subject company had paid the monies or other assets out to or for the benefit of the persons who were shareholders immediately prior to the commencement of the steps taken to implement the series of inter-related transactions.

(See section 137(2) of the Act).

—B—

1. If the facts of any inter-related transaction lead to the conclusion that the two premises set out in A.2. above have been established and therefore the "result" contemplated by section 137(2) of the Act obtains, then the subject company is the "person" who is deemed to have conferred such "benefit" and the said section 137(2) of the Act has the effect of requiring that such "benefit", be "included in computing the taxpayer's income for the purpose of Part I"; or, alternatively, if the circumstances require it, that such "benefit", be "deemed to be a payment to a non-resident person to which Part III applies"; or, alternatively, if the circumstances require it, that such "benefit" be "deemed to be a disposition by way of gift to which Part IV applies".

2. Because such "benefit", depending on the circumstances of the case, may be treated, for tax purposes, either under Part I, Part III or Part IV of the *Income*

Tax Act, section 137 of the Act appears in a different part of the Act, separate from any of these Parts, namely in Part VI of the *Income Tax Act.*

When the circumstances of the inter-related transactions are such that it is correct to include such "benefit" "in computing the taxpayer's income for the purpose of Part I", then the total of it is included in such taxpayer's income as one of the sources of such taxpayer's income within the meaning of section 3 of the Act in the same manner as if section 137(2) was in one of the series of sections in Part I such as section 6, section 8(1), section 16(1) and section 81(1). But section 137(2) of the Act in any such case is not dependent upon for its efficacy on or connected with any other section or sections in Part I, such as sections 6, 8(1), 16(1) and 81(1) and therefore none of these latter sections are relevant in the adjudication of any case in which section 137(2) is applicable.

(In like manner, if the circumstances of the inter-related transactions are such that it is correct that such "benefit" be "deemed to be a payment to a non-resident person to which Part I applies", then for taxation purposes section 137(2) of the Act should be considered in effect as being a separate section in Part III of the Act.)

(In like manner, if the circumstances are such that it is correct that the "payment" be "deemed to be a disposition by way of gift to which Part IV applies", then for taxation purposes section 137(2) of the Act should be considered in effect as being a separate section in Part IV of the Act.)

—C—

1. Any evidence which is material to establish whether the facts of any case bring it within the provisions of section 137(2) of the Act, are admissible under the general rules of evidence. Specifically, in cases such as this, where there are a series of inter-related transactions, then the details of all the inter-related transactions are admissible and relevant, even though the parties to the appeal are not parties to all such transactions, as for example, in the subject case, when, after the sale transaction of the shares by the appellants, which was one of the inter-related transactions, other persons only and

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not the appellants or either of them were directly involved in carrying out the subsequent inter-related transaction or transactions.

2. Finally, in cases such as this (and generally in all income tax cases), the Minister in his pleadings and evidence at trial, is not bound by the assumptions made by the assessor in making the assessment or re-assessment and the Minister is also not restricted to relying on the reasons stated in the Notices of Assessment or Re-Assessment or the section or sections of the *Income Tax Act* therein relied upon but, instead, is entitled to allege in his pleadings other facts and to plead any other alternative or additional section or sections of the *Income Tax Act*, and to adduce evidence in support thereof, provided however, if the latter situation obtains the onus of proof is on the Minister.

So much for the applicable law, in my view.

Certain of the facts of this case have already been detailed. In addition, however, from a careful consideration of the whole of the evidence, I make these further findings of fact, namely:

1. Melville Neuman, solicitor, acted as agent for the appellants at all material times and specifically in advising, negotiating and completing the series of transactions going to make up the whole transaction between the appellants and R.A.C. McColl, James Balfour, Kilkenny Enterprises Limited and Donegal Enterprises Limited.

2. Ian Forbes, chartered accountant, acted as an agent for the appellants on the closing of the series of transactions going to make up the whole transaction.

3. The appellants personally and through their said solicitor Neuman and their said accountant Forbes, had knowledge that R.A.C. McColl, James Balfour, Kilkenny Enterprises Limited and Donegal Enterprises Limited were engaged at all material times in schemes aimed at the "stripping of surpluses" of companies which had converted their assets into cash by selling their operations and operating assets to a new company.

4. The appellants personally and through their said solicitor Neuman and their said accountant Forbes,

knew that the surplus of Allied Heating Supply Ltd., (the old company) would be "stripped" and paid out to the appellants, less the fees paid for services as heretofore mentioned, without the appellants paying income tax, in the following manner:

(a) A new company would be incorporated.

(b) The assets of Allied Heating Supply Ltd., (the old company) would be sold to the new company.

(c) The issued preference shares of the old company would be redeemed.

(d) The articles of association of the old company would be amended in an appropriate way to facilitate the said "stripping".

(e) Allied Heating Supply Ltd., common shares would be split into Class "A" (voting) and Class "B" (non-voting).

(f) The Class "A" shares would be sold to two individuals and the Class "B" shares would be sold to two corporations.

(g) Allied Heating Supply Ltd., would declare a liquidating dividend equal to the sale price of the assets of the new company less the fees and expenses to Mr. McColl and the others. (These fees were not a profit because there was no risk. These were fees for services.)

(h) Offsetting or compensating cheques would be exchanged on closing.

5. It was always intended that the business would be carried on without disruption, by the new company, and under the same management and control, and this took place.

6. No bank funds would be involved in the inter-related transactions or at risk, by loan or otherwise.

7. The only funds that would be involved in the inter-related transactions were to come from the old company.

8. All of the above steps would be inter-related, each conditional upon the other. They would be instigated, have as their purpose and be part and parcel of a scheme, to appropriate funds or property of Allied Heating Supply Ltd., to and for the benefit of the appellants.

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Gibson J.

9. Specifically, in dealing with the sale of shares:

(a) They knew this was not an isolated transaction but was an inter-related part of a scheme aforesaid:

(b) That it was not *bona fide* in that it was not entered into for any legitimate business purpose (in the main before and exclusively after April 24, 1963) but was entered into as a means to avoid the taxation consequences of having funds or property of Allied Heating Supply Ltd., come into the hands of the appellants;

(c) They knew that the sale of shares in Allied Heating Supply Ltd., was not necessary for the implementation of the decision to allow the son and son-in-law to acquire an equity in the business;

(d) They knew all cheques exchanged were uncertified (which was understandable only because it was not important to the appellants that the cheques of the said purchasers of the shares be backed by funds because of this "round-robin" exchange of cheques). They knew that the funds were to come from Allied Heating Supply Ltd., only, which was known to the appellants and to all parties to the transaction.

10. They knew that the above mentioned series of transactions were not entered into by persons dealing at arm's length except in the matter of establishing the *quantum* of the fee. Once the fee required by Mr. McColl and the others had been agreed upon, all of the parties were to act in concert.

Relating these facts to the relevant principles of law as I understand them, as set out above, it is obvious that "the result" that is, the financial consequences of these inter-related transactions was that monies belonging to the old company immediately prior to the so-called dividend stripping or surplus stripping transaction ceased to belong to the old company immediately thereafter and belonged to the appellants in total (except for the $5,000.62 in fees and expenses paid as mentioned); that the following two premises were established, namely, that the sale of the shares was pursuant to or part of an inter-related transaction and that the result of the whole series of the inter-related transactions was the same as if the old company had paid

the monies (less the said fees of $5,000.62) to or for the benefit of the appellants who were shareholders of the old company immediately prior to the commencement of the steps taken to implement the said series of inter-related transactions.

Therefore, the conclusion I reach is that the "result" contemplated by section 137(2) of the *Income Tax Act*, obtains, because as a financial consequence of the above mentioned series of transactions, there took place what is sometimes called a "dividend strip" or "surplus strip" of the earned surplus of Allied Heating Supply Ltd., and that in the process Allied Heating Supply Ltd., conferred a "benefit" on the appellant Craddock of $69,614.03 plus his share of the fee paid, but not including the fees paid for the liquidation of that company, (but both of which were included in the total of $5,000.62 paid for the "dividend strip") namely $2,100.43, and on the appellant Atkinson of $29,834.58, plus his share of the said fees paid, namely, $900.19, all of which sums being prior thereto the assets of Allied Heating Supply Ltd., the total amounting to $99,-448.61; and that the portion of the said amount that should be included in the income of the appellant Craddock for the taxation year 1963 is $69,474.03 (computed as follows:

$\frac{14,000}{20,000}$ shares × $99,448 61 — $200.00 (share capital) = $69,474 03); and the portion that should be included in the income of the appellant Atkinson is $29,774.58 (computed as follows: $\frac{6,000}{20,000}$ shares × $99,448 61 — $200.00 (share capital) = $29,774.58).

The appeals are therefore dismissed with costs, and the re-assessments are referred back for re-consideration and re-assessment not inconsistent with these reasons.

Montréal 1968 — 16 sept. — Ottawa 20 sept.

ENTRE:

LA BANQUE PROVINCIALE DU CANADA ..... } REQUÉRANTE;

ET

SA MAJESTÉ LA REINE ..... INTIMÉE.

Loi sur les banques, S.C. 1953-54, c. 48, article 88(1)(f)—Loi sur les prêts destinés aux améliorations agricoles, S.R.C. 1952, c. 110, article 3(1)(c) —Action accueillie avec dépens.

Cette instance fut soumise uniquement pour l'interprétation de certaines questions de droit.

Il est, toutefois, nécessaire de résumer les faits qui ont donné naissance à ce litige.

Le 9 mai 1958, Miville Aubé, «un cultivateur, propriétaire ou locataire d'une ferme, a présenté à la Banque Provinciale du Canada, succursale de Gentilly, une demande d'un prêt de $1,500 en vertu de la *Loi sur les prêts destinés aux améliorations agricoles,* S.R.C. 1952, ch. 110, dans la forme prescrite à l'annexe A des règlements adoptés sous le régime de cette loi».

Cette demande d'emprunter fut, «conformément à la Loi, dûment examinée et vérifiée par un fonctionnaire de la banque requérante avec le soin que la banque exigeait dans la conduite de ses opérations ordinaires. Le fonctionnaire de la banque, en consentant le prêt, a attesté, qu'au mieux de sa connaissance, les conditions et les fins du prêt étaient de nature à en justifier la garantie en vertu de la Loi et du présent règlement».

La *Loi sur les banques* (S.C. 1953-54, ch. 48, à l'article 88) édicte que:

88. (1) La banque peut prêter de l'argent et consentir des avances...

f) à tout cultivateur pour l'achat d'instruments aratoires, sur la garantie de ces derniers

La *Loi sur les prêts destinés aux améliorations agricoles* (S.R.C. 1952, ch. 110, article 3(1)(*c*)), édicte que:

3. (1) Sous réserve des dispositions du présent article et des articles 4 et 5, le Ministre doit verser à une banque le montant de la perte qu'elle a subie par suite d'un prêt pour améliorations agricoles, si

...

c) un fonctionnaire responsable de la banque a certifié qu'il a examiné et vérifié la demande de prêt avec le soin que la banque exige de lui dans la conduite des opérations ordinaires de cette dernière.

Jugé. La Cour est d'avis que l'accomplissement de cette exigence essentielle de la Loi sur les prêts agricoles, qui définit les conditions éventuelles de la responsabilité du «Ministre» envers la banque, est admis de façon formelle par l'intimée:

2. Le règlement, sur les prêts destinés aux améliorations agricoles, entré en vigueur le 19 février 1965, ne saurait s'appliquer à une transaction remontant au mois de mai 1958;

3. La Cour n'accepte pas l'argument unique de l'intimée, que la fraude perpétrée par les deux complices, Aubé et Proulx, privait de réalité objective la remise valable de la garantie prévue par l'article 88 de la *Loi sur les banques* et, partant, la relevait de toute responsabilité;

4. La Cour accepte et adjuge, sur l'admission des faits offerte par l'intimée, que toutes les stipulations des lois afférentes ont été régulièrement observées par la banque;

5. Action accueillie avec dépens contre l'intimée.

DEMANDE de remboursement de prêt d'argent.

Claude Benoît pour la requérante.

Paul M. Ollivier, c.r. pour l'intimée.

DUMOULIN J.:—Cette instance, selon les «Admissions des parties sur les faits» (pages 12-14 du dossier) fut soumise uniquement pour l'interprétation, très simple d'ailleurs de certaines questions de droit.

Il est, toutefois, nécessaire de résumer les circonstances qui ont donné lieu à ce débat.

Le 9 mai 1958, Miville Aubé, «un cultivateur propriétaire ou locataire d'une ferme, a présenté à la Banque Provinciale du Canada, succursale de Gentilly, une demande d'un prêt de $1,500 en vertu de la *Loi sur les prêts destinés aux améliorations agricoles,* S.R.C. 1952, ch. 110, dans la forme prescrite à l'annexe A des règlements, adoptées sous le régime de ladite loi. . .» (Admissions, art. 1).

Comme les admissions conjointes des parties stipulent qu'elles «acceptent que jugement soit rendu sur la base desdits faits», ce qui suivra ne saurait être révoqué en doute et lie, pour autant, l'intimée.

Cette demande d'emprunter fut, «conformément à la Loi, dûment examinée et vérifiée par un fonctionnaire de la banque requérante avec le soin que la banque exigeait dans la conduite de ses opérations ordinaires et ledit fonctionnaire de la banque, en consentant le prêt, a attesté qu'au mieux de sa connaissance les conditions et les fins du prêt étaient de nature à en justifier la garantie en vertu de la Loi et du présent règlement» (Admissions, art. 2).

A l'art. 4 de cette même pièce de procédure, nous lisons que:

> Antérieurement au prêt consenti par la requérante à Miville Aubé, un avis par ce dernier de son intention de fournir une garantie à la Banque Provinciale du Canada sous l'autorité de l'article 88

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Dumoulin J

de la Loi des banques a été dûment donné le 9 mai 1958 et enregistré à la banque du Canada à Montréal le 13 mai 1958 sous le numéro 3372...

Sur remise par Miville Aubé à la Banque Provinciale d'un reçu signé à Gentilly le 20 mai 1958 par le supposé vendeur d'une «presse à foin, numéro 3, équipée d'un moteur Wisconsin, roue double à côté», attestant le paiement par Aubé du prix d'acquisition de cet engin agricole, un emprunt de $1,500 lui fut consenti par la requérante.

Ce même jour, cession de ladite presse à foin avait été consentie à la Banque Provinciale du Canada pour garantir le remboursement du prêt effectué sous l'autorité de l'art. 88 de la *Loi sur les banques*. La requérante, par surcroît de prudence, ne versa pas à l'emprunteur le montant de $1,500 mais le déposa au compte en banque du supposé vendeur, Aurèle Proulx.

L'intimée admet que cette transaction ne fut, en réalité qu'une supercherie montée par les complices Aubé et Proulx afin de faciliter l'obtention d'un prêt bancaire à Aubé qui ne reçut jamais livraison et ne fut jamais propriétaire de la presse à foin précitée. Peu après, Aubé obtint de son présumé vendeur remise de la somme de $1,500. Notons que la Banque Provinciale exigea de l'emprunteur la remise d'un document, signé par Proulx, qui simulait l'acte de vente de l'instrument aratoire.

Subséquemment Aubé paya à la requérante deux versements de $250 chacun, laissant un solde exigible de $1,000, auquel s'ajoutent présentement les intérêts impayés sur ce reliquat à raison de 5% l'an depuis le 28 août 1961.

Passons, maintenant à la législation pertinente.

La *Loi sur les banques* (S.C. 1953-54, ch. 48), à l'article 88, édicte que:

> 88 (1) La banque peut prêter de l'argent et consentir des avances
>
> . . .
>
> *f*) à tout cultivateur pour l'achat d'instruments aratoires, sur la garantie de ces derniers.

La *Loi sur les prêts destinés aux améliorations agricoles* (S.R.C. 1952, ch. 110), article 3(1)(*c*), dit que:

> 3. (1) Sous réserve des dispositions du présent article et des articles 4 et 5, le Ministre doit verser à une banque le montant de la perte qu'elle a subie par suite d'un prêt pour améliorations agricoles, si
>
> . .

c) un fonctionnaire responsable de la banque a certifié qu'il a examiné et vérifié la demande de prêt avec le soin que la banque exige de lui dans la conduite des opérations ordinaires de cette dernière.

Or l'accomplissement de cette exigence essentielle de la *Loi sur les prêts agricoles,* qui définit les conditions éventuelles de la responsabilité du «Ministre» envers la banque, est admis de façon formelle par l'intimée à l'art. 2 des «Admissions des parties sur les faits».

Enfin, l'art. 18 mentionne que:

> Ledit Miville Aubé a fait cession de ses biens par la suite et la banque requérante n'a pu recouvrer de l'emprunteur le solde en capital et intérêts découlant du prêt, même après avoir adressé une preuve de perte au syndic de la faillite.

A l'audition, les parties ont cité certains articles d'un *Règlement sur les prêts destinés aux améliorations agricoles,* entré en vigueur le 19 février 1965, et qui ne saurait guère s'appliquer à une transaction remontant au mois de mai 1958.

L'intimée allègue comme argument unique que la fraude perpétrée par les deux complices Aubé et Proulx privait de réalité objective la remise valable de la garantie prévue par l'article 88 de la *Loi sur les banques,* et, partant, la relevait de toute responsabilité.

C'est équivoquer sur les mots. Un pareil argument ne vaudrait que dans l'éventualité d'une complicité entre la requérante et les deux copains ci-haut nommés, alors que l'intimée convient au para. 2 de l'admission des faits que toutes les stipulations des lois afférentes ont été régulièrement observées par la banque.

Pour tous ces motifs, la Cour accueille la demande de la requérante et recommande à l'intimée, Sa Majesté la Reine, de rembourser la Banque Provinciale du Canada du montant de perte subie, soit une somme de $1,000 en capital, plus l'intérêt accumulé à raison de 5% l'an, depuis le 28 août 1961. La requérante aura droit de recouvrer, après taxation, les frais et dépens encourus.

Montreal 1968
Sept. 13
Sept. 20

BETWEEN:

MOUTON PROCESSORS (CANADA) LIMITED ..... } SUPPLIANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Crown—Taxes not legally payable—Demand for refund—Excise Tax Act, R.S.C. 1952, c. 100, s. 46(6)—Time limitation for application—Whether sums paid under protest and because of coercion.

Prior to June 1951 suppliant paid sums of nearly $338,000 on the demand of the Revenue Department as being due under s. 80A of the *Excise Tax Act* on sheepskins processed and sold as mouton. Following a decision of the Supreme Court of Canada in 1957 that s. 80A did not apply to mouton suppliant applied for a refund and filed a petition of right.

Section 46(6) of the *Excise Tax Act* declares that moneys paid as taxes by mistake of law or fact shall not be refunded unless application is made within two years.

Held, dismissing the claim, suppliant failed to satisfy the onus of establishing that the sums were not paid on account of tax, e.g. that payment was made under protest and because of coercion, i.e. to avoid threatened sanctions.

Premier Mouton Products Inc. v. The Queen [1961] S.C.R. 361; *M. Geller Inc. v. The Queen* [1963] S.C.R. 629, discussed. *Beaver Lamb and Shearling Co. v. The Queen* [1960] S.C.R. 505, referred to.

PETITION OF RIGHT.

John J. Spector, Q.C. for suppliant.

Paul M. Ollivier, Q.C. for respondent.

JACKETT P.:—This is a petition of right to enforce a claim by the suppliant for refund of $339,023.54, being the aggregate of payments claimed to have been made by it to the Crown by reasons of demands made by the Crown for taxes which, according to the position taken by the Department of National Revenue, were imposed by section 80A of the *Excise Tax Act* R.S.C. 1952, c. 100 on sheepskins processed by the suppliant and sold as mouton skins during the period from March 19, 1946, to May 24, 1951.

I might indicate at this stage that the respondent has admitted receiving payments from the suppliant aggregating $338,895.43 during the period from April 1, 1946, to May 18, 1951, and that the suppliant is confining its claim for refund to the amounts so paid.

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Before examining the pleadings in more detail, it will be useful to outline at some length the background to the bringing of these proceedings to the extent that it would seem to be beyond controversy.

During the relevant period, i.e. from April 1, 1946, to May 18, 1951, section 80A of the *Excise Tax Act*, as enacted by section 2 of chapter 30 of the Statutes of 1945 and section 2 of chapter 8 of the Statutes of 1950-51, read as follows:[1]

> 80A. (1) There shall be imposed, levied and collected, an excise tax equal to fifteen per cent of the current market value of all dressed furs, dyed furs and dressed and dyed furs,
>
> (i) imported into Canada, payable by the importer or transferee of such goods before they are removed from the custody of the proper customs officer;
>
> or
>
> (ii) dressed, dyed, or dressed and dyed in Canada, payable by the dresser or dyer at the time of delivery by him.
>
> 2. Every person liable for taxes under this section shall, in addition to the returns required by subsection one of section one hundred and six of this Act, file each day a true return of the total taxable value and the amount of tax due by him on his deliveries of dressed furs, dyed furs, and dressed and dyed furs for the last preceding business day, under such regulations as may be prescribed by the Minister.
>
> 3. The said return shall be filed and the tax paid not later than the first business day following that on which the deliveries were made.
>
> 4. The Minister may make regulations for the purpose of determining what constitutes the current market value of furs, and the tax shall be computed upon the value so determined. Such regulations shall be binding upon the owner of the furs as well as upon the dresser or dyer.

From a time prior to 1946, the Department of National Revenue, the department charged by law with the duty of collecting the tax imposed by section 80A, took the position that that section applied to a product known as mouton that was produced by processing certain kinds of sheepskins and, accordingly, that Department insisted upon the persons who did that kind of processing during the period in question in this action complying with all the provisions of the statute and the applicable regulations that applied to a dresser or dyer of furs. They did this by reason of the view that prevailed in the Department that such a person was a dresser or dyer by whom furs had been dressed or dyed.

[1] Prior to September 8, 1950, the rate was 10% and not 15% as indicated in the version of the section quoted.

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In consequence of the Department of National Revenue having taken that position (I will not consider at this point precisely what led to the consequence), the suppliant, as already indicated, paid, during the period April 1, 1946 to May 18, 1951, the aforesaid amount of $338,895.43.[2]

Almost two years after the period in question in April 1953, an action was commenced in this court by the Crown against Universal Fur Dressers and Dyers another processor of mouton, for tax in an amount slightly over $500, which the Crown claimed should have been paid in respect of processing of mouton done from February 2 to February 6, 1953. That action was obviously launched, probably pursuant to an arrangement with the defendant in that action, to settle a dispute as to whether section 80A was applicable to mouton processing. Although I do not recall any admissible evidence to that effect, I am also willing to assume that that action was launched by reason of some mouton producers as a group having challenged the applicability of the tax to their operations. I have no evidence as to when that challenge was first made or as to when the suppliant first became a party to that challenge if it was made prior to the commencement of the action against Universal.

Apparently the suppliant continued, after May 1951 to make payments of the kind already discussed as, on May 15, 1953, Mr. J. J. Spector, Q.C., of Montreal, wrote to the Minister of National Revenue a letter reading, in part, as follows:

> I am instructed by my clients, Mouton Processors (Canada) Limited and Mouton Trading Company Limited, of 2600 Mullins Street, Montreal, Quebec, to make claim for refund in a total sum of $108,149.39, payable as follows:
>
> To Mouton Processors (Canada) Limited and Mouton Trading Company Limited—the sum of $34,234.06
> To Mouton Processors (Canada) Limited—the sum of $73,915.33

[2] It is of interest, but not relevant, to note that, according to the evidence led by the suppliant, the payment was made to the Crown by the suppliant, in each case, only after the suppliant, as processor, had collected the amount of the "tax" from the owner of the processed sheepskin as a condition to the delivery of it to the owner. It was this sequence of events that led the "owner" to claim that it was the person to whom refunds should be made in *M. Geller Inc. et al v. The Queen* [1960] Ex. C.R. 512; [1963] S.C.R. 629.

> These claims for refund are asserted for a period covering the past two years, to wit, May 15th, 1951 to May 15th, 1953, and are based on payments made allegedly under Sections 80A and 105 of the Excise Tax Act and Amendments, Chapter 179, R.S. 1927.
>
> In behalf of my said clients, I assert that these moneys have been paid to the Crown in error and consist of taxes assessed and levied by your officers in connection with sheepskins, which were wrongly defined by your officers to be dressed furs, dyed furs and dressed and dyed furs.
>
> It is asserted, among other reasons, that Section 80A of the said Excise Tax Act does not apply to sheepskins, nor does it cover the various processes used in connection with sheepskins, which are different from and not used in the processing of furs.
>
> This letter will also serve as a notification to you that a like claim is asserted with respect to all future tax payments which might be assessed or levied by you and your officers against my aforesaid clients in connection with sheepskins, and it is understood that any payments of such tax which might be made in the future are made without prejudice to and without admission or waiver of any of my clients' rights.

I have no doubt that this letter was written by reason of some knowledge on the part of the suppliant of the commencement of the test action against Universal Fur Dressers and Dyers to which I have already referred, although I have no actual evidence of the circumstances giving rise to the writing of the letter.

On June 11, 1956, the Supreme Court of Canada delivered judgment in the action of the Crown against Universal Fur Dressers and Dyers, by which it was conclusively determined that the provisions of section 80A did not apply to mouton.

Some time after that decision, the Department made the refunds to the suppliant that were claimed by Mr. Spector's letter of May 15, 1953. Those claims were obviously made as falling within section 46(6) of the *Excise Tax Act*, R.S.C. 1952, c. 100 which read then and still reads as follows:

> (6) If any person, whether by mistake of law or fact, has paid or overpaid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid.

Subsequently, mouton processors other than the suppliant brought proceedings in this court for refund of certain payments made as a result of the position taken by the Department of National Revenue concerning the effect of section 80A, even though a section 105(6) type of application had not been made within two years after such

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payments were made. The judgments in those cases are reported as follows: *Beaver Lamb and Shearling Co. v. The Queen*,[3] *Premier Mouton Products Inc. v. The Queen*,[4] *M. Geller Inc. et al. v. The Queen*[5].

The decision of the Exchequer Court of Canada in the *Premier Mouton Products Inc.* case was handed down on February 23, 1959, and the decision of the Supreme Court of Canada in that case was handed down on March 27, 1961. In that case, the payments in question had been made during the period from March 30, 1950, to January 29, 1952, after Premier Mouton Products Inc. had taken a definite position that it had no liability to make the payments and the Department had insisted that it must nevertheless make the payments or face legal sanctions and pursuant to an arrangement that was then made that all payments should be expressly made "under protest". Indeed, all payments were made by cheques so marked. The decision of this court in that case was that the suppliant was entitled to be repaid the payments so made. This decision was upheld on appeal but for reasons that were somewhat different from those of the judge who delivered the judgment of this court. The reasons of the majority of the judges in the Supreme Court of Canada in that case are set out in the following portions of the judgments of Taschereau J. (as he then was) and of Fauteux J.:

> TASCHEREAU J.—It is first submitted on behalf of the appellant that the respondent is barred from claiming any refund as it failed to make any application in writing within two years after the moneys were paid or overpaid (Section 46, para. 6 of the Act, 1952 R.S.C., c. 100). This section applies, when the payment has been made by mistake of law or fact, but I do not think that such is the case here. The officers of the company were not mistaken as to the law or the facts. They had been in the fur business since many years, and it was in 1950 that they commenced the processing of raw sheepskins.
>
> When they started that business, they immediately received the visit of two inspectors of the Excise Department, with whom they had numerous discussions in the course of which they continuously maintained that mouton was not a fur, and therefore not subject to the tax. After being told that they would be "closed up" if they did not pay, they decided, with the agreement of the inspectors, to pay "under protest". This was done from March 23, 1950, until September 7, 1951, and all the fifty-eight cheques were endorsed "paid under protest" or "tax paid under protest".

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[3] [1958] Ex. C.R. 336; [1960] S.C.R. 505

[4] [1959] Ex. C.R. 191; [1961] S.C.R. 361.

[5] [1960] Ex. C.R. 512; [1963] S.C.R. 629.

The evidence is clear to me that there was on the part of the officers of the company no error of law. They had the conviction that they did not owe the tax, and their numerous discussions with the departmental officers, and the payments made under protest, negative any suggestion of a mistake of law.

At that time, other firms engaged in the same business as the respondent had contested the validity of this tax and had refused to pay it. A test case was made, and a few years later this Court, in *Universal Fur Dressers and Dyers Ltd. v. The Queen*, [1956] S.C.R. 632, 56 D.T.C. 1075, held that the tax was not payable. The respondent's officers were aware of the position taken by the others operating in the same field, and of their refusal to comply with the request of the Department. When the respondent finally decided to pay under protest, I am quite satisfied that it was not because the officers were mistaken as to the law; they were fully aware of their legal position, and had repeatedly set forth their contentions to the Department's officers from the beginning of the discussions in 1950. There being no mistake of law or fact, s. 46(6) does not apply, and therefore the failure by the respondent to give a written notice is not a bar to the present proceedings.

I do not agree with the trial judge who says in his reasons, although he allows the claim, that the respondent paid as a result of a mistake of law. The respondent is not bound by this pronouncement, and is of course entitled to have the judgment upheld for reasons other than those given in the Court below. The true reason why the payments were made under protest, is that the respondent wished to continue its business and feared that if it did not follow the course that it adopted, it would be "closed". Eli Abramson, one of the officers of the respondent says in his evidence:

> Q. What were you told by the officers of the Department with whom you were discussing this?
>
> A. Well, they told me I have to pay the tax. So, I says, 'Why do I have to pay the tax?' They said 'If you don't pay the tax we will close you up, because that is the law, and you must pay the tax!'

This statement is not denied by the two inspectors who were called as witnesses. Instead of seeing their business ruined, which would have been the inevitable result of their refusal to pay this illegal levy, they preferred, as there was no other alternative, to comply with the threatening summons of the inspectors. As Abramson says: "Well, if I have to pay, I feel I am going to pay it under protest". This is what was done, and I am satisfied that the payments made were not prompted by the desire to discharge a legal obligation, or to settle definitely a contested claim. The pressure that was exercised is sufficient, I think, to negative the expression of the free will of the respondent's officers, with the result that the alleged agreement to pay the tax has no legal effect and may be avoided. The payment was not made voluntarily to close the transaction. Vide *Maskell v. Horner*, [1915] 3 K.B. 106 at 118, also *Atlee v. Backhouse*, (1838) 3 M. & W. 633, 646, 650; 150 E.R. 1298, *Knutson v. Bourkes Syndicate*, [1941], S.C.R. 419, 3 D.L.R. 593, *The Municipality of the City and County of St. John et al v. Fraser-Brace Overseas Corporation et al*, [1958] S.C.R. 263, 13 D.L.R. (2d) 177. As it was said in *Valpy v. Manley*, (1845), 1 C.B. 594, 602, 603; 135 E.R. 673, the payment was made for the purpose of averting the threatened evil, and

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not with the intention of giving up a right, but with the intention of preserving the right to dispute the legality of the demand. The threats and the payments made under protest support this contention of the respondent. Vide: *The City of London v. London Club Ltd.*, [1952], O.R. 177, 2 D.L.R. 178. Of course, the mere fact that the payment was made "under protest" is not conclusive but, when all the circumstances of the case are considered, it flows that the respondent clearly intended to keep alive its right to recover the sum paid. Vide *supra.*

In Her Majesty the Queen v. Beaver Lamb and Shearling Co. Ltd., [1960] S.C.R. 505, 23 D.L.R. (2d) 513, decided by this Court, the situation was entirely different. The majority of the Court reached the conclusion that the company paid as a result of a compromise and that there was no relation between the agreement that was reached and the threats that had been made. The payment was made voluntarily to prevent all possible litigation, and to bring the matter to an end.

I must add that in the province of Quebec, the law is substantially in harmony with the authorities that I have already cited. The consent to an agreement must be legally and freely given. This is an essential requisite to the validity of a contract. Moreover, I think that art. 998 of the *Civil Code* applies, as the respondent who did not owe any amount to the appellant was unjustly and illegally threatened in order to obtain its consent. Articles 1047 and 1048 of the *Civil Code* do not apply, and are not a bar to respondent's claim. These sections suppose the existence of an error of law or of fact, which does not exist here.

FAUTEUX J.:—It is convenient to say immediately that the claim of respondent is not that it paid these moneys by mistake of either law or fact, but under illegal constraint giving a right of reimbursement. That this is really the true nature of the claim appears from the petition of right. It is therein alleged that from the beginning and throughout the period during which these moneys were exacted, there were, between the officers of the Department of National Revenue and those of the respondent company, numerous discussions in the course of which the latter (i) claimed that no exise tax could be imposed on these sheepskins; (ii) demanded that the officers of the Department alter their illegal attitude; (iii) opposed the payment of such tax which it was "forced" to pay and which it did pay under protest at the suggestion of the officers of the Department. Surely, one who makes such allegations and says that he did pay under protest does not indicate that he was under the impression that he owed the money and that he paid through error. As was said by Taschereau J. in *Bain v. City of Montreal,* (1883), 8 S.C.R. 252, at the bottom of page 285:

> Of course, one who pays through error, cannot protest: he is under the impression that he owes, and has nothing to protest against, or no reasons to protest at all.

Furthermore, the evidence adduced by respondent is consistent with this view as to the nature of the claim. Indeed the evidence accepted by the trial Judge shows that, to the knowledge of the officers of the Department, other processors in the trade entertained the view that such a tax was not authorized under the Act. It also shows that respondent, who was opposed to its payment, would not

have paid it, as it did under protest, had not its officers been intimidated, threatened by those of the Department, and in fear of the greater evil of having their business closed up.

The trial Judge so found and, in this respect, expresses himself as follows:

> Il n'y a pas de doute qu'elle ne les aurait pas payés si elle n'avait pas été intimidée par les remarques et informations des officiers du Ministère du Revenu National, à l'effet qu'elle devait payer parce que c'était la loi et qu'au cas de refus, elle pourrait voir son entreprise close.

Having said this, the trial Judge continues:

> La preuve m'autorise, je crois, à conclure qu'elle a réellement pensé qu'elle devait payer et que la taxe était exigible; le paiement a donc été fait par erreur. Dans ces circonstances, il est logique de croire que son consentement au paiement a été vicié par les représentants de l'autorité et que les paiements n'ont pas été faits volontairement mais par suite d'erreur et *de crainte d'un mal sérieux*. (The italics are mine).

I agree with the trial Judge that these payments were not voluntary payments, but involuntary payments made because of fear of the serious consequences threatened. I must say, however, that I find it difficult to reconcile that conclusion, which is supported by the evidence, with the statement that these payments were made through error. And if the trial Judge really meant that the payments were made through error, in the sense that respondent officers really thought that they owed these moneys to the appellant, I must say, with deference, that such an inference is not supported by the evidence.

The right of respondent to be reimbursed these moneys, which it paid to appellant, involves the consideration of two questions:— (i) Whether, under the general law, there is, in like circumstances, a right to recover moneys paid, and, in the affirmative, (ii) Whether this right to recover, under the general law, is barred, in the present instance, by any of the statutory provisions of the *Excise Tax Act*.

The first question must be decided according to the principles of the Civil Law of the province of Quebec where the facts leading to this litigation took place and where, in particular, these payments were made.

Article 998 of the *Civil Code*, relating to the incidence of constraint as affecting consent, reads as follows:

> If the violence be only legal constraint or the fear only of a party doing that which he has a right to do, it is not a ground of nullity, but it is, if the forms of law be used or threatened for an unjust and illegal cause to extort consent.

In *Wilson et al. v. The City of Montreal*, (1878), 24 L.C.J. 222, 1 L.N. 242, the Superior Court condemned respondent to repay to appellants moneys it had collected from them under an illegal assessment roll made to defray the costs of certain municipal improvements. These moneys were paid under protest, as evidenced by the receipt obtained from the City and which read:

> Received from the Hon. Charles Wilson, the above amount which he declares he pays under protest and to save the proceedings in execution with which he says he is threatened.

This judgment, being appealed, was confirmed by the Court of Appeal, (1880), 3 L.N. 282.

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In *The Corporation of Quebec v. Caron,* (1866), 10 L C J. 317, the Court of Appeal again confirmed a judgment condemning the City to reimburse a payment made, not by error, but "sciemment" by Caron, under protest The claim of the City was for arrears of water rate and it had, in like cases, the power to shut off the water. The claim, however, was prescribed Caron was threatened, on the one hand, by his tenant, to be sued in damages in the event of a stoppage of water and was threatened, on the other hand, by the City, of a stoppage of water unless payment was made. The Court of Appeal said:

> It is true that there was no physical force employed to compel the payment but there was a moral force employed which compelled the respondent to choose one of two evils, either to pay a debt which he could not by law be forced to pay, or to pay damages which he desired to avoid; in neither case could the payment have been voluntary; it was the effect of moral pressure, and would not have been made without it. It was an influence which took away the voluntary character from the payment and yet which could not be ranked with "crainte et violence". Under these circumstances, this payment was not being voluntary but was made under pressure; the plaintiff's action must stand and the appeal be dismissed.

Baylis v The Mayor of Montreal et al, (1879), 23 L C.J. 301. This was an action brought to recover from the City an amount collected from the appellant for assessment not legally due, the assessment roll, under which the payment was exacted, being a nullity The appellant did not protest or make any reserve when he paid He paid only when compelled to do so by warrant of distress Sir A A. Dorion, C J. said, at the bottom of page 304:

> And it has repeatedly been held that a payment made under such circumstances is not a voluntary payment and did not require that the party making it should pay, under protest, to enable him to recover back what has been illegally claimed from him.

In *Bain v. City of Montreal, supra,* the above decisions are referred to, with virtual approval, by Taschereau J., at page 286, where he makes the following comments as to the significance and necessity, or non necessity, of protest:

> I cannot help but thinking that, that when a party pays a debt which he believes he does not owe, but has to pay it under *contrainte* or fear, he ought to accompany this payment with a protest, if not under the impossibility to make one, and so put the party whom he pays under his guard, and notify him that he does not pay voluntarily, if this party is in good faith. If he is in bad faith and receives what he knows is not due to him, he is, perhaps, not entitled to this protection. A distinction might also perhaps be made between the case of a payment under actual *contrainte,* and one made under a threat only of *contrainte,* or through fear.
>
> If there is an actual *contrainte,* a protest may not be necessary, and in some cases, it is obvious, may be impossible, but if there is a notice of threat only of *contrainte,* then, if the party pays before there is an actual *contrainte,* he should pay under protest. *Demolombe* Vol 29 No. 77 seems, at first sight, to say that a protest is not absolutely necessary, but he speaks, it must be remarked, of the case of an actual *contrainte.*

Of course, each case has to be decided on its own facts. It is not as a rule of law that a protest may be said to be required. For a protest is of no avail when the payment or execution of the obligation is otherwise voluntary. *Favard de Langlade, Rép* Vo. *Acquiescement,* Par XIII; *Solon,* 2 Des Nullités, No. 436; *Bédarride* De La Fraude, Vol. 2, No. 609.

Being of opinion that, under the general law, respondent is entitled to be reimbursed of the moneys it paid to appellant, there remains to consider the contention of the Crown that this right is barred under the provisions of s. 105 of the *Excise Tax Act.*

Appellant relies on s 105(6):

> 6. If any person, whether by mistake of law or fact, has paid or over-paid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid.

The French version of s. 105(6) reads:

> (6) Si quelqu'un, par erreur de droit ou de fait, a payé ou a payé en trop à Sa Majesté des deniers dont il a été tenu compte à titre de taxes imposées par la présente loi, ces deniers ne doivent pas être remboursés à moins que demande n'ait été faite par écrit dans les deux ans qui suivent le payement ou le payement en trop de ces deniers.

The two texts make it clear that these provisions apply only where the refund claimed is for moneys paid under a mistake of law or fact. They have no application in this case.

The other provisions of the Act, which may be referred to, are in s 105(5) reading

> 5. No refund or deduction from any of the taxes imposed by this Act shall be paid unless application in writing for the same is made by the person entitled thereto within two years of the time when any such refund or deduction first became payable under this Act or under any regulation made thereunder.

These provisions are also inapplicable to the present case. The refund claimed is not for "taxes imposed by this Act" but for moneys exacted without legal justification

It was further conceded that s. 105 is not exhaustive of the cases where refund may be made. Indeed one would not expect the Act to provide that moneys exacted under threat as a tax not imposed under the Act, may be reimbursed.

On July 16, 1959, Mr. J. J. Spector, Q.C., wrote to the Minister of National Revenue as follows:

> I am instructed by my clients, Mouton Processors (Canada) Limited and Mouton Trading Co Ltd, to claim from The Crown the sum of $337,907 29, being the amount of alleged excise tax paid to Her Majesty by the two said companies, my clients, between October 1st, 1946 and May 19th, 1951, in error of law and fact, under compulsion, duress and protest.
>
> My said clients were constrained by you and the officers of your Department to pay an alleged excise tax on sheepskin processed into

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mouton, which was in fact and in law not due nor exigible. The said payments were not made voluntarily but under the unlawful and urgent compulsion of invoking sanctions of a penal and drastic nature, and the threat of putting my clients out of business if they failed to make such payments to The Crown, notwithstanding that the payments claimed were for a non-existent debt, and the compulsion and threats exercised by the Crown were without justification or cause.

The said sums which my clients were unjustly and illegally constrained and compelled to pay were not in effect taxes in the sense of the law, and were not due to or exigible by Her Majesty, and constituted an unjustified enrichment of the Crown at the expense of my said clients.

The Minister and his officers, it is respectfully submitted, acted illegally in compelling my clients to make payments in the aforesaid amount on the ground that the sheepskin processed into mouton by my said clients were in fact furs, when in fact they were not furs, and did not fall within the ambit of the Excise Tax Act in force when the said payments were so illegally exacted, in accordance with the decision of the Supreme Court of Canada in Her Majesty vs Universal Fur Dressers & Dyers, 1956, S.C.R. 632.

It is further respectfully that the Minister of National Revenue and his officers acted ultra vires of the powers granted by Parliament in the circumstances herein complained of.

The favour of your early remittance of the sum herein claimed is respectfully requested.

That letter was, as appears, written after the decision of the Exchequer Court of Canada in the *Premier Mouton Products Inc.* case, but before the decision of the Supreme Court of Canada in that case.

After the latter decision, on December 19, 1961, these proceedings were launched.

The portion of the petition of right setting out the allegations of fact on which the present claim is based, reads as follows:

4. During the said period the Department of National Revenue, a Department of Your Majesty's Government of Canada, wrongfully and illegally insisted upon exacting and in fact did wrongfully, illegally and without legal justification exact payments from your Suppliant, allegedly under the terms of the Excise Tax Act and its Regulations, which the said Department alleged were imposed on the sheepskins which were processed by your Suppliant and sold as shearlings or as mouton skins;

5. The said sheepskins, processed shearlings or mouton, were not and never were subject to the alleged excise tax which your said Department of National Revenue wrongfully, illegally, and without legal justification exacted from your Suppliant, and in so exacting such payments from your Suppliant the said Department of National Revenue was committing acts ultra vires the powers conferred upon it by Parliament;

6. As a consequence of the wrongful, illegal and relentless pressures exercised by your said Department of National Revenue upon your Suppliant, your Suppliant was compelled and forced to pay as alleged excise tax, during the said period, the sum of $339,023 54 between the relevant dates aforesaid, the whole as appears from a schedule fyled herewith as Suppliant's Exhibit S-1;

7. Your Suppliant, in the course of numerous discussions with the officers of the said Department of National Revenue, both in Montreal and in Ottawa, from the very beginning opposed and continued to oppose the wrongful exaction of the said payments as alleged excise taxes; and similar objections and protests were made by other sheepskin processors in Canada;

8 The Department of National Revenue wrongfully, illegally and persistently took the position, under pain of invoking all legal sanctions provided under the Excise Tax Act, that sheepskin, processed shearling or mouton was fur and as such was subject to the excise tax imposed upon furs, and notwithstanding the numerous and constant objections and protests made by your Suppliant and other processors of sheepskin in Canada, the officers of your Department of National Revenue persisted in their stand until a test case was finally taken in order to obtain a judgment on the matter;

9. The said test case was taken in the form of an Information exhibited by the Deputy Attorney General of Canada in the Exchequer Court of Canada, in which Universal Fur Dressers and Dyers of Toronto was Defendant. Your Majesty was Plaintiff, and said action, bearing No. 72452, was tried before this Honourable Court by the Honourable Justice J C. A. Cameron, who rendered a decision thereon on March 17th, 1954, ordering and adjudging that the Plaintiff is entitled to recover against Defendant the sum of $573.08 as Excise Tax, together with the penalties provided for non-payment by the Excise Tax Act. The said judgment was thereupon appealed to the Supreme Court of Canada, which by unanimous judgment rendered on the 11th day of June, 1956, reversed the judgment a quo, and held that sheepskin, as processed and sold by your Suppliant, was not subject to the said excise tax;

10 The payments which your Suppliant made, as detailed in Exhibit S-1, were paid under protest by your Suppliant alone, and with its own moneys, were exacted without legal justification, were involuntarily paid under duress, coercion and fear, and under the constant, persistent and unlawful threats and constraint on the part of the officers of the Department of National Revenue, that if your Suppliant did not make said payments it would be put out of business, since the Department would invoke all the sanctions provided under the said Excise Tax Act and would, in addition to penal proceedings, obtain judgments and execute same upon the goods, chattels and assets of your Suppliant;

11. The Department of National Revenue sent its officers into the business premises of your Suppliant almost daily to check, verify, levy and collect the alleged excise tax which it wrongfully and illegally insisted on imposing upon your Suppliant's sheepskins, processed as aforesaid, and the forms of law were constantly threatened and used by the said officers for an unjust and illegal cause, to extort payment of the sums herein claimed by coercion and fear, the whole contrary to law;

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12 The aforesaid payments made by your Suppliant were made under constraint and fear, were not prompted by the desire to discharge any legal obligation or to definitely settle any legal claim, were not make *(sic)* of the free will of your Suppliant's officers, were not made voluntarily to close any transaction, were not made with the intention of giving up any right, but said payments were made solely for the purpose of averting a threatened evil, and with the intention of preserving the right to dispute the legality of the demand and to retain its right to recover the sums paid;

13. The said sums so paid do not in law and in fact constitute a tax of any kind or nature whatsoever, and at all relevant times herein no excise tax was leviable or payable by your Suppliant on the sheepskin, shearling or mouton processed and sold by Suppliant; nor did any of the provisions of the Excise Tax Act apply to the payments made by Suppliant herein;

14. Furthermore, Your Majesty is presently illegally and wrongfully benefitting from the said sum claimed herein by which Your Majesty has been unjustifiably enriched, the said sum constituting an "enrichissement sans cause" at law;

15. Due demand for reimbursement has been made upon the said Department of National Revenue to no avail, and the said Department, through its officers, in a letter dated July 22nd, 1959, referred to the Premier Mouton Products case and the Beaver Lamb case, then under appeal, and stated that the claim would be considered when the said appeals had been disposed of, and by letters of September 30th, 1960 and June 19th, 1961, the Department of National Revenue refused to approve any payment of the sums herein claimed to your Suppliant. A final demand for the sum herein claimed was made on November 24th, 1961;

On April 22, 1963, the suppliant was ordered to give particulars of certain of these allegations by an order reading as follows:

UPON A MOTION FOR PARTICULARS made on behalf of the Respondent with respect to those paragraphs in the Petition of Right in which it is alleged that the Department of National Revenue and its officers exercised pressure and made threats in order to compel Suppliant to pay excise tax,

IT IS ORDERED that with respect to Paragraphs 6 and 10 of the Statement of Claim, the Suppliant give specific particulars, as far as is reasonably possible, of the words used insofar as pressure was concerned, and the dates upon which they were used, the qualifications of the officers who made threats, and if possible, to give precise information as to some cases in which they were made.

Pursuant to this order, the suppliant filed particulars reading as follows:

With respect to Paragraphs 6 and 10 of the Statement of Claim:

1. The words used insofar as pressure was concerned were to the following effect:

That if Suppliant did not pay the said sums claimed as excise tax, Suppliant would have to discontinue business; that

the Department would invoke severe sanctions and repetitive penal prosecutions, that it was not the intention to write the Suppliant every day; that the Department would enforce strict compliance; that Summary Convictions Prosecutions would be instituted; that the Department would revoke the Suppliant's Sales Tax and Excise Tax Licenses;

and to the statement made by Suppliant that they could not operate if subjected to daily prosecutions and the drastic actions aforesaid, the answer was to the effect that this was the Suppliant's problem and Suppliant would have to pay notwithstanding.

The Suppliant thereupon said that in order to stay in business payments would be made but under protest, and that the matter would be submitted to the Courts in order to prove to the officers of the Department that they were wrongfully exacting the said payments.

2. The dates upon which words to the foregoing effect were used were between March 19th, 1946 and May 24th, 1951, and particularly on each occasion on which Michael Morris, the Manager of the Suppliant, visited Ottawa to confer with V. C. Nawman, Assistant Deputy Minister, which dates can be established from Departmental records.

3. The pressure was exerted by the several officers and agents of the Department, including the Assistant Deputy Minister, the Collector of Customs and Excise, Montreal, and the several officers of the Department who attended at the premises of the Suppliant regularly in order to supervise and enforce the daily payments claimed as taxes, the letter also stating that said payments must be made on pain of discontinuing business and suffering severe sanctions.

Except for the allegations concerning the *Universal Fur Dressers and Dyers* case and those concerning the letters referred to in paragraph 15 of the petition of right, the statement of defence denied the allegations in the pleading of the suppliant that I have quoted.

Before reviewing the evidence adduced in this case, it would be well to indicate the legal principles that apply, as I understand them.

In the first place, it seems clear that if the payments were made by the suppliant "in the mistaken assumption of paying an excise tax" or "to settle definitely a contested claim" for such a tax, their recovery is barred by reason of the suppliant's failure to comply with section 105(6) of the *Excise Tax Act*. This appears to have been established by the decision of this Court in *M. Geller Inc. et al v. The Queen*[6] dismissing the claim of Nu-Way Lambskin Processors Ltd., which decision seems to have had the implied

[6] [1960] Ex.C.R. 512.

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approval of the Supreme Court of Canada in the same case[7] where Taschereau J., delivering the judgment of the court, said:

> The learned trial judge, [1960] Ex.C.R. 512, 60 D.T.C. 1189, dismissed the Petition of Right of the suppliant Nu-Way Lambskin on the ground that it failed to apply for a refund within the statutory delay. Section 105(6) provides as follows:
>
> > 105(6) If any person, whether by mistake of law or fact, has paid or overpaid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid.

This would appear to apply whether the payments were "prompted by the desire to discharge a legal obligation" or were made "to settle definitely a contested claim". Compare the *Premier Mouton Products Inc.* case, *supra,* per Taschereau J. at page 369.

If, on the other hand, the suppliant, at the time of the payments in question, made it clear to the Department that it took the position that there was no tax payable and was making the payments to avoid threatened sanctions being imposed against it (because such sanctions would outweigh in its judgment the inconvenience of payment) and with a view to having its claim to freedom of liability determined in some appropriate way, then it was not a payment on account of tax at all, but a payment to avoid incurring sanctions under the Act and, that being so, section 105(6) would have no application. This is my understanding of the effect of the *Premier Mouton Products Inc.* case as decided by the Supreme Court of Canada.

Indeed, it may be that, unless payments were accompanied by an express indication that they were made "under protest", they cannot be recovered under the principle in question. This would seem to depend on whether the payments were made in the face of threats of sanctions or in the face of the actual imposition of sanctions. See *Bain v. Montreal*[8] per Taschereau J. at pages 285 *et seq.*, as quoted by Fauteux J. in the *Premier Mouton Products Inc.* case, *supra.* In any event, it is clear that there must be a causal connection between the imposition or threat of sanctions and the making of the payments. See *Beaver*

[7] [1963] S.C.R. 629

[8] 8 S.C.R. 252.

Lamb and Shearling Co. v. The Queen[9] and the reference to that case in the judgment of Taschereau J. in the *Premier Mouton Products Inc.* case, *supra.*

Finally, I should say that, in my view, the suppliant has the onus of establishing the facts necessary to support its claim for reimbursement. In other words, the onus was on the suppliant to establish that the payments in question were *not* made on account of tax.

What I have to decide, therefore, is whether the evidence in this case establishes, on a balance of probability, that all or any of the payments in question were made by the suppliant to the Crown under protest, and under coercion in the sense that I have indicated. If the evidence does establish that in respect of any payments, the suppliant is entitled to judgment for their repayment. If it does not, the petition of right must be dismissed.

Leaving aside for the moment any question as to the admissibility of evidence, the suppliant has failed to establish on a balance of probability, in my view, that the payments were made under protest to avoid the imposition of legal sanctions and has not established that they were not made either as payments of taxes claimed by the Department of National Revenue or in order to effect a final settlement of such claims.

It has been shown that the effective manager of the suppliant's operations during the part of the relevant period that commenced in "early 1947" was one Morris, who has been dead since April 1959, that one Silverberg whose title was that of Sales Manager was, after early 1947, in effect, manager of the suppliant's plant operations, that, during the early part of the relevant period, Mr. Lazarus Philips, Q.C., or the firm of which he was a partner, was the suppliant's legal adviser in connection with the matter, and that, subsequently, Mr. J. J. Spector, Q.C., performed that function. Nothing has been produced, either from the suppliant's files or the files of the Department (of which the suppliant has had full discovery during the course of the trial of this action), to indicate that there was ever any written indication by the suppliant to the Department that it disputed its liability to pay the tax or objected in any way to payment of the tax or that there

[9] [1960] S.C.R. 505.

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was any record of any such position having been taken verbally at any relevant time; and there is no evidence as to why, if any such writing or record ever existed, documentary evidence of it is not available from the suppliant's files. While Mr. Morris was dead at the time of the trial and could not therefore give evidence, neither Mr. Philips nor Mr. Spector, who would presumably have been privy to, or have knowledge of, any such communications if they had been made and who are both alive and well able to give evidence, were produced as witnesses to testify to any such communications. Indeed, there is no evidence whatsoever as to the actual circumstances in which the payments in question were made.

On the other hand, there is the evidence of Mr. Silverberg, who appeared as a witness to give evidence of what he remembered concerning the matters in issue (which took place over seventeen years earlier) and, as he remembered it, he had many discussions (during the years in question after he started to work for the suppliant) with the departmental officer who attended at the plant daily to check the daily reports that the suppliant was required to make, and these discussions always followed a pattern of his maintaining that the tax in question was not payable, and the departmental officer taking the position that according to law it was payable and, if it was not paid, the suppliant's operations would be "closed down". Silverberg says that he took these statements seriously, that he communicated them to Morris, who also took them seriously, and that, as a consequence, as he recalls it, Morris consulted Mr. Philips and went to Ottawa many times to protest to departmental officers about payment of the tax. He also recalls, so he says, that Morris would return from Ottawa and report that he had made such protests to a departmental officer, but they were "adamant" and it might be necessary to sue the government to determine their rights.

It is clear from Mr. Silverberg's evidence that it was Morris' responsibility to make decisions concerning the payment of the tax in question and that Mr. Silverberg's only possible responsibility in connection with the matter, as long as Morris was looking after the matter as he in fact always did, was to pass on to Morris any information that might be relevant to the matter. It seems clear, further,

that Mr. Silverberg was never instructed to discuss the matter with the departmental officer and that the discussions with him were in fact discussions between Silverberg, who had no responsibility concerning payment or non-payment, and the departmental official who had no responsibility for enforcement of payment. In fact, it seems clear that they were conversations of a matter of merely common interest in the same class as the discussions that the same individuals sometimes had about the weather.[10]

Mr. Silverberg also gave evidence about meetings with other mouton processors in June 1947 to discuss what action should be taken about the tax in question.

The other witness called by the suppliant to give evidence concerning the payments in question having been made under protest was Mrs. Elizabeth Rose who was Morris' secretary from early 1948 on. She testified that Morris went to Ottawa during the balance of the period in question to protest payment of the tax, that he wrote letters to the Department protesting payment of the tax, that "He was always paying the tax under protest", that there were meetings in his office of other mouton processors and their lawyers working out some method of fighting the tax, that briefs were prepared and letters written and memoranda put on file as a result of those meetings.

As I had earlier indicated that I intended to do, I have outlined all the evidence, as I understand it, that was

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[10] His evidence reads in part:

A. There was always a discussion about the processing charge, which was open to discussion. But these charges were set between the factory manager and Mr. Morris and myself. He accepted them quite readily. The only discussion of any importance was when he found some tiny, tiny discrepancy that the bookkeeper might have made one way or the other, as little as $1.00 or $2.00 on large amounts of money. A matter of calculation, multiplication, I suppose, but unimportant, I thought. But, he thought it was very important.

Q. But you say that in addition to that, you also discussed the question of the tax liability, generally?

A. The tax what?

Q. The tax liability, the liability to pay that tax?

A. We discussed that many times.

Q. Not every day?

A. No, not every day, it would have been too boresome, but whenever it would come up. There would be occasions when we talked about the weather, besides taxes.

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designed to show protest and compulsion in relation to the payments without drawing any distinction between what in my view was inadmissible and should have been rejected, and what was admissible and relevant.

In the first place, the only evidence of threats is that of the conversations between Silverberg and the departmental officer who checked the daily returns. If there had been some evidence upon which a finding could be made that the statements made by the departmental officer were accepted by Morris as representing a threat of departmental action and that he had taken the "threats" seriously, and had made the payments, when he would not otherwise have made them, by reason of such "threats", I should think that, subject to further enquiry as to the circumstances of the actual payments, there would be a *prima facie* case under the principles applied by the Supreme Court of Canada in the *Premier Mouton Products Inc.* case. There has, however, been no causal connection established between the "threats" in question and the payments of tax, and such "threats" cannot therefore form a basis for a judgment in the suppliant's favour, as appears from the *Beaver Lamb and Shearling Company* decision.

The other question that has to be considered is whether it has been established that the suppliant made it clear to the Department that the payments or some of them were being made under protest by verbal communications from Morris to a departmental official in Ottawa, or by letters written by Morris to the Department. Disregarding evidentiary rules the evidence of Mr. Silverberg and Mrs. Rose is to the effect that Morris did make such protests beginning some time in 1947. That evidence has to be considered in the light of the following circumstances:

(a) there is nothing on the departmental files to show that any such protest was made, while it is clear from the evidence that, in the ordinary course of departmental business, letters from Morris would be there if they had been received and there would be departmental memoranda of verbal protests if any had been made;

(b) no documents have been produced by the suppliant although it is clear from Mrs. Rose's evidence that such documents would be on the suppliant's file in the ordinary course of business if letters had been written or protests had been made verbally—and the suppliant has adduced no evidence to show that the suppliant's documents of that period have been destroyed, lost or were otherwise unavailable;

(c) the suppliant did not tender the evidence of either of the two lawyers who, according to the evidence that was put before the Court, acted

for the suppliant in connection with this tax matter although clearly such evidence could have been brought if it would have been helpful; and

(d) on May 15, 1953, a demand was made on behalf of the suppliant for refund of similar payments for the period from May 15, 1951 to May 15, 1953, the period just before the launching of the test case against Universal Fur Dressers and Dyers, without any suggestion that such payments were made under protest; and at the same time a like claim was asserted in respect of "future tax payments", and it was stated that "any payments of such tax which might be made in the future are made without prejudice to and without admission or waiver of any of my client's rights".

Considering all the evidence in the light of these circumstances, I can only conclude that the balance of probability is that there was no protest by the suppliant against payments of the kind in question prior to the claim that was made in May 1953 by Mr. Spector for the "tax" paid after May 1951. The absence of any evidence by the lawyers concerned, and the absence of any explanation concerning the failure to produce relevant documents, can lead me to no conclusion except that there is no evidence available from those sources that would aid the suppliant's case. It furthermore seems probable that, if the lawyers in question, or either of them, had been consulted on the matter during the period in question, and the suppliant had as a result of advice so obtained decided to make an issue of the matter, there would have been a definite protest and clear-cut evidence of it duly preserved to be available for the present eventuality. The fact that such evidence is not available makes it seem probable to me that there was no decision by the Suppliant during the period in question to make an issue of the matter either because the lawyers were not consulted at that time or because their advice did not persuade the suppliant that it should make an issue of the matter.

On balance, it seems probable to me that Mr. Silverberg and Mrs. Rose, at this late date, are confusing the periods of time during which the events that they recall transpired. It seems probable that it was during the two-year period prior to the commencement of the test case that these events took place. In any event, I cannot conclude on the evidence that the payments during the period in question were made under protest, or that they were made under any compulsion except the normal compulsion that operates on taxpayers generally.

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Having regard to the above conclusions, I need only say that, had I taken time to consider the matter at the time, I would have rejected the evidence as to what Morris told Mr. Silverberg and Mrs. Rose as being inadmissible by reason of the hearsay rule. I have examined the suppliant's authorities on this question and none of them, as I read them, comes close to revealing an exception that would be applicable. I should also have rejected Mrs. Rose's evidence concerning the contents of letters written by Morris in the absence of evidence satisfying the requirements of the best evidence rule by showing that the originals had been lost, or destroyed, or were otherwise unavailable.

There will be judgment declaring that the suppliant is not entitled to any of the relief sought by the petition of right and ordering the suppliant to pay to the respondent the costs of the action.

Ottawa 1968 Sept. 16 Sept. 23

BETWEEN:

EDWIN GOEGLEIN ..... APPELLANT;

AND

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

Gift tax—Sweepstake winnings of husband deposited in joint account of husband and wife—Whether presumption of gift to wife rebutted—Onus of proof—Income Tax Act, secs. 111, 124(4)(b).

In 1964 appellant won $150,369 in the Irish Hospitals' Sweepstake and deposited that sum in a joint savings account that had been previously opened in a bank in Brockville, Ontario in the names of himself and his wife. It was the understanding of appellant and his wife that she would draw on the account only if something happened to prevent him from doing so or if he died.

Held, dismissing an appeal from a gift tax assessment, appellant had not satisfied the onus of rebutting the presumption of law that he made an advancement by way of gift to his wife of a half interest in the sum deposited.

Conway v. M.N.R. [1966] Ex.C.R. 64, referred to.

Held also, the wife's interest in the sum deposited vested in her immediately on deposit.

APPEAL from gift tax assessment.

C. S. Bergh and *M. J. O'Grady* for appellant.

R. D. Janowsky for respondent.

JACKETT P.:—This is an appeal from an assessment for the taxation year 1964 for gift tax under Part IV of the *Income Tax Act* in the sum of $11,389.52.

During that year, the appellant received the sum of $150,369.06 as the holder of a winning ticket in the Irish Hospitals' Sweepstake and deposited that amount in a joint savings account that had been previously opened in the names of the appellant and his wife in the Canadian Imperial Bank in Brockville, Ontario.

On these facts, the respondent took the view that the appellant had made a gift to his wife in the amount of $75,184.33 within the meaning of that word as used in section 111 of the *Income Tax Act,* which reads as follows:

> 111. (1) A tax shall be paid as hereinafter required upon the gifts made in a taxation year by an individual resident in Canada or a personal corporation.
>
> (2) For the purpose of this section, "gift" includes a transfer, assignment or other disposition of property (whether situate inside or outside Canada) by way of gift, and without limiting the generality of the foregoing, includes
>
> (*a*) the creation of a trust of, or an interest in, property by way of gift, and
>
> (*b*) a transaction or transactions whereby a person disposes of property directly or indirectly by way of gift.

It is common ground between the parties that, as the deposit had the effect of making the appellant and his wife the joint creditors of the bank for the amount of the deposit there is a gift by the appellant to the wife of the amount of her interest unless the wife's interest is subject to a resulting trust in favour of the appellant, and that, having regard to the relationship between them, the onus is on the appellant to show that the deposit was made in circumstances that gave rise to such a resulting trust.

I have examined all the authorities to which I have been referred and I can do no better than to adopt the statement of the applicable law contained in a passage to be found in my brother Thurlow's judgment in *Conway v. M.N.R.*[1] at pages 70 to 72, which reads as follows:

> As I understand it the principle upon which the beneficial ownership of property held jointly by two or more persons is determined, where the property has been contributed by one of them alone, is that while at law the title is vested in the joint holders, if valuable

[1] [1966] Ex C.R 64.

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consideration has not been given therefor by the other or others, they, in equity, hold on a resulting trust for the contributor of the property, except in cases in which the contributor intended to make a gift of some interest in the property to the other joint holder or holders Where a gift is intended (or perhaps as some cases indicate, to the extent to which a gift is intended) such other joint holders are not trustees and the equitable title follows the legal title. The intention to make such a gift may appear either from express declaration by the contributor to that effect or from circumstances but where a transfer is made by a husband to his wife or by a father to his child whether jointly with himself or otherwise a gift is presumed until the contrary is shown. Thus in *In re Estate of Hannah Mailman,* [1941] S C R 368, Crocket J speaking for the majority of the Supreme Court said at page 374:

> "That both law and equity interpose such a presumption against an intention to create a joint tenancy, except where a father makes an investment or bank deposit in the names of himself and a natural or adopted child or a husband does so in the names of himself and his wife, is now too firmly settled to admit of any controversy. This presumption, of course, is a rebuttable presumption, which may always be overborne by the owner's previous or contemporaneous oral statements or any other relevant facts or circumstances from which his or her real purpose in making the investment or opening the account in that form may reasonably be inferred to have been otherwise. In the absence, however, of any such evidence to the contrary the presumption of law must prevail. That is the clear result of such leading English cases as *Dyer v. Dyer* (1785) 2 W. & T.'s Leading Cases, 8th ed. 820; *Fowkes v. Pascoe,* (1875) 10 Ch. App. 343; *Marshall v. Crutwell* (1875) L R. 20 Eq. 328; *In re Eykyn's Trusts* (1877) 6 Ch D. 115; *Bennet v. Bennet* (879) 10 Ch.D. 474, and *Standing v. Bowring* (1885) 31 Ch.D. 282. This principle has been uniformly recognized in Canada wherever the courts have been required to adjudicate upon claims depending upon the creation of a joint tenancy or gift of a joint interest when the owner of the money involved has made investments or bank deposits in his own and another's names."

It will be observed that in this passage Crocket J. also referred to *Fowkes v. Pascoe, In re Eykyn's Trusts* and *Standing v. Bowring* and in my opinion these cases are not inconsistent with the view that when the transfer is a gift a joint ownership by the husband and the wife of the capital at least, even if not, in all cases, of the income as well, exists during the joint lives. That such a joint ownership exists from the time of the transfer is I think implicit in the following statement of Crocket J. which follows at page 375 the passage already quoted:

> "There have been many such cases, particularly in Ontario and New Brunswick. Some of these involved disputes between the executor or administrator of a deceased father and a surviving son or daughter, and other disputes between the executor or administrator of a deceased husband and his surviving widow, where the presumption is in favour of a joint tenancy or a gift of a joint interest for the benefit of the child or of the wife, as the case may be."

The same appears from the statement of Kellock J. in *Niles v. Lake,* [1947] S.C.R. 291 at page 311:

> "The mere transfer into the joint names or purchase in joint names is sufficient to constitute joint ownership with its attendant right of survivorship. As put in Williams on Personal Property, 18th Ed., p. 518:
>
> > 'If personal property, whether in possession or in action, be given to A and B simply, they will be joint owners***. As a further consequence of the unity of joint ownership, the important right of survivorship, which distinguishes a joint tenancy of real estate, belongs also to a joint ownership of personal property.'"

So far as the capital is concerned, I therefore reject the submission that in a case of this kind the wife is presumed to have no interest in the joint property during the joint lives.

Moreover, while the basis for the decision in *Re Hood,* (1923) 1 Ir. R. 109, that the husband was entitled to the income of the joint property during the joint lives does not appear from the judgment, a possible explanation, which would not I think apply today, is suggested in the judgment of the Lord Chancellor Brougham in *Dummer v. Pitcher,* (1833) 2 My. & K. 262; 39 E.R. 944, where at page 273 he said:

> "It was further contended that the circumstance of the testator's power over this *chose in action* continuing after the transfer and up to his death differs this from the case of advancement to a child. But there is a great fallacy here, as it seems to me. The testator's power may have continued, but in what capacity? As husband, and in the exercise of his marital right."

On the other hand in decisions on gifts of joint interests other than by a husband to his wife the right of the donor to the income during the joint lives appears to have rested on what was presumed in the circumstances to be the intention of the donor at the time of the making of the gift (*vide Fowkes v. Pascoe,* [1875] L.R. 10 Ch. App. 343, at page 351). No doubt circumstances may be conceived in which such an inference might also be drawn in the case of a gift of a joint interest by a husband to his wife. Under present day law relating to the legal capacities and rights of married women in the absence of either direct or circumstantial evidence of what the intention was I can see no sufficient reason for raising with respect to income any different presumption from that applicable in respect to the capital but whether there is a different presumption or not it is clear that it is rebuttable and must yield to the proper inference to be drawn from the circumstances of the particular case.

and in a passage on page 74 of the same judgment, which reads as follows:

That the presumption is not to be taken lightly appears from *Shephard v. Cartwright,* [1954] 3 All E.R. 649, where Lord Simonds said at page 652:

> "Equally it is clear that the presumption may be rebutted, but should not, as Lord Eldon said, give way to slight circumstances."

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In *Conway v. M.N.R.*, the question was one as to whether there had been a gift by a husband to his wife in his lifetime by depositing sums of money in a joint bank account in both their names, or whether the whole beneficial interest was still in the husband at the time of his death so that it became subject to estate tax. While this is a question of gift tax, as it appears to me, the question to be answered is the same as that which had to be answered in the *Conway* case, namely, whether the relevant evidence rebuts the presumption that the husband intended to advance or benefit the wife by making her a legal owner of the money in question.

There is one substantial difference between the *Conway* case and this case in that here the husband, as well as the wife, was still available to give evidence as to his intention when he made the deposit. Unfortunately, they have both reached an age where, admittedly, their memories do not serve them as well as they might. I should also mention that, as their evidence was taken on commission, I have not had the advantage of observing them when they were giving their evidence. I do not suggest that I have any doubt whatever as to their credibility, but I do think that I would have better appreciated what meaning they meant to convey by some of their answers if I had been present and heard the answers as they were being given. I might also have been able to ask for further explanation of certain answers that I find ambiguous.

Two things seem to me to be clear from a careful reading and re-reading of the evidence of the appellant and his wife.

In the first place, as between the appellant and his wife, he was the manager of their financial affairs. I think it is clear that, regardless of any technicality as to whether money belonged to the appellant or his wife or to the two of them jointly, she relied on him completely, as long as he was available for the purpose, to take all necessary action and to make all decisions about their financial affairs, and he accepted the role that she thus confided in him. To adopt the words of Lord Chancellor Brougham in *Dummer v. Pitcher, supra,* the appellant had complete "power" over their money "As husband, and in the exercise of his marital right".

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Secondly, I think it is clear that both the appellant and his wife had a basic understanding of the nature of a joint bank account. They both knew that, once the money was in such an account, the wife had a right to make withdrawals just as much as the appellant had, although she would not, in ordinary circumstances, have thought of doing so. Both the appellant and his wife appreciated that that was the legal position during their joint lives. Furthermore, the appellant recognized that the wife was entitled to have access to the bank book and she in fact did have access to it.

It is against the fact that both the appellant and his wife realized that the wife had a continuing right to draw money from the joint account that one must, in my view, appreciate their evidence as to the purpose of putting the appellant's money into such an account. As I understand the evidence, after reading it as a whole and as carefully as I can, it comes to this: the money was put into a joint account so that the wife could use it as and when the necessity arose for her to do so either because something had happened to make it impossible for him to act himself during his life or by reason of his death. It was well understood that she would not exercise her rights as long as he was available to play his accustomed role, but they both appreciated that she did have the right to draw money so that she could do so if it became necessary.

Had the appellant and his wife contemplated only the possibility of the wife drawing on the account when the appellant was not available during his lifetime, it might have been thought (although I do not think that I would so decide) that the joint account was a mere convenience for the management of his affairs during his lifetime. However, it seems clear to me that both of them regarded the account as having been adopted to put the wife in the same position with regard to the money upon his death as it put her in the event of his being "knocked out" during his life. That being so, it seems clear to me that their concept of the account was one that, while expressed in layman's language, is, in essence, one of beneficial joint ownership.

As far as any particular intention concerning the deposit of the sweepstake monies is concerned, there is no suggestion that there were any contemporary declarations or other manifestations of intent. All that we have is that, when the appellant was pressed, in 1968, to say what his

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intention was in 1964, he said that he intended to "Put it in my name". I cannot conclude that this is a layman's way of saying that, when he put it in their joint names, he intended that his wife should not have the same interest in it that he obviously knew that she had in other moneys in the account, having regard particularly to the absence of any expression contemporaneously of any such exceptional arrangement. My inference from all the evidence is that, in the emotional disturbance involved in winning a prize of such magnitude, the appellant had no thought at the time except that he would put the moneys into the bank account where he put all other money that ought to be put in the bank for safekeeping. It seems clear that in the absence of a formulated intention not to advance his wife, the law attributes an intention to him to do so when he made her a legal owner of the money; I cannot find any evidence in his subsequent filing of a gift tax return prepared on an inconsistent basis to rebut this presumption. All it suggests to me is that he did not fully understand the legal implications of what he had done.

The appellant took two positions in the alternative to his main position that there was no gift. Having regard to the view that I have taken of the facts, I can deal with each of them in a sentence. I find that the wife's interest vested immediately so that there can be no question of applying section 124(4)(*b*). I have heard no evidence that would support a partnership interest of the wife in the sweepstake winnings at the moment that they were received.

For the above reasons I conclude that, by the deposit of the money in question in their joint bank account, the appellant conferred a beneficial interest in the money on her. That being so, and no question having been raised as to the amount of the assessment, the appeal must be dismissed with costs.

BETWEEN:

W. B. ELLIOTT, operating under the trade name, W. J. Elliott and Co. .. APPELLANT;

AND

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

Ottawa 1968
Sept. 6
Sept. 24

Customs duty—Appeal from Tariff Board—Device for re-shaping discharged cartridge cases—Whether loading tool or machinery for pressing metal—Whether question of law—Customs Act, R.S.C. 1952, c. 58, s. 45.

The expression "loading tools" in tariff item 44100-1 is not an expression in common use except by persons concerned with firearms, and it is therefore open to the Tariff Board to attribute to such expression the meaning which those persons give to it.

Held accordingly, the Tariff Board did not err in law in classifying an imported article for rehabilitating discharged brass cartridge cases as a "loading tool" under tariff item 44100-1 rather than as "machinery for working metal by pressing" under tariff item 42753-1.

Canadian Lift Truck Co. v. Dep. Min. of National Revenue for Customs and Excise [1956] 1 D.L.R. (2d) 497, referred to.

APPEAL from Tariff Board.

W. B. Elliott on his own behalf.

R. W. Law for respondent.

KERR J.:—This is an appeal respecting the classification under the customs tariff of an article manufactured by E. C. Herkner Co., of Boise, Idaho, which was referred to in the manufacturer's catalogue brochure as an "Echo 'C' Model Loading Tool", which article is hereinafter sometimes referred to as the imported article.

The article was classified by the respondent under tariff item 42720-1 which reads as follows:

42720-1 All machinery composed wholly or in part of iron or steel, n.o.p., of a class or kind not made in Canada; complete parts of the foregoing.

The appellant appealed to the Tariff Board and urged that the article should be classified under tariff item 42753-1 which is as follows:

42753-1 Machinery, of a class or kind not made in Canada, for working metal by turning, milling, grinding, drilling, boring, planing, shaping, shearing or pressing, and accessories and attachments therefor; parts of the foregoing.

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The Tariff Board rejected both the classification made by the respondent and the classification urged by the appellant and declared the proper classification to be in tariff item 44100-1 which is as follows:

44100-1 Guns, rifles, including air guns and air rifles not being toys; muskets, cannons, pistols, revolvers, or other firearms, n.o.p.; cartridge cases, cartridges, primers, percussion caps, wads or other ammunition, n.o.p.; bayonets, swords, fencing foils and masks; gun or pistol covers or cases, game bags, loading tools and cartridge belts of any material.

The appellant explained to the Tariff Board that the firing of a brass cartridge with smokeless powder expands the brass case, but that the case can be brought back to its original size, or reformed, enabling it to be used again, by a loading tool or pressure device. The imported article serves that purpose.

The appeal to this Court is taken under section 45 of the *Customs Act*, R.S.C. 1952, c. 58, as amended, from the declaration of the Tariff Board.

At the hearing of the appeal in this court the appellant and counsel for the respondent agreed that the appeal should be argued upon a case consisting of:

1. Letter dated April 14, 1967, from the appellant to the Tariff Board giving notice of appeal from the Deputy Minister's decision, a copy of which was attached to the letter;
2. The transcript of the hearing held by the Tariff Board on October 23, 1967; and
3. The exhibits filed with the Tariff Board.

The exhibits filed with the Tariff Board were the following:

A-1 Lyman Catalogue No. 43;
A-2 Oxford dictionary meaning of the word "Machine";
A-3 Webster dictionary meaning of the word "Tool";
A-4 Echo Model "C" Loading Tool;
A-5 Shaping die;
D-1 Pages one to six of Echo Catalogue;
D-2 K14E form; and
D-3 Publication entitled "Machine Tools—Today" presented by the National Machine Tool Builders' Association.

The right of appeal to this court conferred by section 45 of the *Customs Act* is limited to a question of law.

The Board's declaration contains the following statements, which, in part, are findings of fact:

> The appellant was represented by Mr. W. B. Elliott, the person doing business under the name of W. J. Elliott and Co, who put the imported article in evidence; evidence was also adduced in the form of two brochures, one of the E. C. Herkner Co., of Boise, Idaho, U.S.A., the manufacturer of the imported article and the other a brochure of the Lyman Gun Sight Company, also of the U.S.A.
>
> The E. C. Herkner Co. refers, in its brochure, to the imported article as an "Echo 'C' Loading Tool". The Lyman Company, in its brochure, refers to similar equipment as "Re-Loading Equipment".
>
> Under cross-examination Mr. W. B. Elliott admitted that in the trade the terms "loading" and "re-loading" have a similar meaning.
>
> Mr. W. B. Elliott gave a demonstration of the functions of the imported article which are, in short, simply to rehabilitate a discharged brass cartridge case from its expanded size after discharge to its original size for insertion into the chamber of the rifle. He stated that "loading" and "re-loading" were improper terms as the functions of the imported article were performed prior to the recharging of the cartridge with powder and bullet. However, on the evidence, the Board finds that in the trade these terms are used to describe the imported article.
>
> The appellant then argued that the effect of the imported article was one of "working metal by pressing" and therefore it should have been classified under tariff item 42753-1. The Board rejects this argument: the mere fact that a manufactured article may be made of metal (to wit: brass) does not suggest that its mere compression is "working metal" within the meaning of the words in Tariff Item 42753-1.
>
> Notwithstanding the stipulation of counsel for the respondent, the Board finds that, however that stipulation might seek to put the imported article under tariff item 42720-1, the fact remains that this item is qualified by the provision "n.o.p." and that the article in issue is provided for by the words "loading tools" in tariff item 44100-1. A reading of tariff item 44100-1 indicates an immediate "genus"-guns etc. Loading tools are provided for "eo nomine" thereunder and it matters little whether the same are hand tools, machines or other advances in the trade.
>
> The Board rejects both the classification made by the respondent and that urged by the appellant and declares the proper classification of the imported article to be in tariff item 44100-1.

In this court the appellant argued that the declaration of the Tariff Board was so unreasonable as to constitute error in law. I may mention here that the appellant was not represented by counsel and conducted his own case before the Board and this court and, although not a lawyer, appeared to have an appreciation of the points in issue and argued the case with skill and resourcefulness. His argu-

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ment was based, largely, on his submissions (*a*) that the words "loading tools" are used in item 44100-1 in the context of accessories that normally accompany the hunter in the field and apply to tools for muzzle loading firearms but not to tools for ammunition, (*b*) that the word "tools", as used in the customs tariff, encompasses only manually operated tools (that is, tools whose use requires skill, e.g., a hammer) and machine operated tools, e.g., dies used in the imported article, and does not encompass "machines", and (*c*) that machines for working metal by pressing are provided for *eo nomine* in tariff item 42753-1 and the imported article is such a machine and should be classified under that item.[1]

The appeal to this court involves the two questions as to whether or not the Tariff Board was properly instructed in law as to the construction of the statutory items and whether or not there was evidence which enabled the Board, thus instructed, to reach the conclusion it did. These questions are subject to the same comment as that made by Kellock J., in delivering the judgment of the Supreme Court of Canada in *Canadian Lift Truck Co. v. Deputy Minister of National Revenue for Customs and Excise*[2], when he said:

> The question of law above propounded involves at least two questions, namely, the question as to whether or not the Tariff Board was properly instructed in law as to the construction of the statutory items, and the further question as to whether or not there was evidence which enabled the Board, thus instructed, to reach the conclusion it did.
>
> While the construction of a statutory enactment is a question of law, and the question as to whether a particular matter or thing is of such a nature or kind as to fall within the legal definition is a question of fact, nevertheless if it appears to the appellate court that the tribunal of fact had acted either without any evidence or that no person, properly instructed as to the law and acting judicially,

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[1] He put this contention in the following words in his notice of appeal to this Court:

> "Since the legislators have provided for machines for working metal by pressing *eo nomine* in tariff item 42753-1 we must conclude that this classification is intended to override any less specific provisions such as machines not otherwise provided in tariff item 42720-1, also the ambiguous provision "tools" in tariff item 44100-1, otherwise tariff item 42753-1 is virtually ineffective.
>
> This is not only a paramount rule for interpretation in the customs tariff but a fundamental rule of interpretating the English language.
>
> This is the essence of my submission."

[2] [1956] 1 D.L.R. (2d) 497.

could have reached the particular determination, the court may proceed on the assumption that a misconception of law has been responsible for the determination; *Edwards v. Bairstow,* [1955] 3 All E R. 48.

Counsel for the respondent submitted that the only issues in this appeal are:

(1) Whether the Tariff Board erred as a matter of law in deciding that the imported article was a "loading tool" described *eo nomine* in tariff item 44100-1, and

(2) Whether the Tariff Board erred as a matter of law in not deciding that the imported article was machinery of a class or kind not made in Canada for working metal by pressing within tariff item 42753-1;

and that the Board correctly decided those issues, there was no error on a question of law in deciding them, they are questions of fact, and the said findings of fact were based on ample evidence before the Board and are not so unreasonable as to amount to an error as a matter of law.

The meaning of a word is usually to be found in standard dictionaries. Words and expressions may have a particular meaning by reason of the circumstances in which or the persons by whom they are generally used; for example, in a profession or trade. In a statute a word does not stand alone and the sense in which it is there used and the meaning it has in its context there is a matter of construction of the statute or of the part in which the word is found.

Dealing now with the material before the Board. The appellant's description of the operation of the imported article appears in the following excerpts from the transcript of the hearing by the Board[3]:

Mr. LAW: Is a loading tool and a reloading tool the same thing?

Mr. ELLIOTT: Yes, but if you didn't reload there would be no pressure like that. I will show you why.

The Echo reloading tool is one of the latest examples.

On the downstroke of the machine the metallic body of the case is pressed into its original shape except that its neck is pressed in beyond its original shape and the spent primer pressed out.

THE CHAIRMAN: Now, you have in your text that the neck is pressed in instead of out.

MR. ELLIOTT: That is pressed in with one stroke of the press and is pressed out with the next stroke of the press.

[3] See pages 27 to 30 of the transcript.

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On the upstroke of the press the cartridge neck is pressed out to just under its original shape and a new primer pressed in.

The reshaped cartridge case is then removed from the machine and charged with powder, an operation, not, usually, connected with the machine.

. . .

Another die (correctly ruled by the Dominion customs appraiser as a tool for a machine) is then placed in the machine and, by means of the seating plug a bullet is pressed into the cartridge case working the metal to a "press-fit". Some reloaders crimp the cartridge case into the cannelure of the bullet but I do not do this.

THE CHAIRMAN: Now, you do not do this, or the tool does not?

MR. ELLIOTT: The tool will do it, but I do not do it.

THE CHAIRMAN: Do you use this tool yourself for your business?

MR ELLIOTT: Yes. Well, I have used it. I have used a much larger and faster machine, but I have used this.

The metal in the cartridge case is worked by pressure substantially, the neck of the case is worked even more, and the metallic primer is worked to a lesser amount probably in some cases below its elastic limit.

Every operation, and every part of every operation of the reloading tool works the metal of the cartridge case to a varying degree. Thus it would be possible for a machine to conform as well to all the requirements of T.I. 42753-1 (works metal by pressing) as the Echo tool but not conform better.

Two manufacturer's trade catalogues were filed as exhibits before the Board. Exhibit D-1 consists of pages 1 to 6, inclusive, from the catalogue of E. C. Herkner Co., the manufacturer of the imported article. Page 3 shows a picture of the article, calls it the "Echo 'C' Model Loading Tool" and states that it is the result of ten years of careful study of the needs and wishes of shooters all over the country, shooters who had need for a low cost tool having features found only in higher priced tools, and that it has more than ample strength for all cartridge swaging operations. Exhibit A-1 is Catalogue No. 43 of the Lyman Gun Sight Corporation of Middlefield, Connecticut. The appellant demonstrated to the Tariff Board both the imported article and another article that is pictured as No. 1 on page 14 of the Lyman catalogue, and he said that the article shown as No. 3 on page 14, namely, "The All-American Comet Press", resembles closely the "Echo 'C' Model Loading Tool". Page 15 of the Lyman catalogue, on which information respecting the articles appears, is entitled "Lyman Reloading Equipment". Article No. 1 is referred to there as a reloading tool; Article No. 2, "The Tru-Line Jr. Press",

is there said to be the fastest tool on the market; No. 3, "The All-American Comet Press", is referred to as a reloading press.

I think that, like the advertising material referred to in the *Canadian Lift Truck Co. Ltd.* case (*supra*), the catalogues filed as exhibits in this appeal were not prepared from the standpoint of the customs tariff but to give to prospective customers such pertinent information as would enable them to purchase articles fitted to their requirements.

Members of the Board and counsel for the respondent questioned the appellant as to whether loading tools and reloading tools are the same or different things. The concluding part of that discussion is as follows[4]:

THE CHAIRMAN: The word "tool" you say, is ambiguous?

MR. ELLIOTT: Yes.

THE CHAIRMAN: In the trade, if I use not the word "tool" alone, or "machine" alone, but if I say loading tool, what will people understand?

MR. ELLIOTT: I don't think they will know. I think it could be applied to either one or the other.

THE CHAIRMAN: In both devices that you showed us this morning?

MR. ELLIOTT: Yes.

THE CHAIRMAN: Well, indeed, it is so applied in one of the catalogues, if I remember.

MR. ELLIOTT: Yes, and more specifically applied as a reloading press. You must take the more specific name.

THE CHAIRMAN: But the word loading tool is used in at least the only two catalogues that are before us.

MR. ELLIOTT: Yes. One refers to a machine, the other to a tool; and the Lyman catalogue refers to a specific tool.

THE CHAIRMAN: The Lyman catalogue refers to a reloading tool, but you say a reloading tool and a loading tool have the same meaning.

MR. ELLIOTT: Well, yes, substantially, yes.

THE CHAIRMAN: But in referring to the press in No. 1, it says that the Tru-Line Junior Press is the fastest tool on the market. The catalogue deems it to be a tool.

MR. ELLIOTT: Well, it is a tool, a tool that shapes metal by pressing as defined in Webster.

THE CHAIRMAN: But this Tru-Line Junior Press, which is described as the fastest tool on the market, would this be known as a loading tool in the industry?

MR. ELLIOTT: Yes, or a reloading tool.

[4] See pages 72 to 74 of the transcript.

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THE CHAIRMAN: Or a reloading tool?

MR. ELLIOTT: Yes.

THE CHAIRMAN: So the word loading tool or reloading tool implies an article the purpose of which is the reforming of these cartridges in the trade?

MR. ELLIOTT: Yes, with the power as applied by the human hand modified in some manner. That defines it as a machine.

THE CHAIRMAN: And you argue rather that that changes it into a machine?

MR. ELLIOTT: Yes. I mean, people don't use the same word to describe the same thing. They may use different words. Some people will call it a tool and some call it a machine, and some call it a press...

Several dictionary definitions of "tool" and "machine" were cited, including the following:

Oxford English Dictionary (Exhibit A-2)

Machine:

...

4. In a narrower sense: an apparatus for applying mechanical power, consisting of a number of interrelated parts, each having a definite function.

In recent use the word tends to be applied esp. to an apparatus so devised that the result of its operations is not dependent on the strength or manipulative skill of the workman; thus the term 'printing-machine' does not in ordinary language include the hand-press, but is reserved for those apparatus of later invention in which manual labour is superseded by the action of the mechanism.

Webster's Dictionary (Exhibit A-3)

Tool:

1. a An instrument of manual operation, as a hammer, saw, plane, file, or the like, used to facilitate mechanical operations; an implement.

b *Engineering* The cutting or shaping part in a machine or a machine tool (which see); also, a machine for shaping metal in any way, often specifically, a machine tool.

Shorter Oxford Dictionary

Tool:

Any instrument of manual operation; a mechanical implement for working upon something, as by cutting, striking, rubbing, or other process, in any manual art or industry; usually, one held in and operated directly by the hand, but including also certain simple machines, as the lathe.

Funk and Wagnall's New Standard Dictionary

Tool:

A simple mechanism or implement, as a hammer, saw, spade, or chisel, used in working, moving, shaping, or transforming material. A power-driven apparatus, as a lathe used for cutting and shaping the parts of a machine; also, the cutting or shaping part of such an apparatus.

Mechanism·

> Mechanism is a word of wide meaning, denoting any combination of mechanical devices for united action.

Machine:

> A machine is distinguished from a tool by its complexity and by the combination and co-ordination of power and movement to produce results.

Webster's Third International Dictionary

Tool:

> A machine for shaping metal.

The expression "loading tools" is not, it seems to me, an expression in common use except by persons who manufacture, sell, use or in some way have to do with firearms or related things. To them the expression is meaningful as being the name of a particular thing or class of things. I think that it was open to the Board to determine the meaning or sense which persons conversant with firearms attribute to that expression and to construe the expression, as used in item 44100-1, in that same sense. This the Board did, as I appreciate their declaration. It was also open to the Board on the material before it to construe "loading tools" in item 44100-1 as embracive of the imported article and to classify it under that item and not under item 42753-1 and, in my opinion, also, the Board did not err in law in so doing.

It appears to me that the view of the Board was tenable and I am unable to say that there is not evidence sufficient in point of law to sustain the Board's findings or that the Board, properly instructed as to the law and applying correct principles and acting judicially, could not reach the conclusions which it in fact reached.

The appeal herein is dismissed and it is declared that the imported article, the "Echo 'C' Model Loading Tool", is classified under tariff item 44100-1 of the customs tariff.

The appellant will pay the respondent's costs of the appeal to be taxed.

Ottawa 1968
June 21, 25-28
Oct. 1

BETWEEN:

MELNOR MANUFACTURING LTD., and MELNOR SALES LTD. ..... PLAINTIFFS;

AND

LIDO INDUSTRIAL PRODUCTS LIMITED ..... DEFENDANT.

Industrial Designs—Assignment by design's author to nominee of employer —Nullity of—Nunc pro tunc transfer—Effect of—Time limitation— Industrial Design and Union Label Act, R.S.C. 1952, c. 150, secs. 4, 7(3), 8, 12, 13(1), 14(1).

A designer engaged by a company to design a lawn sprinkler executed a specification for a design on August 9th 1966 and as required by his employer assigned all rights in the design to the employer's subsidiary, which applied for and obtained registration as proprietor of the design on January 30th 1967 under the *Industrial Design and Union Label Act,* R.S.C. 1952, c. 150. On March 25th 1968 the parent company's rights in the design as at August 9th 1966 were transferred *nunc pro tunc* to the subsidiary in order to resolve doubts as to the validity of the latter's title to the Canadian registration. On March 30th 1968 the subsidiary assigned its rights to plaintiffs which brought this action against defendant for infringement of the design

Held, dismissing the action, on the proper construction of secs. 4, 8 and 12 only the author of a design or a person for whom the author executed the design for good or valuable consideration can register the design as its proprietor; hence in this case the parent company alone was entitled to register the design and plaintiffs consequently acquired no right to the design from the subsidiary. *Renewal Mfg. Co. v. Reliable Toy Co.* [1949] Ex. C.R. 188; *Jewitt v. Eckhardt* 8 Ch.D. 404, referred to. The *nunc pro tunc* transfer of the parent company's rights to its subsidiary was of no effect because it was not registered within one year of publication of the design in Canada as required by s. 14(1).

Held further, plaintiffs had not established on the evidence that the design was in fact the work of the declared designer. Section 7(3) as to the effect of a certificate of registration does not require otherwise.

Held also, while s. 13 requires an assignment of a design to be recorded the recording may be made at any time.

ACTION for infringement of industrial design.

Christopher Robinson, Q.C. and *James D. Kokonis* for plaintiffs.

Weldon F. Green for defendant.

NOËL J.:—The plaintiffs, two Canadian corporations, acquired by an assignment from International Patent Research Corporation, dated March 28, 1968, a design applied to lawn sprinklers and registered under No. 226/29037 in the register of industrial designs on January 30, 1967. Since this assignment, the plaintiffs allege (and the defendant admits) that the defendant has offered for sale to the public and sold, lawn sprinklers identified by the defendant by the name *"Swinger"* and not made by either of the plaintiffs or International Patent Research Corporation or with the licence in writing of any of them. The defendant otherwise denies that its lawn sprinklers have had applied to them plaintiffs' design or a fraudulent representation thereof or that its offering for sale to the public and sale has infringed the plaintiffs' exclusive right for the said design, which right the defendant also denies.

The plaintiffs further allege that the design applied to the sprinklers so offered for sale to the public or so sold is the design covered by the registration or a fraudulent imitation thereof, and that the defendant has, without the licence in writing of the plaintiffs, applied the said design or a fraudulent imitation thereof to the ornamenting of lawn sprinklers and has published and sold and exposed for sale lawn sprinklers to which such design or fraudulent imitation thereof has been applied, and has thereby infringed the plaintiff's exclusive right for the said design acquired by its registration.

The plaintiffs therefore claim

a) an injunction restraining the defendant, by itself, its servants, agents or workmen from infringing the plaintiffs' exclusive right for its industrial design;
b) the damages suffered by the plaintiffs as a result of the defendant's infringement of the said exclusive right;
c) delivering up on oath to the plaintiffs of all lawn sprinklers in the possession or power of the defendant to which the design or a fraudulent imitation thereof has been applied;
d) such further and other relief as the justice of the case requires;
e) costs.

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The defendant admits that industrial design No. 226/29037 was registered in the name of International Patent Research Corporation on January 30, 1967, but pleads that this design registration, however, is and always has been invalid and void on the grounds that the said design,

(1) is not one within the scope of the *Industrial Design and Union Label Act*;

(2) at the date of registration was not registrable in that it was identical with or so closely resembles those designs already registered and those referred to in a schedule attached to its particulars of objections as to be confounded therewith;

(3) was published more than one year prior to the date of registration in Canada having regard to the prior art and the offering for sale of a number of oscillating lawn sprinklers;

(4) was not original at the date of adoption of the said design by the said proprietor having regard to the prior art and the offering for sale and sale of oscillating lawn sprinklers embodying the design;

(5) the articles to which the said design has been applied after registration under the authority of International Patent Research Corporation, the assignor, and/or the plaintiffs, failed to bear the letters Rd. and the year of registration at the edge or on any part thereof, or a label with the proper marks thereon, nor did the name of the proprietor appear upon such articles contrary to section 14(1) and (2) of the *Industrial Design and Union Label Act*;

(6) the description of the said design in the registration fails to state distinctly the things or combinations that the applicant regarded as original and in which an exclusive property or privilege was claimed;

(7) any differences between the said design described and illustrated and the designs commonly known and commonly used in the art prior to the date on which the said design was adopted consisted merely of workshop or obvious alterations which did not constitute an exercise of intellectual activity sufficient to establish originality as required by the *Industrial Design and Union Label Act*; and, finally,

(8) International Patent Research Corporation, the assignor of the said design registration to the plaintiffs, was not the person entitled under the provisions of the *Industrial Design and Union Label Act* to make application for registration of the said design and register the said design in its name in that at all material times it was fully aware that the author of the said design was John D. Bienert of New York City, New York, or Horace Chow, of Moonachie, New Jersey, or both of them, who executed the said design for Melnor Industries Inc., a United States corporation, for a good or valuable consideration and therefore the application for registration was invalid and void *ab initio* and the registration invalid and void *in limine*.

The defendant prays that the present action be dismissed with costs.

Leave was granted the plaintiffs on June 17, 1968, to produce a reply and joinder of issue whereby *inter alia* they admit:

(a) that defendant had no notice of the acquisition of the rights of the plaintiffs in the industrial design from International Patent Research Corporation until April 19, 1968, the date of the service of the statement of claim upon it;

(b) that the author of the industrial design involved herein (No. 226/29037) was John D. Bienert who executed the said design for Melnor Industries Inc., a New York corporation, for good and valuable consideration.

The plaintiffs further allege that Melnor Industries Inc. was, since before the year 1960 until 1967, a New York corporation engaged in the business of designing and manufacturing garden equipment including lawn sprinklers and had in that period a number of wholly owned subsidiary companies which included amongst others, a United States corporation International Patent Research Corporation and two Canadian companies, Melnor Sales Ltd. and Melnor Manufacturing Ltd., the present plaintiffs.

The evidence discloses that International Patent Research Corporation (hereinafter referred to as "Inter-

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national"), was formed to hold all patent and design rights in all countries, including the United States and Canada of the Melnor group of corporations and the plaintiffs submit that from the incorporation of International in 1961 arrangements were made to transfer to the latter the title to all inventions, both mechanical and design, relating to operations of the Melnor group and to resulting patents, design registrations and similar rights in all countries with the intention on the part of Melnor and International that the latter should hold all such rights in all countries. The normal arrangements for the above purpose were to have the inventor of the invention including design, execute an application for United States patent in respect of the invention and at the same time execute in favour of International an assignment of all rights to the invention described in the application and to the application and of any patents therefor obtained in the United States and in foreign countries. Plaintiffs submit that an independent designer by the name of Bienert was engaged by Melnor to create the design in suit and executed a specification on August 9, 1966, and then executed a United States application for registration therefor, which matured into United States patent D-207,575 of May 2, 1967, and that he executed also an assignment to International of all rights in the design in the United States and all foreign countries, which was recorded in the United States Patent Office on August 11, 1966, and Melnor and International believed that thereby all of such rights had been effectively conveyed to International; International then at the direction of Melnor, and on the understanding that the assignment from Bienert to International was effective to make International proprietor of the design in Canada, applied in Canada as the proprietor for registration of the design by application serial No. D-34,959, which matured into design registration No. 226/29037 of January 30, 1967; pursuant to an agreement and plan of reorganization, made on November 1, 1966, between Melnor and Beatrice Foods Co. (hereinafter referred to as Beatrice) a corporation of the State of Delaware, in the United States, Melnor, on January 31, 1967, conveyed to Beatrice all Melnor's business and assets including, amongst others, inventions, patents and patent rights and all interests to which Melnor

had any right of ownership or otherwise or to which Melnor had a conveyable or assignable interest; the assets of Melnor thus conveyed included all the issued and outstanding shares of all the subsidiary companies of Melnor, including those of International, with the result that since January 31, 1967, all the said subsidiary companies have been wholly owned subsidiaries of Beatrice; since January 31, 1967, Beatrice has carried out, under the name Melnor Industries, the business formerly carried on by Melnor with the same directing personnel as was the directing personnel of Melnor and Melnor since is no longer in existence; on March 25, 1968, Beatrice executed a document transferring to International *nunc pro tunc,* as of August 9, 1966, all such rights as Melnor may then have had in and to the design in suit. This document, produced as Exhibit 25, appears to have been recorded under number 3945 on May 15, 1968, nearly a month after the taking of the present action and was executed for the purpose of validating or confirming the title of International to the design in suit as it was brought to the attention of Beatrice that by operation of law, arising from Melnor's payment of monies to Bienert for the creation of the design, Melnor may be said to have become the proprietor of the design prior to the time that Bienert executed, on August 9, 1966, an assignment of the design to International. As Melnor Industries, Inc. had not transferred its ownership in the design to International, Beatrice wished, by this *nunc pro tunc* document, to eliminate any doubt as to International's proprietorship of the design and as to its title to the Canadian design registration pertaining thereto.

Harold James, a patent attorney employed by the Melnor group of companies, explained how and why International was set up. In 1961 or 1962, he says he brought the requirements of the Canadian patent marking law, and in particular that the name of the proprietor was a part of that marking (cf. section 14(1) and (2) of the Act), to the attention of his client Melnor. Melnor had advised him that many of their products were sold under names other than Melnor because it was undesirable that the name Melnor appear on these lines as they were sold at lower prices and were of somewhat lesser quality than the sprinklers sold under the Melnor name. James said he

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discussed the matter with Canadian counsel and with Mr. Sol Glick, of the Melnor firm, and the latter suggested the possibility of using a corporation with a neutral name as the owner. From the creation of International in 1961, the practice, according to James, was that when a United States application, mechanical or design, was prepared, his office would send with the application and the formal papers for the application, an assignment from the inventor or designer, whoever he may be, to International of all rights including all foreign rights to the invention be it mechanical or design. These documents would be executed by the inventor, returned to James' office and then the application papers, together with the assignment, would be sent to the United States Patent Office, the application papers for filing and the assignment for recording. An assignment of the Canadian rights to International would, therefore, be executed at the same time as the application and then both would be forwarded to Canadian associates for filing and recording.

James explained that the basis for that practice was to carry out the purpose for the formation of International which was to have a neutral name for Canadian design markings and to have all patent and design rights in one place rather than just Canadian patent rights in one place and other patent rights elsewhere.

The above facts have given rise to a number of problems which, having regard to the confusing and terse language used in some of the sections of the present *Industrial Design and Union Label Act* in this country, have not been conducive to an easy solution.

As a result of the above transactions, a number of attacks were made by the defendant not only as to the validity of the industrial design in suit, but also as to the title of the plaintiffs to this design.

The main one which I will deal with now is that as the plaintiffs admitted in paragraph 1(*b*) of their reply, that the design in suit was executed by Bienert for Melnor Industries Inc. "for a good or valuable consideration", the sole proprietor of the design, as provided for in section 12(1) of the *Industrial Design and Union Label Act*, R.S.C. 1952, chapter 150, could, therefore, only be Melnor who would also be the only person, as proprietor, who could, under section 4 of the Act, apply for its registration

and who, under section 8 of the Act, could alone register it. Sections 12(1), (2), 4 and 8 of the Act read as follows:

> 12. (1) The author of any design shall be considered the proprietor thereof unless he has executed the design for another person for a good or valuable consideration, in which case such other person shall be considered the proprietor.
>
> (2) The right of such other person to the property shall only be co-extensive with the right that he has acquired.
>
> 4. The proprietor applying for the registration of any design shall deposit with the Minister a drawing and description in duplicate of the same, together with a declaration that the same was not in use to his knowledge by any other person than himself at the time of his adoption thereof
>
> 8 Where the author of any design has, for a good and valuable consideration, executed the same for some other person, such other person is alone entitled to register.

The defendant therefore submitted that as Bienert had no right to this design, he could not, by his assignment to International, transfer any right to this corporation and the latter's application in October 1966 as the proprietor of this design on the basis of his assignment, as well as the registration obtained on the strength of this application, are null and of no effect. As the plaintiffs draw their title from International, they also can possess no greater right than their author International.

Defendant further urged that even if the assignment is valid it could not be upheld because it "had not been recorded in the office of the Minister" as required by section 13(1), (2) and (3) of the Act reproduced hereunder:

> 13 (1) Every design is assignable in law, either as to the whole interest or any undivided part thereof, by an instrument in writing, which shall be recorded in the office of the Minister, on payment of the fees prescribed by this Act in that behalf.
>
> (2) Every proprietor of a design may grant and convey an exclusive right to make, use and vend and to grant to others the right to make, use and vend such design within and throughout Canada or any part thereof for the unexpired term of its duration or any part thereof.
>
> (3) Such exclusive grant and conveyance shall be called a licence, and shall be recorded in like manner and time as assignments.

It is also, according to counsel for the defendant, too late to record the assignment now as one must read into this section a requirement which existed in the forerunner to the present Act and which, he says, was by oversight, not included in the present Act that all assignments be registered within 30 days from such assignment. There is, he says, a good reason to come to this conclusion in view

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of the wording of subsection (3) of section 13 which states that "such exclusive grant and conveyance shall be called a licence, and shall be recorded in like manner and time as assignments". This section of the Act, however, mentions no time or delay for the registration of assignments and the only interpretation I can give to the language used here (as I cannot import into the Act a requirement which it does not mention) would be that if the Act had provided for a delay or a time for the assignment of designs, then a licence shall also be recorded "in like manner and time". As however, the Act mentions no time, it must, I believe follow that no time is set down for such a recording and assignments can therefore be recorded any time after they are granted. It therefore follows that if plaintiffs' assignment is valid it can be recorded at any time after its execution.

In view of the circumstances under which the present assignment of the design in suit was made by Bienert to International and the fact that International, who registered the design as its proprietor, was not its owner, the first question is whether a *nunc pro tunc* document such as Exhibit 25 can effectively validate the above assignment and give International a valid title to the design it registered in January 1967.

It can only do so if, as an assignee, it can be included in the word "proprietor" mentioned in section 4 of the Act where a proprietor only can apply for registration of a design.

The question here really is whether the proprietor contemplated in this section, is restricted to those persons (the author or the person for whom the latter has executed the design for a valuable consideration) contemplated in section 12 of the Act, or as being entitled to register under section 8 of the Act.

After careful consideration of the various sections of the Act which deal with the rights of the proprietor, assignee and licencee, I must, I believe reach the conclusion that under sections 12, 4 and 8 of the Act, the author or, in the case he produces a design for someone else for a valuable consideration, that other person alone can register and sections 12 and 8 do not merely determine, as submitted by counsel for the plaintiffs, who, between the author and

the person for whom he executed a design, is the owner and has the right to register a particular design. I say this because, in my view, the person in a position to comply with the requirement in section 4 that he supply "a declaration that the same (design) was not in use to his knowledge by any other person than himself at the time of his adoption thereof" is either the author or the person for whom he made the design. Indeed, in order to make such a declaration, one must know the facts surrounding the creation and the application of the design at the time it was adopted and, in my view, only the author or the person for whom the design is made is in a good position to supply this information. It is, I believe, necessary that the author or the person for whom the design is made for valuable consideration give this information because the purpose is to get at the person to find out whether in fact he is entitled to the monopoly. Now, as the person who paid for the execution of the design in suit at the time of the adoption of this design, was Melnor Industries Inc., it follows that it alone was the proprietor of this design and was the only one entitled to register it. This would be in line with the decision of Cameron J. in *Renewal Mfg. Co. v. Reliable Toy Co. et al*[1] where at p. 193, dealing with the predecessor to the present Act he stated:

> ...As I have stated above, only the proprietor of a design is entitled to register his design. By the provisions of section 35 (*supra*) the author shall be considered the proprietor unless he has executed the design for another person for a good or valuable consideration, in which case such other person shall be considered the proprietor. Then, by section 31 it is provided that if the author shall for good and valuable consideration have executed the design for some other person, such other person shall *alone* be entitled to register. It follows from the provisions of these two sections that if an author has executed the design for good and valuable considerations for another person, that the author cannot register the design in his own name, that right being reserved for "such other person."

It would also seem that, as under section 14(1) of the Act, a design to be protected must be registered by its proprietor within one year from its adoption in Canada, it would be too late now, even by a *nunc pro tunc* document such as Exhibit 25, to try to correct the situation in order to make International retroactively the proprietor

[1] [1949] Ex. C.R. 188.

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of the design. The plaintiffs, therefore, have no better title to this design than International and cannot in the present action enforce any rights therefor.

It may well be, as submitted by counsel for the plaintiffs, that by restrictively interpreting section 4 of the Act in holding that only the author or the person for whom he made the design for a valuable consideration can register, may mean, although I do not intend or need to decide it here, that in some cases such as, for instance, when the author or the other person for whom it is made, dies before registration, an industrial right could then be lost forever. There is, as a matter of fact, no provision in the Canadian statute (although there appears to be one in the English Act) which deals with the matter of devolution and as section 12 mentions only the author or the person for whom the author made the design for a valuable consideration, who, as already mentioned, according to section 4, are persons in a position to supply the information required, and there is no mention of a legatee, it may be that in the event of the decease of the only person entitled to register, the right could be lost forever.

The language used in the present Canadian *Industrial Design and Union Label Act* is very sparse and it is not, I believe, possible to import into the Act something to take care of a situation which appears not to have been dealt with at all. Parliament, indeed, did not see fit to mention in the statute a legatee as a possible proprietor entitled to register a design and it is questionable whether this Court can supplement the Act in order to deal with such a situation.

It is, I agree, somewhat surprising that this legislation be so drawn up as to say that a property right which by law normally devolves on somebody, may, in some cases, disappear altogether and be lost forever, but in a matter such as the present one, which deals with the giving by statute of a monopoly in an industrial right, one could be faced with such a situation where, unless a right is properly registered by whoever under the statute is declared to be entitled to register it, such a right is lost.

Whatever may be the rights of an heir or legatee to an unregistered design, it is clear from a reading of the relevant sections of the Act that an assignee is not mentioned as being a person authorized to register a design

as its proprietor, although of course, section 13 permits an assignee to record an assignment. I must, therefore, conclude that under the relevant sections of the present Act only the author or the person for whom he has executed a design for a good or valuable consideration can register a design as its proprietor[2].

I am fortified in the conclusion I have reached in this regard by a consideration of other sections of the Act where a clear distinction appears to have been made between the registered proprietor and his assignee such as in sections 11 and 16 of the Act where mention is made of "...the registered proprietor or if assigned of his assignee..." in dealing with their rights in the event of unlawful use of the design (section 11) or the violation of their rights (section 16). There is, of course, section 14(1) of the Act which deals with the conditions of registration and marking requirements which says that "the name of the proprietor shall appear upon the article to which his design applies by being marked..." and there is no question that the word proprietor here must include an assignee as under the preceding paragraph 13 an assignee can acquire rights and in the event he does then his name and not that of the person from whom he acquired rights must appear under the marking requirements on the goods manufactured or sold by him. The purpose of marking goods is indeed to indicate to the public the owner of the wares at a particular time when they are on the market and if the owner happens to be an assignee it is clear that his name alone must appear on such wares. It would, no doubt, have been preferable that

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[2] In *Jewitt v. Eckhardt* (8 Ch. D. 404) Jessel M. R. dealing with a design stated at p. 410:

> On the other hand, can you register an assignment or license before the proprietor himself has registered? It would have this very singular consequence if you could. If a license by the author or the sole proprietor of a design be granted before registration, and the licensees had a right to register and to publish, nobody else could register it afterwards, and the original proprietor would lose his right, which would be a singular result. Whereas, if the provision of the Act is, as I think it is, to have registration on the part of the author and proprietor before he grants out the partial interests, then there is no difficulty, because every man who gets a partial interest registers under the 6th section, and that grant must be in writing. It seems to me that that is the real meaning of the Act, although it is not so perfectly expressed as I should like.

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the word assignee be included in the section to indicate clearly that such was the case, but this, in my view, is another example of the inadequacy of the language used in the present Act. It does not, however, persuade me that the restrictive interpretation I have given to the other sections of the Act which deal with registration and those entitled to register is wrong nor that an assignee should also be read into the word "proprietor" in those sections.

I must, therefore, conclude that the registration effected by International here, even fortified by the *nunc pro tunc* document, which indicates that the intention of Melnor Industries Inc. and the Melnor group was to insure that International would, as part of the group, be the proprietor of the design in addition to having been obtained by a false declaration that it was the proprietor, and being, therefore, on this account alone invalid and of null effect, has given International, or the plaintiffs, from whom they draw their rights, no valid title to the design in suit and the action for this reason alone must be rejected[3].

Having reached this conclusion, it should not be necessary for me to deal with any other of the numerous attacks launched by counsel for the defendant herein except to say that, having regard to the whole of the evidence adduced, even Bienert's authorship of the design in suit remains doubtful and, therefore, questionable. Indeed, the evidence that Bienert (whom plaintiffs claim) was the author of the design in suit, is not, in my view, sufficiently coherent and convincing to establish clearly that such is the case. I say this, notwithstanding the fact that defendant alleged (although alternatively, as it stated in paragraph 8 of defendant's particulars of objection that either Bienert or Ho Chow was the author) that Bienert was the author of the design which plaintiffs admitted and that counsel for the defendant, in an attempt to read in at the trial parts of an affidavit of one Warshauer, an officer of the Melnor group of companies and tendered in support of the interlocutory injunction proceedings as part of the discovery of this officer, produced the entire document which happened to contain, in addition to the statements counsel for the

[3] *In* re Carter (1932) 49 R.P.C. 403, which dealt with an invention, it was held that an application to which the true and first inventor was not a party is void and that the irregularities cannot be cured by amendment.

defendant wanted to use as evidence, a statement to the effect that Bienert was the author of the design in suit.

I am not satisfied, on the whole of the evidence produced herein, even considering the effect of the language used in section 7(3) of the Act, that a certificate issued under the Act "in the absence of proof to the contrary, is sufficient evidence of the design, of the originality of the design, of the name of the proprietor, of the person named as proprietor being proprietor, of the commencement and term of registry and of compliance with the provisions of this Act" that Bienert's authorship of the design is sufficiently or satisfactorily established.

A brief outline of the evidence with regard to the authorship of this design will show what I mean.

Counsel for the defendant read in parts of the answers given on discovery by Warshauer, an officer of the plaintiffs' companies, who in the course of such an examination produced two drawings of the design in suit, Exhibit 21—drawing 33A, dated 4/2/66, which at the trial became Exhibit M and drawing 33A1, dated 4/7/66, which became at the trial Exhibit X, both of which, as can be readily seen, were made prior to the date when the plaintiffs state Bienert executed the specification of the design for them, which they allege was on August 9, 1966. Warshauer admitted that both of these drawings had been made by one Ho Chow or Tappan, two draftsmen employed by the Melnor companies and he was then asked the following questions:

Q Mr. Warshauer can you tell me what stage of the evolution of the industrial design in suit, Exhibit 21 represents?

A. I cannot tell you the exact stage Mr Green

Q. Well as your counsel has said, it does represent a stage, is that right?

A. Yes, sir

Q Now do you recall telling me on your cross-examination on April 25 when I directed your attention to Exhibit No. 6 of the cross-examination of which this is a copy, Mr. Kokonis? Will you admit that?

MR. KOKONIS: I will do that, yes.

Q. Will you do that? You told me in an answer to this question and I was directing your attention to Exhibit 6, 'Does it incorporate the design which you say is the subject of this suit?' and your answer was 'Yes, sir' Is your answer the same today?

MR. KOKONIS: I will agree that on cross-examination Mr. Warshauer was asked that question and gave that answer. However, that was

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cross-examination. This is examination for discovery. You are on this examination today, examining Mr. Warshauer in his position as an officer of the companies in question.

MR. GREEN: Yes.

MR. KOKONIS: And in giving his answer today based on a knowledge of the company, Mr. Warshauer has agreed that Exhibit 21 represents one stage of the evolution of the design here in suit.

The following then took place with regard to another drawing of the design in suit, Exhibit 22 (Exhibit X at trial):

Q. Now looking at Exhibit 22.

A. Yes.

Q. What does that Exhibit represent Mr. Warshauer?

MR KOKONIS: Well Mr. Green, Exhibit 22 represents the working mechanism of the sprinkler No. 33 which is marked Exhibit 20 to these proceedings and in respect of which Exhibit we will admit that the design of the industrial design which is here in suit has been applied.

Q You have produced another drawing for the first time this morning which I had no previous knowledge of and I would like you to tell me what that drawing depicts?

A. This drawing depicts the final design of the sprinkler No. 33 Rain Wave.

Q Which is the design in suit, is that right, as depicted in Exhibit 23?

A. Yes, sir.

Q. And what date does it bear?

MR KOKONIS: Well Mr Green, there are two dates on the drawing. The first date June 7, 1966 and which I understand to be the date of the first drawing; it also bears a date in red, June 4, 1968 which I understand is the date the print is put into file at Melnor Industries

Q. I understand from off the record discussion Mr. Warshauer, that this is a blueprint of the original drawing which you have in your possession?

A. Yes, sir.

Q And so far as you know it was drawn by whom?

A. Frank Tappan who I understand is a draftsman employed by Melnor Industries.

Q Inc. at that time?

A. Yes

Q. He would be operating under the direction of Ho Chow?

A. Yes, sir.

Q. And we are agreed that this discloses the features of the design in suit?

MR. KOKONIS: As Mr. Warshauer has said this is the final drawing, the last stage of evolution one might say.

Q. The last stage of evolution?

A. Yes, sir.

Q. I'd like to mark that Exhibit 24.

Exhibit 24· Blueprint drawing 33A bearing date 6/7/66 and June 4, 1968 in red.

Warshauer was then asked whether he knew of the existence of any other drawings in the hands of Bienert and the following questions and answers ensued:

Q. Well apart from your companies and the persons employed by them do you know of the existence of any drawings, for example, in the hands of Mr. Bienert?

A. I do not know of any.

Q. If you should learn that there are, would you produce them to counsel if you can get them into your possession that is?

Q. Now have you any knowledge, I am speaking about your corporate entity, Mr. Warshauer, of how Mr. Bienert went about the conception of this design?

A. No, Mr. Green. He is a designer and I don't know.

Q. Did he do his work at your plant?

A. He would...

Q. No, did he?

A. I don't know.

Q. Well in the course of working on this design, did he provide drawings to Melnor Industries Inc?

A. I do not have first hand knowledge of that.

Q. If he did not provide drawings, did he provide a model?

A. To the best of my knowledge, he did not provide a working model.

Q. Is that your own personal knowledge or the knowledge of the company?

A. My personal knowledge.

Q. Well I want an answer on the knowledge of the company.

MR. KOKONIS: Yes, Mr. Green.

I did get an answer, my Lord, in the letter of June 14, on page 2, paragraph No. 8:

8. *Pages 56 and 57 Discovery—*

Inquiries have been made of the personnel at Melnor Industries and there is no knowledge as to whether Mr. Bienert provided a model of the design in suit. A search of the records of Melnor Industries has failed to reveal any drawing or sketches other than the drawings produced to you prior to the examination for discovery and the two drawings referred to under No. 7 hereinabove.

In the face of such conflicting and incomplete evidence with regard to Bienert's authorship of this design, it is not possible for me to reach the conclusion that he really did anything in this regard. It is true that it appears from the evidence that the design was registered in Bienert's name in the United States Patent Office but this is not conclusive evidence in this country that he is the author of it. Furthermore, the fact that no drawings or model made by Bienert could be produced of a design which was registered in the United States Patent Office is to say the least surprising. This, of course, leaves the matter of authorship in a very unsatisfactory and unconvincing situation. Plaintiffs could

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have, and, I believe, in view of the drawings produced on discovery, which were made by either Chow or Tappan, two paid employees of Melnor, and the fact that plaintiffs were not able to produce even a sketch of the design made by Bienert, should have produced Bienert as a witness to explain this most extraordinary fact that being the author of a design which was registered in the United States Patent Office it was not possible to find and produce a drawing, model or even a sketch of his design, particularly when, on the other hand, there were a number of drawings made by others of this design, some of which appear to deal with the first stage of the design, such as Exhibits AP, M and X, and others with the latter stages of the design, such as Exhibits AO and N which are more detailed and one (Exhibit N) which bears the inscription "final design" even if some of these drawings happen to bear also a design of the inner mechanism of the sprinklers. I should also add that all of these drawings bear a date prior to August 9, 1966, when plaintiffs claim Bienert executed the specification of the design in suit for them. There is not, in my view, after considering the whole of the evidence hereunder, sufficient or satisfactory evidence before me to establish that Bienert was the author of the design in suit and the plaintiffs have here failed to discharge the burden they had of establishing the authorship of the design[4]. One may also wonder why the evidence in this regard was allowed to remain in this unsatisfactory condition. Should the answer be, as submitted by counsel for the defendant, that Bienert had created the earlier sprinklers (Exhibits C and D) for Melnor and when the latter came around to protect the design in suit, created by Melnor's draftsmen, it credited Bienert for the features that corresponded to the earlier sprinklers in which case there would be some questions as to whether what Melnor's employees did was in the course of their duties, in the employer's time and at its expense[5]. This could also cast some doubt on the originality and novelty of the design in suit.

I should before parting with this case, even if such a course is unnecessary, in view of the conclusion I have reached as to the defective title of the plaintiffs herein, but because of the possibility of an appeal, deal with this

[4] *Cf.* Henrich's Design (1892) 9 R.P.C. 73.

[5] Cf. *Renewal Mfg. Co. v. Reliable Toy Co. et al, (supra).*

question of the novelty and originality of the design in suit and I should do so bearing in mind the possibility that it may have been created by either Chow or Tappan. The design, if one refers to the certificate, is described as being:

> ...characterized by a pair of end supports which have essentially similar but different sized shapes in front and side elevation and top plan, said front elevation shape comprising upwardly converging side walls, a top wall, and spaced depending essentially diverging feet portions, said side elevational shape comprising a substantially vertical front wall, a top wall, and a downwardly and outwardly inclined rear wall, said top plan shape comprising a narrow central portion with widening tapered end portions, the front edges of all said portions being essentially planar, one end support having forwardly and rearwardly projecting housing portions located substantially in registration with one another.

It was strongly attacked by the defendant, on the basis that it is merely a skeletal type structure adapted to some material as distinguished from a solid form and that cost reduction and not invention was the main consideration underlying the production of the housing of the design. It was also submitted that the design in suit compared to Exhibits C and D, which counsel for the plaintiffs admitted was proper prior art, was different only in that the following obvious changes were made and this for stability reasons only: the entire motor housing and horizontal hose connection was lowered and the end support was widened at its base to provide a four point suspension. It was further submitted that the lowering of the motor housing within the thin web were necessitated changes in the web to relate the top flange structurally more closely to the motor housing by employing a box structure (common in the field to orient the structure directionally). As the lowering of the motor housing and the hose connection interfered with the bottom flange it was replaced by two radial flanges tied directly to the motor housing.

According to the defendant, the design in suit was scaled down from the prior art (Exhibits C and D) and the differences between the latter and the design in suit were merely prompted by a cost reduction programme and that, therefore, there was no originality in the design in suit.

I have examined and compared the prior art and the design in suit herein and although it may well be that a knowledgeable draftsman or engineer presented with the request to produce lawn sprinklers of a cheaper construction

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than those exemplified by Exhibits C and D could arrive at a structure which, in some respects, might resemble the housing and end support of the plaintiffs' sprinklers (even assuming the possibility that the design in suit may have been made by Melnor's draftsmen Chow and Tappan looking at Exhibits C and D or even taking some of its features from the prior art) such a structure would not be necessarily identical or even closely similar to the structure of the plaintiffs' sprinklers in view of the various features of construction the evidence reveals one can choose from and that can be used to attain a less costly product.

Furthermore, having regard to what existed in sprinklers before the design in suit was adopted or to what existed in terms of ornament treatment available generally in the plastic art (as the housing and back of the sprinkler involved herein are made out of this material), I would conclude that there was here on the part of whoever was the author of this design, a mental conception and sufficient intellectual activity expressed in a physical form which is substantially different from any of the old designs (including Exhibits C and D) or any known combinations thereof and which had not existed before. I am also of the view that this difference cannot be considered as trivial. As a matter of fact, the whole top of plaintiffs' design above the motor housing, which is greater than the top of Exhibits C and D, is purely design, as the evidence discloses that it is achieving nothing functionally even if the lowering of the top in the design in suit might, in some small way, affect its balance when pulled over the ground. There is no doubt a family resemblance between the prior art (Exhibits C and D) in that the design is such that the outline of the silhouette of both units is similar, but the originality does not reside there but in the treatment of the housing proper, which is quite different from what existed before including Exhibits C and D. I, therefore, must find that the design in suit is sufficiently novel and original to be sustained. This, of course, leads me to deal finally with the matter of infringement. I would indeed have no hesitation in saying that if the plaintiffs had a valid title to this design, I would have concluded that defendant's sprinkler, as exemplified by Exhibit 2, clearly infringes the design in suit. I say this not only because defendant admitted that they copied the design in suit

and that the first batch of sprinklers it produced was identical to plaintiffs' but I would reach the same conclusion even with regard to its amended sprinkler. Exhibit 2, which was changed only in some small aspects and in features of the design which were not original in plaintiffs' design in the first place and because it retained those features which, in my view, do give it its originality. The defendant, as a matter of fact, merely angled in the side and the top of the flanges instead of bowing them out as in the plaintiffs' design. In all other respects, except in some very minor aspects, the defendant's unit is identical to the design in suit. I am also convinced that these changes were made by defendant to satisfy its customers who had accepted to purchase a considerable number of sprinklers from the defendant upon being exhibited by defendant sprinklers produced by the plaintiffs, which had been purchased in the United States by a Mr. Ondrey, an officer of the defendant company, and from which the name "Rain Wave" (plaintiffs' trade mark) had been deleted, as well as the words "patent pending". It was under these circumstances important for the defendant or Mr. Ondrey to retain a unit close to what it had spent a lot of money producing and upon which a good number of purchase orders had been obtained, but something still far enough away not to be an infringement. I must say that the defendant has not been successful in attaining this object because after examining defendant's unit, Exhibit 2, and plaintiffs' unit, Exhibit 9, I must come to the conclusion that a person who knew or had heard of plaintiffs' designs and then went to a shop where he saw defendant's units, even with the silhouette of defendant's units angled in the side and the top of the flanges, would be likely to pick up defendant's units thinking that they were the units he had heard of before as being plaintiffs' units. As a matter of fact, the units involved here are so close to each other that it is not possible to conceive that the defendant would have come out with the sprinkler it produced if the plaintiffs' design had not existed at all. I must, therefore, conclude here that the plaintiffs would have been successful in establishing that defendant's sprinklers (Exhibit 2) infringe the design in suit.

The action is dismissed with costs.

Montreal 1968
Oct. 8-9

BETWEEN:

CANADA STARCH COMPANY LIMITED ..... APPELLANT;

AND

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

Income tax—Deductions—Business income—Computation of—Lump sum paid to remove opposition to registration of trade mark—Whether payment on account of capital—Income Tax Act, s. 12(1)(b).

Appellant, which manufactured a cooking oil made from corn oil, decided in 1963 to place on the market a less expensive cooking oil made from soya bean oil in order to meet competition. With this in mind it employed advertising agents to suggest a name for the product, designers to design containers and labels, and a market survey firm to conduct a market survey. The name "Viva" was recommended for the new product but appellant's application for registration of that name as a trade mark was opposed by a grocery company which had registered the word as a trade mark. Following negotiations the grocery company abandoned its opposition on payment of $15,000, and appellant's application was duly granted.

Held, the $15,000 so paid by appellant, like the fees paid to the trade mark lawyers and the Trade Marks office, was a payment incidental to its ordinary trading operations, and therefore deductible in computing its income for the year; it was not a payment on account of capital and thus barred from deduction by s. 12(1)(*b*) of the *Income Tax Act*. Registration of a trade mark is of no value if the trade mark does not become distinctive in the course of the current operations of the business, and hence if the trade mark "Viva" was of enduring benefit to appellant's business it was not because of the $15,000 paid the grocery company.

M.N.R. v. Algoma Central Ry. [1968] S.C.R. 447; [1968] C.T.C. 161; *Sun Newspapers Ltd. et al v. Fed. Com'r. of Taxation* (1938) 61 C.L.R. 337, referred to.

INCOME TAX APPEAL.

Bruce Verchere for appellant.

M. J. Bonner for respondent.

JACKETT P. (orally):—This is an appeal from the appellant's income tax assessment for the 1964 taxation year in which the only question that I have to decide is whether a payment of $15,000 made by the appellant in that year to a third person in certain circumstances is deductible in computing its income for the year, or whether the

deduction of that amount is prohibited by section 12(1)(*b*) of the *Income Tax Act*, which reads as follows:

> 12. (1) In computing income, no deduction shall be made in respect of
>
> * * *
>
> (*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part,
>
> * * *

The circumstances in which the payment of $15,000 was made are set out in an "Agreed Statement of Facts", which reads in part as follows:

> 1. The Appellant's principal business is corn grinding from which the Appellant produces, *inter alia*, industrial starches and corn sweeteners for sale to manufacturers. In addition, the Appellant manufactures for sale by retailers, cooking oils known as "Mazola" and "VIVA" and other food products. Prior to 1963 the only cooking oil sold by the Appellant was "Mazola".
>
> 2. Proctor & Gamble Company of Canada Limited was not, prior to 1964, a competitor of the Appellant in respect of the manufacture and sale in Canada of liquid cooking oil, but was a competitor of the Appellant in the sense that prior to 1964 Proctor & Gamble Company of Canada Limited sold in Canada a solid vegetable shortening under the trade name "Crisco".
>
> 3. In the spring of 1963 the Appellant discovered that Proctor & Gamble Company of Canada Limited planned to market in Canada a liquid cooking oil under the trade name "Crisco". Such oil is less expensive to the consumer than the Appellant's oil, "Mazola", because "Crisco" is made from soya bean oil, which is less expensive than the corn oil used to produce "Mazola". Proctor & Gamble Company of Canada Limited did, in 1964, commence to sell "Crisco" cooking oil in Canada and has continued to do so to the present time.
>
> 4. In the spring of 1963 the Appellant's marketing division recommended that a soya bean oil, comparable in price to "Crisco" (and therefore less expensive than "Mazola") be introduced and sold by the Appellant in Canada. The Appellant would thus be in a position to compete with the expected entry into the Canadian market of Proctor & Gamble Company of Canada Limited's liquid cooking oil, "Crisco". It was the opinion of the Appellant's marketing division that there was a substantial commercial advantage to be gained from the marketing of a variety of cooking oils rather than only the one brand, "Mazola".
>
> 5. In or about April 1963, on the advice of the Appellant's Marketing Research Division, the Appellant's executive officers decided to test market a second and less expensive brand of cooking oil.
>
> 6. In or about April 1963 the Appellant engaged the services of Baker Advertising Agency to suggest a product name for the proposed new cooking oil. . . . In or about May 1963 the Appellant's officers tentatively selected "VIVA" as the product name for the proposed new cooking oil.

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7. In June of 1963 the Appellant instructed Messrs. Herridge, Tolmie, Gray, Coyne & Blair, solicitors, of Ottawa, to advise it whether the word "VIVA" was available as a trade mark. The Appellant received a letter dated July 22nd, 1963, from the solicitors reporting upon the availability of the trade mark "VIVA". . . .

8. In June of 1963 the Appellant retained the services of Stewart & Morrison Limited, industrial designers, to design containers and labels for the Appellant's proposed new cooking oil, "VIVA".

9. In June 1963 the Appellant instructed Admetrics Limited to carry out a demographic survey of the cooking oil market as far as size, regional use and brand desirability were concerned.

10. During June of 1963 the Appellant expended the sum of $3,832.00 in respect of the Admetrics survey and the services performed by Stewart & Morrison Limited in preparing rough designs of a bottle and label for its proposed new cooking oil, "VIVA".

11. In or about June 1963 the Appellant adopted the code name "Brand X" for its new cooking oil "VIVA" in order to preserve as much secrecy as possible.

12. On July 8th, 1963, Messrs. Gowling, MacTavish, Osborne & Henderson, solicitors, of Ottawa, on Appellant's instructions, filed with the Registrar of Trade Marks an application for the registration of the trade mark "VIVA" for use in association with edible vegetable oils. . . .

13. In July of 1963 the Appellant engaged Louis Cheskin Associates, a firm carrying on the business of market research, to conduct a name association study to gauge the public response to the name "VIVA", and also to the names "Harvest", "Argo", "Senora" and "Puritan". The Appellant's marketing officials wished to investigate the acceptability of the proposed name, "VIVA", to consumers and considered that because the largest consumer of cooking oils in Canada was to be found amongst ethnic groups, the largest of which was Italian, it was important to employ a name for the proposed new cooking oil which would satisfy the English, French and Italian segments of the Canadian population. The test was also designed to determine the acceptability of the name "VIVA" to varying age and economic groups. Accordingly the test was conducted with a sample of 405 consumers, 205 in the province of Quebec and 200 in Toronto. Of the persons tested in Toronto 100 were Italian. The persons tested were classified according to age (under and over 35 years) and family income (under and over $5,000.00). The report by Louis Cheskin Associates to the Appellant was received by the Appellant in September of 1963. . . .

14. On August 21, 1963 the Registrar of Trade Marks informed the Appellant's solicitor that the proposed mark "VIVA" was considered to be confusing with registered trade mark number 126932, the property of Power Super Markets Limited . . .

15. During the month of August 1963 the Appellant expended $4,777.13 with respect to:

(a) services performed by Stewart & Morrison Limited for container and label design, and

(b) services performed by Baker Advertising Agency Limited for television commercials to be used to market the Appellant's new cooking oil, "VIVA".

16. During October of 1963 the Appellant expended $175.00 for services performed by Colour Research Institute with respect to a design for the proposed "VIVA" label.

17. In November of 1963 the Appellant approached officers of Power Super Markets Limited with a view to obtaining the consent of Power Super Markets Limited to the registration by the Appellant of the mark "VIVA".

18. In November of 1963 the Appellant again retained Louis Cheskin Associates to conduct further research with respect to the Appellant's plans for marketing "VIVA" cooking oil. . . .

19. During November of 1963 the Appellant expended the following sums in connection with the proposed launching of "VIVA" cooking oil in the market place:

Colour Research Institute for container and label design	$ 4,870.00
Baker Advertising Agency Limited for television commercials	859.82
Stewart & Morrison Limited for container and label design	1,952.22
Louis Cheskin Associates for market research	3,660.00
TOTAL	$11,342.04

20. On or about December 2nd, 1963 the Registrar of Trade Marks sent to Power Super Markets Limited a notice of the Appellant's application for registration of "VIVA".

21. During December of 1963 the Appellant expended $1,320.00 for services performed by Stewart & Morrison Limited with respect to the design of "VIVA" labels, shipping containers and advertising material and salesmen's kits.

22. On or about January 3rd, 1964 Power Super Markets Limited filed with the Registrar of Trade Marks a statement of opposition to registration of the trade mark "VIVA".

23. During January, 1964 the Appellant expended $2,525.00 for services performed by Colour Research Institute for ocular testing on Brand X display material and by Stewart & Morrison Limited with respect to the design of "VIVA" in shipping containers and advertising display material.

24. In February of 1964 Mr. A. S. Cummings, Vice-President of the Appellant, met with Mr. Leon Weinstein, an official of Power Super Markets Limited, and as a result of the meeting an agreement was entered into whereby Power Super Markets Limited would withdraw its opposition to registration by the Appellant of the trade mark "VIVA" in consideration of payment by the Appellant of the sum of $15,000.00 upon registration of the trade mark. . . .

25. During February of 1964 the Appellant expended $1,425 00 for services performed by Stewart & Morrison Limited in respect of tests on "VIVA" label designs and the preparation of "VIVA" sales and advertising materials. The Appellant also expended $1,836.00 for colour association tests performed by the Colour Research Institute.

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26. During March of 1964 the Appellant expended the following sums in connection with the launching of "VIVA" cooking oil in the market place:

(a) Stewart & Morrison Limited for containers and label designs	$ 1,050.00
(b) Consolidated Glass Company Limited for containers	5,599.58
(c) Miscellaneous	2,026.75

27. Pursuant to the agreement . . . Power Super Markets Limited withdrew its objection to the Appellant's application for the trade mark "VIVA" and on May 1st, 1964 the Appellant was registered as owner of the trade mark "VIVA" under registration number 135609 in respect of edible soya bean oil. . . . The $15,000.00 payment was released to Power Super Markets Limited on or about May 13, 1964. Subsequently, the Appellant applied for amendment to the statement of wares covered by its said trade mark 135609 by deleting the words "edible soya bean oil" and substituting therefor the words "edible vegetable oils". On 28 December, 1964 the Registrar of Trade Marks advised the Appellant that such application had been granted and the statement of wares had been amended. . . .

28. In April of 1964 "VIVA" cooking oil was test marketed and sales were made in the London and Calgary areas.

29. During April 1964 the Appellant incurred the following expenses:

(a) Colour Research Institute for container and label design	$ 165.00
(b) Baker Advertising Agency Limited for television commercials	$51,915.15
Total	$52,080.15

In effect, in the course of putting a new product on the market, the appellant, in addition to spending money on market research, industrial designs and advertising, spent money on obtaining the registration of a trade mark that it was adopting for the new product; and that expenditure included this amount of $15,000 that it paid to induce another company to drop its opposition to such registration being granted to it.

No question is raised by the respondent as to whether the amount of $15,000 was laid out for the purpose of earning the income from the appellant's business (section 12(1)(*a*))[1] or as to the reasonableness of the amount so

[1] 12. (1) In computing income, no deduction shall be made in respect of
(*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,

laid out.[2] The only question that I have to consider is whether the deduction of the payment is prohibited by section 12(1)(*b*) because the payment was a payment "on account of capital". The respondent says that it was such a payment and the appellant says that it was not. I have to reach a conclusion this morning as to which of these two contentions is correct.

I start from the basis indicated by Fauteux, J., delivering the judgment of the Supreme Court of Canada in *M.N.R. v. Algoma Central Railway*,[3] where he says:

> Parliament did not define the expressions "outlay . . . of capital" or "payment on account of capital". There being no statutory criterion, the application or non-application of these expressions to any particular expenditures must depend upon the facts of the particular case. We do not think that any single test applies in making that determination and agree with the view expressed, in a recent decision of the Privy Council, *B.P. Australia Ltd. v. Commissioner of Taxation of the Commonwealth of Australia*, [1966] A.C. 224, by Lord Pearce. In referring to the matter of determining whether an expenditure was of a capital or an income nature, he said, at p. 264:
>
> > The solution to the problem is not to be found by any rigid test or description. It has to be derived from many aspects of the whole set of circumstances some of which may point in one direction, some in the other. One consideration may point so clearly that it dominates other and vaguer indications in the contrary direction. It is a commonsense appreciation of all the guiding features which must provide the ultimate answer.

For the purpose of the particular problem raised by this appeal, I find it helpful to refer to the comment on the "distinction between expenditure and outgoings on revenue account and on capital account" made by Dixon J. in *Sun Newspapers Ltd. et al. v. Fed. Com. of Taxation*[4] at page 359, where he said:

> The distinction between expenditure and outgoings on revenue account and on capital account corresponds with the distinction between the business entity, structure, or organization set up or established for the earning of profit and the process by which such an organization operates to obtain regular returns by means of regular outlay, the difference between the outlay and returns representing profit or loss.

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[2] 12. (2) In computing income, no deduction shall be made in respect of an outlay or expense otherwise deductible except to the extent that the outlay or expense was reasonable in the circumstances.

[3] [1968] S.C.R. 447 at p. 449; [1968] C.T.C. 161 at p. 162.

[4] (1938) 61 C.L.R. 337.

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In other words, as I understand it, generally speaking,

(a) on the one hand, an expenditure for the acquisition or creation of a business entity, structure or organization, for the earning of profit, or for an addition to such an entity, structure or organization, is an expenditure on account of capital, and

(b) on the other hand, an expenditure in the process of operation of a profit-making entity, structure or organization is an expenditure on revenue account.

Applying this test to the acquisition or creation of ordinary property constituting the business structure as originally created, or an addition thereto, there is no difficulty. Plant and machinery are capital assets and moneys paid for them are moneys paid on account of capital whether they are

(a) moneys paid in the course of putting together a new business structure,

(b) moneys paid for an addition to a business structure already in existence, or

(c) moneys paid to acquire an existing business structure.

In my opinion, however, from this point of view, there is a difference in principle between property such as plant and machinery on the one hand and goodwill on the other hand. Once goodwill is in existence, it can be bought, in a manner of speaking, and money paid for it would ordinarily be money paid "on account of capital". Apart from that method of acquiring goodwill, however, as I conceive it, goodwill can only be acquired as a by-product of the process of operating a business. Money is not laid out to create goodwill. Goodwill is the result of the ordinary operations of a business that is so operated as to result in goodwill. The money that is laid out is laid out for the operation of the business and is therefore money laid out on revenue account.

Basically, as I understand it, a trade mark or trade name is merely one facet of the goodwill of a business. A trade mark or trade name is a mark or name which distinguishes the businessman's wares or services from those of others.

It so distinguishes his goods or services because, by virtue of his business operations, including the use of the name or mark, his goods or services have become distinct from those of others in the public mind. That was certainly so in the period when trade marks depended exclusively for their legal protection on the legal action for the tort of passing off. In my view, that basic commercial or business fact remains unchanged by any of the different statutory schemes that have been adopted to give greater legal protection to the public and to honest business men against practices whereby one businessman's goods or services can be passed off as those of another. I do not overlook the fact that statutory rights are now conferred on a person who obtains registration of a trade mark or the fact that registration can be obtained of a "proposed" mark. Such rights are, however, dependent on a complicated scheme of statutory conditions designed, as I understand them, to facilitate the provision of legal protection to members of the public and to business men who, by their business operations, have caused their goods or services to be distinguished by specific marks as against persons who would otherwise be able to take advantage of the confidence the public has acquired in such marks. In my view, a trade mark that actually distinguishes is, even under the statutory scheme, a result that flows from the current operations of a business and it follows, as I have already indicated, that the moneys laid out in the operations that incidentally give rise to trade marks are moneys laid out on revenue account. (I emphasize that moneys laid out to acquire a trade mark that is the creation of somebody else's business operations would, on the contrary, be moneys laid out on capital account.)

I have been speaking in relatively simple terms of a trader with a simple operation who buys and sells goods and, for that purpose, adopts some identifying mark. As the facts of this case illustrate, modern business is not conducted in such a simple way. In place of individual traders relying on their individual sagacity and judgment, there are huge corporations for whom each single decision becomes a major operation. Huge sums must be spent on market surveys before a decision can be made as to what product to market or as to what trade mark or trade name

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to adopt. Industrial designers are employed at great expense to choose a colour and design for a label. Lawyers, accountants and economists find employment in the highly complicated process that has replaced the decisions that an individual would have made "by the seat of his pants". Nevertheless, from the point of view of what are current business operations and what are capital transactions, as it seems to me, the distinction follows the same line.

In my view, the advertising expenses for launching the new product in this case were expenses on revenue account. I expressed a similar view in *Algoma Central Railway v. M.N.R.*[5] in a decision that was upheld on appeal.[6] As I indicated there, "According to my understanding of commercial principles . . . , advertising expenses paid out while a business is operating, and directed to attracting customers to a business, are *current* expenses". Similarly, in my view, expenses of other measures taken by a businessman with a view to introducing particular products to the market—such as market surveys and industrial design studies—are also current expenses. They also are expenses laid out while the business is operating as part of the process of inducing the buying public to buy the goods being sold.

It remains to consider expenses incurred by a businessman, during the course of introducing new products to the market, to obtain the additional protection for his trade mark that is made available by trade mark legislation. A new mark adopted and used in the course of marketing a product gradually acquires the protection of the laws against passing off (assuming that it is, in fact, distinctive). This is something that is an incidental result of ordinary trading operations. Additional expenditure to acquire the additional protection made available by statute law seems to me to be equally incidental to ordinary trading operations. It follows that, in my view, the fees paid to trade mark lawyers and to the trade mark office are deductible. In this case, no submission was presented to me as to any principle whereby I should distinguish between the ordinary costs of acquiring trade mark registration and the

[5] [1967] 2 Ex. C.R. 88

[6] [1968] S.C.R. 447, [1968] C.T.C. 161.

$15,000 payment that, in this case, was necessary in the judgment of the appellant to obtain registration of its trade mark "VIVA", and I have been able to conceive of no such principle.

What the respondent does say is that the payment of $15,000 must be disallowed as being a payment "on account of capital", and he relies on the "usual test" to which I referred in *Algoma Central Railway v. M.N.R., supra,* at page 92 as follows:

> The "usual test" applied to determine whether such a payment is one made on account of capital is, "was it made 'with a view of bringing into existence an advantage for the enduring benefit of the appellant's business'"? See *B.C. Electric Ry. Co. Ltd. v. Minister of National Revenue,* [1958] S.C.R. 133, per Abbott J. at pages 137-8, where he applied the principle that was enunciated by Viscount Cave in *British Insulated and Helsby Cables, Ltd. v. Atherton, supra,* and that had been applied by Kerwin J., as he then was, in *Montreal Light, Heat & Power Consolidated v. Minister of National Revenue,* [1942] S.C.R. 89 at 105.

The respondent says that the payment of $15,000 was made "with a view of bringing into existence an advantage for the enduring benefit of the appellant's business," because it made the payment in order to acquire a registered trade mark with all the statutory rights to which the owner of a registered trade mark is entitled. Looking only at the *Trade Marks Act,* there is much force in this contention. However, in distinguishing between a capital payment and a payment on current account, in my view, regard must be had to the business and commercial realities of the matter. When the intricate conditions of the *Trade Marks Act* are properly understood, they operate so that the statute only provides protection for a trade mark that is distinctive of the owner's wares or services. If it does not distinguish them, the registration is invalid (section 18), and the protection afforded by section 19 does not apply. The situation is, therefore, that if, as a result of the ordinary current operations of a business, a trade mark is distinctive, the action of passing off (and section 7 of the *Trade Marks Act*) operates to give automatic protection; and additional protection can be obtained by registration. The trade mark, as an advantage for the enduring benefit of the business, is the product of the current operations of the business and is

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not the result of registration. Registration merely facilitates the businessman in enforcing the rights that accrued to him from his business operations. Either "VIVA" will be found, if it is ever tested, to have become distinctive of the appellant's wares by virtue of its trading operations, or its registration will be found to be invalid. Mere registration is an empty right if it is not based on a trade mark that has business or commercial reality as an incidental consequence of the current operations of the business. In my view, therefore, the trade mark in question was an "advantage for the enduring benefit of the...business", if it is such an advantage, was not acquired by the payment of $15,000.

Putting my view another way, it is that, while a trade mark once it becomes a business or commercial reality is a capital asset of the business giving rise to it, just like goodwill, of which it is merely a concrete manifestation, a trade mark is not a capital asset that has been acquired by a payment made for its acquisition, but is a capital asset that arises out of, and can only arise out of, current operations of the business; and registration of a trade mark does not create a trade mark that is such a business or commercial reality, but is merely a statutory device for improving the legal protection for it.

The appeal will be allowed and the assessment will be referred back to the respondent for reassessment on the basis that the sum of $15,000 referred to in paragraph 13 of the Notice of Appeal is deductible in computing the income of the appellant for the 1964 taxation year. The appellant will have its costs in an amount which it is agreed should be $938.65.

BETWEEN:

PALMER-McLELLAN (UNITED) LTD. ..APPELLANT;

AND

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

Ottawa 1968
Sept. 26
Oct. 11

Income tax—Interest on bonds—Deductibility—Amalgamated company—Bonds used by one predecessor to acquire capital stock of other predecessor—Income Tax Act, secs. 11(1)(c), 85i(2).

In December 1958 *O U* Co acquired all the issued capital stock of *S* Co for $110,000, which sum had been obtained from the sale of *O U* Co bonds, plus the delivery of other *O U* Co bonds to the value of $100,000. The *O U* Co and *S* Co were subsequently amalgamated as appellant under the New Brunswick *Companies Act*, *S* Co's capital stock becoming part of appellant's capital stock and appellant being substituted for *O U* Co with respect to the obligations of the latter's bonds.

Held, confirming a 1963 assessment, appellant was not entitled under s. 11(1)(*c*) of the *Income Tax Act* to deduct the interest paid on the bonds in computing its income.

1. Following the formation of appellant the *S* Co shares acquired by *O U* Co (the income from which would be exempt to *O U* Co) disappeared or became the property of *O U* Co shareholders, and the interest thereafter paid by appellant on *O U* Co bonds must continue to be characterized as interest on money used to acquire property the income from which would be exempt. *Canada Safeway Ltd. v. M.N.R.* [1957] S.C.R. 717 applied.

2. The provisions of s. 85i(2), that a corporate entity formed on amalgamation shall be deemed to be a new corporation, etc, do not affect the issue in this case.

3. Since *S* Co's shares disappeared or became the property of *O U* Co shareholders on the amalgamation it could not be said that such property was thereafter used in the amalgamated company's business so as to permit the claimed deduction.

4. Interest paid by appellant was not deductible as a current business expense apart from the provisions of s. 11(1)(*c*).

APPEAL from Tax Appeal Board.

John P. Palmer, Q.C. for appellant.

M. J. Bonner and *M. A. Mogan* for respondent.

THURLOW J.:—This is an appeal from a judgment of the Tax Appeal Board[1] which dismissed the appellant's appeal from an assessment of income tax for the year 1963. The

[1] [1967] Tax A.B.C. 458.

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issue raised is the right of the appellant, in computing its income, to deduct under section 11(1)(*c*) the interest paid by it on two issues of its bonds.

The facts are not in dispute and they were put before the court by an agreed statement signed by counsel for the parties.

The appellant is the corporation resulting from the amalgamation on or about December 31, 1959, under provisions of the New Brunswick *Companies Act*[2] of a company (herein referred to as Old United) of the same name as the appellant and another company named Palmer-McLellan Shoe Company Limited (herein referred to as the Shoe Company). At the time of amalgamation all the issued shares of the Shoe Company were owned by Old United which had acquired them on or about December 30, 1958, for $110,000, which had been raised by the sale of $110,000 of first mortgage bonds of Old United and paid in cash and $100,000 of general mortgage bonds of Old United which had been delivered to the vendors of the shares as part of the consideration therefor. It is agreed that these shares while held by Old United were property the income from which would be exempt within the meaning of sections 11(1)(*c*) and 12(1)(*c*) of the *Income Tax Act*. It would follow from this that the interest paid during the same period by Old United on the two issues of bonds referred to would not be deductible under section 11(1)(*c*) in computing its income.

The amalgamation of the Shoe Company and Old United was effected by an agreement between the companies dated November 23, 1959, which was confirmed under the provisions of the Act by letters patent dated December 22, 1959. Under these documents the capital stock of the appellant was established at the same amount and with the same division into two classes of shares as in the case of Old United and all such capital stock was declared to be issued as fully paid up and to be held by the persons who held shares of Old United, share for share. Both the agreement and the letters patent provided *inter alia* that on amalgamation all the property of the two almalgamating com-

[2] R.S.N.B. 1952, c. 33 as amended by Statutes of New Brunswick 1954, c. 28.

panies should be and become the property of the appellant, that the liabilities of both amalgamating companies should be and become liabilities of the appellant, that the unissued capital stock of the Shoe Company should cease to exist and that its issued capital stock should form part of the no par value common stock of the appellant.

Both documents provided as well that all charges and securities upon the assets of either or both of the amalgamating companies (other than the shares of the Shoe Company) should be unimpaired by the amalgamation and in particular that the securities constituted by the trust deeds given to secure the first mortgage and general mortgage bonds of Old United should continue in full force other than security upon the shares of the Shoe Company and that the amalgamated company should be bound to observe the contents of the said trust deeds and should succeed and be substituted for Old United under the said trust deeds with the same effect as if the appellant had been named therein as the party thereto.

Under section 30A of the *Companies Act* it is provided that upon the adoption of an amalgamation agreement in accordance with the provisions of the Act the amalgamating companies may apply to the Provincial Secretary Treasurer for letters patent confirming the agreement and amalgamating the companies so applying, and the statute goes on to declare that:

> ... on and from the date of the letters patent such companies are amalgamated and are continued as one company by the name in the letters patent provided, and the amalgamated company possesses all the property, rights, privileges and franchises and is subject to all liabilities, contracts, disabilities and debts of each of the amalgamating companies.

Following the amalgamation the appellant continued the business of both companies using therein the assets of both. In computing its income for the years 1960, 1961 and 1962 in all of which business losses were sustained, as well as for the year 1963, when a profit was realized, the appellant sought to deduct the interest on both issues of bonds of Old United but the Minister in making the assessment under appeal disallowed all such deductions.

With respect to the deductibility of interest on capital indebtedness in computing income for tax purposes Rand,

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J., in *Canada Safeway Ltd. v. Minister of National Revenue*[3] referring first to the *Income War Tax Act* and later to the *Income Tax Act* said at page 727:

> It is important to remember that in the absence of an express statutory allowance, interest payable on capital indebtedness is not deductible as an income expense. If a company has not the money capital to commence business, why should it be allowed to deduct the interest on borrowed money? The company setting up with its own contributed capital would, on such a principle, be entitled to interest on its capital before taxable income was reached, but the income statutes give no countenance to such a deduction. To extend the statutory deduction in the converse case would add to the anomaly and open the way for borrowed capital to become involved in a complication of remote effects that cannot be considered as having been contemplated by Parliament. What is aimed at by the section is an employment of the borrowed funds immediately within the company's business and not one that effects its purpose in such an indirect and remote manner.

The claim made on the 1949 assessment results from the modification of provisions as they appear in the *Income Tax Act* which in that year superseded the *Income War Tax Act*. Section 11(1)(*c*)(i) and (ii), as re-enacted by 1950, c. 40, s. 5, are the pertinent paragraphs and they are as follows:

> 11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:
>
> * * *
>
> (*c*) an amount paid in the year or payable in respect of the year (depending upon the method regularly followed by the taxpayer in computing his income), pursuant to a legal obligation to pay interest on
>
> (i) borrowed money used for the purpose of earning income from a business or property (other than property the income from which would be exempt), or
>
> (ii) an amount payable for property acquired for the purpose of gaining or producing income therefrom or for the purpose of gaining or producing income from a business (other than property the income from which would be exempt),
>
> or a reasonable amount in respect thereof, whichever is the lesser.

The language in (i) "used for the purpose of earning income from a business" corresponds with that of s. 5(1)(*b*) of the repealed Act and to what has been said on the latter there is nothing to be added: the business of the subsidiary is not that of the company.

The word "property" is introduced in paras. (i) and (ii) but I cannot see that it can help the appellant; the language

> borrowed money used for the purpose of earning income from ... property (other than property the income from which is exempt)

[3] [1957] S.C.R. 717.

in (i) means the income produced by the exploitation of the property itself. There is nothing in this language to extend the application to an acquisition of "power" annexed to stock, and to the indirect and remote effects upon the company of action taken in the course of business of the subsidiary.

In para. (ii), which contemplates an unpaid purchase price rather than a mortgage, where the "property" acquired is stock, so far as the income is the dividends received, the deduction is excluded by the last clause in brackets, and the effect of a collateral benefit has been dealt with. If the purpose is of gaining or producing income from a business, the language is limited to the business in which the property purchased is employed: beyond that, the question is the same as for the previous years.

The wording of section 11(1)(*c*) was amended by Statutes of Canada 1953-54, c. 57, section 21, to read:

> 11 (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:
>
> . . .
>
> (*c*) an amount paid in the year or payable in respect of the year (depending upon the method regularly followed by the taxpayer in computing his income), pursuant to a legal obligation to pay interest on
>
> (i) borrowed money used for the purpose of earning income from a business or property (other than *borrowed money used to acquire* property the income from which would be exempt), or
>
> (ii) an amount payable for property acquired for the purpose of gaining or producing income therefrom or for the purpose of gaining or producing income from a business (other than property the income from which would be exempt),
>
> or a reasonable amount in respect thereof, whichever is the lesser;

In seeking to apply section 11(1)(*c*) and the principles enunciated by Mr. Justice Rand to the present situation it is, I think, necessary to bear in mind that both the money borrowed by Old United on its first mortgage bonds and its general mortgage bonds themselves had been used to acquire property, that is to say, shares of the capital stock of the Shoe Company, and that Old United had held those shares, presumably for the purpose of gaining income therefrom, up to the time of the amalgamation. The conditions of section 11(1)(*c*) for deduction of the interest on the bonds would thus have been present had it not been for the fact that the shares were property the income from which would have been exempt and thus fell within the exception.

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But while this was the situation up to the moment of the amalgamation and though the precise effect of the amalgamation on the capital stock of the amalgamating companies, and in particular that of the Shoe Company, is not as clear as it might be, it is I think apparent that from the moment of the amalgamation the appellant, while saddled with liability for payment of both issues of the bonds of Old United, had no asset representing the capital stock of the Shoe Company. This appears to me to be so either because the capital stock of the Shoe Company had disappeared in the amalgamation or because it had in fact, as the amalgamation agreement and the letters patent provided, become part of the Class B stock of the appellant and had been treated as issued to the shareholders of Old United, share for share, and on a fully paid up basis.

The appellant from the moment of the amalgamation did have the assets of the Shoe Company but these assets were not what the money borrowed by Old United on its first mortgage bonds and its general mortgage bonds had been used to purchase and I do not see any way in which these assets can even be regarded as having been acquired in exchange for the shares. The shares went, if anywhere, to the shareholders of Old United. The assets of the Shoe Company went nowhere. They simply became part of the property of the amalgamated company of which the Shoe Company itself was a continuing element just as Old United as well was a continuing element.

Nor, on reflection, do I think the assets of the Shoe Company can be regarded as representing the capital stock of that company formerly held by Old United. Those assets, as I view the matter, became property of the appellant by virtue of the amalgamation procedure and not, in any legal sense, by reason of Old United's ownership of or its giving up of the shares.

It appears to me to follow from this that on the basis of the nature of the amalgamated company as a continuation as one company of both amalgamating companies, as contemplated by the *Companies Act*, there is no basis for the deduction under section 11(1)(*c*) of the interest paid by the appellant on the bonds issued by Old United, not, as I see it, because the property acquired through their issue, that is to say, the shares of the Shoe Company were prop-

erty the income from which would, while they were held by Old United, be exempt or because such shares were not acquired for the purpose of gaining income from such property but because the amalgamated company from the time of its inception never held such shares or anything representing them from which to gain or produce income, whether exempt or not exempt, and from the point of view of the appellant in any subsequent taxation year there is thus nothing upon which to characterize the use to which the borrowed money and bonds were put as anything but what it was originally, that is to say, use to acquire property the income from which would be exempt.

The appellant's case, however, was not founded solely on section 11(1)(*c*) and the application of it to the actual facts. Its counsel relied as well for the application of section 11(1)(*c*) on section 85I(2)(*a*) and the inference of a fictitious acquisition by the appellant of property upon condition that the appellant discharge liabilities secured thereby. Such an inference, in his submission, was necessarily to be implied from the provision of section 85I(2)(*a*)[4] that the appellant be deemed, for the purposes of the Act, to be a new corporation. He went on to contend, that the appellant's liability for the payment of interest on the two series of bonds issued by Old United was thus distinct from the liability of Old United therefor (which was a liability incurred to acquire shares of the Shoe Company) and was a liability incurred by the appellant to acquire the property by which the bonds were secured and therefore fell within section 11(1)(*c*)(ii) as an "amount payable for property acquired for the purpose of gaining or producing income therefrom or for the purpose of gaining or producing income from (the appellant's) business" . . .

In the view I take it is unnecessary to reach a conclusion as to what would follow from the inference of a fictitious

[4] Sec. 85I(2) Where there has been an amalgamation of two or more corporations the following rules apply:

(*a*) for the purposes of this Act, the corporate entity formed as a result of the amalgamation shall be deemed to be a new corporation the first taxation year of which shall be deemed to have commenced at the time of the amalgamation, and a taxation year of a predecessor corporation that would otherwise have ended after the amalgamation shall be deemed to have ended immediately before the amalgamation;

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acquisition by the appellant of assets subject to payment of liabilities secured thereby since I do not find in section 851 any sufficient warrant or basis for the suggested inference.

Accepting that the statute requires that the appellant be treated as a new corporation for the purposes of the *Income Tax Act* such purposes, so far as relevant, are, as I see it, the measuring of its income for prescribed periods of time, including the determination of deductions to which it may be entitled, and the computation of its liability for tax. These purposes do not seem to me to require any inference to be made as to how the new corporation came into possession of whatever assets it had at the commencement of its fictitious existence. It is to be treated as a new corporation for the purposes I have mentioned but, as I see it, it is not to be treated as a new corporation for any other purposes and I see in section 851 no basis for treating the assets of such a corporation as having been acquired in any other manner than that in which they were in fact acquired, that is to say, the manner in which they were acquired by the amalgamating corporations.

The new company contemplated by section 851 simply starts off with certain assets and certain liabilities, that is to say, the assets and liabilities of the amalgamating companies. With respect to such assets and liabilities nothing further is, as I see it, required for the purposes of the *Income Tax Act*; and if for the purpose of characterizing some items of assets or of liability it becomes necessary to know its history that history, as I see it, is nought but its actual history. There is no need to take the further step of assuming some fictitious transaction or event conferring the asset on the fictitious new company or visiting it with the liability.

If, for example, one of the amalgamating companies had used borrowed money or given bonds to acquire a mine, the income from which was exempt for the first three years of operation, I should not have thought it necessary to infer either an acquisition of the mine or an undertaking of liability for the borrowed money or bonds to render the interest therein deductible by the amalgamated company after the expiry of the period of exemption.

Nor do I find in paragraphs (*b*) to (*n*) of section 851(2), which prescribes rules relating to a variety of subjects

bearing on the computation of the income of an amalgamated corporation, anything which appears to me to conflict with this interpretation of section 85I(2)(*a*) or to render it necessary to draw the suggested inference. Indeed the fact that the legislature specifically provided for certain fictitious assumptions to be made tends to confirm that others not provided for are not to be made.

As an alternative submission the appellant also contended, also on the basis of the appellant being a new corporation distinct from the two amalgamating corporations, that for the purpose of determining deductibility of interest under section 11(1)(*c*) regard must be had to the use made of the borrowed money in the taxation year under consideration, that in the years under review the money represented by the bond issues of Old United was not invested in property the income from which would be exempt but was invested in the business of the appellant and the interest was therefore deductible.

With respect to the first mortgage bonds there is, as I see it, no basis for saying the money borrowed by Old United was used in the appellant's business or to gain income from its property during the years under review. It had in fact been used to purchase shares, which in the amalgamation either disappeared or became the property of the shareholders of Old United. And though the shareholders, as I see it, were no richer as a result, I do not see by what route it can be said to follow that the borrowed money which had been so used was in the years under review used to earn income from the appellant's business or property.

The situation is similar with respect to the interest on the general mortgage bonds of Old United. These bonds were given to acquire the same property (i.e., shares of Old United) which, in the amalgamation, either disappeared or became the property of the shareholders of Old United. One therefore is left to wonder what property used by the appellant to earn income from its business or property in the years under review was acquired for the amount owed on the bonds and again I can see no way in which any property which it had during those years can be regarded as having been acquired either for the amount due on the bonds or for anything acquired by Old United therefor.

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The submission in my opinion therefore fails.

Finally it was urged that since there is no definition of "profit" in the *Income Tax Act* and profits are thus left to be computed "on the basis of generally accepted accounting practice and long-established principles", the interest on the indebtedness here in question—being an annual recurring payment for the use of money invested in the appellant's business—was not a payment on account of capital within the prohibition of section 12(1)(*b*) and was within the exception of section 12(1)(*a*) since the payment of the interest was necessary to forestall foreclosure by the bondholders and consequent termination of the business and was deductible in computing profit on accepted commercial principles.

This argument was admittedly in conflict with the opening sentences which I have quoted from the judgment of Rand J., in *Canada Safeway Ltd. v. Minister of National Revenue (supra)* the correctness of which I have not heretofore known to be challenged and it is, I think, contrary as well to the concept expressed in section 4 of the Act which defines income from a business or property as being, subject to the other provisions of Part 1 of the Act, the profit (not of the taxpayer) but of the business or property for the year. The profit from the business or property initially is thus the same whether the capital invested in it is borrowed capital, on which interest is payable, or not. The right to deduct interest on borrowed capital invested in the business or property when computing income for income tax purposes therefore depends on the deduction falling within the precise limits defined by section 11(1)(*c*).

The appeal will be dismissed with costs.

BETWEEN:

NORD-DEUTSCHE VERSICHERUNGS-GESELLSCHAFT, UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION LIMITED and FISCHER BEARINGS MANUFACTURING LIMITED ..... SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT;

AND

KONINKLIJKE NEDERLANDSCHE STOOMBOOT-MAATSCHAPPIJ N.V. (THE ROYAL NETHERLANDS STEAMSHIP COMPANY) ..... THIRD PARTY DEFENDANT

Ottawa
1967
Nov. 27-29, Dec. 4-8, 11-15, 18-21
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Jan. 22-26, 29-30, Feb. 1-2, 5-9, 12-16, 19-21, Mar. 12, 15, Apr. 1-5
Sept. 10

Crown—Shipping—Limitation of liability—Interest—Collision of ships in St. Lawrence—Range lights maintained by Transport Minister—Displacement by ice action—Responsibility of Departmental officials—Liability of Crown—Tort, delict—Statutory limitation on liability—"Canal", meaning—Actual fault or privity of Crown—By whom Crown represented—Interest on damages awarded—Rule in Quebec—Crown Liability Act, S. of C. 1952-53, c. 30, s. 3(1)(a) and (b), s. 18—Canada Shipping Act, R.S.C. 1952, c. 29, s. 660—Quebec Civil Code, Arts. 1054, 1056.

On April 10th 1965 the *Hermes* with pilot aboard was proceeding down the St. Lawrence River with its course set by the Pointe du Lac range lights, which were intended to indicate the centre line of a channel 550 feet wide, when she suddenly sheered to port as a result of bank suction and collided with the *Transatlantic* upbound. The front range of the Pointe du Lac lights, the only fixed aid to navigation in use, was set on a concrete pier which had been sunk in the clay river bed in 1935. Under s. 591 of the *Canada Shipping Act* the lights were vested in the Crown and were subject to the control and maintenance of the Minister of Transport, who had delegated this responsibility to officials of his Department. These officials were aware that the pier was subject to enormous ice pressure each year and that it was in a dilapidated state but they did not know that it had been displaced to the south by ice action between 25 and 30 feet by the end of 1964 and an additional 12 feet before the collision, that the light was also displaced 2¾ feet by tilting, and that as a result the line indicated by the lights was some 230 feet south of mid-channel on the day of the collision. No action had ever been taken by these officials to ascertain if the pier had moved, though it would have been simple to do so. While pilots and navigators knew that the line indicated by the lights in 1964 was to the south of mid-channel they also knew that ships could still proceed safely by using them.

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The court found that the sole cause of the collision was the additional displacement of the pier by 12 feet between 1964 and the date of the collision.

Held, the Crown was liable in tort for the accident under s 3(1)(*a*) and (*b*) of the *Crown Liability Act*, both by the common law and by the civil law of Quebec. The Department of Transport officials failed in their obligation to take the action necessary to ensure that the pier had not been displaced by ice action or to give warning of the misalignment of the lights (*The King v Hochelaga Shipping and Towing Co.* [1940] S C R. 153; *Grossman v. The King* [1952] 1 S C R. 571; *Workington Harbour & Dock Board v. Towerfield* (*Owners*) [1951] A C 112; *Indian Towing Co. v. U S.* (*Coast Guard*) [1956] 1 A M C. 27; *The King v. Canada Steamship Lines Ltd.* [1927] S.C.R. 68, applied. *Cleveland Cliffs Steamship Co. v. The Queen* [1957] S C R. 810, distinguished) Under s 3(1)(*a*) and (*b*) of the *Crown Liability Act* the Crown is also subject in Quebec to the delictual and quasi-delictual liability described in Art. 1054 of the *Civil Code* for damage caused by things under the Crown's care, in this case the Pointe du Lac lights, which was the sole cause of the accident within the meaning of the doctrine. *Mazeaud & Tunc*, "Responsabilité Civile", éd. 1957 at pp. 610, 614, 615, 208, 209; *Castel* "The Civil Law System of the Province of Quebec", p 485; *Mazeaud & Tunc*, "Traité et pratique de la responsabilité civile", 5e éd, tome II, no. 1257.

Held also, the Crown's liability was not limited by s. 660 of the *Canada Shipping Act* (1) The Crown failed to establish that the channel where the accident occurred, which had been a natural channel navigable by ocean-going vessels of 10 feet draught before being deepened to 35 feet, was a "canal" within the meaning of s. 660, which word imported the paramountcy of man's ingenuity in the making of the canal. (2) The Crown also failed to establish that the damage occurred without its actual fault or privity within the meaning of s. 660. While the Minister and Deputy Minister of Transport (who it was contended were alone designated by Parliament to represent the Crown in the administration of the Department) had no actual knowledge of the pier's displacement, responsibility for aids to navigation had been delegated to officials in the field (whose fault was not imputable to the Crown) and to officials at Ottawa, who were the directing minds of the Department on aids to navigation and whose failure to set up a proper system of control was therefore a fault imputable to the Crown Such failure also involved a breach of duty attached to the Crown's ownership and control of the pier with a consequent presumption of liability under Art. 1054 of the Quebec *Civil Code*. *The Lady Gwendolyn* [1965] 2 All E R. 283; *The Truculent* [1952] P 1; [1951] 2 Lloyd's Rep. 308; *Lennard's Carrying Co. v. Asiatic Petroleum Co.* [1915] A C. 705; *Paterson Steamships Ltd. v. Canadian Co-operative Wheat Producers Ltd* [1935] S C R. 617; *Hudson v Ridge Mfg Co* [1957] 2 All E R. 229, considered

Held also, having regard to s 3(1)(*a*) and (*b*) of the *Crown Liability Act, viz* that the Crown's liability in tort (delict and quasi delict in Quebec) is that of a private person the damages will in accordance with the provisions of Art. 1056 of the Quebec *Civil Code* bear interest at 5% from the filing of the petition of right. Section 18 of the *Crown Liability Act* which permits the Minister of Finance to pay interest at 4% from the date of a judgment against the Crown

does not affect the rule in Quebec as set forth in Art. 1056 *Civil Code*. *The Queen v. Henderson* 28 S.C.R. 425; *Langlois v. Canadian Commercial Corp.* [1956] S.C.R. 954, referred to.

PETITION OF RIGHT.

A. Stuart Hyndman and with him *Francis Gerity, Q.C., Peter G. Cathcart* and *Bruce Cleven* for suppliants.

Léon Lalande, Q.C., Bernard M. Deschenes, Q.C., Paul M. Ollivier, Q.C. and *Peter M. Troop* for respondent.

Jean Brisset, Q.C. and *Blake Knox* for third party.

NOËL J.:—By petition of right, the suppliants claim damages from Her Majesty the Queen as a result of a collision which took place on April 10, 1965, in a 550 foot channel situated in Lake St. Peter (between Sorel and Three Rivers, P.Q.) in the St. Lawrence River, in the province of Quebec, between the downbound vessel M/V *Hermes* and the upbound vessel M/V *Transatlantic,* allegedly caused by the displacement of a range light which guided the vessel *Hermes* so close to the south bank that it sheered, crossed the channel and collided with the *Transatlantic*. Respondent in turn, by way of third party proceedings taken against the owners of the vessel *Hermes,* asks that the latter be condemned to indemnify her against any damages she may be condemned to pay by judgment to be rendered in the action between her and the suppliants.

The amounts claimed as a result of this accident are in excess of five million dollars and the suppliants are underwriters, insurers and consignees of the cargo laden on board the M/V *Transatlantic.*

Nord-Deutsche-Versicherungs-Gesellschaft, one of the suppliants, a hull and machinery underwriter, is acting herein on its own behalf and for and on behalf of all those underwriters concerned or having an interest in the following policies of insurance which at the relevant time were in effect with respect to the German motor vessel *Transatlantic*:

(a) a hull and machinery policy no. K120, dated October 1, 1961;

(b) increased value policy no. 108, dated October 1, 1964;

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(c) crew personal effects policy no. E-104, dated October 1, 1964;

(d) cargo policy no. 326/64, covering Decca radar equipment, dated October 1, 1964;

(e) cargo policy no. 2579, covering wireless set, dated September 25, 1964.

United Kingdom Mutual Steam Ship Assurance Association Limited, is the protecting and indemnity club in which the said vessel *Transatlantic* was entered at the time of the casualty, hereinafter referred to by and in virtue of certificate of entry No. 11097.

The third suppliants, Fischer Bearings Manufacturing, Limited, is acting herein on its own behalf as a consignee of cargo laden on board the said vessel *Transatlantic* and as well for and on behalf of all those interested as consignors, consignees, or persons subrogated in their rights in the whole of the cargo laden on board the said vessel at the time of the above mentioned casualty.

The group of underwriters, represented by the first suppliant, Nord-Deutsche Verischerungs-Gesellschaft, paid the owners of the German motor vessel, *Transatlantic,* for the total loss of their ship and also paid for any personal effects of the crew, for the Decca radar equipment and for the wireless set. The United Kingdom Mutual Steam Ship Assurance Association is principally concerned with the removal of the wreck of the M/V *Transatlantic* from the bed of Lake St. Peter in accordance with the requirements of the *Navigable Waters Protection Act* and also some minor items of claim with respect to the repatriation of the crew. The cost of the removal of the wreck turned out to be just over a million dollars.

The third suppliant, Fischer Bearings Manufacturing, Limited, is acting in a representative capacity as well as on its own behalf. This name was selected as a matter of convenience out of many interests concerned in the cargo which became virtually a total loss as a result of this casualty.

Paragraphs 24 and 25 of the petition of right deal with the various items claimed by the suppliants and their value and paragraph 26 alleges that "by virtue of the applicable law and by instruments dated as of the 5th day of May, 1965, and as of the 26th day of August, 1966, respectively",

the suppliants "are, and have been, duly subrogated in and have had transferred and assigned to them to the extent paid by each of them respectively all claims and demands, recourse and rights of recovery which the Owners of the said vessel *Transatlantic* had or might be entitled to assert against any party or parties, government person or body with respect to all losses, damages, expenses and costs sustained or incurred in consequence of the said casualty the whole as more fully appears from the originals of the receipts, transfers, subrogations and assignments annexed thereto to form part hereof as if recited at length".

Counsel for the respondent as well as for the third party defendant, admitted during the trial that in all cases the suppliants had in fact been legally subrogated in the rights allegedly assigned.

The respondent, by her defence, contested the suppliants' petition and then instituted third party proceedings against Koninklijke Nederlandsche Stoomboot-Maatschappij N.V. (The Royal Netherlands Steamship Company) the owner of the motor vessel *Hermes*. By the statement of claim filed and served on the third party with the permission of the Court, the respondent alleged that the collision between the M/V *Transatlantic* and the M/V *Hermes* had been caused by the fault, imprudence, neglect, inability and want of care of the third party and its servants, officers and the pilot aboard the *Hermes* for a number of reasons set out in paragraph 4 of such statement of claim which I will mention later. The Crown, by the third party proceedings, seeks judgment that the third party be condemned to indemnify it for any damage it might be condemned to pay by the judgment to be rendered in the action between it and the suppliants in capital, interest and costs.

The third party delivered a statement of defence and a counterclaim praying that the third party proceedings instituted against it by the respondent be dismissed with costs and, alternatively, for a declaration that if it is found liable to indemnify the respondent in respect of any damage which the latter may be condemned to pay to the suppliants, it is entitled to limit its liability under the relevant provisions of the *Canada Shipping Act* (sections 657 to 663, 1934, chapter 44) because the damage or loss

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thus sought to be recovered from it in indemnity is damage or loss to property through the act or omission of those on board the vessel of the third party defendant to wit the *Hermes* in the navigation of such vessel, an event which occurred without the actual fault or privity of the third party defendant.

I should mention here that at the outset of the trial respondent applied for leave to amend subparagraph (1) of paragraph 43 of the statement of defence by deleting the words "qui descendait cette partie de la rivière pour la première fois cet hiver là" as well as for leave to file a cross-demand claiming also the right to limit her responsibility according to the provisions of the *Canada Shipping Act,* section 668, on the basis that the channel where the collision occurred is really a canal of which she was the owner. The amendment was granted and the request to file a cross-demand was taken under advisement to be dealt with at a later date. During the trial, the Crown made a further application for leave to amend its statement of defence by adding the following subparagraph (*e*) to paragraph 49:

> (*e*) Ils (the officers and pilot aboard the *Transatlantic*) ne naviguèrent pas, dans le chenal étroit où l'abordage eut lieu, conformément à la règle 25 des règles pour prévenir les abordages en mer, c'est-à-dire à la droite du chenal ou du milieu du passage;

The application was granted with costs against the Crown in any event of the cause.

I should state before proceeding further, the decisions made as to the manner in which the trial should proceed and as to how the cross-demands of the third party and the Crown for the purpose of limiting their respective responsibilities in the event they are held liable, will be dealt with. After due consideration, the Court concluded that to allow the counterclaims for limitation of responsibility to be heard with the main action would serve no useful purpose and would only confuse matters in that it may be that the burden in the main action is on the suppliants, whereas the burden in the counterclaims is on the respondent and third party respectively in view of the circumstance that under section 657 (3) and 660(1) of the *Canada Shipping Act* the limitation of liability is only available if the owner of the ship or canal, as the case may

be, establishes that the damages occurred without his actual fault or privity. Furthermore, in the event that the main action is dismissed there will be no need to deal with the counterclaims at all.

It was, therefore decided that the parties herein would proceed with the evidence necessary to determine the main action as well as the claim by the respondent against the third party, the latter being restricted to a defence against such an action; and the hearing of the counterclaims was stayed until the Court shall have reached a decision on the question of liability for the collision. It was indicated further that in the event that the suppliants are successful in whole or in part, the reasons for judgment will indicate how the parties are to proceed with reference to the counterclaims. It was also decided by consent that the quantum of damages would not be dealt with during the present trial and that the quantum of any damages awarded would form the subject of a reference. The trial proceeded on the above basis.

I should now revert to the facts of the collision which gave rise to these proceedings.

On April 10, 1965, in the early morning hours, on a fine day, with maximum visibility and little or no wind, the M/V *Transatlantic* (length over-all 407 feet; mean draft 19 feet; beam 54 feet; gross tonnage 5,521 tons; net tonnage 3,215 tons; propelled by a single right-handed propeller connected to an internal diesel combustion engine developing 3,335 B.H.P., and capable of attaining a maximum speed of 13 knots when loaded) was upbound in the navigational channel of Lake St. Peter (550 feet wide and 35 feet deep) from Three Rivers destined for Montreal, P.Q., with a full load of general cargo. There was virtually no ice of any consequence in lake St. Peter and there were only a few winter buoys on the north side of the channel between Pointe du Lac and Yamachiche bend. There were no buoys on the south side of the channel.

On the same day and morning the M/V *Hermes* (length over-all 424 feet; mean draft 18¼ feet; beam 57.6 feet; gross tonnage, 5,708.6 tons; net tonnage, 3,154 tons; propelled by a single right-handed propeller connected to an internal diesel combustion engine developing 4,900 B.H.P. and capable of a maximum sea speed of 16.7 knots when

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loaded) left her anchorage off Sorel, P.Q., around 0516 hours down bound in the same channel, bound for the Continent with a full cargo.

After the *Hermes* was brought onto a down river heading, her engine was put on full speed ahead for river navigation, the revolutions being set at 120 R.P.M., giving her a speed of 15 knots through the water; in addition to the pilot (Belisle) who had the conduct of the vessel, there were on the bridge of the *Hermes* the master, the chief officer and the fourth officer and a seaman who was at the wheel. At 0535 hours, the lower light of the Ile de Grâce leading lights was brought abeam on the port hand and shortly thereafter the *Hermes* entered Lake St. Peter; at 0610 hours, the light pier in the centre of no. 2 curve in Lake St. Peter was brought abeam on the port hand, the bearing being taken on the centre light. The *Hermes* had up to this point guided herself along this course by means of the leading lights known as Rivière du Loup range lights, situated at curve no. 2, as it appears on chart 1337 (Exhibit D-19). These ranges were used to lead the *Hermes* down to curve no. 2 by keeping the vessel in line with them and once these ranges were reached, the same front range light with a different back light, however, were used to guide it further down and beyond this point (by keeping them in line directly astern of the vessel) towards a point in the channel called Yamachiche bend where, at some point in the middle of the bend, other range lights, the Pointe du Lac lights, were available and made use of. Immediately after reaching the curve and whilst steering on the Rivière du Loup downbound ranges, the *Hermes* successively met and passed three inward bound vessels (the *Montcalm,* the *Lundefjell* and the *Thorsriver*) about half a mile to two miles apart from each other without incident; there was no reduction of speed and the ships were passed port to port at a normal and safe meeting distance.

Shortly after entering Yamachiche bend (about 900 feet west of winter buoy 58L) the *Hermes* altered her course to port by the 13 degrees required to bring her into the next leg of the course to come on the Pointe du Lac leading beacons; when the vessel had been steadied on her new course, she then made use of what the pilot and her officers

considered as the only reliable aid to navigation at that point, namely, the range lights at the lower end of the course known as the Pointe du Lac range lights situated some five miles from Yamachiche bend. The chart on board the *Hermes* at the time (Exhibit T-5, British Admiralty chart no. 422) showed that when the Pointe du Lac range lights came in line, they were intended to show a bearing of 056 degrees 13 minutes and indicate the centre line of the channel.

Having brought herself into position with the two range lights, the *Hermes* proceeded downstream with the M/V *Transatlantic* coming upstream some short distance away. Both vessels were proceeding at full manoeuvering speed, the *Hermes* at 15 knots and the *Transatlantic* at some 12 knots. The M/V *Transatlantic* at this time was also making use of the Pointe du Lac range lights but had them astern instead of having them in front as the *Hermes*. Those on board and in charge of the M/V *Transatlantic* claim that they had the lights open to the north in such a way that they could safely navigate the channel, knowing they should be on the starboard side of the channel and meet at a safe and proper distance any ship coming down. Those on board and in charge of the *Hermes* claim they were keeping these lights in line knowing they should be on their side of the fairway by so doing and, thereby, meet safely the M/V *Transatlantic* coming upstream. A red winter buoy, located at the lower end of Yamachiche bend, identified as being in the approximate charted position of buoy 54L, as shown on Canadian chart no. 1337 (Exhibit D-19), was left abeam to port. Very shortly after, and at a time when the vessels were about three ship lengths apart and still shaping courses to pass safely and all clear port to port, the head of the *Hermes* swung to port and despite instant corrective starboard helm actions, as observed by the position of the indicators and the fact that the engine was put full speed astern, the head of the *Hermes* still continued to swing rapidly to port. To those on the *Transatlantic,* this turn to port became increasingly fast until it became obvious that the *Hermes* was out of control and was sheering across the channel and that a collision was inevitable. Instructions were given on the *Transatlantic* to stop the engines, put the engines full astern and put her helm to starboard, but to no avail, as the distance (both

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longitudinal and lateral) between the ships proceeding towards each other was too short for any successful avoiding action to be taken and a collision occurred.

The impact occurred between the port bow of the *Hermes* and the port side of the *Transatlantic* in way of her midship housing. The *Transatlantic* immediately burst into flames, the bridge was destroyed and two members of the crew and one passenger were killed. The *Hermes* disengaged herself from the *Transatlantic* and the latter floated across the channel alongside the south bank of the channel where she remained with her bow upstream and the *Hermes* followed and came alongside her also with her bow upstream where she assisted the crew and attempted to extinguish the fire on board the *Transatlantic*. Later, around 11 a.m., the *Transatlantic* started drifting downstream and her bow swung to starboard and her starboard side came to rest against the south bank.

The collision occurred at 0628 hours and about two cables down river from the eastern end of Yamachiche bend. Around 11 a.m. some tugs arrived with pumps aboard and proceeded to fight the fire. They in fact, held the *Transatlantic* against the south bank at a place where summer buoy 49L would usually be while fire fighting operations went on. The *Hermes* assisted in these operations during a good part of the day. As the day proceeded, it became obvious that the *Transatlantic* could not be saved and at about seven o'clock in the evening of the day of the collision, April 10, 1965, while still ablaze, she capsized and sank in the channel a short distance below Yamachiche bend.

The most westerly of the Pointe du Lac leading lights (known as the "front range") situated on a pier in the water which the suppliants and the third party claim was displaced and out of alignment to the extent of some 40 feet, is described in paragraph 13 of the petition of right as consisting:

> ...at the relevant time of a steel skeleton tower some 28 feet in height, resting on a concrete platform measuring some 60′ x 60′, which in turn rested on wooden cribwork embedded into the bed of Lake St. Peter. The cribwork and the concrete platform had been constructed in about the year 1935; the other Pointe du Lac leading light is located on shore some 7,552 feet to the east of the front range and is more fully described in the "List of Lights and Fog Signals, Atlantic Coast including the Gulf of St. Lawrence to Montreal" issued by the Department of Transport.

In paragraph 14 of the petition, the suppliants allege that:

> 14. The leading lights or ranges are the primary aids to navigation on which vessels navigating the St. Lawrence River must and do rely. Navigational buoys are installed for summer navigation but at the relevant time and place only a series of winter spar buoys marked the north side of the channel and in this connection, as happens in the fall of every year, the Director of Marine Works of the Department of Transport had issued on the 13th November, 1964, a Notice to Mariners (No. 932) which reads:
>
> > "Commercial shipping using the St. Lawrence River Ship Channel between Montreal and Quebec is hereby warned that floating aids to navigation cannot be depended upon after November 30th owing to possible ice conditions."

The third party in a similar allegation has also taken the position that "until official navigational buoys are laid along the dredged channel for summer navigation the leading lights are the only official and reliable aids to navigation leading vessels with safety through that leg of Lake St. Peter in which the *Hermes* and the *Transatlantic* were navigating shortly before the collision. . .".

There is also in the petition of right an allegation in paragraph 15 (and a similar one in paragraph 18 of the statement of defence of the third party) that leading lights "and the whole of the improvements to the navigation of Lake St. Peter (comprising the channel itself and its ancillary aids to navigation) are constructed, repaired, maintained, improved, erected, placed or laid down for the greater security and facility of navigation at the expense of the Government of Canada, and together with all buildings and other works belonging thereto are vested in Her Majesty and are under the direct control and management of the Minister of Transport under section 591 of Part IX of the *Canada Shipping Act*".

The allegation on which the suppliants base their claim is contained in paragraph 18 of the petition of right which concerns the displacement of the front range and reads as follows:

> 18. The sudden sheer to port taken by the *Hermes* occurred at a time when she apparently was being navigated with the Pointe du Lac leading lights in line and in such a position that she should have been in about mid-channel. In fact, the front range of the Pointe du Lac leading lights were displaced and out of alignment to the extent of approximately 40 feet in a southerly direction, which meant that for a vessel in the position of the *Hermes* immediately before the collision, instead of being in mid-channel, she was some 235 feet to the south thereof.

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Substantially the same facts are alleged in the defence to the third party proceedings.

The suppliants then in paragraph 19 of the petition of right state that this alleged misalignment, (and the third party has a similar allegation (paragraph 22)) was "the immediate and sole cause of the collision between the *Transatlantic* and the *Hermes*".

According to both the suppliants and the third party, the Crown is liable because of a number of breaches of duty committed by it and its employees or servants (as alleged in paragraphs 20, 21 and 22 of the petition of right and paragraphs 23, 24 and 25 of the third party's defence) attaching to the ownership, possession, occupation or control of property, namely the front pier and light of Rivière du Loup and Pointe du Lac each of which was out of line with its rear light and in that the officers and servants of the Crown failed to ascertain such misalignment and to give warning that the lights were no longer serving the purposes advertised.

The particulars of the negligent acts allegedly committed by employees of the respondent on which the suppliants rely, will be considered later when the matter of liability of the respondent is dealt with. The employees in question are the District Marine Agent of the Department of Transport in Sorel, Noël Paquette, the Superintendent of Pilotage in Ottawa, Captain David Jones, the District Superintendent of Pilots in Montreal, Claude Melançon, and the Chief of Aids to Navigation Branch of the Department of Transport, A. K. Laing.

This collision, according to the suppliants and the third party, was caused by the displacement of the Pointe du Lac Range of which the servants of the Crown knew or should have known. The suppliants contended that the servants of the Crown should have corrected the displacement or should have warned mariners that the range was no longer serving its intended purpose.

The Crown contends that the only allegation it has to meet here is a failure on the part of its employees or servants to ascertain and give warning. It denies that the misalignment of the Pointe du Lac leading lights was the immediate and sole cause of the collision. It alleges on the contrary that the collision was caused by the negligence of

the pilot and officers on board the *Hermes,* as well as the pilot and officers on board the *Transatlantic,* which negligence consisted, according to the Crown, in a number of faulty manoeuvers which are enumerated in paragraphs 43, 45, 46 and 47 of the defence, and did not result from any breach of duty on the part of the Crown or its servants.

The Crown's position is that if there was a displacement in the ranges, it was known to the pilots and that, in any event, range lights are not instruments of absolute precision. It also asserted that the horizontal sensitivity of the Pointe du Lac range lights, due to special physical and geographical conditions, was below normal and this was known to navigators and pilots who travel in that part of Lake St. Peter; the distance of six miles between the beginning of the course and the lower light tended to decrease further its value of indication; the Crown had, in 1963, required a specialized engineer to examine the pier who reported that it was in good condition, had been displaced only slightly over the years and should give respondent no concern; for the first time in 1965, the respondent experimented by leaving the steel tower on the base to assist navigators. In any event, according to the Crown, the total displacement, or a substantial part thereof, took place after the collision and between the 14th and 20th of April 1965 and at no time did it receive a report from pilots, as required by law, that the range lights were not at their proper place. That finally whatever displacement existed, was caused by "force majeure" and that it could not have been foreseen nor could the Crown have prevented it.

With respect to the matter of damages, the respondent, in its pleadings (paragraph 70) states that it cannot be held liable for expenses resulting from the capsizing of the *Transatlantic* and its subsequent refloating as these damages were caused by the fault, neglect and inability of the captain and officers of the *Transatlantic* and the persons in charge of the salvage operations for which the Crown alleges the suppliants must bear the consequences (paragraph 70) and more particularly because the captain of the *Transatlantic* and its officers did not take the necessary means to prevent the capsizing of the vessel in the channel by having it towed as they could have done, out of the narrow part of the channel. There is also an allegation that

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the captain and officers failed to fight the fire on board their vessel in accordance with the ordinary rules of the art and of prudence.

In the proceedings taken by the Crown against the third party, the respondent merely repeated that the collision and damage had been caused by the fault, imprudence, neglect, inability and want of care of the third party (the *Hermes*) and its servants, officers and employees, and its pilot reiterating the allegations contained in paragraph 43 of its defence.

The third party, on the other hand, after describing its vessel, the *Hermes,* states (in paragraph 6 of its defence) that, being in a pilotage district within the meaning of Part VI of the *Canada Shipping Act,* she was assigned by the pilotage authority, for her passage between Montreal and Three Rivers, a duly licensed pilot, namely pilot Cyrille Belisle, who had the conduct of the vessel as she was proceeding down river, and then described the circumstances leading up to the collision.

The position taken by the third party, as well as that taken by the suppliants, is that the purpose of the Pointe du Lac leading lights and beacons is to lead mariners by their alignment from Yamachiche bend to curve number 3 in Lake St. Peter either in a down river or up river course that they indicate to navigators that their vessel is in the centre of the navigable channel when the leading lights at night, or the beacons during the day, are kept in line; that until the official navigational buoys are laid along the dredged channel for summer navigation, the leading lights or beacons of Pointe du Lac and Rivière du Loup are the only official and reliable aids to navigation leading vessels with safety through that leg of Lake St. Peter in which the *Hermes* and the *Transatlantic* were navigating shortly before the collision and, in fact, before the end of the navigation season the Department of Transport issues a Notice to Mariners warning them that floating aids to navigation, namely buoys, cannot be depended upon during winter navigation (cf. P-63, notice issued November 13, 1964, weekly edition, No. 46, notice no. 932). This warning was still in full force at the time of the collision and there was only a limited number of winter buoys laid in this leg of the channel through Lake St. Peter to mark the north side of the dredged channel.

The third party and the suppliants both described by their pleadings how aids to navigation are constructed and maintained by Her Majesty and are vested in Her Majesty and under the direct control and management of her Minister of Transport under section 591, Part IX of the *Canada Shipping Act*, the said Minister having delegated his powers and responsibilities with respect to the maintenance, repair, etc., of these aids to navigation to the district and marine agent of the Department of Transport for the district of Sorel, which district extends from Beauharnois canal to Portneuf.

Paragraph 19 of the third party's defence, deals with the duties of the district marine agent (a civil engineer by the name of Noël Paquette, located at Sorel, P.Q.) as follows:

> 19 In the ordinary discharge of his duties, the said District Marine Agent is charged with the obligation of ascertaining that the said aids to navigation always serve the purpose for which they are intended and as may be necessary of maintaining and repairing them and of warning mariners of any defect in them which could create a danger or hazard to navigation until such defect has been corrected, such warnings being issued by way of periodic daily radio broadcasts followed by written Notices to Shipping or to Mariners, the said District Marine Agent, having accepted such duties, being always fully aware of the reliance by the navigators of vessels passing through his District on the performance of his duties;

The position taken by the third party, and the suppliants have taken a similar stand, is that as of the date of this collision, no Notice to Mariners, Notice to Shipping, broadcast or information of any kind, had been published or circulated by the District Marine Agent or by any other agency, official or employee of the Department of Transport or other departments of the Government of Canada to indicate that the Pointe du Lac leading lights or beacons, or any of the other leading lights and beacons in Lake St. Peter, could not be relied upon and were not fulfilling their intended and publicized purposes.

Nothing had indeed been done to indicate that the lights could not be relied upon, although on April 10, 1965, the date of the collision, and for some considerable time prior thereto, the front range of the Pointe du Lac leading lights or beacons was out of alignment having been displaced in a southerly direction to the extent of approximately 40 feet which meant that a vessel in the position of the *Hermes* at

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the entrance of the channel below Yamachiche bend, keeping the beacons in line, would find herself some 235 feet to the south of the physical centre of the dredged channel instead of being in its centre with her navigators having no reliable means to observe such a deviation.

Furthermore, according to the third party, the collision and its consequences were the result of delicts and quasi-delicts committed by servants of the Crown (of which I will say more later when dealing with the question of liability), namely the district marine agent of the Department of Transport in Sorel (Noël Paquette) in charge of aids to navigation, the Superintendent of Pilotage in Ottawa (Captain David Russell Jones), the District Superintendent of Pilots in the District of Montreal (Claude Melançon) and the Chief of Aids to Navigation of the Department of Transport (A. K. Laing).

It is against the above background, and as a result of the above circumstances, that a long and protracted trial ensued involving the hearing of not only those involved in the collision, but also a number of navigational experts, engineers, naval architects and tank testing technicians. The latter were brought in as a result of a tank test made in Holland in the fall of 1967 which was attended by representatives of all parties.

The first question to be determined is whether there was a displacement of the lower range of the Pointe du Lac beacons before or on April 10, 1965, the extent of such a displacement, if any, and did any such displacement cause (or contribute to) the sheer and consequential collision.

The Crown, in its written proceedings, does not admit that the Pointe du Lac front leading lights had been displaced or misaligned. It, however, says that even had there been a gradual displacement thereof, it was known to the pilots, and particularly to those of the *Hermes* and the *Transatlantic,* that these leading lights (as all such lights) depend upon a number of physical and geographical factors for their value as indicators and that the Pointe du Lac leading lights were known to the pilots and navigators as having a horizontal sensitivity below normal, which together with the distance of six miles between the front light and the beginning of the course in Yamachiche bend, reduced considerably their value as indicators.

There is no question, and the evidence of both the suppliants and the respondent so discloses, that the Pointe du Lac front light had been displaced gradually up to at least the year 1964, the only matter which requires some elucidation is as to whether the total displacement, as established by triangulation after the collision around the end of April 1965 of between 38 and 43 feet towards the south, had taken place prior to April 10, 1965, or whether some part of it was effected subsequent thereto.

There is also no question that an investigation that was conducted by a number of engineers and land surveyors some time after the collision, indicated that the pier on which the front light of Pointe du Lac was located had, at the time of the investigation, been displaced between 37.9 feet and 60.5 feet when using the bearing given by ship channel co-ordinates at P.I. (point of intersection) Yamachiche, and that such displacement would result in a corresponding displacement at the beginning of the course of between 205 and 357 feet. The displacement of the front light of Pointe du Lac, when using the bearing given by the hydrographic chart no. 1337, however, varied between 60.5 feet and 72.5 feet with a corresponding displacement at the head of the course of between 363 feet and 427 feet.

Appendix "B" produced by James Haase, professional engineer, as part of Exhibit P-45, reflects this situation and it will be helpful to reduce it hereunder:[1]

The above table[1] also contains the displacement of the Rivière du Loup range as established by Messrs. Duplessis and Poulin on April 30, 1965, which, as shown, indicates a displacement of the low light of 12.1 feet with a corresponding displacement at P.I. (point of intersection) Yamachiche of 152 feet when using the ship channel co-ordinates and a displacement of 18.6 feet with a corresponding displacement of 234 feet at P.I. Yamachiche when using the bearing given by the hydrographic chart.

There is also no question that in addition to whatever displacement existed on April 10, 1965, an additional displacement of a few feet of the front light of Pointe du Lac existed as a result of the light steel structure tilting towards the south. In a memo dated May 17, 1965, the District Marine Agent of Sorel, Mr. Paquette, reported

[1] Not reproduced in this report—ED.

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that the error caused by this tilt was a maximum of 30 feet. This error due to tilt was, however, corrected prior to the surveys of April 28, 1965, as well as those that took place afterwards, and must, therefore, be added to the displacement of the range found by the three surveys, i.e., of Messrs. Duplessis and Poulin, of April 28, 1965, conducted on behalf of the Association of Pilots, the D.O.T. survey of May 1965 and the International Underwriter Contractors' survey of August 1965, conducted on behalf of the Department of Transport.

Mr. James Haase (the suppliants' engineer) adopted as being likely to be more accurate the results obtained when using the ship channel co-ordinates (which are the co-ordinates adopted by those who built the channel as opposed to the hydrographic co-ordinates adopted by the hydrographic chart service) and there is no question that these co-ordinates are preferable to those given by using the bearing of the hydrographic chart for the reasons given by Haase at p. 1035 of the transcript:

> Q Why do you consider that to be a more accurate result?
> A. Well, what we are really interested in is the centre line of the dredged channel and I feel certain that engineers who established this dredged channel in the first place and maintained it thereafter would be controlling the work from their own system of survey points, and survey system, and survey data.
>
> There is incidentally another point, that if the chart bearings are correct, I think an awful lot of ships would be aground in Lake St. Peter now, because as you can see the displacements are in the order of 360, 390 feet, and I don't think many ships can absorb this kind of deviation, so it is rather unlikely, in fact I think it is impossible that the chart bearings are correct.

We may, therefore, take it, and there appears to be no disagreement between the parties on this point, that whatever displacements had taken place, either prior to April 10, 1965, or some days thereafter, are in the order of those established by the surveys based on the ship channel coordinates.

The important question at this point in my enquiry here, therefore, is: When exactly did the displacement or displacements of the front pier of Pointe du Lac take place?

In order to answer this question, it is, in my view, necessary to consider the evidence as to what happened in the year 1935, when this pier was erected and sunk, to

examine a survey carried out in 1941 by the Hydrographic Section of the Department of Energy, Mines and Resources, and to evaluate a number of photogrammetric studies conducted by Dr. A. J. Brandenberger and Dr. Zarzycki.

(His lordship reviewed the evidence described and proceeded.)

The above, in my view, taken with the evidence of Dr. Brandenberger and Dr. Zarzycki established conclusively that there was a movement of the front pier of Pointe du Lac between 1935 and 1941 and between 1941 to 1959 of several feet and that although it is not possible to establish such movement exactly, it is reasonable to conclude that a displacement between two and six feet occurred prior to the year 1941 and, therefore, in 1959, this pier had already started to move. One must also conclude that the displacement had reached between 25 and 30 feet by the year 1964. Furthermore, the various surveys and investigations conducted after the collision on behalf of the suppliant, the third party and the respondent establish also, in my view, that a final total displacement of between 37 and 43 feet had taken place at the time of the surveys and it is not unreasonable to assume that the actual movement by the time of the surveys was the average of these two figures, or some 40 feet. If the further displacement caused by the tilting of the light which must, I believe, be taken, as suggested by counsel for the Crown (cf. p. 5728 of the transcript), as being less than the $5\frac{1}{2}$ feet mentioned by Mr. Paquette, is accepted as one half of this figure, we still obtain a further displacement which added to the 40 feet, gives a displacement of some $42\frac{3}{4}$ feet. If to this, a further possible displacement of 20 feet at 51L is added for the sensitivity of the ranges (as alleged by the respondent) we end up with a total corresponding displacement of the front range somewhat in excess of $42\frac{3}{4}$ feet which happens to be very close to the figure alleged by the suppliants in their petition of right, and which, if multiplied by the 5.4 factor (admitted by the parties) to obtain the displacement at the beginning of the course, gives a figure somewhat in excess of 229.50 feet which would bring a vessel with a beam of 57.6' dangerously close to the south bank in a fairway 275 feet wide.

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The only question now remaining with respect to the matter of displacement of this pier is whether the final displacement occurred prior to the collision or, as urged by the Crown, at a date subsequent thereto. A conclusion in this regard can be reached only by an assessment of the evidence and a drawing of the proper inferences therefrom.

That the *Hermes* sheered because of bank suction on April 10, 1965, is beyond question and all parties, of course, agree that this is what happened. If, however, the displacement that occurred subsequent to the year 1964 did not occur until after the accident, there would be less justification for the *Hermes* to come as close as she did to the south bank where bank suction took place and her navigational manoeuvers in such an event would also be subject to closer scrutiny and more serious criticism. The suppliants had the burden of establishing their allegation that the front pier of the Pointe du Lac lights had been displaced by at least 40 feet at the time of the collision and they attempted to do so by expert evidence (Mr. Haase at p. 967 *et seq.* of the transcript) and also by a number of events which took place during the period under investigation.

(His Lordship reviewed the evidence and proceeded).

I must, therefore, conclude from the above that whatever force was brought to bear by ice movement on this pier sufficient to move it southwards must have occurred prior to April 10, 1965.

A recital of the events which took place prior to the collision appear also, in my view, to sustain this proposition.

Two other vessels, the *Manchester Commerce,* on April 3, 1965, and the *Carinthia,* on April 9, 1965 (the day preceding the collision) sheered also approximately at the same place where the *Hermes* sheered on April 10, 1965. Both of these vessels were at the time guided by two experienced pilots; the *Manchester Commerce* by pilot Richard Barrett, a class A pilot who happens to have also a master's foreign going Canadian certificate, and the *Carinthia,* by pilot Adélard Tremblay, who holds a master home trade, and a second mate (foreign going) certificate. The *Carinthia* is a rather large vessel, 640 feet in length, 85 feet in beam with a draught of 26 feet. Tremblay was

coming downstream on April 9, 1965, at 14 knots, when after meeting the *London Splendour,* a vessel of a tonnage similar to the *Carinthia* (25,000 to 30,000 tons) his vessel sheered to port and he barely managed to prevent an accident by putting the rudder to starboard and because his vessel had two propellers. Pilot Tremblay immediately concluded that a sheering had taken place and his first thought was that his vessel had gone over a part of the channel where the water was low.

His vessel was at the time at a lateral distance of some 125 feet from the *London Splendour* and this also would indicate that the sheering of the *Carinthia* was due to bank suction and not to interaction which, admittedly, is much less when a vessel meets a vessel than when it overtakes it. The assessor, here, is of a similar view, but informed me that "at the moment of the sheer, the *Carinthia* was entering the channel leaving the wider part used for anchoring vessels. It appears that the sheer was caused by the pressure of the bow (bow cushion) on the corner of the south bank of the channel. Such sheer, due mainly to the ship being very close to the bank, was possibly increased very slightly by the interaction between the two vessels".

With regard to the *Manchester Commerce,* there can be no question of interaction as there was no ship in sight when pilot Barrett, on April 3, 1965, states his vessel sheered violently somewhere in the general vicinity of where the other two sheerings took place after entering the channel from the anchorage at a distance of about two ship lengths from the position of summer buoy 51L. Both Barrett and Tremblay are experienced and able pilots who had been piloting ships down this part of the river 150 times a year for a good many years. They, therefore, knew the area well.

The *Manchester Commerce* was, according to Barrett, proceeding at full speed, approximately 14 knots not counting the current, and he states he was taking the Pointe du Lac ranges in line. Pilot Tremblay, on the *Carinthia,* stated that he had reduced his speed from 18 knots to 14 knots and was taking the lights "craqué au nord" which he explains (at p. 1655) by saying that one half of the upper light target would be moved towards the north as indicated by two pieces of carton attached together (Exhibit P-59).

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There is also the evidence of pilot Belisle and of the captain of the *Hermes* who both stated that the lights were taken in line prior to the collision.

Now, all of these pilots state that the taking of the Pointe du Lac lights in line in 1964 would bring them down safely on their side of the fairway. Belisle's experience in 1964 was that with the ranges in line, a downbound vessel would be 100 to 125 feet from buoy 51L, although he did admit that he could go as close as 50 feet with a small ship such as the *Black River*, but then he added the ranges would be open to the north. Both Tremblay and Barrett stated that in 1964, the taking of the Pointe du Lac lights in line, would place a vessel somewhere on the south side of the channel. Barrett (at p. 1233 of the transcript) states "Well, in 1964 when the buoys were in place on both sides of the channel, if you were going down the Pointe du Lac course with the lights in line you would be closer to the black buoys than the middle" and added that he had had no sheering in 1964. He was asked in cross-examination by counsel for the Crown whether a ship in 1964 would be led 50 to 75 feet to the south summer buoys and answered that he did not think it would bring a ship that close. Pilot Tremblay, on the other hand, in cross-examination, merely says that in 1964, the Pointe du Lac lights may be a little to the south (pp. 1633-1634). He added that he was more familiar with the Rivière du Loup lights leading to the south than the Pointe du Lac lights. As far as the Pointe du Lac lights were concerned, he even stated (at p. 1634) "Dans le numéro 3 je n'étais pas au courant du tout ...".

Pilot Vallée of the vessel *Transatlantic* also dealt with the situation in 1964 and stated (p. 2223) that with the ranges in line, a vessel going downstream would be on the south side of the channel. He then added:

> R. On passait à peu près demi-distance entre le centre et le côté sud Mettons, par exemple, une centaine de pieds, cent (100) pieds, cela dépend du côté où vous êtes, du bateau.

In view of the experience of these pilots who by lining up the lights could navigate safely down this channel in 1964 and in the face of the three sheerings which occurred between April 3 and 10, 1965, to vessels conducted by three experienced pilots who knew this course thoroughly and

who had lined up their vessels on the Pointe du Lac leading lights as they had done in 1964 and by so doing had brought their vessels so close to the south bank that they sheered, the conclusion appears to be inescapable that the fatal displacement or at least a displacement greater than whatever existed in 1964 had already taken place at that time. As a matter of fact, Dr. Corlett's evidence was to the effect that the *Hermes,* upon sheering, had reached an offset of some 10 feet from the south bank, this means that the 40 feet final total displacement adopted as a good approximation is not too far off when the sensitivity of these ranges is taken into consideration as well as the fact (as indicated by Exhibit P-64 the soundings taken in 1941) that the line of the range was somewhat to the south at the beginning of the course.

There is also, moreover, the evidence of pilot Vallée of the *Transatlantic* when both he and pilot Belisle were on board the *Hermes* alongside the *Transatlantic* after the collision, alongside the south bank of the channel.

Raymond Vallée (at p. 2266 of the transcript) states that from the south side of the channel, standing on the port side of the *Hermes,* looking backwards, he pointed out to Belisle that there must be something wrong as the ranges are slanted to the north.

> . . . Puis je me suis aperçu, j'ai dit à M Belisle, il y a quelque chose qui ne va pas; nos «ranges» sont cantés au nord. Bien, il dit: cela n'a pas de bon sens, le bout du «hook» est à terre . . .

If these lights were slanted to the north for one viewing them from the south side of the channel, it can indicate only, in my view, that they had been displaced at that time, i.e., prior to the collision, to their maximum displacement and, of course, this is further convincing evidence that the total displacement had already taken place before the collision on April 10, 1965.

The Crown attempted to establish by means of A. Brochu, a Department of Transport maintenance man in the Ship Channel Branch (agence maritime), located at Sorel, and Arthur Lemoyne, an electrician who maintained the lights in the river, that the last part of the displacement of the pier really took place between the 20th and 23rd of April on the basis that on April 17th, the basic structure of the steel tower of the light was in good condition and on

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the 20th of April it was not as the legs of the structure were buckled (c'était tordu). On the 17th, when crossing on the ferry from Three Rivers to St. Angèle, Arthur Lemoyne states that he saw a lot of ice coming down the river on both sides (p. 2432, 2433, 2434). He reported this the same night to his superior, Mr. Lequin, by phone because he was worried he says for the light at Pointe du Lac. When he went back on the 20th, the steel structure had been moved to one side and was looking towards the north and the light was out.

Now, although there appears to be no doubt if one relies on the evidence of these men, that something happened to the structure between the 17th and 20th of April 1965 and that some ice came downstream, this ice could not have brought sufficient pressure upon this pier to move it, bearing in mind the height of the water at the time (there was about 5 feet more water on that date than at the end of March, 1965, (Exhibit D-53)). There was not even sufficient pressure to remove the steel structure which, although damaged was merely displaced and still remained in an upright position on the pier. This ice, indeed, with the pier submerged by water as described by both Lemoyne and Brochu, could not have been at a sufficient depth to exert the pressure required (as established by Haase) to move this pier even with the piles broken as they had to be after the date of the collision.

It therefore follows that on the basis of the evidence, I can only conclude that the total displacement of the pier found after the collision existed at the time of the collision and the liability herein must be determined on this basis.

I now turn to the attacks made by the Crown on the manner in which both vessels, the *Hermes* and the *Transatlantic* were navigated immediately prior to the collision. The position taken by the Crown here is that if the total displacement is found to have existed prior to the collision, such displacement can only be the indirect cause of the accident, as the errors of navigation committed by those in charge of the respective vessels are the direct cause thereof.

According to the Crown, the *Hermes* was at fault because it (a) entered a narrow part of the channel at full speed; (b) doing so during winter navigation; (c) doing so when a meeting with the *Transatlantic* was imminent, in-

stead of reducing the speed of the vessel and meeting in the Yamachiche anchorage; (d) those in charge of the *Hermes* were navigating in Lake St. Peter with one marine chart only which was incomplete; (e) they did not use their radio-telephone to communicate with the *Transatlantic* in order to arrange for an easier and safer meeting; (f) they did not pay any attention to the buoys and did not use them as an aid to navigation; pilot Belisle relied only as a guide on the range lights of Pointe du Lac when he had directly facing him a rising sun and when he knew that these lights were inexact and imprecise; (g) they did not use their gyrocompass and the other instruments of navigation at their disposal.

The officers and pilot of the *Transatlantic* were also at fault according to the respondent in that pilot Vallée at a distance of some three miles noticed that the *Hermes* was too far south in the anchorage thereby creating a situation of imminent danger and noticing that the *Hermes* could not bring herself back in time to enter the narrow part of the channel which he pointed out to the first officer of the *Transatlantic,* they continued, nevertheless, upstream at full speed. They were also at fault because (a) having noted the danger of an imminent collision, they did not reduce their speed; (b) they gave no signal; (c) they did not use the radio-telephone; (d) they effected no manoeuver to prevent the collision and (e) they did not navigate in the narrow channel where the collision occurred in accordance with Rule 25 of the *Rules to Prevent Collisions at Sea,* i.e., at the right of the channel or in the middle of the fairway; (f) the Crown also took the position that even if there had been a displacement or a misalignment of the Pointe du Lac lights, it was known to the pilots and particularly to those of the *Hermes* and the *Transatlantic.*

In order to understand the navigational manoeuvers prior to the collision, it will be useful to mention here in some detail what action was taken on board each of the vessels immediately prior to the collision. The chief officer of the *Hermes,* Pieter Floris Vos, describes what took place on board his vessel as follows (p. 487 of the transcript): As his vessel came into Yamachiche bend at some 800-900 feet from buoy 54L, i.e., 900 feet before the intersection of the lines of the two ranges, an alteration of course was made of 13 degrees and 45 minutes (this information was obtained

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from chart 422, Exhibit T-5). The first order given by the pilot because of this change of course was 60 degrees. The helmsman then gave 10 degrees port rudder and the ship started swinging to port. As the helmsman was steadying up the ship, and just before she came on 60 degrees, the pilot ordered 58 degrees so the helmsman applied a little port rudder again and steadied the ship on 58 which gave a true compass course of 57 degrees. Vos states (p. 488) that when the vessel was on the 58 degree course "we had the Pointe du Lac ranges exactly in line". The ship was kept on this 58 degree course for some time until Vos, from the rudder indicator, saw that the helmsman had applied 5 degrees starboard rudder. The compass at this time was on 57 degrees. He saw the bow of the ship moving slightly to port. The ship at this point was not steadying up and looking at the compass again, he saw it was moving to 056 and the helmsman applied another 5 degrees starboard rudder, but the bow of the ship still went to port. The vessel went to port even faster after the 10 degree starboard rudder, and then the order came from the captain and pilot "hard to starboard and full astern". When the full 5 degrees to starboard was applied and the ship was starting to move slightly to port, the *Transatlantic* was about three ship lengths away, i.e., some 1,200 feet and the latter was bearing a few degrees over the port bow. With the telegraph on full astern, the *Hermes* still kept moving to port even faster than before and sheered at increased speed. It then collided with the *Transatlantic* at an angle which, according to the witnesses, could vary from 16 to 17 degrees leading aft (Ven Eyk, p. 126) 50 degrees (Peterson, p. 81) and 70 degrees (Vos, p. 491). Vos stated that the approximate interval between the time when the *Hermes* first started to go to port and the moment of collision, was less than a minute (p. 491), from 25 to 30 seconds according to Belisle (p. 725) and from a half minute to 40 seconds according to Peterson (p. 89). If one calculates the speed of both vessels taking into consideration the distance mentioned as separating them, it would appear that this interval was between 30 and 40 seconds and the 32 mean seconds adopted by Dr. Corlett in his evidence could well be a proper estimate here.

The *Transatlantic* on the other hand was proceeding upstream with, according to pilot Vallée and its first officer

Peterson, the Pointe du Lac ranges open to the north, at a speed of between 12 and 13 knots over the ground. Both Dietz, the helmsman of the *Transatlantic* and Vos, of the *Hermes*, stated that immediately prior to the collision, the *Transatlantic* turned 30 degrees or more starboard and surprisingly at the speed she was going at the time she did not run ashore on the northern bank or have any bank effect and, of course, this can only indicate that she was not as far northward as pilot Vallée stated. As a matter of fact, she was probably towards the centre of the channel or even somewhat to the south of this centre. There can, in my view, be no other explanation. The *Transatlantic* indeed is a ship some 406 feet in length and at a 30 degree angle would, if she was on the northern part of the channel when struck amidship as she was by the *Hermes*, necessarily hit the north bank. That such an occurrence did not happen establishes conclusively, in my view, that she was not as close to the north buoys as Vallée would want us to believe. This, of course, would not be too surprising having regard to the evidence of H. Peterson, the chief officer of the *Transatlantic* that that ship was being guided by means of the Pointe du Lac lights. If the front light was displaced at the time to the extent already established, it is not too surprising that the *Transatlantic* was, prior to the collision, navigating on the centre line or even on a line south thereof and this, of course, would explain the fact that both Vallée and Peterson saw the wash of the *Hermes* aft on its starboard side a few seconds prior to the collision.

Having thus established the navigational manoeuvers and the position of both vessels immediately prior to the accident, it is now possible to look at the navigational failures of the officers and pilots of both vessels as alleged by the Crown, to determine firstly whether such manoeuvers are faults and if so, whether they had anything to do with causing the collision.

Before going into this matter, however, I should explain that with regard to the navigational matters involved here, I have had during the course of this trial, the able advice and assistance of an assessor appointed by the Court, Captain Jean-Paul Turcotte, Director of Marine Education, Department of Education, Province of Quebec. This gentleman has a master foreign-going certificate (1957) and

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prior to directing the Marine Education Section of the Department of Education, was in charge of a vessel which navigated between the Maritime Provinces, Quebec and Montreal. During the months of June to August in each of the years 1961 to 1964, he served an apprenticeship with the Quebec District Pilotage Services. Because of the variety of his experience as a captain, a pilot and a lecturer, he was invaluable to this Court during the trial as well as in the course of preparing these reasons for judgment. He not only attended the trial and heard all the witnesses but also attended the tank tests conducted in Holland in December 1967.

Because an assessor had been appointed in this case, the suppliants and the third party submitted at the outset of the trial that having regard to the practice followed in the United Kingdom and in the Admiralty Division of this Court, no expert evidence should be heard on navigational matters. There is no doubt, as pointed out by counsel for the third party that in admiralty cases, assessors are not only technical advisers, but are also sources of evidence as to facts. The practice is that a court assisted by nautical assessors, obtains its information regarding questions of nautical science and skill relating to the management and movement of ships from them and not from sworn witnesses called by the parties and can direct them to inform themselves by a view or even by experiments and then report thereon. Assessors, however, only give advice and the judge does not have to accept it. He must, in all cases, come to a decision himself and bear the responsibility for such a decision. While it is clear that the judge is not bound by the opinion of the assessor, great weight must, nevertheless, be given to the assessor's nautical experience and his opinion should ordinarily be accepted if there is no ground to question it. The responsibility of the decision, notwithstanding the evidence given, however, always rests with the judge who must not surrender his own judgment to that of the assessor who merely assists the court with his nautical skill. As pointed out by Lord Justice Scott, at p. 612, in *The Queen Mary*[2] collision:

> ... The function of the assessors is only to give to the Court expert evidence on technical questions of seamanship or navigation, such as would be admissible in evidence if given by an independent expert witness.

[2] 80 Ll.L.Rep. 609.

It seems that the reason behind the appointment of assessors is to dispense with nautical evidence as to the management of ships and prevent "the inundation with the opinions of nautical men on one side and opposite opinions on the other, to the great expense of suitors and a great delay in the hearing of the cause and with no benefit whatever" (cf. Dunlop J. in *Harbour Commissioners of Montreal v. The S.S. Universe*[3]).

Although the hearing of expert witnesses contradicting themselves may be a loss of time and money in some trials, this is not always the case and although the appointment of an assessor who alone advises the Court on matters of navigation, may have its advantages, it also, however, has its disadvantages in that most of the time the appeal court knows little of what has transpired between the judge and the assessor and, in most cases, does not even know what questions were asked and what answers were given. Furthermore, as there is no cross-examination of the assessor, that possibility of testing the accuracy of his opinions is missing. There are, therefore, advantages in having only assessors to deal with technical matters, but there are also some disadvantages. In view of the particular features of the present case, the Court decided, although an assessor had been appointed under the provisions of section 40 of the *Exchequer Court Act* (which authorizes the Court "to call in the aid of one or more assessors specially qualified, and try and hear the cause, matter or petition, wholly or partially, with the assistance of such assessor or assessors") that there was no necessity to adopt entirely the procedure ordinarily followed in an admiralty case. The present case, of course, is not a claim under the admiralty jurisdiction of the Court even if it does involve two vessels, but is one in damages against the Crown. The thought was that there could be some advantage here in having not only an assessor who could be called upon to answer questions and give answers which, if accepted by the Court, could be incorporated in the reasons for judgment, but also navigational experts for such assistance as they are properly qualified and competent to give to the Court. I have dealt at length with the question of admitting evidence from experts because a very strong objection was taken by

[3] 10 Ex. C.R. 305.

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counsel for the suppliants and for the third party to the evidence of certain English captains and Suez Canal pilots, as well as two Canadian captains, who were called by the Crown to testify on the navigational conduct of those in charge of the *Hermes* and the *Transatlantic*. These witnesses were Captain Atkinson, and Captain Lionnet, both former pilots in the Suez Canal, and two Canadian captains, Captain Irvine and Captain Goulet. I should say here that with regard to matters of navigation, I should have thought that more persuasive evidence would have come from pilots who had piloted the part of the St. Lawrence River where the collision occurred and who had navigated such waters immediately prior to or on April 10, 1965, when the casualty took place than what was given to the Court in this case. The foreign captains had navigated the Suez Canal where there was a speed limit of 7 knots, where vessels were conducted in convoys and where the navigational aspects were entirely different from those prevailing in the St. Lawrence River and particularly in Lake St. Peter. One of the Canadian captains, Captain Irvine, obtained most of his experience in the Great Lakes and in canals, and the other, Captain Goulet, admitted that, as far as navigating Lake St. Peter on the leading lights was concerned, he always used a pilot or pilots. By the evidence of pilots with relevant experience, it might have been possible to check in some manner whether the practice adopted by the pilots of the district of Montreal to Three Rivers, for instance, of going downstream in the channel at full speed on a clear day was one peculiar to the pilots heard in this case, including Captain Goulet, or a general one followed by all those pilots who navigated the channel in question at the relevant time. It is interesting to note, however, that even Goulet, when coming down Lake St. Peter on a clear day, would do so at 185 revolutions, i.e., 13.8 knots and, therefore, at full speed.

Captain Goulet was asked by counsel for the third party in cross-examination, the following questions and gave the following answers (cf. p. 3798 of transcript):

> Q. Quelle est la vitesse, la pleine vitesse du *Edouard Simard*?
>
> R. La pleine vitesse du *Edouard Simard* est de cent quatre vingt-cinq (185) révolutions, qui est notre vitesse normale, le «cruising speed» qu'on appelle, et la vitesse ordinaire est d'environ 13.8 nœuds.

Q. Par temps clair, et lorsque la glace ne nuisait pas à la navigation, à quelle vitesse descendiez-vous, par exemple dans le Lac St-Pierre, normalement?

R. Je descendais dans le Lac St-Pierre à une vitesse de cent quatre vingt-cingt (185) révolutions, ce qui donne 13.8 variable, 13.7—tout dépend des conditions du vent, ou du courant cette journée-là; le courant est assez variable sur le Lac St-Pierre, un peu.

I should add that I would also have great difficulty in accepting the evidence of Captain Irvine (whose nickname is "Sputnik" because he has a reputation for not losing any time in navigating vessels) that a vessel should reduce speed in order to meet in the anchorage a ship coming upstream. Furthermore, such a course of action is, I am told by the assessor, not the practice followed in the channel and would unduly delay navigation.

The evidence of these foreign captains or pilots and of the two Canadian captains, although critical of the manoeuvers of the *Hermes* and the *Transatlantic,* have not convinced the Court, after taking into account the views of its assessor, that any of the manoeuvers adopted by either vessel on the day of the collision, was of a nature such that it constituted a fault which caused the collision, particularly in view of the overwhelming evidence given by all the Canadian pilots and navigators who were experienced in navigating the waters in question, that they were accustomed to proceed in a manner no different from that adopted by both ships.

I should also mention that prior to the hearing of these expert witnesses on navigation, a very strong objection was also taken to their testimony being received on the basis that (with the exception of Captain Goulet and also possibly Captain Irvine) not being experts in navigating the St. Lawrence River, they could not be heard on the question of any practice prevalent in that navigational sector or of what a reasonable prudent and competent mariner would have done under similar circumstances. There was also an objection to any of these witnesses making evaluations of evidence. In particular, there were objections to such witnesses as Dr. Corlett expressing opinions as to the conclusion that should be reached on contested questions of fact for the purpose of relating the conclusions from tests thereto.

These expert witnesses were finally permitted to testify on the basis of specific facts being hypothetically put to

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them on which they were allowed to give an opinion. Furthermore, although they were allowed to testify as to what was the proper course to pursue under whatever circumstances were admitted or proved, they did not, nor were they allowed to state what their own conduct would have been under such circumstances. I am satisfied that generally speaking, the evidence of these witnesses was given in accordance with such rulings and although there was some conflict among the witnesses on some points, on no occasion did an expert's opinion depend on his view of the credibility of the witnesses. In all cases, I believe the witnesses clearly stated the hypothesis on which they were basing their opinions. The only question now is whether this evidence established that the navigators of either ship had committed any breach or breaches of navigation such as to have caused this collision.

Before going into the alleged faults of navigation committed by those on board the *Hermes,* I can deal very briefly with two of the items mentioned by respondent in paragraph 43 of its defence. With reference to the allegation that they were navigating in Lake St. Peter with an incomplete British chart (Exhibit T-5) and did not have a Canadian chart that contained an indication of the buoys, it is sufficient to say that no matter what chart had been on board the *Hermes,* it would not have prevented the collision. As Captain Atkinson, an expert witness called by the Crown (at pp. 3936 and 3944) agreed, the chart had nothing to do with the fact of the collision. It is true that the chart that they had did not contain an indication of the buoys but these buoys in winter navigation, because of the movement of ice, were unreliable. This is made clear by the Notice to Mariners of November 13, 1964 (Exhibit P-63). There was, therefore, good reason not to rely on them even if some sort of an alignment of these buoys had been made prior to the collision. The assessor has confirmed my view on this matter and this allegation must, therefore, be rejected.

I can also deal rapidly with the allegation that they did not use their radio-telephone. Prior to the collision, both ships were navigating the river on a clear day preparing for a normal port to port passing similar, as far as the

Hermes was concerned, to the passing effected with the three ships she had just met in the Rivière du Loup course and with which there had been no communication nor any need therefor. There was, of course, no signal whatsoever given prior to the collision for the simple reason that both ships were too close by the time the danger became apparent. The collision by that time was inevitable. Furthermore, although the pilot of the *Hermes* knew that in 1964 the lining up of the lights of Pointe du Lac did not take a vessel along the centre of the channel but somewhat south thereof, he did know, as did all the other pilots who have given evidence with regard thereto, that in 1964 those lights would take his vessel safely down his side of the fairway. He was, therefore, in 1965, in no position that would cause him to anticipate any danger (unless he was blessed with the gift of foresight, of prescience or foreknowledge and could have anticipated beforehand something which it took at least 18 days for the parties to find out from Poulin's survey). Unless they should have anticipated danger, there was no reason why, sometime prior to the sheering, the navigators of the *Hermes* should have used the radio-telephone. In any event, no suggestion has been made on how (when the sheering started) with the short period of time that elapsed before the collision occurred, they could have used the radio-telephone or in what manner any such use would have prevented the collision. It did not occur to the pilot of the *Transatlantic* to use this instrument, to warn the appellant of the apprehensions he says he had as a result of his observations and I cannot see how it should, under the circumstances of this accident, have occurred to those on board the *Hermes* to do so. This allegation must, therefore, also be rejected and I may add that I am fortified in this conclusion by the considered opinion of my assessor who, on this matter, has expressed the view that the radio-telephone is an instrument to be used only when arrangements have to be made for overtaking vessels or meeting with restricted visibility or, in cases of urgency or strict necessity and that under the circumstances of the present case, coming down the river on a clear day with no traffic going downstream ahead and with no overtaking involved, the *Hermes* had no obligation to communicate by radio-telephone with the

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Transatlantic. It, therefore, follows that the fact the *Hermes* did not use this instrument can have no causal connection with this collision.

Pilot Belisle, of course, did not use the buoys on the north side of the channel (as the Crown contends that he should have, having regard to the fact that these buoys had been verified a few days before the accident, that this information was available at the pilotage offices and that all pilots should have availed themselves of it) but only the leading lights of Pointe du Lac and in view of the Notice to Mariners, (P-63) already mentioned, I am of the view (and the assessor so advises) that it was the only thing to do. Had he used the buoys and gone astray because they were not properly located, he would have clearly been guilty of negligence. While the respondent supplied some evidence that these buoys had been verified a few days before the accident (on April 6, 1965), nevertheless, on April 10, 1965, it was still winter navigation and some ice was still coming downstream. That being so, having regard to the admonition of November 13, 1964, contained in the Notice to Mariners, to the effect that buoys were unreliable because of ice, those navigating the river could not rely on them to any greater extent at that time than they could have relied on them prior to the date when they were checked, particularly when, according to the evidence (if one refers to the course navigated by the ship and the crew who carried out this task) this verification was apparently carried out in some haste. It also appears that with a ship coming upstream on the northern side of the channel, the use of buoys, if at all visible, would be of little assistance. According to Captain Atkinson, these buoys could only have been of some assistance to the *Hermes* had they been lined up and this was possible at one spot only, i.e., when the ship came off Rivière du Loup downbound lights to come up to the Pointe du Lac lights. This would have, therefore, been possible for a few fleeting seconds only and at about 900 feet from buoy 54L, at a time when the *Hermes* was guiding herself on another defective light, the downward Rivière du Loup beacon (which the evidence established guided her some one hundred feet south of her proper position) and when her navigators were looking towards the Pointe du Lac lights,

as they had to, according to the information available to them, to guide them safely down the next leg of the course. It is difficult to see how, under those circumstances, the navigators of the *Hermes* could be taken to task for not using an aid to navigation (the buoys in question which happened to have been spar buoys and, therefore smaller than summer buoys) which they had been warned were unreliable and, which, under the conditions prevailing at the time, were difficult to use and of doubtful assistance. In this respect also, the conduct of the navigators of the *Hermes* (and here again I am confirmed by the assessor's opinion) can hardly be considered as faulty or as having caused or even contributed to this collision. This allegation is therefore also rejected.

There is also the allegation by the Crown that pilot Belisle relied only on the range lights of Pointe du Lac when he had directly facing him a rising sun and when he knew that these range lights were "inexact and unprecise".

There was, I should say immediately, no evidence whatsoever that Belisle had a rising sun in front of him which prevented him from seeing the range lights on the morning of April 10, 1965. His evidence, as well as that of Vos, is that the Pointe du Lac range lights, which they lined up and followed, were clearly visible. This part of the allegation is, therefore, groundless. Belisle knew that these range lights taken in line did not lead one on the central part of the channel. Incidentally, it would be surprising if he did not know that, as the evidence adduced for the respondent established that as far back as the year 1935 and in the year 1941, the lights would, at the beginning of the Pointe du Lac course, lead a ship some 25 to 50 feet southwards. He knew, as did all the other pilots plying this course, that a downbound vessel taking the lights in line, would be led some 100 feet north of the south buoys. He also knew, however, as did all the other pilots, that this would still allow him to go safely down the south side of the channel. This, indeed, seems to have been the extent of the knowledge of the pilots in these waters in 1964 and I may add that none of them could know whether such a result was caused by the buoys being misplaced, the lights being defective or even by some change in the configuration of

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the channel. Paquette, in his evidence, even states (at p. 2009) that such a displacement could not have been discovered:

> R. Je n'ai reçu aucun rapport de qui que ce soit que la base avait été déplacée, parce que ce n'était pas perceptible d'une façon ou d'une autre.

If the crew of the ship assigned to the maintenance of the aids to navigation in the area who navigate continuously in these waters and whose duty it was to maintain aids to navigation in the river, did not discover the displacement, or if neither the ships of the ship channel section of the Department of Transport, nor their ice breakers, discovered the 28 feet displacement of the front light of Pointe du Lac in 1964, there would seem to be no basis for holding that the pilots were at fault for not realizing that the leading of these lights to the south was caused by a displacement of the pier rather than by a misplacement of the buoys, or even a change in the channel. Furthermore, in these circumstances, I can find no basis for holding that the pilots were guilty, as the respondent alleges that they were, of not complying with section 12(4) of the Montreal General Pilotage By-laws in not reporting the displacement of the range when it was not perceptible. My conclusion is that, while pilots navigating in that part of the St. Lawrence in 1964, realized that the lights in line did not indicate the centre of the channel, they knew that a downbound ship taking them in line in 1964 would be safely conducted through the channel on that course and there was no reason for them to anticipate any danger in proceeding in the same manner early in 1965. (The assessor herein is of the same view.) There is, therefore, no validity in the Crown's allegation of fault under this heading.

I now come to the allegation by the Crown that the navigators of the *Hermes* did not adequately use their gyrocompass and other instruments of navigation at their disposal. The other instruments referred to are probably the ship's radar, a chart and the fixing of positions by means of a sextant. I have inquired from my assessor as to whether there is any validity to this allegation and he has given the following answer with which I am in full agreement: "There was no reason in the present case for Belisle or the master to make use of a chart or to use radar when

they could clearly see the leading lights ahead, which are more precise than any observation, that can be made by radar. As far as the gyrocompass is concerned, Belisle was using it and had it at 57 degrees when he should have been on a bearing of 56 degrees. A ship cannot be navigated on a quarter or even a half degree. It is possible, for instance, for a vessel in a particular course to be navigated one degree or a half degree off which, however, from time to time, is corrected by the alignment with the ranges. The *Hermes* here, should have been steering 56½° and the fact she was being navigated at 57° was not unusual and could not indicate that she was not properly aligned especially if Belisle was following the range lights. Furthermore, the current could have possibly caused this difference of ¾ of a degree the *Hermes* was steering prior to entering the cut at the east end of Yamachiche bend."

I come now to the main criticism levelled at the navigators of the *Hermes*. It is that they entered a narrow part of the channel at full speed during winter navigation when a meeting with the *Transatlantic* was imminent, instead of reducing the speed of the vessel and meeting in the Yamachiche anchorage. I have already mentioned the practice followed by navigators in this channel as well as Captain Irvine's opinion in this regard.

I should, before dealing with this matter more fully, comment on what the respondent describes as entering a narrow part of the channel. The Lake St. Peter channel starts for a downbound vessel, somewhere downstream from Sorel, P.Q., and ends somewhere prior to attaining the city of Three Rivers, a distance of some 15⅔ miles. The lake this channel traverses is some 14 miles long and 6 miles wide and its approximate centre lies somewhere along its centre line. This channel is 550 feet wide and, therefore, allows vessels navigating its length downbound and upbound some 275 feet to travel in when meeting or passing each other. Now, although the *Hermes* prior to the collision was entering a part of the channel, that at this point was narrower than it had been in Yamachiche bend (where it was some 2,000 feet wide) it was not changing from another part of the lake to the channel but was still proceeding through the same channel as it had done since leaving Sorel, where en route, it had many times passed from a wider part of the channel to a narrower part the

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width at the five curves, indeed, varying from 800 to 900 feet (cf. St. Lawrence River Pilot, 1966, p. 185). This narrower part of the channel, which the *Hermes* was entering prior to the collision, was still, however, of a breadth of 550 feet, which allowed ample room for navigation having regard to the size of the ships involved. Indeed, the beam of the *Hermes* was 57.6 feet and that of the *Transatlantic* was 54 feet and there, therefore, remained 439 feet to meet in. There is no doubt, and the evidence so discloses, always a possibility of interaction between ships meeting in narrow channels (although such danger is greater when one ship overtakes another) as well as of bank effect if a ship navigates too close to a bank. The navigators of the *Hermes* (and in particular the master and officers) however, had no way of knowing at the time, and there is no reason why they should have apprehended that they were being led astray by the range lights into an area in proximity to the bank (the latter being covered with water and not perceptible in any manner) where there was danger of bank effect. Under these circumstances, it is difficult to see how they can be faulted for the speed at which their vessel was operated at the time (15 knots) even if such speed would increase the unforseeable bank effect on their vessel. Had the *Hermes* been on the course on which the lights would have guided her in 1964, as the pilot was entitled to assume that she was, with the ranges in line, there was no imprudence in entering the cut at the east end of the anchorage at full manoeuvering speed and there would have been no accident had this been the case.

Captain Turcotte has advised me that he is also in full agreement with my conclusion on that point and has added that it is not necessary to reduce speed to enter a narrower part or to emerge from one as long, of course, as the ship is in the channel. He added, however, that after listening to the evidence in this case, he thought it would be a good thing for the authorities to regulate the speed of vessels during winter navigation in this channel.

The attack made on the speed of the *Hermes* at the time of the collision by the respondent was, however, pressed further by the evidence of the captains brought in by the respondent as navigational experts as well as by the evidence of Dr. Christian Brew Corlett, a doctor of philosophy in naval architecture, on the basis that even if one

assumes that the front leading light of the ranges was displaced by some 40 feet, giving a vessel at the chartered position of 51L (some 200 feet downstream from the eastern cut of Yamachiche anchorage) a displacement of 225 feet, this would still place a vessel drawing 20 feet passing position 51L in a safe position (although if one adds to this displacement that caused by the sensitivity of the ranges, the original southern displacement at the commencement of the course as determined by the 1941 survey and the tilt of the upper structure, this statement appears to be most doubtful) *if the vessel was proceeding at a speed which would allow sufficient reserve power for an emergency.* The *Hermes,* as already mentioned, went full astern when she was in a sheer caused by bank pressure and suction and this removed all rudder power and ability to break the suction. According to the above captains and Dr. Corlett, (and the tests made in Holland in December 1967 confirmed this) had the engine of the *Hermes* been kept full ahead with increased speed (instead of being fully reversed) the ship, as the stern left the bank, would have responded very quickly to her rudder and the collision might well have been avoided. This manoeuver, according to Captain Atkinson, of London, England, a former Suez Canal pilot, is an action which would take a cool mind and technical knowledge of the causes and effects of bank suction, which he says, he would expect all pilots in narrow submerged channels to have.

This, in my view, points up again the difficulty encountered when foreign captains are brought in as experts to give evidence on navigational problems involving the conduct of ships in waters which are foreign to them. The evidence here, of course, is that none of the pilots heard at the trial knew very much about bank effect or had, until the spring of 1965, ever navigated a ship which had sheered. Captain Goulet, of course, stated that in navigating the Lake St. Peter channel he had experienced sheering many times but he explains this by saying that it occurred while his ship was assisting the ice breakers and at a time when his vessel was presumably pushing ice away from the bank. As for Captain Irvine, his experience with bank suction was in the canals situated on the Great Lakes. The pilots heard at the trial and involved in this accident had, of course, from time to time, while navigating

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in the St. Lawrence River, felt some pressure effect on the conduct of their ship, which, however, they could and would correct merely by pressing on the rudder, but they had never experienced a sheering prior to April 3, 1965, when for the first time the *Manchester Commerce* sheered in the Lake St. Peter channel and more precisely in the beginning of the Pointe du Lac course.

Now, although Captain Atkinson states that he would expect all pilots to have complete knowledge of bank suction, his evidence in this regard when cross-examined by counsel for the suppliants is of interest (cf. p. 3904):

BY MR. GERITY:

Q. You said that young men, I presume young officers, would learn about these matters from some standard text. Could you name one or two?
A. Well, the Admiralty Manual of Navigation.
Q. Deals with bank suction? Which volume?
A. Admiralty Manual of Seamanship, sorry.
Q Do you have one with you?
A. I haven't got one here, no.
Q. What other books deal with it?
A. Offhand, I can't think of any particular one.
Q. Have my learned friends showed to you any Canadian publication that deals with it?
A. Well, not Canadian, American.
Q. Which one was that?
A. He has shown me an American book by two American naval officers on shiphandling.
Q. Marine, Plummer's book?
A. Yes.
Q. Is that the only one you have been shown?
A. No, I was shown another one, a small red one.
Q. By whom?
A. Plummer was one and the other one was by two American naval officers.

Although most ship handling books deal in a summary fashion with bank suction, there is very little written which really goes into the subject in any detail and which gives the relationship of offset from banks with the speed of vessels nor were there many tests that had been made in this regard before April 10, 1965. It is, therefore, not too surprising that the pilots involved in this casualty had heard very little about this subject. Nor does it appear that at any time pilots plying their trade in the District of Montreal, or even elsewhere in Canada, were ever educated

or even informed of the dangers of bank suction, although all the pilots of the District of Montreal are under the authority of the Minister of Transport (the same department involved in supplying aids to navigation or in maintaining the channel) who as the pilotage authority under the *Canada Shipping Act* (R.S.C. 1952, c. 29, secs. 322 *et seq.*) through the Superintendent of Pilotage of Canada (Mr. Jones) in Ottawa and the District Superintendent in Montreal (at the time, a Mr. Melançon) had the duty to ensure that the pilots conning vessels in Canadian waters are properly qualified and categorized. It is not entirely irrelevant to add that, under the controlled pilotage system which now operates in this country, vessels cannot select their pilots. The pilotage authorities indeed provide pilots through a roster system and the vessel has no say in the matter; and, because of this, one may well say that the original position of the pilot as an independent contractor has now become in fact that of an employee of the public authority who sets down the procedure by which pilots now operate in Canada and the manner in which vessels must make use of them. One may even ask whether under such circumstances, the respondent can now complain of the manoeuvers effected by the pilot herein even if theoretically the captain of a ship always remains liable for the conduct of his vessel.

Captain Atkinson was again examined with regard to the matter of bank suction and its effects on vessels, by counsel for the suppliants (at pp. 3905-3906 of the transcript) as follows:

Q. Were you shown any notices or documents from the officer of the Superintendent of Pilots of Canada directed to his pilots about these subjects?

A. No.

Q. Yet in the Suez Canal you were given that information, were you not, when you were a younger pilot?

A. Yes.

Q. In considerable detail?

A. Yes.

Q. I thought so. Have you seen any evidence in this case of any pilot, whether he was a witness, who ever experienced bank suction before these unhappy events?

A. No, but I did read evidence of one pilot who dealt with it on the *Corinthia*.

Q. Did he say he had ever experienced it before that time?

A. Not to my knowledge, no.

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As a matter of fact, pilots in this part of the St. Lawrence were never at any time given any instructions regarding the dangers of bank suction.

A Mr. J. T. Tothill, of the ship section, National Research Council of Canada, conducted tests with model ships some time in the beginning of the year 1967 for the purpose of measuring squat and bank effects and then produced a written report on the subject which could be of great interest and assistance to pilots. There was, at no time, however, any attempt made by anyone, including the Superintendent of Pilotage of Canada, to bring this very important document or its contents to the attention of the pilots, even though it was known at this time that bank effect had caused the sheering of three ships and a most serious collision involving loss of life.

Under these circumstances, it is difficult to see how the pilots involved herein, all experienced men, could have met the situation created in the channel on the fatal morning of April 10, 1965, with any more knowledge than what they had received. The question really is whether a reasonably well trained and reasonably competent pilot would have had any more knowledge on the subject than these pilots had.

In April 1965, the conditions and effects of bank suction, as well as the navigational manoeuvering necessary to get out of a sheer caused by bank suction, were not completely known to even these experts familiar with whatever had been written on the subject. Since then, Mr. J. T. Tothill's paper of 1967 (Exhibit P-81) has disclosed some useful information on the subject and the tests conducted in Holland by Mr. Ter Heide under the supervision of Dr. Corlett have also given a wealth of results which one with hindsight could possibly now use to criticize the action taken by the navigators of the *Hermes* in reversing the course of their vessel once the sheer began instead of pushing the ship at full speed and thereby possibly getting out of it. I say possibly because I am still not certain, although the tests in Holland would seem so to indicate that an increase of pressure on the rudder by increasing the revolutions of the engine will take a ship out of a sheer and bring her back under control and that, had such a forward action been taken at the time, the collision would not have hap-

pened, although, of course, in such an event, it might well have taken place at some spot further down and aft of the *Transatlantic* instead of amidships.

Furthermore, the tests made in Holland were conducted with a model and in conditions which, although close to what existed at the time of the collision, still could not, and did not, reproduce identical conditions. The difficulty of similitude inherent in such tests, as pointed out by Dr. John Doust, is a factor which leaves one somewhat skeptical, particularly with regard to determining whether under the conditions prevalent prior to the collision in question, the navigators of the *Hermes* should have pressed on a head as suggested and even whether they could safely do so. I am also left in some doubt with respect to the conclusion of the tests that below certain speeds at specific offsets from the bank, there can be no sheering and therefore, no possibility of a collision. I say this after reading an American decision cited by counsel for the respondent in *Al Johnson Construction Co. et al v. S.S. Rio Orinoco and Trans-World Carriers Inc.*[4] which indeed leaves me somewhat perplexed. Here a vessel navigating at a reduced speed of 3 knots started to sheer and although the vessel had reserve speed and used it, it did not succeed in avoiding a dredge with which it collided.

There is also the question as to what a pilot or navigator (even an experienced one) would do when faced with a situation where he has but a few seconds (between 30 or 40) in which to take a decision and where he can realize only after the passage of a few of those seconds that the sheering of his vessel is not due to a faulty rudder, as both Barrett on the *Manchester Commerce* and Belisle on the *Hermes* first thought was the cause of their sheering difficulties. In both of these cases, the rudder was, after the sheering, subjected to a thorough examination in order to ensure that such was not the case. Who indeed in what can be termed the agony of collision with a ship out of control going towards an oncoming ship, could be taken to task for reversing the engines as was done on the *Hermes*, after an attempt had been made to straighten its course by means of applying a 10 degree turn on the rudder and where a 5

[4] 249 F. Supp. 182 (1965).

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degree turn, according to several witnesses, is applied regularly to bring a ship back in line when navigating in the St. Lawrence River. Captain Turcotte is fully in agreement with the above and advised me that "because of the short sequence of events we must rely on the experience and judgment of the master and pilot of the *Hermes* and assume that when the engine was reversed, the collision was unavoidable and it then became a matter of attempting to reduce the impact". This is what Barrett with the *Manchester* did and he had no ship coming upstream at the time. It is true that pilot Tremblay on the *Carinthia* pressed on ahead and managed to avoid hitting the northern bank, but he explained this by saying that he had a vessel with two propellers and had he had but one propeller, he would not have been able to get out of the sheer. Furthermore, there was no ship ahead of him and, therefore, he was free to press ahead. It is true that Tremblay had reduced the speed of his vessel from 18 knots to 14 knots in the hope of meeting the *London Splendour* in the anchorage but as he stated, his ship was not, nor was the *London Splendour,* a small ship. He explains this at p. 1622:

> Me DESCHENES:
>
> M. TREMBLAY: Parce que, avec la classe de bateau que j'avais, rencontrer un pétrolier dans 550 pieds, sans aide à la navigation, ce n'est pas la même chose que si j'avais eu deux petits bateaux. Alors, c'était préférable de ne pas jouer avec mes nerfs, de rencontrer dans le 2,000 pieds.

Tremblay then testified (p. 1659) as follows:

> LE PRÉSIDENT: Vous n'avez pas songé à faire machine en arrière?
>
> M. TREMBLAY: Bien là, Votre Honneur, si mon navire a refusé d'obéir exactement à mes désirs, cela aurait été le «step» suivant, arrêter mon engin de droite, et encore il restait arrière tout, sur la droite. J'avais beaucoup à mon avantage pour pouvoir, vous savez, me sauver de la situation.
>
> Me BRISSET: Qu'est-ce que vous appelez «vous aviez beaucoup à votre avantage»? Qu'est-ce qui était à votre avantage?
>
> M. TREMBLAY: Parce que j'avais deux hélices.
>
> Me BRISSET: Et si vous aviez eu une hélice?
>
> M. TREMBLAY: A! «God bless me», là, je ne le sais pas, j'aurais peut-être traversé carré au nord du lac et je serais resté là.

As a matter of fact, Tremblay stated that even with two propellers it took his vessel some 1,800 feet to come back on a normal course (cf. p. 1660).

It, therefore, follows, I believe, that although the tests conducted in Holland under Mr. Ter Heide and Dr. Corlett's evidence, are most interesting and informative with regard to the fact that bank suction effects vary directly as the square of the speed and diminish as the vessel gets away from the bank, such tests and evidence, in my view, point out only that the relationship of the effects of bank suction on vessels to offsets from banks at various speeds were not too well known in April 1965 and in particular that it was not known to those navigating vessels in our waters. Such information can be useful now only if it is passed on to navigators. I must say, however, that it is unfortunate that these tests were not conducted at regular offsets in order to determine more precisely a curve of the effects of bank suction. New and valuable information was nevertheless obtained by the tests as confirmed by Mr. Ter Heide at the end of his evidence after he had explained the various tests conducted. He was indeed asked by the Court the following questions and gave the following answers (cf. p. 4372):

> HIS LORDSHIP: Mr. Ter Heide, as far as you are concerned, did you learn anything as far as the bank effect is concerned on ships; the effect on ships by these tests?
>
> THE WITNESS: Oh, yes, a lot.
>
> HIS LORDSHIP: A lot?
>
> THE WITNESS: Yes, and I think the two parties here did too.

Had I known of the results of the tests at the time they were authorized (although I did suspect that the faster the ship was going, the greater would be the sheering) and had I known also that there was no reason for pilots to anticipate (as I have now held) that the lower light would be displaced to the extent it was on April 10, 1965, and that bank suction could ensue, I would have been reluctant to allow such tests to be carried out.

The main criticism levelled at the navigators of the *Hermes* which is that travelling at 15 knots, they had no reserve speed available to bring her out of a sheer, becomes irrelevant once it is established that, under the circumstances of this collision with the navigators of the *Hermes* in no position to anticipate a sheering, a manoeuver involving the reversing of the engines as adopted by them was perfectly reasonable. My assessor confirms this by stating

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that he would not have "stepped on the gas" here even if he had had reserve speed to play around with once it was obvious that the vessels had reached a point where a collision became unavoidable. It follows that whatever speed the *Hermes* was navigating at had nothing to do with the cause of this accident and should not be considered.

I have already dealt in some respects with the allegations of the respondent with regard to the navigational breaches committed by the navigators of the *Transatlantic* by saying that, as suggested by the Crown, their vessel must have been somewhere near the centre of the channel prior to the collision. I say this notwithstanding Vallée's evidence that the northern buoys were being used as a guide and that the starboard side of the vessel was some 100 to 150 feet away from them. Had this been so, I have no doubt that the impact of the *Hermes*, together with the 30 degree starboard action taken by the *Transatlantic* would have projected the vessel against the north bank. As this did not occur, the only inference that can be drawn is that the *Transatlantic* was not on the northern side of the channel but probably on the centre part or even somewhat to the south thereof if the lateral distance of both vessels, as stated by their navigators, is considered. The vessel was, at the time, lined up on the Pointe du Lac ranges which were opened to the north and, therefore being conducted, as all pilots conducted ships in 1964, on the assumption that so operated they would effect a safe passage. Although the navigators of the *Transatlantic* were closer to the six north buoys which incidentally were at variable distances from each other (some were one half mile, others one mile apart over a total distance of some five miles) than those on board the *Hermes*, and in a better position to use them, they also were subject to the admonition of November 13, 1965, issued by respondent that they should not rely on them during winter navigation, but use instead fixed aids, such as the range lights of Pointe du Lac. Having regard to this advice, the use of these lights in the same manner as they had been using them in 1964 and without any reason to anticipate that circumstances had changed in the meantime, was not, in my opinion, negligence, and cannot be regarded as a cause of the collision. It is true that because of the misalignment of the front light, the *Transatlantic* was led much more to the south then it

should have been and this could well have given the *Hermes* a false sense of security in maintaining the course it was following. The evidence discloses, however, that both ships were being navigated by means of lining up the lights (either in line or slightly opened to the north) and the course of the *Hermes* was, therefore, directed by ranges and not by the position of the *Transatlantic* in the channel. Furthermore, as the navigators on the respective ships did not, at the time, know of the most recent displacement of the range and did not know that it was leading the ships more to the south than in 1964, the position of the *Transatlantic* (even if the lateral distance from the north buoys might have raised some doubt in their minds as to their position) cannot be attributed to negligence of those on the *Transatlantic* that was a cause of this accident.

Pilot Vallée stated that at a distance of some 3 miles he noticed that the *Hermes* was acting strangely and the respondent points out that notwithstanding this, he did not reduce the speed of his vessel. The evidence discloses that although the *Hermes* was led somewhat more to the south of the course because of the displacement of the Rivière du Loup lights, her manoeuvers were not as strange as Vallée stated. His evidence in this regard is indeed contradicted by the navigators on board the *Hermes* and also by the actual course followed by this vessel. Furthermore, and I am supported by the assessor's advice in this regard, it is difficult to see what could have been attained by reducing the speed of the *Transatlantic* when it was some three miles away from the approaching *Hermes*. On the other hand, later when the unforeseeable sheer of the *Hermes* took place, all necessary action appears to have been taken to try to avoid this accident. It is true that no signal was given by the *Transatlantic* prior to the collision but this is not too surprising in view of the fact that there was very little time to give a signal and that any signal given would have been useless. With regard to the suggested use of the radio-telephone, if what pilot Vallée states is true, that he saw the *Hermes* was in difficulty some three miles away, he could and should have used it. Even assuming, however, that such was the case, I could not hold the *Transatlantic* liable on the basis of such evidence which, even if true, would merely be an omission or a refusal of assistance on the part of Vallée which could,

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in no way, constitute a basis for establishing liability or even contributory negligence. I would also be reluctant to accept Vallée's statement with regard to the difficulties he claims the *Hermes* seemed to be in as, in my view, they are not supported by the weight of the evidence.

We are, therefore, left with but one explanation for this collision, i.e., the 40 feet displacement of the Pointe du Lac front light on April 10, 1965, which was rendered still more deceptive by the misalignment of the preceding Rivière du Loup range lights which had also led the *Hermes* more southward than it should have gone in order to take the Pointe du Lac lights and, therefore, closer to the south bank where the sheer took place and, of course, the position of the *Transatlantic* in the channel may well have lulled the *Hermes* into a false sense of security.

Having come to this conclusion, it follows that the sole direct cause of this collision was due to the increased displacement of the light in 1965 as compared with 1964. Although the increase between 1964 and April 10, 1965, was only some 12 feet, nevertheless, it caused the total displacement to reach some 40 feet and thereby created a most dangerous situation for those ships plying those waters in the spring of 1965 when the Pointe du Lac lights were the only means of navigation upon which, according to their training, experience and instructions, they were entitled to rely.

Having thus determined the factual situation, I now turn to what may well be the most difficult part of my task, namely to deal with the question whether the Crown can be held legally liable for this collision caused by the misalignment of the ranges and the consequential damages.

According to both the suppliants and the third party, the liability of the Crown was due to a number of breaches of duty on the part of the Crown and its servants, as alleged in paragraphs 20, 21 and 22 of the petition of right and paragraphs 23, 24 and 25 of the third party's defence. As there is very little difference in the allegations of both the suppliants and third party in this respect, it will suffice to reproduce hereunder paragraphs 20, 21 and 22 of the petition of right and indicate wherever necessary the slight differences involved:

> 20. The collision and the consequent damages sustained by the Suppliants were the result of a breach of duty on the part of the

Crown and its servants, *attaching to the ownership, possession, occupation or control of property,* namely, the structures on which the lights and beacons in Lake St. Peter had been installed and more particularly the lower or front beacon and light of Pointe du Lac and the Rivière du Loup leading lights and beacons downbound with the result that their misalignment caused such leading lights and beacons to be a danger to navigation rather than an aid to navigation, and in that the officers and servants of Her Majesty failed to ascertain such misalignment and to give warning of it to those in charge of the navigation of the vessels *Hermes* and *Transatlantic,* who relied for the safety of their vessels upon being given due warning that such lights and beacons were no longer serving the purposes advertised and published for the information of mariners.

(Emphasis added).

The particulars of the negligent acts allegedly committed by employees of the respondent on which suppliants rely are enumerated in paragraphs 21 and 22 of the petition of right reproduced hereunder:

21. Such collision and the consequent damages sustained by the Suppliants were also the result of delicts and quasi-delicts committed by servants of the Crown, namely, the District Marine Agent of the Department of Transport in Sorel in charge of such aids to navigation, the Superintendent of Pilotage in Ottawa, the District Superintendent of Pilots in the District of Montreal and the Chief of the Aids to Navigation Branch of the Department of Transport, and more particularly:

(a) As to the District Marine Agent of the Department of Transport for the District of Sorel:

i. because of his failure to ascertain and correct the misalignment of the leading lights and beacons of Pointe du Lac which had resulted from the shifting and tilting to the south of the base on which the front range had been installed, which shifting and tilting was known or should have been known to him and which already had become significant and dangerous by the fall of 1964 and by the beginning of April, 1965, had increased to such an extent as to place a downbound vessel, keeping the ranges in line, on the south bank of the dredged channel;

ii. because of his failure to ascertain and correct the misalignment of the downbound Rivière du Loup lights and beacons which also had resulted from the shifting or tilting to the south of the base on which the lower beacon had been installed;

iii. because of his failure at least to warn mariners of such misalignment and of the unreliability of such aids to navigation;

the whole despite his having men, materials and equipment available and despite his knowledge and acceptance of the reliance placed on the due performance of his duties by the navigators passing through Lake St. Peter, in particular the navigators of the *Hermes* and *Transatlantic.*

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The latter part of subparagraph (*a*) of paragraph 24 of the third party's defence is expressed in somewhat different language and appears to go further than the above allegations. It reads as follows:

> (*a*) . . . the whole in spite of his knowledge of the justifiable reliance by the navigators of vessels passing through Lake St. Peter, and in particular by the navigators of the "*Hermes*" and the "*Transatlantic*", on the performance of his duties by the said servant of the Respondent, the Crown, and the acceptance of such duties by such servant, the more so in view of the conditions referred to in Paragraph 17 which still prevailed;)
>
> (*b*) As to the Superintendent of Pilotage in Ottawa, as well as to the District Superintendent of Pilots in Montreal, because of their failure to provide to the Pilots assigned to vessels in the Pilotage District of Montreal the information required by them to competently discharge their duties in the conduct of such vessels.
>
> (*c*) As to the Chief of Aids to Navigation Branch of the Department of Transport, and to the Superintendent referred to in paragraph (*b*) hereof, all of whom were servants of the Crown and subject to the direction and control of the Minister of Transport, because of their failure in their duty to commercial shipping and to the Suppliants and Third Party Defendant in particular—
>
> (i) the said officers and servants failed in their duty to create or maintain any sufficient system for the dissemination of information to mariners so that the said mariners might receive timely warning of dangers to navigation of which the said officers had knowledge or should have had knowledge; and,
>
> (ii) more particularly, in that they knew or ought to have known that other vessels and, more particularly, the downbound cargo vessel "*Manchester Commerce*" and the downbound passenger vessel "*Carinthia*" had previously to the date here in question, namely on the 3rd and 9th days of April, 1965, respectively, encountered difficulties and danger while traversing the dredged channel across Lake St. Peter in exactly the same locality where the "*Hermes*" and "*Transatlantic*" came into collision, which said difficulty and danger were reported or should have been reported to the servants of the Respondent, the Crown, any lack of knowledge on their part being indicative of their failure in their duty as aforesaid to create an effective system for the receipt of such information,
>
> 22. The Officers and servants of the Crown mentioned in the preceding paragraph, although having at all relevant times the equipment, men and funds required, failed in their duty to inspect and ascertain the condition of the said aids to navigation and to warn mariners of defects developing in them and to ensure that navigators, relying upon the performance of the said duty and acting upon the information published and advertised, would not be misled into

navigating in the channels of Lake St. Peter in the belief that they might do so safely in the manner in which they were directed and invited to do by the said information.

Briefly stated, the position taken by the suppliants and the third party herein is that the collision was caused by the displacement of the ranges; that the servants of the Crown knew or should have known that the ranges were displaced; and that they should either have corrected the situation or warned mariners that the ranges were no longer serving their intended purpose.

The Crown, on the other hand, takes the position that the only case it has to meet here are the various causes of action set out in the pleadings and, of course, there is no question that such is always the case.

Counsel for the Crown contends that paragraph 20 of the petition of right, which deals with the liability of the Crown under section 3(1)(*b*) of the *Crown Liability Act* is limited to a claim that there was a failure on the part of the Crown's servants to ascertain and to give warnings and that as there is no allegation that the Crown had a duty herein to maintain the pier, a cause of action based on failure to maintain is not available to suppliants in this action. While the paragraph is not as easy to read as it might be, I do not think it can be read so narrowly. The first part of the paragraph reads in part as follows:

> 20. The collision and the ... damages ... were the result of a breach of duty on the part of the Crown... attaching to the ownership, possession, occupation or control of... the structures on which the lights and beacons in Lake St. Peter had been installed... with the result that their misalignment caused such... lights and beacons to be a danger to navigation rather than an aid to navigation...

These words are clearly so framed as to rely on a "breach of duty on the part of the Crown" resulting in specified lights being misaligned so as to create a danger to navigation. If the matter had been raised by way of an interlocutory application, it might be that the claimants would have been required to plead the facts from which the Court would be asked to conclude that there had been such "a breach of duty on the part of the Crown". On the other hand, if such an application had been made, I should have thought it possible that the Court would have concluded that the claimants could not be expected to plead any fact other than that the misalignment did exist and that that

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had been adequately pleaded. Lack of care might well be inferred from misalignment unless excluded by an explanation of the misalignment that is consistent with the Crown having discharged such duties as devolve on it from ownership, possession, occupation or control of the lights in question. I find, therefore, that the petition does sufficiently raise a case under section 3(1)(*b*) of the *Crown Liability Act*.

Having thus been raised in the proceedings and having been argued and debated by counsel for all parties, the question of maintenance, therefore, forms part of the issues raised in these proceedings.

The Crown, in its defence, denies that the misalignment of the leading lights was the immediate and sole cause of the collision and alleges that this collision was caused by the fault, neglect, imprudence, inability and want of care of the pilot and officers on board the *Hermes* as well as the pilot and officers on board the *Transatlantic* and that the said collision had in no way resulted from a breach of duty on the part of the Crown and its servants either as the owner or controller of the property and that their servants or officers had not been guilty of any omission which could constitute a cause of action in tort or otherwise against them personally. The Crown took the position that, even if all the facts alleged in the petition of right were admitted, it could not be held legally liable in tort or otherwise for the damages claimed by the suppliants.

The Crown then raised a number of navigational breaches committed by the navigators and pilots of both vessels with which I have already dealt. There is no point dealing with them again here except to summarize the conclusions that I have already reached, namely that none of the manoeuvres of either ship prior to the collision can, under the circumstances of the case, be considered as constituting a fault or negligence that was a proximate cause of the casualty.

The only defences raised by the respondent which remain and may be pertinent to its liability for the displacement are (1) that although it had no obligation to do so, it had, in 1963, required a specialized engineer to examine completely amongst other things, the pier of the Pointe du Lac range and he, by his written report, concluded that it was in good condition, that it had been displaced only

slightly over the years and that it should give respondent no concern; (2) the respondent also alleged that in 1965, for the first time, it experimented by leaving the steel structure on the base of the lower pier of Pointe du Lac in an attempt to assist navigators, and this was known to the pilots and navigators and particularly to the pilots of the *Hermes* and *Transatlantic*; (3) the Crown finally took the position that if the base of the lower light of Pointe du Lac was displaced before the collision this displacement was caused by "force majeure" and that it could not have foreseen nor have prevented it (paragraph 68).

With respect to the matter of damages, the respondent in its pleadings (paragraph 70) claims that it is not liable for expenses resulting from the capsizing of the *Transatlantic* and its subsequent refloating as the captain and officers of the *Transatlantic* and the persons in charge of the salvaging operations were at fault in not properly beaching the vessel at a place situated out of the narrow part of the channel. It is also alleged that the captain and officers failed to fight the fire on board their vessel in accordance with the ordinary rules of the art and of prudence.

The suppliants rely on sections 3(1)(*a*) and 3(1)(*b*) of the *Crown Liability Act* of 1953[5] and contend that they have established a cause of action under both branches of the sub-section. They also contend that the tort referred to in the above Act in respect of any matter arising in the province of Quebec, is any delict or quasi-delict considered as such under the laws of that province.

"The Crown is liable" (under the above Act[6]) "in tort for the damages for which, if it were a private person of full age and capacity, it would be liable". Since the passing of this Act, therefore, the Crown, with very few exceptions, is assimilated to a person of full age and capacity and its liability for torts is that of such a person.

Counsel for the Crown argued that the use of the word tort, even in the French version of section 3(1)(*a*) of the Act, indicates an intent to allow an action in tort against the Crown only in those actions which are accepted as torts under the common law and that article 1054 of the *Civil Code*, for instance, which has no exact counterpart

[5] S. of C. 1952-53, c. 30. [6] *ibid*, s. 3(1).

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under the common law, would not apply against the Crown. This article deals with the recourse given against custodians or owners of things for damage caused by such things when under their care. The law, by this section, establishes a presumption of liability against the person in whose care the thing causing the damage was at the time, which presumption, however, can be rebutted by the owner or guardian establishing that he took all reasonable means to prevent the damage. There is indeed no such legal presumption in the common law and the Crown contends that the *Crown Liability Act,* because of the use of the word tort in the French text has clearly excluded such a resource. There is, I believe, a short answer to this submission in that, firstly, the Act in the definition section, clearly defines the tort contemplated as being a delict or a quasi-delict in Quebec, which must encompass a recourse based on article 1054 of the *Civil Code* and secondly, as the terms of section 3(1)(*a*) as well as of others extending the liability of the Crown in respect of property namely section 3(1)(*b*) appear to resemble, with some modifications, the *Crown Proceedings Act* enacted in the United Kingdom in 1947, there is the noteworthy omission in 3(1)(*b*) of the Canadian Act of the words "at common law" which appear in the English section 2(1)(*c*): "duties attaching at common law to the ownership, occupation, possession or control of property". A number of pronouncements were made by this Court, as well as by the Supreme Court of Canada, under the old section 19 of the *Exchequer Court Act* which gave a special recourse against the Crown for the negligent acts of its servants and it was repeatedly asserted that (although a presumption of fact such as the one covered by the dictum *res ipsa loquitur* could assist a claimant) negligence had to be proved under section 19 and no legal presumption (such as the one contemplated in article 1054 C.C.) could replace such proof. (Cf. *Tremblay v. The King*[7]; *Gauthier & Co. v. The King*[8]). Indeed, the tort of negligence can only be established by positive proof thereof. Under the new Act, however, there is no restriction and as it is stated that the Crown can be held liable as a person of full age and capacity, there would seem to be no reason why the legal

[7] [1944] Ex. C.R. 1 at p. 4.

[8] [1944] Ex. C.R. 17.

presumption of article 1054 of the *Civil Code* should not apply in a proper case to the Crown as it applies to all persons of full age and capacity in Quebec.

The proper interpretation to be given to this statute is, I believe, that the law which applies with regard to the liability of the Crown (unless the Crown is excepted therefrom) for a cause of action originating in Quebec, is that which governs any delict or quasi-delict committed by a private person of full age and capacity in that province including the legal presumption of article 1054 if such an article is found to be applicable to the circumstances of a particular case. I shall have more to say later on this subject when considering the manner in which the servants or officers of the Crown discharged whatever obligations they had to navigation with regard to the particular range lights they had under their control.

I should now, I believe, state here that under section 591 of the *Canada Shipping Act*, R.S.C. 1952, chapter 29:

> 591. All lighthouses, lightships, floating and other lights, lanterns, and other signals, buoys and beacons, radio aids to marine navigation, anchors and land marks acquired, constructed, repaired, maintained, improved, erected, placed or laid down for the greater security and facility of navigation at the expense of any province of Canada before it became a part thereof, or at the expense of the Government of Canada, together with all buildings and other works belonging thereto and in connection therewith, are vested in Her Majesty, and shall be under the *direct control and management of the Minister.*

(Emphasis is mine).

Lake St. Peter, where the collision took place, is a man-made channel, an improvement in navigation of the River St. Lawrence and was vested in the Crown under section 108 of the *British North America Act.*

I believe it can be said that navigators of all countries are welcome to use our navigational rivers and lakes and although they do benefit from such a use the commercial operations of all navigators, Canadian and foreign, benefit also the commerce and industry of Canada. Without the links created by canals, channels and railways, it is, I believe, doubtful that Canada as a nation would have known the industrial and commercial expansion it has now attained. We may, therefore, take it that all ships plying our waterways are invited and encouraged to do so and are entitled to rely on the means supplied to navigate such waters in safety and I would think that the same would

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apply to our Canadian ships navigating in foreign waters who also should be entitled to rely on the means given to navigate safely in such waters. If this is the situation, the Crown would owe an unqualified duty to see that such means are fulfilling their intended purpose to those using our waterways including the channel which leads them to and from the chief port of this country, Montreal.

There has always been a certain reluctance in the United Kingdom as well as in Canada to hold the Crown liable, particularly when the injury resulted from non-repair of a public work or non-feasance. There are, however, a number of pronouncements of the Supreme Court made even prior to the time when the *Crown Liability Act* of 1953 was not fully applicable which it would be helpful, I believe, even at this stage, to set down.

In *The King v. Hochelaga Shipping and Towing Co.*[9], Crocket J. dealing at p. 162 with the situation where there had been a lack of action on the part of the Crown in repairing a public work that had caused damages, stated:

> Dealing with the contention of the respondent that the Crown was not bound to keep in repair any public work and that it could not be held liable for injuries resulting from the unsafe condition thereof, the learned judge, while assenting to this submission and stating that s. 19(*c*) seemed to exclude the case in which the injury was the result of non-repair or non-feasance, added that in some cases non-repair or non-feasance may constitute a hazard or, in other words, create what is called a trap and bring about a condition which renders an accident almost unavoidable. "This", he said, "is what happened in the present case."

In *Grossman and Sun v. The King*[10], where an aircraft came down on an airport and ran into a ditch which had not been sufficiently indicated, Taschereau J. made the following pertinent remarks at p. 602:

> ... There is no obligation sanctioned by law or by common practice to contact any other station called radio range or otherwise, which is not concerned with traffic, but mostly with weather conditions, particularly when there is no danger *reasonably forseeable*, and nothing appears abnormal. It is by virtue of the regulations, the obligation of the airport itself to warn by *clearly marked signs* of any obstructions on the field, and not the duty of the pilot to inquire if any employee has been negligent, and if his life is in peril *by accepting the implied invitation to land.* (Vide International Civil Aviation Conference, 1944, sections 5 and 28). It would otherwise be tantamount to a total reversal of the respective duties and obligations imposed by law to the parties. Of course, it would be more efficient

[9] [1940] S.C.R. 153 at p. 162.

[10] [1952] 1 S.C.R. 571 at 602.

for the pilot to do so, but the law does not require such a high standard of care. Perfection in the actions or behaviour of men is not a condition *sine qua non*, to the right to claim damages. Motorists who drive on public highways, captains who bring their ships into port, are entitled to expect that the road will be in a safe condition, that there will not be any submerged object to obstruct navigation. *King v. Hochelaga Shipping* (1940) S.C.R. 153). Unless he knows of the danger on account of its obviousness or otherwise, the driver of the automobile or the captain of the ship is entitled to be warned of its existence. The right of a pilot of an aircraft, invited to land on a public airfield is identical.

(Underlining is mine.)

There is indeed an obligation to warn the users of ports of a danger which the harbour authority knew or ought to have known as stated by Lord Porter in *Workington Harbour & Dock Board v. Towerfield (Owners)*[11] where a ship went aground on an accumulation of river silt:

> The harbour board's negligence, however, was not confined to a failure to warn the shipowners of facts within their knowledge. They also failed to use due diligence to ascertain the facts with which they should have been acquainted.

The duty of one undertaking a range light service was, I believe, properly described in an American case, *Indian Towing Co., et al v. United States (Coast Guard)*[12] per Frankfurter J. where the Coast Guard was sued for negligence in the operation of the light on a lighthouse (which was allowed to go out) under the *Federal Tort Claims Act*, which is similar to our *Crown Liability Act* in that its purpose is to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable. The alleged negligence in that case was the failure of the Coast Guard personnel to check the electrical system which operated the lights, the failure to make a proper examination of the connections and other apparatus connected with the light and the failure to repair the lights or give notice to vessels that the light was not functioning and at p. 34, Judge Frankfurter stated:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and *engendered reliance on the guidance* afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order, and if the light did become extinguished,

[11] [1951] A.C. 112 at 131.

[12] (1956) 1 A.M.C. 27 at 34.

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then the Coast Guard was further *obligated to use due care to discover this fact* and to repair the light or *give warning* that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

(Emphasis added.)

As a matter of fact, this same rule was applied in *Grossman and Sun v. The King* (*supra*) by Taschereau J. when he stated at p. 604:

> In these two cases (*The King v. Canada Steamship Lines* [1926] S.C.R. 68 and *The King v. Hochelaga* [1940] S.C.R. 153) as in the present one, the negligence was *the failure to warn of an existing danger* that the employees of the Crown in the performance of their duty, *knew or ought to have known,* bringing into play section 19(c) of the Exchequer Court Act. I would indeed be loath to hold that an employee of the Crown, whose concern it is to maintain an airfield in proper and safe condition, and to indicate by visible marks all dangerous obstructions, would not if he failed to do so, be neglectful of his duty to oncoming pilots whose welcome on Canadian soil has been sanctioned and recognized by an international agreement with foreign countries. It is from him that diligence and alertness is rightly expected. His lack of vigilance is a personal negligence, for which the "Superior" is answerable before the courts.

(Emphasis is mine.)

The front pier of Pointe du Lac was built and sunk in 1935 and for many years since that time the Aids to Navigation Branch, in Ottawa, and in Sorel, were under the supervision of departmental officers who are no longer there. Mr. A. K. Laing and Mr. Paquette, respectively Chief of Aids to Navigation in Ottawa and District Marine Agent at Sorel had, however, been in charge for several years prior to the casualty and in order to determine whether these officers or any others whose duty it was to ensure that these lights were in a proper position and operating in accordance with the purpose for which they were advertised, have properly performed their functions or duties, it will be helpful, I believe, to go over the history of this pier from the time it was built.

An examination of the departmental files by the above two named officers, would obviously have disclosed that the front leading light of Rivière du Loup, as well as the front leading light of Pointe du Lac, had been a subject of considerable concern to the Department of Transport for a period of at least 13 years prior to the casualty and no one

except Mr. Laing (Chief of Aids to Navigation at that time) in his letter of August 15, 1952, had ever indicated the need to fix its position and find out at that date if it had moved from its original position although there was a simple means of doing so by using the ship channel co-ordinates and by triangulation. There is no evidence that Mr. Laing's suggestion in the above letter was ever followed up or that a fixing of the position had taken place. There is no indication that there had been or was, or is even at the present time, a general system of checking from time to time by either the aids to navigation section or the ship channel section or the chart making section, or even the pilotage section, the location of those aids to navigation situated on piers in the water and particularly those of a certain vintage, in order to ensure that they have not shifted from their original position, although it was well known, and is well known, that such piers are repeatedly subjected each year to considerable ice pressure.

This pier had been in existence for 30 years and in that span of time, no one within any of the departmental branches involved had ever fixed its position or even thought of doing so until a serious collision occurred involving loss of life and considerable loss of property although the Aids to Navigation Branch in the district of Sorel had at its disposal a number of ships under its command and several others that it could requisition from time to time from the ship channel section of the Department. It also had a considerable staff of men, technicians and engineers that it could call upon. What is more extraordinary, however, is that even after the casualty of the *Transatlantic* and the sheering of two other vessels at approximately the same place, within the same period of time, no one, including Noël Paquette, the District Chief of Aids to Navigation, ever thought of checking the front range of Pointe du Lac other than merely looking at it from a distance when on board one of the ships and reporting that the pier had not moved or was not misaligned and could not have caused the accident.

It was only much later, on April 28, 1965, when the Association of Pilots took the initiative of engaging the services of Messrs. Poulin and Duplessis, land surveyors, that it was realized for the first time that the pier had moved.

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The conduct of the officers of the Crown even after the casualty does give us some indication as to whether any corrective actions would have been taken if the officers of the Crown had been informed of the displacement of the lights before the collision, as the Crown alleges the pilots had to and should have done, and does supply some information as to what system had been set up for the reporting of casualties and the dissemination of information to navigators, which systems the suppliants claim was defective and inadequate.

I will deal firstly with the history of these lights prior to the collision by reciting the various communications issued between the officers of the Department with regard to the lights and then consider whatever action was taken by the officers of the respondent subsequent thereto.

F. S. Jones, Chief Engineer of the Department of Transport, with regard to the Pointe du Lac range lights, informed the Deputy Minister of Transport, in a letter dated June 26, 1952, that "a permanent light structure is long overdue at this place and notwithstanding the difficulties to be expected regarding foundation for such light".

Whoever were in charge of the aids to navigation at that time were no doubt concerned with solving the problem of maintaining a steel structure on the pier during the spring ice break-up, but this correspondence does also indicate that if there was a serious problem involved at this point caused by ice pressure on the steel structure, some thought was also given to the effect of ice pressure on the pier proper.

On July 9, 1952, a letter (Exhibit P-29) was written by Hector Beauchemin, the then District Marine Agent, to Norman Wilson, the then Chief of Aids to Navigation, stating that "we concur completely with the recommendations of the Chief Engineer and as a matter of fact, a study of the situation was started last fall and we are of the opinion, with the facts now in our hands, that it will be necessary to build a new pier as the present one cannot be improved in such a way as to provide better service in the spring or at the opening of navigation and for the use of the ice-breakers when they start operation".

A further letter from Hector Beauchemin to Norman Wilson was forwarded on July 22, 1952 (Exhibit P-29)

which deals with the steel structure, and also with the pier proper which he reports to be at that time in a condition of disrepair and mentions "the enormous ice pressure in that vicinity":

> As you are aware, the present pier at Pointe-du-Lac front is a cause of considerable trouble, and at each opening of navigation, it is impossible to put in place the structure on the pier owing to the high level of water generally prevailing. *The present pier is also badly in need of major repairs.*

(Emphasis is mine.)

and lower down he adds:

> ... To remediate this situation, it is proposed to build a new pier in the back of the present one which will *have enough height to carry a permanent structure and enough strength to withstand the enormous pressure of ice in that vicinity.*

(Emphasis is mine.)

On August 15, 1952, a letter, (Exhibit P-29) was forwarded to the District Marine Agent in Sorel by A. K. Laing, the Acting Chief of Aids to Navigation, asking the District Marine Agent to make a survey and indicate in what condition the pier is in and approximately what the repairs would cost. He then for the first time, asks the very pertinent question as to whether there has been any movement or shifting of this pier since it was constructed in 1935, to which, however, there appears to have been no answer given at this time.

On September 10, 1952 (Exhibit P-29) a further letter is forwarded to Wilson by Beauchemin which deals with a survey made at the Pointe du Lac front light on September 9, 1952. Beauchemin reports as follows on the results of this survey:

> The present pier is a 60' x 60' x 7 feet high wooden crib made of 8" square timber, rock filled and topped by mass concrete. The wooden crib apparently from the pressure of the mass concrete and from the action of the ice has given way all around the pier and the boulders under the crib are sloping all around the pier. At the north and north west section there is a void under the mass concrete. The pier has tilted at the south corner at a difference of level of a foot and a half with that of the north corner and it is fair to assume that this tilting will increase in the future as the *supporting crib is in such bad condition.*

(Emphasis is mine.)

While the survey was made for the purpose of establishing whether the pier was capable of sustaining a concrete

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mass cap 11 feet high on which to raise the steel structure of the light, it also appears that the crib is, nevertheless, described as being in a very bad condition.

In a memorandum (Exhibit P-29) from Norman Wilson, the then Chief of Aids to Navigation, to the Director of Marine Services, dated October 24, 1952, the replacement of the Pointe du Lac front pier is again discussed and a description of the bottom on which the piles of the pier are embedded is given. The following is stated in paragraph two of this memorandum:

> The present pier is virtually a floating close-faced timber crib, stone filled, with fifty 50 foot 12" to 14" diameter piles which were included in the design, we presume, to withstand lateral ice and wave pressures and not with the idea of their being substantially bearing piles *since the nature of the bottom in which they were driven was soft blue clay.*
>
> That structure has stood since 1935 and though the Agent in his report on file, hereunder, indicates that the pier has tilted and there are voids in places under the concrete, *there is little to indicate that there has been any indication of lateral movement or of deformation in the crib proper...*

(Emphasis is mine.)

He then concludes as follows:

> It is quite possible that due to low lake levels in past years the upper courses of timber may have been subject to alternate drying and wetting and that deterioration, coupled with ice erosion, may have seriously effected the top courses and it is possible that inside timbers subject to wetting and drying may have deteriorated but to my way of thinking the pier is substantially sound and that if such is the case we should make use of it and that we should certainly not consider an entirely new structure until we are satisfied that the present crib is *not usable after repair.* I propose to have Mr. Poland and a diver proceed to Sorel to make a thorough inspection of the condition of the underwater part of the crib before going further with the Agent's proposal.

From a memorandum dated November 1, 1952, of H. V. Anderson to the then Chief of Aids to Navigation, it appears that Mr. Poland made his inspection and Anderson then reported that

> ... I am of the opinion that this pier is far from having served its usefulness.

and at paragraph two of this memorandum, he adds:

> Actually, I believe that the criticism offered by Mr. Jones of the St. Lawrence Ship Channel can be very effectively answered, and certainly at a very much reduced cost by our giving more detailed consideration to the method of exhibiting a light using the existing pier as a base.

Mr. Laing (Acting Chief of Aids to Navigation) then on November 14, 1952, (Exhibit P-29) in a memorandum addressed to the Chief of Aids to Navigation deals with the condition of the pier as reported in Anderson's prior memorandum of November 1, 1952, and emphasizes the necessity of an annual examination thereof. After considering the possibility of removing the back light tower 1½ miles inland and placing the front light on a low structure on the beach at high-water mark, he added at p. 2 of his memorandum that,

> ... (2) If the shore range proves impracticable it is recommended that more rip-rap be placed around the crib, completely around if no interference will be caused to mooring of floating equipment at the pier. *(3) that annual examination of the pier be made essential so that we may be warned of serious deterioration if any* ...

(Emphasis is mine.)

This examination, of course, could mean a mere superficial examination of the pier to see if it was still holding together, but to the engineers and technicians in the various sections of the Department of Transport concerned with such matters, and to competent and careful officers in their position, it should also mean, I believe, something more. The crib could be in one piece and, therefore, appear to be apparently in perfect condition and yet would not be fulfilling its initial purpose. It could, indeed, have been moved several feet in one block and thus create a danger to navigation, particularly at a time when the light erected on it was the sole reliable aid to navigation.

Now all the above correspondence of the Department was written in 1952 at a time prior to when winter navigation came into operation. The conditions of traffic due to winter navigation changed considerably in the following years. More ships navigated the St. Lawrence River during the winter and early spring months and because of this fixed aids to navigation became more and more important with, I believe, a corresponding greater duty on the part of those in charge of such lights to ensure that with this increased traffic on our waterways, such aids were proper and reliable guides.

There was, as already mentioned, a question asked by A. K. Laing in his memorandum of August 16, 1952, as to whether the pier had shifted since 1952, but as far as the

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evidence shows no answer was ever given to this question nor was there any triangulations made to find out, although such an operation for an engineer or a surveyor was a rather simple one. That no one except Mr. Laing was concerned as to whether there had been any shifting of the pier is more surprising in view of the fact that it was well known, as indicated above, that the piles of the pier were embedded in silt and clay with the uppermost deposit consisting of loose silty sand and no bed-rock was encountered to a depth of 85 feet. This is not too solid a base for a pier, even with 50 piles embedded in the bottom, when consideration is given to the well known fact expressed in several memoranda of the Department, that this only partially weighted crib pier was subjected to enormous ice pressure in each winter and spring.

It is not until the year 1963 that further consideration appears to have been given to this pier when an engineer by the name of Huffey was retained to examine it. He was accompanied by two engineers of the Aids to Navigation section and his examination was apparently for the purpose of seeing whether a permanent tower could be placed on the substructure of the Pointe du Lac front pier. Pier No. 2 of the Rivière du Loup light was also examined at that time.

A. W. Huffey and an assistant, the District Engineer of Sorel, J. R. Galarneau, and J. V. Danys, an engineer of the Department of Transport, were taken by tug to the pier which was inspected from the top and by Huffey and his assistant diving and reporting to Danys the condition of the pier under water. In view of the condition of this pier in 1952, it is not too surprising that Danys in his report of March 3, 1963, Exhibit P-33, (which should be May 3, 1963) paragraph 3, describes the condition of the pier as follows:

> 3. *Concrete Slab*
>
> The concrete slab above the water line was in good condition. However, the underwater inspection disclosed that the edges of the concrete under water cap are broken off and completely disintegrated. It appears that on an average in a five-foot strip all around the edge of the crib there is no solid concrete slab anymore. The concrete cap was reinforced and the reinforcing bars are sticking out of the sides.
>
> On the northeast side about 10 feet of concrete slab along the edge is destroyed and on the southwest side the width of the destroyed concrete slab is approximately 5 feet.

4. *Cribwork*

The north corner is surrounded by placed rip-rap.

Northeast side

There is a 4 foot wide hole approximately 20 feet from the north corner. In the middle third, three top logs are missing and stones have fallen out of the crib pockets for some fifteen feet near the east corner of the crib wall is deformed and the bottom has moved outwards.

Southeast side

Three quarters of the length of the crib wall is intact. But at approximately 10 feet from the south corner a break of the timber logs from top to bottom was evident It appears that the south corner was underscoured and this corner settled down causing a break of the crib logs. The bottom of the river at this location has been eroded and at the fracture the cavity is approximately one foot high. At the corner the crib is lying on the eroded river bottom.

Southwest side

This is the most damaged side. For half of the side length (from the south corner towards the west corner) the timbers have fallen out of the crib and they lie on the lake bottom and are covered with a chunk of broken concrete The other half of the crib, the divers could not see because everything was covered with pieces of the broken concrete.

According to the inspection of the west corner, it seems that the southwest side of the crib has been undermined and pulled away as well. The connection of the logs on the northwest side near the corner are pulled out.

I shall only refer here to that part of Mr. Danys' conclusions which are pertinent to the condition of the pier in 1963 and which are found at p. 3 of the report:

> Because of the large dimensions of the original crib, 60 x 60 feet, it appears that there is no immediate danger to the structure. However, it is felt that *a protection of the crib against further damage should be undertaken as soon as practical, if it is wanted to preserve this pier. Also, borings shall be taken to find out if a permanent tower could be built on top of the present pier.*

(Emphasis is mine.)

Here again there is a strong indication that something must be done to this already damaged pier in order to preserve it and there is no indication that anything was done in this regard.

Huffey's report of May 22, 1963, deals with both the front pier of Rivière du Loup and the front pier of Pointe du Lac. He reported that as far as the Rivière du Loup pier was concerned (p. 3, paragraph 3 of Exhibit P-14):

> 3 2 The total lateral movement was not of course directly measurable, but adding the estimated pile displacement to the visible displacement above the pile tops, a total of 15 feet horizontally is estimated by the writer.

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He then concluded at pp. 3 and 4, paragraph 4, 4.1 that:

> 4 1 Much of the incumbent weight of the timber cribs and concrete cap may well be resting on the remaining unbroken piles, and also on the consolidated rip-rap along the side D E. of the crib.
>
> 4.2 The possibility of further movement of the crib is likely as a state of imbalance will be reached after further lateral displacement.

Nothing was done as a result of that report either to repair the pier or even to advise navigators of the displacement that was then well known. Huffey, then, at p. 5 of his report, dealt with the Pointe du Lac crib and explained that "this crib was examined in less detail owing to the lateness of the day", adding that the damage here was considerably less than that at the Rivière du Loup crib. He explained that "the pile foundation could not be examined except in one or two instances where the tops of the piles were visible under water along side A.B. (see drawing No. 2)", and that the pile tops examined were vertical, suggesting that little or no lateral movement had taken place in the foundations. He then, after describing the timber cribs and the concrete cap, concluded as follows:

> 6 1 Actual damage sustained by this crib is relatively superficial consisting largely of the emptying and deterioration of gravity crib pockets on side A B., and also breaking of the tapered extremities of the concrete cap.
>
> 6.2. The slight lateral displacement can be neglected as the crib has lost little in strength and it *can be repaired at* relatively little cost.

(Emphasis is mine.)

Here again, it must be inferred that repairs were necessary yet no action was taken in this regard.

Huffey, in cross-examination, admitted that he had been asked to do an inspection and not an engineering survey. He was, indeed, merely asked to look at the pier and see if from such an underwater inspection he could report on its physical condition. He had not been supplied with any plans, nor did he have any co-ordinates of the initial location of this pier which could have told him by means of triangulation whether it had moved or not since it had been sunk in 1935.

He merely looked, as he says in his report, at the top of a couple of piles and as they appeared to be vertical, concluded that little or no lateral movement had taken place in the foundations, although we now know after this

lengthy trial, that in 1959 this pier had moved laterally between 4 to 13 feet southwards and as a deflection of ½ foot is sufficient to break the piles they must have been broken at that time.

The few pile tops examined by Huffey were, of course, vertical, but as they were bolted to the crib proper this would not be too surprising even if they had been broken at some depth in the soil and this, of course, would not necessarily indicate that there was no lateral displacement. Short of a triangulation to determine whether there had been a displacement of the base or not, Huffey had no way of knowing from his examination whether there had been a movement in any way of the pier base. As a matter of fact, all he or his diver actually did was to creep around underneath it in murky water and by prodding around with their feet, report that there was a certain amount of damage and this examination, he says himself in his report, was carried out "in haste because of the lateness of the day".

Huffey in his evidence tended to minimize the condition of the pier as he says he found it in 1963. I would, however, be inclined to prefer Danys' description of the pier in his report (P-33) as he jotted it down from descriptions given to him by both Huffey and his assistant which should be more accurate than what Huffey described from memory five years later.

Danys' description of the condition of the pier should be much closer to the truth than Huffey's and Danys' admonition in this regard should be repeated here:

> ...it is felt that a protection of the crib against further damage should be undertaken as soon as practical if it is wanted to preserve this pier.

The situation of the Pointe du Lac front pier as described by Beauchemin in 1952 is much worse in 1963 but here again, nothing is done to repair it or, which is more important, to find out by triangulation whether it had moved or not. As a matter of fact, relying on Huffey's hasty examination, which was known to be such by two engineers of the Department, J. Danys and R. Galarneau, and which was also known by them not to be an engineering or a localisation survey, no precautions were taken whatsoever to make sure that the light which would be left

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on that pier as the only fixed aid to navigation during the winter months or even the summer months was fulfilling and would continue to fulfil its purpose. As a matter of fact, when the officers of the Department decided that in the fall of 1964, the light would remain on the pier for the first time in order to assist those vessels plying these waters in the winter and spring of 1965, these officers or men did not know exactly what that light indicated. In view of the history of this pier since 1935, the examinations made of it in 1952 and in 1963, and its condition at that time, there was an urgent need to investigate whether it had moved or not. Had this been done, there is no doubt in my mind that it would have been repaired or replaced and this casualty would not have occurred. The same applies to the situation found at the Rivière du Loup pier which, as already mentioned, by leading the *Hermes* more south than it ought to, may well have contributed to the accident.

Exhibit P-40, a report made by officers of the Department on November 27, 1962, established the disintegrated condition of the front pier of Rivière du Loup which, as already mentioned was also confirmed by Huffey's report of May 1963. A recommendation was made for the construction of a new pier surrounded by a wall of sheet piling. This is the same pier which Jean-Noël Poulin found displaced southwards by some 12½ feet in April 1965. However, after both reports of 1952 and 1963, there is not the slightest reference to any shifting of the pier itself and as to whether or not it was serving a really useful purpose. Furthermore, the indicators on the front pier of Rivière du Loup which, during winter navigation were a makeshift and far from precise affair, were set up in this fashion without any notice being issued to navigators who should have been informed of this situation by those in charge of such aids to navigation.

On April 16, 1964, the vessel *Trein Maersk* reported that it had touched bottom with her starboard bilge while turning a curve and getting into a new course at Yamachiche bend. On April 21, 1964, a letter was written to Mr. H. Land, Chief Engineer, River St. Lawrence Ship Channel, Montreal. In this instance, the Department did not locate a mud bank in Yamachiche bend and the file was closed. Here again, it did not occur to those in charge of aids to

navigation that it might have been a good thing to check the alignment of the lights. As a matter of fact, had the lights been checked at that time in 1964, a displacement of the front Pointe du Lac pier of between 24 to 28 feet southwards would have been found, the necessary steps would have been taken to either correct the situation or warn navigators and the collision between the *Hermes* and the *Transatlantic* would not have occurred. Pilot Beaudet's report (Exhibit P-16) indicates that the *Trein Maersk* was travelling at the time at 22 knots and incidentally, no comment was made by anyone within the Department of Transport with regard to the speed of the vessel. It is true that the pilot reported that he realized that the buoy used as a smallrange light on the front pier was off position at the time on account of high water but there is nothing to show that there was an inspection or survey made to find out whether, in fact, it was off position or not or whether the Pointe du Lac range was in anyway misleading ships rather than leading them safely.

Mr. N. A. Gray, from the Dominion Hydrographer's office, in a letter addressed to the Chief of Aids to Navigation (Exhibit P-19), Mr. Ballinger, on August 10, 1967, says that the only evidence that the range lights were in a correct position when their survey was made (and this was August 1941) was that the line of soundings ran very close to the centre of the channel as shown by the buoys as it appears from paragraph 2 of this letter:

> You will note that one line of soundings was run directly on the range line, a fact that is confirmed by the sounding note-book. As the line of soundings runs very close to the center of the channel as shown by the buoys, this shows that the range was in its correct position on August 15, 1941, when these soundings were taken.

I have already commented on this survey when I dealt with the displacement of the pier and I have no intention of repeating here all I said then other than to reiterate that to check the correct position of a pier in this manner is not a very accurate means of doing so and can, at best, be but an approximation which can in no way establish that the pier has not moved.

Minor displacements of piers and leading lights do not always have to be corrected nor does action in such cases always have to be taken to warn mariners of such displacements. When a minor displacement, however, is followed

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by other displacements such displacements in a narrow fairway may become important and this is what occurred in the present instance.

I now come to a period of time immediately after the collision of the *Hermes* and the *Transatlantic*. I would not have dealt in such detail as I have hereafter with whatever action was taken by the employees or officers of the respondent at this time were it not for the fact that the Crown, as already mentioned, contends that it was up to the pilots or navigators to inform their various departments of the misalignment of the ranges and as they had not done so, the Crown could not be held liable for any misalignment that may have caused the collision. I have already mentioned that it is difficult to see how the pilots or navigators could have informed the Department of this misalignment when, although it was realized in 1964 that the ranges were leading ships closer to the south buoys in the summer time than they should, it still allowed them to navigate safely down or up the channel and when even the ships of the Aids to Navigation section or the ice breakers or those belonging to the ship channel, had not felt that wherever the lights were leading, they were not leading sufficiently astray to warrant a complaint or even a mention.

There is also the possibility that the buoys may have been wrongly placed or have shifted towards the north. But even assuming that the pilots should have informed the Department of whatever misalignment existed, the effect of such a notice would have given little results if one should judge from the procedure followed, not only after the present casualty occurred, but even after two other sheerings had taken place at approximately the same place in the channel, within a very short period of time. Notwithstanding the disaster of the *Transatlantic* and the sheering of both the *Manchester Commerce* and the *Carinthia,* the pilots of which had reported to the Department the details of the manner in which the leading lights of Pointe du Lac had taken them off course, Noël Paquette, the District Marine Agent in Sorel, merely looked at the light from some distance off a ship with binoculars and reported to Ottawa that these accidents could not have occurred because of a misalignment of the

Pointe du Lac low light. The officers located in Ottawa then reported this to the pilots involved and it was only after the Association of Pilots of the District of Quebec had retained Mr. Poulin that he, in two days, by triangulation, reported that the low light of Rivière du Loup had moved southwards by some 12.1 feet and that the low light of Pointe du Lac had moved southwards by some 37.9 feet and both of these displacements tally pretty well with the actual displacement of these piers.

It is helpful in order to appreciate the manner in which the officers of the Department dealt with navigational incidents or casualties to go through the various reports and correspondence exchanged as a result of the complaints of the pilots whose ships had sheered when taking these lights.

On April 14, 1965, Jacques Melanson, District Supervisor of pilots, Montreal, wrote (Exhibit P-17) to the Superintendent of Pilotage in Ottawa, Mr. Jones, informing the latter that he was "in receipt of a letter from pilot Adélard Tremblay, requesting that soundings be taken in the channel on Lake St. Peter at Yamachiche bend lower end of Yamachiche anchorage, as well as a complete check up of Pointe du Lac range lights which, according to him, are not giving the true centre line of the channel". Tremblay is the pilot of the vessel *Carinthia* which, near buoy 51L, after having met the *London Splendour,* took a sheer towards the north bank on April 9, 1965, the day preceding the sheering of the *Hermes.*

Melanson explained in this letter that when Tremblay was in his office, he mentioned that the sheering of the *Hermes* was similar to what had happened to the *Carinthia.* He also states that having contacted several pilots "it was agreed by everyone that the way the Pointe du Lac range lights work when taken in line at the curve near the lower end of Yamachiche anchorage, a vessel is almost on the corner of the south bank" which, of course, could only mean that there was something wrong with the alignment of the lights.

Melanson's letter, which contained some rather urgent information and which Jones, the Superintendent of Pilotage in Ottawa, said should have been received two days later on April 16, or even should have been reported by

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telephone in view of the importance of its content for the safety of navigation in that area, reached Jones only on April 20, 1965, six days later.

On April 21, 1965, A. K. Laing, Chief of Aids to Navigation, in a memorandum to the Director of Marine Works, (Exhibit P-62) refers to Melanson's letter of April 14, 1965, and states that: "The District Marine Agent, Sorel, has already checked the Pointe du Lac Range lights. While the tower has been slightly damaged by ice and it may be a few inches off its correct position, there is no reason to believe it could lead a ship onto the south bank. To do this it would mean that the tower is 33 feet off its correct position on the pier. The pier itself is founded on piles driven 40 feet into the lake bed and it is unlikely it could move laterally because of ice shove".

The evidence has now established that there was no check of the range lights made between April 10 (except for Noël Paquette looking at them from some distance on board a vessel) and the date of Laing's memorandum of April 21, 1965.

Furthermore, Laing here, as other officers of the Department, appears to assume that a lateral displacement of this pier is impossible, although they should have known (had they merely examined the correspondence on file) that the piles of this pier are embedded in soft silt and that the pier is subjected to enormous ice pressures every winter and spring and we now know that there was a displacement of between 4 to 12 feet between 1935 and 1941 and a further displacement of between 22 and 25 feet in 1964.

On April 23, 1965, a memorandum (Exhibit P-61) is sent by D. R. Jones, Superintendent of Pilotage, Ottawa, to the District Supervisor of Pilots, Montreal, informing him that sweeping in the area of Yamachiche bend has already commenced and that:

> The second request (of the pilots) for a check of the Pointe du Lac Range Lights has already been carried out and there is no reason to believe that there is anything about these Ranges which could lead a ship onto the south bank.

All that Jones appears to have done after receiving Laing's memorandum of April 21, 1965, is to repeat some of the information contained in it and send it to Melanson in Montreal, adding that a second request for a check of the Pointe du Lac range lights had already, at that

date, been carried out when apparently there had been no second check made. As a matter of fact, had Jones been properly informed, he should have known that the day before the date of his memorandum, on April 22, 1965, the vessel *Montmagny* had found that the light had, in fact been displaced by five feet and possibly more than five feet. Noël Paquette gives this information at pp. 2002 et seq:

LA COUR:

Q. Le 23 avril?

R. Oui, maintenant, entre temps, le 22, j'avais fait faire la vérification de l'alignement par le Montmagnie, nous savions que la tour était déplacée de 5 pieds sur le pilier, par le rapport du Montmagnie, il était évident que le déplacement était plus considérable que 5 pieds.

Q. Est-ce que vous parlez à la suite de votre visite du 20?

R. Oui, on savait que le déplacement était de 5 pieds.

Q. Le 22, vous avez su que ça dépassait?

R. Le 22, nous savions que c'était déplacé de 5 pieds, de beaucoup plus que 5 pieds.

Q. Le 22, c'est à cette date que vous avez su ça?

R. Oui.

Q. Par le Montmagnie?

R. Oui.

Q. Qu'est-ce qu'ils ont fait?

R. Ils se sont rendus au bout de la course, ils n'ont pas été capable de prendre des mesures très précises, c'était presque impossible de prendre des mesures précises avec les éléments que nous avions, ils ont bien vu que c'était déplacé, qu'elle se jetait vers le sud, il n'y avait pas seulement un déplacement de 5 pieds.

On the same date, April 23, 1965, W. J. Manning, Director of Marine Works in a memorandum to Chief of Aids to Navigation (Exhibit P-17) states in paragraph 2 thereof:

> ...Because of the wreck of the "Transatlantic", it seems to me that it would be very important that this range be relocated immediately.

There does not seem to be much doubt in his mind at this date that there was some connection between the Pointe du Lac front range and the collision between the *Hermes* and the *Transatlantic*.

Notwithstanding, however, the above known displacement, of the tower which was well known on April 22, 1965, Jacques Melanson, the Montreal District Superintendent of pilots wrote to Lucien Hémond, the secretary-treasurer of the Corporation of Pilots, in Montreal

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(Exhibit P-18a) on April 27, 1965, repeating the information given him by Jones in his memorandum (Exhibit P-61) of April 23, 1965 that:

> La deuxième demande que vous avez faite, de vérifier les lumières d'enlignement de Pointe-du-Lac a aussi été faite et le Ministère m'informe qu'il n'y a aucune raison de croire que ces lumières peuvent être déplacées à un point et qu'un navire touche la bande sud.

It therefore appears from this correspondence that three people, all in a position of responsibility and relying probably on Paquette's statement that having examined the lights with binoculars from some distance, they did not appear to be displaced, wrote back to the pilots and its corporation stating that the ranges had been checked twice, that everything was in order and that, therefore, it could be inferred that pilots and navigators could keep on using these lights, although, as appears from the evidence of Paquette himself, it was known as early as April 22, 1965, that the tower was displaced by at least 5 feet and even more. D. J. Manning, Director, Marine Works, in a memorandum to the Chief of Aids to Navigation, of April 23, 1965, states in the first paragraph thereof:

> Yesterday, D. M A Sorel telephoned to advise that the Pointe du Lac front light seemed to have been moved five feet east by the ice this spring.

Now although from an inscription in ink on this memorandum, it would appear that this displacement of five feet was corrected on April 24, 1965, all those letters to the pilots and the corporation were still allowed to go out stating that the lights had not been misaligned and were not misaligned, and this appears to be typical of the system whereby casualties are reported, forwarded and acted upon within the various departments concerned.

There is also pilot Barrett's report of the sheering of his vessel which took place on April 3, 1965, which appears to have been received and signed at the Montreal office of pilotage on April 12, 1965 (although pilot Barrett was on a ship on that date) and which was received in Ottawa several days later. There is finally the memorandum of April 1965 received from the *Empress of Canada* (Exhibit P-18) which Mr. Jones, the Superintendent of Pilotage, says he never saw and which shows that the lower range light of Pointe du Lac had shifted seriously enough to be reported by a foreign vessel.

On June 29, 1965, after the casualty and the other two sheerings, Paquette, the District Marine Agent, finally issued a notice saying that the Rivière du Loup range does not define the centre line of the channel and that navigators are now to proceed with caution. Paquette had known of the inaccuracy of this range for years but states that as all the pilots knew about this situation, he saw no necessity of informing them, admitting in cross-examination, however, that it would have been better to inform them and particularly those foreign navigators who did not know of it.

Q. Vous n'avez pas cru bon de donner cet avertissement aux navigateurs?

R. Non, parce que ça fait de mémoire d'hommes que la chose se faisait, il nous fallait prendre pour acquit que les navigateurs sur le St-Laurent sont des professionnels qui connaissent bien le St-Laurent. Alors, les navigateurs qui savent qu'on remplace deux amers par un seul, le même amer ne peut pas être à la même place. s'il y en a un autre qui en remplace deux, ce n'est pas la même chose Ce n'est pas aussi précis.

Q Vous êtes au courant qu'il y a des navires qui remontent le St-Laurent pour la première fois de leur vie?

R. Pas en hiver, pas sans pilote.

LA COUR:

Ils ne sont pas obligés de prendre un pilote?

R. Non, seulement, je crois, que des navires qui remontent le St-Laurent en hiver, avec la glace, et la réduction des aides à la navigation, ils ne prennent pas de chance.

Q. C'est possible?

R. C'est peut-être possible.

Q. Il aurait été mieux de l'indiquer?

R Peut-être, oui. Cela aurait été un surplus de prudence.

Paquette also admits that he had never checked whether the Pointe du Lac front pier or the Rivière du Loup pier had been displaced although this (he also admits could have been easily done by triangulation (cf. p. 2017 of the transcript)):

Q. Est-ce que vous avez pris des mesures pour déterminer s'il n'y avait pas également un déplacement latéral en plus de cet affaissement?

R. Non, je n'ai pas pris de mesures.

LA COUR: Cela aurait pu se faire par triangulation?

R. Oui, cela aurait pu se faire par triangulation, la raison pour laquelle cela n'a pas été fait, lorsque des navires remontent avec les pilotes, je sais, de par de nombreux rapports, je sais que cela ne nuisait pas à la navigation. Les structures d'été qui étaient mises

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en place, lorsque toutes les bouées étaient en place, il n'y avait pas urgence de voir à ce travail, alors qu'il y avait urgence d'en faire ailleurs. C'est une question de priorité.

Paquette knew, or should have known, when a decision was reached in the fall of 1964 to leave the light on the Pointe du Lac pier for the 1965 winter season, of the importance of insuring that that light, as well as the Rivière du Loup one, were properly located as the pilots had complained in the past on numerous occasions of the unsatisfactory condition of both of these ranges because of the unsatisfactory makeshift arrangements adopted by the Aids to Navigation Branch with regard to these lights during the winter seasons which preceded the year 1964 as appears from Paquette's evidence at p. 2018 of the transcript:

Q. Vous rencontriez les pilotes assez souvent?

R. Assez souvent depuis que je suis en fonction, je les ai rencontrés à plusieurs reprises, pour toutes sortes de raisons, presque à chaque fois, il y avait des échanges d'informations ou de demandes, même si cela n'est pas enregistré sur l'agenda.

Me BRISSET:

Q. Quand vous discutiez avec les pilotes en ce qui concerne des amers de Rivière du Loup, est-ce que c'était pour vous dire leur satisfaction à ce sujet?

R. Non, ils n'étaient pas satisfaits pour une raison, c'est que au printemps, il n'y avait rien pour leur indiquer le chenal ni à Rivière du Loup, ni à Pointe du Lac, parce que les amers que nous placions là, les bouées aussi que nous placions là, c'était important, ils connaissaient bien l'endroit mais c'était une situation qui était difficile pour eux.

LA COUR:

Q. Était-ce les deux seuls endroits dont ils se plaignaient?

R. Oui, ce sont les deux endroits dont ils se plaignaient le plus. Ils voulaient aussi avoir des bouées sur le côté sud du chenal, seulement, après avoir donné nos explications à ce sujet, ils ont convenu que ce n'était pas possible.

As a matter of fact, it was only after the Corporation of Pilots took the matter of verifying the ranges in hand by requesting Mr. Poulin to check the Pointe du Lac range by triangulation that a lateral displacement southwards of some 39.7 feet was discovered.

The above correspondence, together with whatever evidence was given by the officers at Sorel, at Montreal or Ottawa, responsible for the leading lights in the channel, leaves one with a feeling that not only was there neglect in ensuring that the lights were fulfilling the purpose for which they were set up and in maintaining them, but that

there definitely was also a lack of due diligence in finding out whether they had been displaced or not from 1935 up to the year 1965 and particularly at the time when the Department decided for the first time in the fall of 1964, to leave the steel structure on the Pointe du Lac pier for the forthcoming winter navigation. The officers who took this decision, and they are not restricted to Paquette, should have ensured that a pier with such a long history and in the dilapidated condition in which it was known to be at the time and on which a light was to remain as the sole and fixed aid to navigation in a channel during the winter season was not only a solid base for the light but also had not been displaced prior thereto. That this duty was not complied with over a long period of time was made clear from the correspondence exchanged between the various officers involved, as well as from the evidence adduced herein.

There is no question, as stated by Crocket J. in *The King v. Hochelaga* (*supra*) at p. 162:

> ...in some cases non-repair or non-feasance may constitute a hazard or, in other words, create what is called a trap and bring about a condition which renders an accident almost unavoidable.

and unfortunately, because of the inactivity of those responsible for these lights, this is exactly what has happened in the present case.

It could also be said in line with the dictum of Taschereau J. (in *Grossman and Sun v. The King* (*supra*) at p. 602) that it was also the obligation of the Department or its officers to warn of any misalignment of the lights and not the duty of the pilot or master of a ship to inquire if any employee has been negligent and if there is any danger of utilizing waterways which navigators are invited to use. As stated by Taschereau J. in the above case:

> ...It is by virtue of the regulations, the obligation of the airport itself to warn by *clearly marked signs* of any obstructions on the field and not the duty of the pilot to enquire if any employee has been negligent and if his life is in peril, by accepting the *implied invitation to land*... captains who bring their ships into port are entitled to expect that the road will be in a safe condition, that there will not be any submerged object to obstruct navigation.

I could add that captains are also entitled to expect that lights that are placed in channels for the purpose of guiding them through the channel will do so safely and that none will lead them so close to the bank that they will

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sheer unless, of course, the captain knows of the danger on account of its obviousness or otherwise. I have already held that there was no valid reason for the pilots and navigators to apprehend that Pointe du Lac ranges in 1965 would lead ships any more south than they did in 1964. I do not intend to repeat here what I have already stated on this subject when dealing with the navigational manœuvres of the ships involved in this casualty other than to say that because of the reasons already given, I can find no substance in counsel for the respondent's submission with respect to the question of the duty to warn. If my understanding of his argument is correct, it is (a) that as the Pointe du Lac leading lights or ranges, when in line, are intended to show the centre line of the channel and indicate a chartered course, when, to the knowledge of pilots, they no longer indicate such course but a different one on the south half of the channel, then they no longer show any known course and become merely a set of private marks such as steeples or towers on shore; (b) the breach of duty alleged against the Crown and its servants is a breach of the duty to warn: that these lights "were no longer serving the purposes advertised and published for the information of mariners", of their "misalignment and unreliability" and finally "of defects developing in them" and (c) that as the pilot of the *Hermes* knew that these ranges were no longer serving the purposes advertised and published for the information of mariners in that they no longer led vessels in the centre as advertised but south thereof and as the Crown had never represented or advertised that the ranges in line led on to a course on the south half of the channel, there was no necessity for the Crown to warn them of something which it had never represented and which, furthermore, had not been reported as the pilots should have to the supervisor of pilots in Montreal.

According to the Crown, the navigators had ceased to rely on the channel authority maintaining the ranges in their chartered position and the only person that the pilot was relying on was himself. He was relying on his personal judgment that:

a) in 1964, when the ranges appeared to him to be in line, they indicated a course which brought his ship according to his own estimate within approximately 50′ to 100′ of buoy 51L;

b) the ranges had not been further displaced since he last used them in line.

There are several answers to the Crown's submission here and I have already dealt with some of them. I will, therefore, merely say here that although the breach of duty to warn is alleged by the suppliants and the third party to be "that these lights were no longer serving the purposes advertised and published for the information of mariners", such a purpose is not confined to leading a ship on a particular course which might, in some cases, bring it down the middle of the channel but the main purpose is to ensure that in a channel where there is upbound and downbound traffic, a ship, by following these ranges, will effect a safe passage and this is what the navigators were relying on. As a matter of fact, until the misalignment and the unreliability of the lights resulting therefrom, or until the defects developing in them become perceptible, there is no duty for pilots to report this, although there is a duty on the part of those who set up such lights to make it their business to know if a pier on which a range light (which is the only reliable fixed aid during winter navigation) is placed is located at its proper place or has been displaced or has tilted to such an extent as to create a danger to navigation and to warn pilots and navigators if any such situation has arisen, and this is the warning that the pilots and navigators were entitled to receive in the present case and did not receive. There was, indeed, no necessity to warn that the lights were leading ships to the south half of the channel; this was well known and still led ships safely up or down it, but there was in the present case, in view of the age and known dilapidated condition of this pier, an urgent necessity to check and find out of any further displacement which could become, and did become, dangerous and this, unfortunately, was not done.

The negligence of the channel authorities and of those in charge of aids to navigation was, therefore, not confined to a failure to warn navigators of facts within their knowledge only, but they also failed, as established by the evidence, to use due diligence to ascertain the facts with which they should have been acquainted. To paraphrase the decision of Frankfurter J. in *Indian Towing Company Inc. et al. v. United States (Coast Guard)* (*supra*) at p. 34, it can also be said here that once the Department operated

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the lights of the ranges and engendered reliance on the guidance afforded by them, it was obligated to use due care and diligence to make certain that they were kept in good working order and if they became displaced, or tilted, then the authorities were further obligated to use due care to discover this fact and to replace them or correct them or give warning that they were not properly functioning. The negligence of the employees of the Crown here was their failure to warn of an existing danger that, in the performance of their duties they knew or ought to have known. That the officers of the Department had such duties appears clearly from the following:

The duties of the District Marine Agent at Sorel are clearly defined in Exhibit P-69 as follows:

> (Position No. T-MAG-401)—Under direction, to be responsible for the direction and administration of all departmental activities pertaining to the construction, operation and maintenance of aids to navigation within the Sorel District; to direct the operations of Canadian Marine Service steamers engaged on this work in supplying and placing aids to navigation; to administer and maintain wharves; to direct and supervise Harbour Masters; to administer the Navigable Waters Protection Act and to act as ex-officio Receiver of Wrecks; to direct the staff including technical personnel engaged on this work; and to perform other related work as required.

Paquette, the marine agent at Sorel described the responsibilities of his agency at p. 1855:

> Q. Alors, l'agent régional est responsable pour la construction et l'entretien et l'opération des aides à la navigation dans le district de Sorel?
> R. Oui, c'est bien ça.

and also at p. 1888 of the corrected copy of the transcript:

> Q. Je comprends que votre agence s'occupe de la pose et de l'entretien des bouées; est-ce que votre agence s'occupe d'autre chose pour les aides à la navigation?
> R. Bien on a l'administration, la responsabilité des phares et de l'administration des quais dans tout le territoire et aussi la responsabilité du port de Sorel et ensuite la responsabilité de l'observation de la loi des eaux navigables dans tout le territoire sous notre juridiction.

J. N. Ballinger, Chief of Aids to Navigation, Ottawa, also confirmed that the responsibility for the aids to navigation in the Sorel area is that of the District Marine Agent (cf. p. 1826 of the transcript):

> A. I would not normally be involved in getting the information, because the responsibility for the Aids to Navigation in this area is that of the District Marine Agent.

HIS LORDSHIP: Who does he come under?

THE WITNESS: For Aids to Navigation he comes under myself, but normally this sort of information would not come to my desk unless there was a problem with it. In other words, the responsibility has been delegated to him to do this job, and until someone proves otherwise we have to assume that he is doing a good job of it. But I, personally, do not get involved in day-to-day checking and location of Aids to Navigation throughout the country. This is the responsibility of the district man, not mine.

Mr. BRISSET: Q. Who comes under your jurisdiction?

A. Yes, this is true, but this is a responsibility that has been delegated to him. I am responsible in the long run, there is no question; but I personally do not get involved in this business of locating.

HIS LORDSHIP: What information would you supply your Marine Agent in that locality in order to enable him to find out whether the light or the base of the light has moved from its original position? Has he any information, or must he just look at it and find out from looking at it?

THE WITNESS: I do not quite know how to answer your question, My Lord. There has been, for many years, very close liaison between the Ship Channel Division and the Marine Agency in Sorel. The Ship Channel Division have the coordinates of all the Aids to Navigation in the lake, to the best of my knowledge—or, at least, I would assume that they have; and, therefore, between the District Marine Agent and the Ship Channel Division, they would, between them, be in a position to pass information back and forth in order to determine the proper location of the aids.

The duties of the Chief of Aids to Navigation in Ottawa are clearly set out in Exhibit P-12 as follows:

> Responsible to the Director, Marine Works for design, construction, maintenance and operation of aids to marine navigation including lightstations and associated buildings and structures, floating aids and unwatched shore-based lights; development of standards for operation of marine aids to navigation; development and/or evaluation of new equipment and techniques; compilation and dissemination of information on the service ability availability, characteristics and location of aids to marine navigation; co-ordination of preparation of the annual budget for construction, operation and maintenance, compilation and publication of statistics and reports.

Now although the Chief of Aids to Navigation has a great number of people to rely on and in some cases may rely on mariners to assist in reporting defective aids to navigation, in a situation such as the present one where aids became progressively defective over a great number of years and can become perceptible only by verifying the position of the piers on which leading lights are placed, the responsibility becomes that of the Aids to Navigation

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Branch and its staff to do this work as Ballinger, the Chief of Aids to Navigation Branch, admitted at pp. 1835 and 1836 of the transcript:

THE REPORTER: (Reading): Q. Mr. Ballinger, would you consider that in the discharge of his functions the Chief of Aids to Navigation has a duty to shipping to warn mariners and navigators when an aid to navigation no longer serves its intended purpose—for instance, if it is out of place and no longer indicates, as in the case at hand, the centre of the channel?

Mr. OLLIVIER: My Lord, there is another possible objection to this. The question assumes that the Chief of Aids is aware of a displacement.

HIS LORDSHIP: Yes, I know, but let the witness say that. He is capable of saying that.

THE WITNESS: I think that this may be so, but I think that in considering what the Chief of Aids' position is, that it must be realized that as part of this overall system of keeping a check on aids to navigation that you have a great many people to rely on not only employees of the Department or of the Federal Government but users of the system as well, because, after all, it is an impossibility to employ sufficient staff to have a 24-hour watch on all aids to navigation. And I think that this must be kept in mind. I think that it is fairly clearly brought out in the various publications, notices to mariners, lists of lights, and the pilotage by-laws, that there is a responsibility on the part of the mariner to assist in this process, and I think, keeping all of this in mind, that the Chief of Aids has the responsibility of advising the mariners, providing that information is fed to him to so provide them. But, accepting also that they have the responsibility in this as well.

Mr. BRISSET: Q. I quite appreciate, Mr. Ballinger, that time is a factor in this. In other words, if an aid to navigation becomes displaced somewhere on the river and that situation has just happened, you would not be able, even with increased staff, to become aware immediately and take the necessary measure. But, if a situation develops over a period of years, would you not expect that through your own check of what is happening to aids to navigation that you would be able to do that work on your own with the staff that you have?

A. It would seem reasonable to me to accept that, and I would think that, if something has been developing over a period of years, that it would be so determined.

The sole question now remaining with regard to the matter of liability is whether the Crown is liable under section 3(1)(*a*) or 3(1)(*b*) of the *Crown Liability Act* or under both of these articles. The evidence discloses that those in charge of aids to navigation, in Sorel, as well as in Ottawa, were remiss in their duties in not taking the measures that could and should have been taken to investigate and determine properly the location of the pier on which the range light was located and warn navigators accord-

ingly. On this basis, it would even seem possible to hold the Crown liable vicariously under section 3(1)(*a*). I could, indeed, again paraphrase the dictum of Taschereau J. in *Grossman and Sun v. The King* (*supra*) at p. 604 and say in the same manner in which he expressed himself that I also would be loath to hold that an employee of the Crown, whose concern it is to maintain leading lights in a channel in proper and safe condition, and to indicate those lights which are not operating properly, could not, if he failed to do so, be neglectful of his duty to pilots and navigators who are invited or authorized to navigate in Canadian waterways. It is from him that diligence and alertness is rightly expected. His lack of vigilance is a personal negligence for which the superior is answerable before the Courts.

It appears, however, that the District Marine Agent's responsibility for ranges is a delegated one; it is indeed delegated to him by the Chief of Aids to Navigation, in Ottawa, who in turn gets his authority from the Minister of Transport. If such is the case, any action taken or not taken by the District Marine Agency is merely the action or omission of the principal himself and if this was the situation, we would have here a case of direct liability and there would then be no necessity that the act or omission give rise to a cause of action in tort against the District Marine Agent as required by section 4(2) of the *Crown Liability Act*.

Although the evidence discloses that no efficient and rapid system for the reporting of casualties and the dissemination of information to mariners had been set up by those officers in charge of Aids to Navigation or the Superintendent of Pilotage in Ottawa, so that navigators and pilots could receive timely warnings of dangers to navigation of which these officers had knowledge or should have had knowledge, there appears to me, in view of the delay of the pilots of the ships that sheered prior to the sheering of the *Hermes* in reporting these incidents, to have been no causal link between the system in operation at the time and the accident. The direct liability of the respondent was involved, however, in that no system had been set up to check from time to time the location of piers situated in the water and particularly those of a certain vintage. Had

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such a system been in existence, the displacement of the Pointe du Lac pier could have been detected and the pilots could have been informed or corrective measures could have been taken to relocate the light and this casualty would have been avoided.

It cannot indeed be said that the situation here is such as to support a finding that there was no duty owed to the suppliants, as was found in *Cleveland-Cliffs Steamship Co. et al v. The Queen*[13] where Kerwin C.J. said at p. 813:

> ... There was no duty owing to the appellants on the part of the Dominion Hydrographer to take soundings in the East Entrance Channel and in the circumstances of this case, I am unable to envisage any possible duty to the appellants resting upon any other servant of the Crown, the breach of which could form the basis of a cause of action against him. The case of *Grossman et al v. The King* ([1952] 1 S.C.R. 571), is distinguishable as there Nicholas, the airport maintenance foreman, was held to owe a duty to Grossman.

Nor would the words of Rand J. at p. 814 in the same case apply to the present instance in view of the justifiable reliance by navigators on the performance by the employees of the Crown of a duty to insure that leading lights have not been displaced and their failure to discover the change of position of the pier on which the leading light was placed and also because both judges deal only with vicarious liability of the Crown and do not deal with its direct liability.

I must place those in charge of such lights in a position similar to the one Brunet, an officer of the Crown was placed in, *The King v. Canada Steamships Lines Ltd.*[14] where Anglin C.J.C. said:

> The case of Brunet is quite different. He was undoubtedly an officer or servant of the Crown. He came to Tadoussac in the discharge of his duties or employment. He saw the use that was being made of the slip which afterwards collapsed and immediately realized that its condition was dubious and had reason, as he says, to "fear" for its safety. He was told by Imbeau that there should be an inspection *"comme il faut"* of the slip because it might be *"endommagé"*—to see if it were not also in bad condition. Instead of clearing up his suspicions by an immediate personal inspection, or at least promptly reporting his fears to Quebec, or warning the officers of the steamship company of the probable danger of using the slip in its then condition, he contented himself with asking Imbeau to make an inspection and to report the result in writing to Quebec. In taking the

[13] [1957] S.C.R. 810 at 813.

[14] [1927] S.C.R. 68 at 77.

risk, of allowing the continued use of the wharf pending such report and in failing to give any warning to the officers of the steamship company Brunet was in my opinion guilty of a dereliction of duty amounting to negligence on his part as an officer or servant of the Crown while acting within the scope of his duties or employment upon a public work (*The King v. Schrobounst,* [1925] S.C.R. 458) and his neglect entailed liability of the Crown for the consequent injuries in person and property sustained by the passengers in attempting to land on the slip on the 7th of July.

I must also conclude that the evidence in this case supports a finding of duty such as was made in *Grossman v. The King* (*supra*).

There is, of course, also here a recourse given to the suppliants under section 3(1)(*b*) of the Act "in respect of a breach of duty attaching to the ownership, occupation, possession or control of property".

I should reiterate that in view of the reliance of navigators on leading lights, the Department and its officers clearly had the obligation to take whatever steps were necessary and reasonable to ensure that the pier under their control (and particularly one which had been under water for a great number of years and which was known to have been subjected to considerable ice pressure each year and to require repairs) on which a leading light is placed, is solid and will resist whatever ice pressures they know or should anticipate it will be subjected to; to check from time to time to ascertain whether it is displaced and, finally, to use due diligence to ascertain the facts with which, in order to perform their obligations, they must be acquainted.

In dealing with the liability of the Crown so far, I have considered only a number of decisions under the common law. The law applicable under the civil law is, I believe, no different. Under the law which prevails in Quebec, abstention or an omission to act can also attract liability. Mazeaud & Tunc in their publication *Responsabilité civile,* éd. 1957, tome 1, p. 610 referring to a decision rendered by La cour de cassation state:

> Il faut donc louer la Cour de cassation d'avoir affirmé sans équivoque «qu'une abstention peut être fautive lorsqu'elle constitue l'inexécution d'une obligation d'agir» et que «cette faute ne saurait être déclarée sans rapport avec le dommage si les précautions omises étaient de nature à en écarter le risque.»

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The same authors, at p. 614 of the same volume, underline the difference between a simple abstention and what is called an abstention "dans l'action" such as found in the present case:

> Il y a abstention dans l'action lorsque l'auteur du préjudice, se livrant à une activité particulière, s'abstient de prendre toutes les précautions qui seraient nécessaires pour que cette activité ne cause pas de dommage à autrui. C'est le cas de l'automobiliste qui cause un accident en négligeant d'allumer ses phares: le dommage résulte de cette abstention, mais c'est une abstention qui se rattache au déploiement d'une activité. Il en est de même... de l'État qui s'abstient de signaler aux automobilistes des travaux sur une route...

and at p. 615:

> ... Les juges apprécient s'il y a faute quasi-délictuelle, en appliquant le critère qui a été dégagé: ils examinent ce qu'aurait fait un autre individu placé dans les mêmes conditions externes que le défendeur: aurait-il pris la précaution que ce dernier a négligé de prendre?

As a matter of fact, under the law of Quebec, as well as under the common law, an omission to act creates liability not only where there is an express provision which obliges one to act but also when there is a legal obligation to act. That there was a legal obligation for all those officers in charge of those ranges to act here can hardly be contested nor, in my view, can it be contested that all reasonable means were not taken to discover the misalignment which caused this casualty.

Had the suppliants not supplied such evidence that all reasonable means were not taken here or had such evidence not been conclusive, they would have still been successful in this petition because article 1054 of the *Civil Code* is applicable to the present case on the basis that, as the front range light of Pointe du Lac was under the control of the respondent and was the sole cause of this casualty, a legal presumption that the respondent is liable therefore arises and can only be rebutted by establishing that the respondent had taken all reasonable means to prevent the damage caused by the thing it had under its care or control. That it did not take reasonable means appears clearly from the inactivity of the officers and employees of the Crown in failing to take appropriate steps to check the light's position prior to the casualty and even after it. The only question now remaining is whether the damage was

caused by the active autonomous act of the thing without the intervention of man which is one of the conditions for the application of the article.

Professor Castel in *The Civil Law System of the Province of Quebec,* at p. 485, deals with this requirement and describes what is meant by an autonomous act:

> What then is the "autonomous" act of a thing causing damage? This is not an easy problem of characterization, but it would seem that such an act can be described both in negative and in positive terms. In negative terms, it would mean that paragraph 1 of article 1054 cannot be applied if, at the moment of the accident, the thing was in a complete state of inertia, of complete passivity. The damage then was not caused by a thing and liability must be proved under article 1053. For instance, if a person slips on a sidewalk, *Cité de Montréal v. Chapleau* (1960) Q.B. 1096, or trips on the root of a tree: *Rosler v. Curé de N.D. de Montréal* (1937) 75 C.S. 911, the sidewalk or the root cannot be said to be "things" within the terms of paragraph 1 of article 1054, any action must then be taken under article 1053 where the burden of proof is on the plaintiff. In positive terms, the application of paragraph 1 of article 1054, requires that a thing has actively caused the damage as a result of its own dynamism, of its own motion, without the direct intervention of man.

That the Pointe du Lac pier or light can be considered as a thing which is covered by the article, would seem to be clear in view of the wide meaning of this word. That this pier and light actively caused the damage here appears also clearly to have been the case when one considers that the light is lighted at night and in the daytime performs also a positive action of leading ships down or up the channel. This light was not at the time when the damage was caused in a state of inertia. It was a leading light and, therefore, it had a dynamism of its own. It was inviting ships to use it to proceed down and up the channel. Furthermore, the pier on which the light was placed, as well as the light itself, had been displaced by the forces of nature by ice pressure and man had had nothing to do with its displacement. This pier and these lights, indeed, had all that is recognized by our Courts as necessary to place upon those who had them under their care or control, a legal presumption of liability which, as already mentioned, the respondent did not rebut by establishing, as it had to, that it had taken all reasonable means to prevent them from causing the damage. The Crown's failure to establish that

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proper and reasonable means had been taken to ensure that these lights would not mislead and cause damage, also renders it liable for this casualty.

I also find support for applying article 1054 to the facts of the present case in the French doctrine, although I am fully aware that article 1384 (C.N.) is more extensively applied in France than our corresponding article 1054 is applied in this country. Our courts have indeed always distinguished between the act of man and the act of the thing itself and have always refused to call upon the notion of guard or control of a thing if the latter was activated by man at the time of the accident. On the other hand, article 1384 (C.N.) applies in every case where the thing itself has not remained passive in the hands of its guardian, (cf. Mazeaud & Tunc, *Traité et pratique de la responsabilité civile,* 5e éd., tome II, no 1257). If the thing was inert at the time of the accident, article 1054 C.C. cannot be invoked (cf. *Gravel v. Dame Thériault*[15]; *Tillotson Rubber Co. v. Smith*[16]) whereas in the same circumstances, article 1384 C.N. could be invoked providing, of course, the thing had caused the damage claimed. (Cf. R. Rodière, *La responsabilité civile,* éd. 1952, no 1508). Notwithstanding these differences, however, it is still helpful to cite here a passage from Mazeaud & Tunc, *Responsabilité civile,* éd. 1952, tome II, pp. 208-209, which points out clearly the distinction to be made when damage is caused by the autonomous act of a thing:

> 1211-9 Est-il possible d'aller plus avant dans les précisions, de dégager un critère permettant de savoir quand une chose joue un rôle créateur dans la réalisation d'un préjudice, quand elle est la cause génératrice de ce dommage?
>
> Sans doute, parce qu'il s'agit de fixer un lien de causalité, est-il impossible d'énoncer des formules ayant une valeur absolue. Du moins doit-on constater que la jurisprudence recherche si la chose se trouvait ou non dans une position ou un état susceptible normalement de créer un dommage, autrement dit, si elle était «anormale» ou «normale» par sa position, son installation ou son comportement. La chose normalement placée, installée ou conduite au moment de l'accident, celle qui n'était pas normalement susceptible de causer un dommage, n'a pas été *cause* du dommage. La jurisprudence est formelle sur ce point. Et il semble que l'on puisse affirmer réciproquement, comme l'ont fait certains auteurs, que, sous réserve peut-être de circonstances tout à fait extraordinaires, la chose qui est entrée en jeu

[15] [1959] Que. Q.B. 61.

[16] [1960] Que. Q.B. 380.

dans la production du dommage et qui était anormale par sa place, son installation ou son comportement, en a été la cause, ou, au moins, une des causes.

Quelques exemples montrent nettement l'exactitude de ces affirmations.

Une automobile a été placée par son gardien sur l'accotement de la route. Son intervention dans le dommage subi par un motocycliste, qui vient s'écraser sur elle, est «passive». Pourquoi? L'automobile n'est-elle pas intervenue dans la réalisation du dommage? Certes. Mais son intervention n'est pas la cause de ce dommage. Son rôle a été purement passif. Ce qui a causé l'accident, ce qui l'a produit, c'est peut-être l'éclatement d'un pneu de la motocyclette, ou son dérapage, ou peut-être simplement l'inattention du conducteur.

La même automobile a été laissée par son gardien sur la route et à la sortie d'un virage masqué, ou la nuit sans les feux réglementaires. Qu'une collision se produise. Cette fois, il y aura intervention «active» de la chose. Pourquoi? Parce que, cette fois, la chose a bien causé le dommage: c'est sa position qui a entraîné le préjudice; c'est de cette position qu'il est né; et peu importe que l'activité du gardien, si cette position en est le résultat, soit fautive ou non.

Il en est de même chaque fois que la chose se trouve dans une position susceptible de provoquer un accident (arbre couché en travers de la chaussée, objet encombrant dans un couloir obscur, saillie d'une bouche d'égout etc.), les juges ayant, dans chaque affaire, à préciser si la chose se trouvait ou non dans une telle position, en dehors de toute recherche d'une faute commise par le gardien.

Although the automobile in the above example had remained passive, it was yet held to have been active because the position it was left in on a turn in the road at night without lights really caused the damages. This situation would not be sufficient to bring into play article 1054 C.C. in Quebec. However, the pier and light in the present case were not merely active in the sense that it was the sole cause of the damage but because, in addition thereto, it caused this damage by actively inviting navigators to use it in order to navigate the channel. This activity, in my view, clearly brings the light within the requirements of article 1054 C.C. and, as already mentioned, the respondent has not succeeded in rebutting a presumption of liability which the application of this article raises against it. It therefore follows that the suppliant's petition of right must be maintained and the proceedings taken by the Crown against the third party must be dismissed.

I now come to the matter of damages. The respondent, in its pleadings (paragraph 70) states that it cannot be held liable for expenses resulting from the capsizing of the

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Transatlantic and its subsequent refloating as these damages were caused by the fault, neglect and inability of the captain and officers of the *Transatlantic* and the persons in charge of the salvaging operations for which the Crown alleges the suppliants must bear the consequences and more particularly because the captain of the *Transatlantic* and its officers did not take the necessary means to prevent the capsizing of the vessel in the channel by having it towed as they could have out of the narrow part of the channel. There is also an allegation that the captain and officers failed to fight the fire on board their vessel in accordance with the ordinary rules of the art and of prudence. I should say immediately that there is no substance to the latter allegation that the fire was not fought properly by the captain and officers of the *Transatlantic.* They indeed, as well as all those who participated in the fire fighting operations, including the officers of the *Hermes,* appear to have done everything they could have done in this respect after the collision.

With regard to the claim that there was fault in allowing the ship to capsize in the channel, Captain W. R. Colbeck, a marine surveyor and the water bailiff of the port of Liverpool, heard as an expert witness on behalf of the Crown, stated that a configuration existed a short distance downstream from where the *Transatlantic* capsized, where she could have been beached. The loss in such a case, according to Colbeck, would then have been greatly reduced both in respect of damage to the cargo and the cost of salvage of the vessel. I should say that in view of the intensity of the fire that gutted the vessel, it appears clearly that whether the vessel remained where it did or was towed elsewhere would have made little difference and we may, therefore, take it that the damage to the cargo could not, in any event, have been minimized. There is a possibility, however, that the expense of the salvage operations might have been reduced had the vessel been beached in a more appropriate location and the question now is whether such a manoeuvre was feasible.

Before going into this matter, however, I should deal with the submission on behalf of the respondent that the captain of the *Transatlantic* dismissed his pilot Vallée shortly after the collision. The latter, if retained, would

have been a most helpful expert to advise the captain with regard to choosing a better location for the beaching of his vessel.

Raymond Vallée asked, at p. 2253, how long he remained on the *Transatlantic* after the collision, answered that he did not know exactly and then explained as follows:

> R. Le nombre de minutes ou d'heures, au juste, je ne m'en rappelle pas au juste. Mais, je sais que je suis resté un petit bout de temps, là, tant qu'on a vu que le feu était incontrôlable. Et le commandant a dit: On fait mieux de partir et on va mettre la chaloupe à l'eau avant qu'il soit trop tard. Parce que ça brûlait.
>
> Q. Alors, c'est le commandant qui vous a demandé de quitter?
>
> R. C'est ça.

It therefore appears that the pilot left some time after the collision, when he was told to leave the burning vessel with all those on board.

The evidence further discloses that on the morning of the occurrence, around 11:00 o'clock, some five hours after the collision, a tug, the *George McKee*, arrived on the scene under the command of Captain William Picard and Jean-Louis Millette. This tug was 100 feet long, and had a 750 h.p. motor. It also had a winch and a 1,400 foot towing line.

Captain Picard states that when he arrived on the scene, his tug approached the *Transatlantic* and he tried to talk to the captain who was on the foredeck of his vessel. He was asked at p. 2875 whether he did speak to him and he answered as follows:

> R. Oui, j'ai demandé, j'ai essayé de le comprendre, je savais que c'était un bateau allemand, je savais par la nationalité de l'équipage, j'ai demandé au capitaine s'il voulait nous donner un câble ou s'il voulait que nous lui en donnions un pour le sortir du chenal, on a vu qu'il était à l'est de l'ancrage, on a regardé sur la carte, on a vu qu'il y avait une belle place pour le sortir du chenal, où il y avait assez d'eau pour le sortir, c'était pour pas qu'il reste dans le chenal. J'ai demandé au capitaine s'il voulait nous donner un câble ou s'il voulait que je lui donne un câble pour le touer, pour le mettre dans l'espace qu'on avait vu sur la carte, pour le sortir du chenal, pour le mettre en dehors du chenal de la navigation, pour laisser continuer les bateaux, on avait vu et on voyait qu'il y avait des bateaux, on voyait 3 ou 4 bateaux qui attendaient pour monter.
>
> Q. Qu'est-ce qu'il vous a dit le capitaine?
>
> R. Il m'a dit, si j'ai bien compris, avec un fort accent allemand, il m'a dit, j'ai compris: «My boat is a fire, I have fire on my boat, I want water». Là, on s'est accosté vis-à-vis la «hatch» numéro un ou

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deux, la voisine, on s'est aperçu que le flanc du bateau était pas mal chaud le réservoir de «fuel» qu'on avait était là, sur ce côté-là, on a pas pris de chance, on a sorti des «hoses», deux, une de toile et l'autre de caoutchouc, pour faire notre possible pour arroser.

Q. Quand vous êtes arrivé pour parler au capitaine, lui avez-vous parlé en français ou en anglais?

R. En anglais.

Q. Qu'est-ce qu'il vous a dit en anglais?

R. Je me souviens bien, j'ai dit ou à peu près: «Do you want us to give you a line or give us a line, will tow you out of the channel». C'est ça qui a été répondu là, il m'a dit quelque chose avant, j'ai compris, après: «My boat is a fire, I have the fire on my boat, I want water». C'est là qu'il a dit ça.

Picard, at p. 2880, states that he thinks the *Transatlantic* could have been towed to a point downstream situated at buoy 41L approximately 300, 400 or 500 feet from where the *Transatlantic* was at the time and where she capsized, where there was 22 to 24 feet of water and where the vessel would have been outside of the channel.

Captain Millette, at p. 2287, says that Captain Picard, after his conversation with the captain of the *Transatlantic,* told him that the captain was not interested to have a tow line on his vessel. Other tugs arrived on the scene shortly after the arrival of the *George McKee* such as the tug *Captain Simard* under the command of captain Roger Gamache and this tug also had a tow line that could have been used to tow the vessel. A number of these tugs also pumped water on the fire in the *Transatlantic.*

Lannin Perrigo, a marine surveyor and a member of a firm which represented the underwriters of the *Transatlantic* and which subsequently represented also other interests including the owners of the cargo, arrived on the scene at 14:40 hours at which time he says (p. 2076) "the vessel was resting on the bank burning fiercely, No. 3 and 4 holds were a holocaust. The bridge was almost completely burned out; No. 2 hold was smoking badly, although the hatch covers were on and No. 5 hold had commenced to burn at that time. The tug—there were several tugs there that were pouring water into the open holds, No. 3 and No. 4".

He enquired to find out where the captain was and found him on No. 1 hatch forward of the vessel, and spoke to him there. Perrigo then said (p. 2079 of the transcript) "I advised the Master that I was representing the under-

writers and he told me that I was to carry on from there". "I then looked for Mr. Paul DuTremble who is the salvage master for Marine Industries Limited and I discussed the situation with him as to what action he had taken to that time, together with the Master of the vessel, and he advised that he had been instructed by the Master to place the vessel against the bank and to put water into the holds".

Q. What was your opinion of this decision or this action on the part of the Master?

A. I think it was the wisest decision to make at that time because the vessel was burning fiercely and there were numerous small explosions going on inside the holds. We didn't know what the cargo consisted of and standing on the No. 2 hatch there were frequent and numerous minor explosions.

So we did not know what would be liable to happen to this ship, whether the shell plating could be blown out and I asked Mr. DuTremble what were the soundings around the vessel at that time and he advised me that the soundings were between 20 feet and 21 feet all around the vessel, indicating that it was on the bank. The draft of the vessel at that time was, I believe, 15 feet 8 inches forward and 20 feet, 10 inches aft.

There was a heavy tear in the port side in the way of No. 3 hold and this extended quite low. This vessel is a riveted ship, with the result that the seam of the butts below the water where they are riveted were unknown as to the amount of water that could be entering the hold at the time.

Also the frames of the vessel were also riveted and as a result of these inquiries my decision was that it was wisest to leave the vessel where she was resting on the bank so that if anything happened she would just settle there.

With regard to the possibility of moving the vessel from its location at the time, Perrigo (at p. 2080 of the transcript) explained as follows:

HIS LORDSHIP: Was there a possibility of it sinking if an attempt had been made to move it elsewhere, either downstream or upstream?

THE WITNESS: We were afraid of this, because they had been putting a lot of water into the vessel and naturally it could not be pumped out, and the entry of water into No. 3 hold could not be calculated and the free surface of the water would have made the vessel unstable if we had attempted to move it, and the possibility of it turning over in the channel was great.

He then, at p. 2088 of the transcript, explained how the capsizing of the vessel took place as follows:

The cause of the capsizing from what I was able to observe was the...I believe that the weight of the vessel due to continuously pouring water in, and in view of the fact that the vessel was close to

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the channel, I believe the weight of the ship caused the bank to capsize or to give away, and with the amount of water which we had poured in and also the addition of the water entering from the collision damage, caused the water to rush over to one side with the bank capsizing and then it was just continuous from there that the vessel continued to heel over with the weight of the water going all to one side.

Perrigo, at pp. 2121 and 2123, stated that it would have been possible when he arrived around 3 o'clock in the afternoon to tow the vessel from buoy 45 to buoy 41, some 4,200 feet, adding, however, that it might have capsized in the channel. He also stated that he had good reason to believe that the vessel was lying on the bank of the channel and not merely up against it. He suggested at one point in his evidence that a sounding had been taken with an echo-sounder and even stated that Paul DuTremble, an employee of Marine Industries, who on the day of the casualty was in charge of salvage operations, had told him that he had taken soundings and that there was 20 to 22 feet of water all around the ship. DuTremble, on the other hand, at p. 2897, says that he never took any soundings:

Q. Vous souvenez-vous, monsieur DuTremble, s'il y a eu des sondages de pris autour du «Transatlantic», ce jour-là?
R. Non, cela je ne peux pas vous l'affirmer s'il y en a eu. Moi, je n'en ai pas pris, personnellement.
Q. Vous n'en avez pas pris personnellement?
R. Non.

There was no explanation given in rebuttal by Perrigo or any one else on the question of soundings being taken and the only conclusion I can reach here is that no soundings around the vessel were taken.

It is as a matter of fact, difficult to see how soundings could have been taken with an echo-sounder as Perrigo seems to suggest. It would have had to be done by a tug twenty to twenty-five feet wide and there would be very little space available for the tug if the soundings were to be taken close enough to the vessel to be useful. As a matter of fact, the soundings could have been taken only if the vessel was far enough from the bank, in which case it could hardly have been on the edge of the bank. The assessor, Captain Turcotte, informs me that the only way an accurate sounding could have been taken here is by hand with a lead sounding line.

I am inclined to accept the view expressed by Captain Colbeck that the *Transatlantic* was not on the bank prior to capsizing, but had been held up against the bank by the tugs. A photograph of the vessel (Exhibit D-105) with the tugs up against it, would seem to confirm Captain Colbeck's evidence in this regard. If the vessel had been on the bank proper and not merely alongside it, the fore end of the ship which had a draft of 15 feet compared to her after end which had a draft of 20.2 feet would have been pushed more beyond the south bank than she appears to be on the photograph and the vessel would not have remained parallel to the south bank as it did. It also appears from the manner in which the ship capsized into the channel that prior thereto, it was merely being held up against the bank.

The master of the *Transatlantic,* Captain Buschan, was, in my view, at fault in not attempting to beach his vessel in a more appropriate place than the channel where it apparently capsized in a depth of 40 to 42 feet. He could have, and should have, used the tugs at his disposal to tow his vessel to a more appropriate location. It is indeed surprising that he did not avail himself of the means at his disposal to do this, but what however is more surprising is that it appears to have never occurred to him to do so. Had such an omission occurred when the captain had but a few minutes in which to take a decision, due allowance could then be made for the state of excitement in which he must have been in when he could not be expected to be as acute in his judgment, or act as skillfully and coolly as he normally would. Under those circumstances, after this sudden and devastating collision, he could, indeed, hardly have been criticized for his inaction. He had, however, a longer period of time than this to consider his position and take a decision; he had, indeed, at least from 6:30 a.m. to 11 o'clock (at which time the *George MacKee* arrived and offered to tow his vessel which he refused) and possibly even later, up until the capsizing of his vessel. The matter of towing the vessel downstream would, it is true, have required good seamanship, but such a manoeuvre would, according to the assessor Captain Turcotte, have been possible, particularly around noon time when although there was some water in the holds, there would not have been

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too much free surface effect because of the permeability created by the considerable cargo in the holds and, therefore, little risk of capsizing the vessel in the process. Captain Turcotte is even of the view that an attempt could, and should have been made, even after Perrigo arrived on the scene around 3 o'clock in the afternoon, to tow the vessel down towards an ideal location situated in the vicinity of buoy 41L where he says there would have been a good beaching area. It might, at this time, he says, have capsized on the way down but it still could not be any worse than where it had been kept up against the bank and where it actually sank.

It also appears to me that DuTremble who, under a Lloyd's open form, was in charge of the salvage operations from 4 o'clock in the afternoon, should have taken soundings even at that time. He, however, did not seem interested to see if the vessel was in an appropriate place to sink and even stated that he knew nothing of this type of operation.

The only conclusion I can reach here is that the captain, as well as those in charge of salvaging operations, were at fault in merely pressing the ship against the bank as they did. Had proper soundings been taken they would, no doubt, have realized the precarious position of this ship and taken prompt and proper action to have it removed downstream.

It therefore follows that the capsizing of the *Transatlantic* was not a natural and direct consequence of the collision which had taken place twelve hours prior thereto. It was indeed the result of the omission, and faulty management, on the part of the captain of the vessel and of those who had charge of the vessel after the collision in not taking the action necessary to beach her in a more appropriate location where the subsequent salvage operations would not have been as intricate nor as costly. It therefore follows that a portion of the cost of the salvaging operations arising from the removal of the vessel from where it capsized is not recoverable from the respondent. According to Perrigo, the wreck removal price was $1,000,000 plus 50 per cent of the net salved value of the hull and cargo. He believes that the additional amounts received in addition to the $1,000,000 did not exceed $150,000.

That part of the cost of the salvaging operations which is not recoverable from the respondent can be determined only by means of a reference to be carried out with possibly the assistance of an assessor, if such a course of action is possible.

Representations in this regard may be made to me at a time and place suitable to all parties to be arranged through the Registrar of this Court. The damages to which the suppliants may be entitled shall also be dealt with in the same manner.

I should now deal with the respondent's cross demand whereby it claims the right to limit its responsibility under the provisions of the *Canada Shipping Act*, section 668, on the basis that the channel where the accident occurred is really a canal of which it was the owner. The Crown's application during the trial for leave to file this counterclaim was taken under advisement to be dealt with at a later date. As I have now reached the conclusion that the respondent is solely responsible for its collision, leave is hereby granted to the respondent to file its counterclaim which shall be governed by the delays and rules applicable to such proceedings under the rules of this Court. I should, however, add that this counterclaim can be considered by the Court only after it is satisfied that all parties entitled to claim from the respondent herein have been given an opportunity to intervene and participate rateably in whatever limited amount is arrived at. This matter also shall be the subject of whatever representations the parties feel should be made in this regard at the same time as the procedure for dealing with the damages and the cost of the salvage operations is determined. The suppliants' petition of right will be maintained with costs and the proceedings taken by the Crown against the third party will be dismissed with costs. There will, however, be no formal pronouncement of judgment in the present case until such time as all the above matters are dealt with, the damages established and the cost of the salvage operations applicable to the removal of the vessel from the preferred location downstream has been determined. The manner in which costs in both proceedings should be determined and dealt with may also be raised at the same time.

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* * *

On September 10, 1968, I reached the conclusion that the respondent was solely responsible for this collision but that the capsizing of the *Transatlantic,* where it occurred, was not a natural and direct consequence of the collision which had taken place twelve hours prior thereto and that therefore a portion of the cost of the salvaging operations arising from the removal of the wreck was not recoverable from the respondent. I also expressed the opinion that that part of the cost of the salvaging operations which could not be recovered from the respondent should be determined by means of a reference to be carried out with possibly the assistance of an assessor and I added if such a course of action is possible. I also stated that the damages to which the suppliants were entitled should also be dealt with in the same manner.

I then dealt with the matter of respondent's cross-demand whereby it claims the right to limit its responsibility under the provisions of the *Canada Shipping Act,* section 660, on the basis that the channel where the accident occurred was really a canal and leave was then granted to the respondent to file its counterclaim which was to be governed by the delays and rules applicable to such proceedings under the rules of this court. I also invited the parties through their counsel to make whatever representations they deemed useful in order to deal with the above matters prior to pronouncing a formal judgment in this case.

Counsel for the parties appeared before me on October 15, 1968, and a number of motions were presented for directions as to the assessment of damages and costs, for directions as to the procedure to be followed in the limitation of liability proceedings, all counsel for the suppliants stating that there was no objection to respondent proceeding in the limitation of liability proceedings by means of a counterclaim. The issue as to what effect the capsizing of the vessel where it occurred had on the cost of removing the wreck was also discussed, the Crown submitting, however, that the referee should deal also with the effect this had, not only in increasing the cost of removing the wreck, but in increasing the damage to the vessel and the damage and loss to the cargo. In view, however, of the Court's decision at

p. 206 of the reasons for judgment in this case, there could be no question of determining by reference whether the cargo or ship would have been less damaged had the vessel been towed downstream in view of the conclusion I had arrived at on these points at p. 206 (*supra*) which could only be attacked by an appeal. I explained why such a claim could not be considered by stating:

> . . . I should say that in view of the intensity of the fire that gutted the vessel, it appears clearly that whether the vessel remained where it did or was towed elsewhere would have made little difference and we may, therefore, take it that the damage to the cargo could not, in any event, have been minimized.

I also pointed out to counsel for the Crown that although I had reached a conclusion on this matter, in doing so I had gone beyond the allegations of the respondent's proceedings as contained in paragraph 70 of its defence. On November 27, 1968, the respondent then moved by notice of motion for an order allowing it to amend paragraph 70 of her statement of defence by adding after the words "les dépenses", in the first line thereof, the words "et les dommages".

The motion was contested by counsel for the suppliants and for the third party and taken under advisement by the court to be dealt with in the further reasons for judgment now being issued.

In view of the conclusion reached by me in this matter, the possibility of an appeal and a possible revision of the conclusion reached with regard to the alleged increased damages to the vessel and the cargo by allowing the vessel to capsize where it did, I must, I believe, and do hereby, grant this motion and issue an order allowing such an amendment to paragraph 70 of the Crown's defence herein with, however, costs against the respondent in any event of the cause.

The matter of appointing a referee to deal with the question of determining the damages sustained by the suppliants, as well as with the additional expenses caused by allowing the vessel to capsize where it did, was also discussed and representations were made by counsel as to how this should be done and who should be appointed. A number of suggestions were made by counsel for the suppliants of competent persons to perform this function but there was no agreement on the persons suggested. The appointment of an assessor to assist the referee was also

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suggested by the suppliants but was resisted by counsel for the Crown on the basis that a competent referee would not need an assessor and could be properly advised by experts produced by the parties. The court at one point even suggested that in view of the difficulties involved in agreeing on the choice of a proper referee and in the manner in which the reference should be conducted, it might be preferable to deal only at this stage with the limitation of liability proceedings, to issue reasons for judgment thereon and appeals could then be taken on the question of liability for the collision and as to whether the Crown was entitled to limit its liability under section 660 of the *Canada Shipping Act*. The court was adjourned and a few days later counsel were reconvened and told that the matter would proceed as hereinabove indicated and December 3, 1968, was set down for the trial on the issue dealing with the right of the Crown to limit its liability.

The counterclaimant (the Crown) produced as witnesses John W. Pickersgill (the Minister of Transport in 1965 when the accident occurred), Mr. John Baldwin, the Deputy Minister of Transport, Herbert Land, an officer of the Department of Transport for 37 years and from 1958 to 1967 Chief of the St. Lawrence Ship Channel Division and Allan Douglas Latter, Superintendent of Pilotage Operations, Department of Transport.

The Crown, in order to limit its liability relies on section 660 of the *Canada Shipping Act,* R.S.C. 1952, chapter 29, which reads as follows:

> 660. (1) The owners of any dock or canal, or harbour commission, are not, where *without their actual fault or privity* any loss or damage is caused to any vessel or vessels, or to any goods, merchandise, or other things whatsoever on board any vessel or vessels, liable to damages *beyond an aggregate amount equivalent to one thousand gold francs for each ton of the tonnage of the largest registered British ship that,* at the time of such loss or damage occurring is, or within a period of five years previous thereto has been, within the area over which such dock, or canal owner, or harbour commission performs any duty or exercises any power, a ship shall not be deemed to have been within the area over which a harbour commission performs any duty or exercises any power by reason only that it has been built or fitted out within such area, or that it has taken shelter within or passed through such area on a voyage between two places both situated outside that area, or that it has loaded or unloaded mails or passengers within that area.

(Emphasis added).

The Crown had the burden of establishing under the above section that it falls within the conditions therein set down and it therefore had to show:

(1) that the channel through Lake St. Peter where the accident occurred, is a canal for the purpose of the *Canada Shipping Act*;

(2) that it was not in actual fault and privity in respect of the cause of damages claimed; and

(3) the largest British registered ship in the area within the five years preceding the date of the accident in order to calculate by means of its tonnage and the value of the gold franc its limited liability.

The value of the gold franc on April 9, 1965, was established by Arthur C. Lord, Assistant Chief of Foreign Exchange, Bank of Canada, Ottawa. Using 22,970,470 units (i.e., the tonnage of the Empress of Canada, the largest registered British vessel within the area at the time of the loss or within a period of five years previous thereto), he calculated that the maximum amount the Crown could be held liable for under section 660 was $1,644,-693.95. Although this calculation or amount was not contested by the suppliants, they refused to accept that the *Empress of Canada* was the largest vessel in that area and the Crown had to establish that such was the case. Captain Allan Douglas Latter, Superintendent of Pilotage Operations, Department of Transport, Ottawa, stated in evidence that he had searched for the largest British ship to traverse Lake St. Peter within the material time, and that it was the *Empress of Canada*. This evidence was not contradicted and, therefore, we may take it that the figure arrived at by Lord does indicate the maximum amount for which the Crown may be held liable if, of course, it is entitled to limit its liability under the Act.

The respondent submits that the channel through Lake St. Peter, where the accident occurred, is really a canal for the purposes of the *Canada Shipping Act*, which it had to establish in order to take advantage as the owner of a canal of the provisions of the *Canada Shipping Act*.

The source of section 660 of the *Canada Shipping Act*, for the limitation of the liability of dock, canal and harbour

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owners, is found in a United Kingdom Statute, 63 & 64 VIC., chapter 32, *Merchant Shipping (Liability of Ship Owners and Others) Act,* 1900.

The provision was introduced in this country by the *Canada Shipping Act,* 1934, c. 44 s. 652, and eventually became s. 660 of R.S.C. 1952, c. 29.

There is no statutory definition of the word "canal" for the purposes of this section and respondent submits that it, therefore, should be construed in its natural and ordinary meaning. It also submits that from reputable dictionaries of both the French and English language it appears that the words "canal" and "channel" in the context of this case are synonyms, both words deriving from the latin word "*canalis*" (cf. The Nuttal Dictionary of English Synonyms and Antonyms and Le Dictionnaire des synonymes de la langue française, par René Bailly (Librairie Larousse)).

It also submits that the Oxford English Dictionary gives as the chief modern sense of the word "canal" the following definition:

> 6. An artificial watercourse constructed to unite rivers, lakes, or seas, and serve the purpose of inland navigation.

and for the word "channel":

> 5. An artificial waterway for boats = "canal"

Webster's International Dictionary, second edition, contains the following:

> *Canal*
>
> 3. An international channel filled with water, designed for navigation, for irrigating land, etc.
>
> *Channel* (. . . see canal)
>
> 2. The deeper part of a river, harbour, strait, etc., where the main current flows, or which affords the best passage.
>
> 3. Obs. . . . b) A canal for vessels. N.B. It is interesting to note that Littré under the word "chenal" says: E. Forme ancienne de *canal* (voy. de mots);

Le Grand Larousse Encyclopédique contains the following definitions:

> *Canal*—Lit ou bras d'une rivière (on dit mieux dans ce sens, chenal ou bras) Voie navigable creusée par l'homme.
>
> *Canal fluvial,* canal qui unit deux fleuves, ou qui rend un fleuve navigable.
>
> *Chenal*: Passage resserré, naturel ou artificiel entre des terres ou des hauts-fonds, utilisé par la navigation (Syn. canal)

Le Dictionnaire Robert gives the following definitions:

> Canal—2° cours d'eau artificiel . . .V. Chenal
>
> *Chenal*—1° Passage ouvert à la navigation entre un port, une rivière ou un étang et la mer, entre des rochers, des îles, dans le lit d'un fleuve. V. Canal.

On the basis of such definitions, the Crown submits that the dredged cut through Lake St. Peter meets the dictionary requirements for a canal in that

(a) it is man-made and, therefore, artificial;

(b) it conveys water and is a watercourse;

(c) it unites the deeper waterways above and below Lake St. Peter;

(d) its purpose is to further inland navigation and without it the vessels *Transatlantic* and *Hermes* would not have been able to navigate to Montreal.

In support of its contention, the Crown referred to an American case *C. W. Chadwick & Co. v. Boston, Cape Cod and New York Canal Co.*[17]. This was an action in damages against a canal authority for the stranding of a vessel in the approach to the Cape Cod canal through the faulty piloting of a pilot employed by the Canal company. It was held therein that the dredged approach was for some purpose a part of the canal but in order, in this case, to determine only whether the pilot was acting within the scope of his employment by the canal company. It does not, however, in my view, determine that a channel is a canal.

The Crown also referred to an unreported decision of this Court by Thorson P., dated March 26, 1947, affirmed by the Supreme Court of Canada on October 5, 1948, Locke J. dissenting. *The Canada Starch Co. v. The King* (No. 20239 of the Exchequer Court).

The claim of the Crown in the above case was for wharfage and wintering charges made under the *Canal Regulations* pursuant to the *Department of Transport Act* in respect of a vessel that had loaded or unloaded cargo and had wintered at a wharf erected on the Old Galop Canal at Cardinal, Ontario.

Among the points involved, one was whether the Old Galop Canal was still a "canal" under the *Department of Transport Act.*

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[17] (1920) 266 F. 775.

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There was no question that the wharf was located on a body of water that had been part of a canal until 1961 when a new canal was built at which time the area in question was closed off but remained accessible from the St. Lawrence River through an opening for vessels wishing to moor at the Canada Starch Company wharf.

Thorson P. held the Old Galop Canal was still a "canal" under the *Department of Transport Act* and also that it had remained a canal under the ordinary meaning of the term. The majority in the Supreme Court agreed with Thorson P., Locke J. dissenting on the ground that the body of water in question was not a canal in the natural and ordinary sense of that term.

This decision is not, in my view, particularly useful in the sense that the section involved had at one time prior to 1901 been a canal and the only question was whether because of the cut off it no longer was one.

I also feel that none of the above definitions are, in my view, sufficiently precise to solve the question involved in this case. There is, however, one element which is contained in all these definitions and that is the "artificiality" which appears to be dominant in the make up of a canal. This, in my view, is the real distinguishing element between a canal and other bodies of water.

Artificialty, however, is a relative concept. No inland waterway is entirely natural. Navigable rivers, indeed, have to be dredged periodically and basins and harbours must be dug if navigation is to be successfully conducted on any navigable river. In any good sized port, or in any important waterway, one can readily see how much of a man's work must go into a natural watercourse to make it a great conveyer of goods and merchandise. Yet I do not believe that anyone will think of calling any port of the St. Lawrence river at Montreal, or the watercourse east of Montreal to Quebec City or down from Quebec City, a canal on the ground that the basins, the embankments, the jetties, were built by man or that the channels were deepened by man and not by nature. I believe that it follows from this observation that a canal can exist only where the ingenuity of man is paramount in the making of the watercourse and, although there is no question that the depth and

width of the channel through Lake St. Peter, as urged by counsel for the Crown, were increased and widened by man, the history of this channel reveals that it could, in its natural state, prior to such work, allow ocean vessels of 10 feet draught to ply its course.

Herbert Land, an officer of the Department of Transport from 1931 until 1968, described the Lake St. Peter channel as being some 500 feet in width and as being dredged to some 35 feet. He confirmed that prior to any improvement, the limiting depth of the channel was some $10\frac{1}{2}$ feet although at high water stage, its limiting depth was some 15 feet.

Land agreed, in cross-examination, that the present course of the Lake St. Peter channel follows that of what was known as the old channel which has always been known as the natural channel in Lake St. Peter through which the waters of the St. Lawrence river eventually go to the sea and it is clear from the following answers that the channel involved in this case is a natural one:

> Q. In other words, what has been done in the channel is simply to improve what is and has always been a natural channel. Is that correct?
> A. That is right . . .

He later agreed also that in those days prior to any work being done to improve the channel, ocean ships could come to Montreal, although others had to anchor below what is known as the flats of Lake St. Peter where they would discharge their cargo which was then brought up to Montreal on smaller crafts.

It also appears, and Baldwin so admits that the St. Lawrence ship channel section, which looks after channels in Canada, including the Lake St. Peter channel, is a branch of its own and was never at any time a part of the same organizational structure which runs canals in Canada.

There is no mention of the Lake St. Peter channel as a canal in the past or present *Canal Regulations* nor does it appear in schedules A and B which list canals. John Nelson Ballinger, who, before he became Chief of Aids to Navigation was Chief of the Canals Division, stated at p. 1757 of the transcript that Lake St. Peter did not come within his jurisdiction when he was in charge of canals and Herbert

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Land testified that there was at one time a feasibility study made to canalize Lake St. Peter which, however, was never implemented. This, of course, indicates clearly that to people like Ballinger and Land, the Lake St. Peter channel was not a canal in the actual and ordinary sense of the term or in the natural and ordinary sense in which such people use the language.

The Department of Transport does not administer it as a canal as no tolls or dues are collected for its use as a canal for the simple reason that it is not a canal, but only a part of the St. Lawrence channel even if large sums of money have been expended on the river in order to render the port of Montreal accessible to bigger and faster and more modern ships. As a matter of fact, whatever has been done to Lake St. Peter has merely been to improve navigation as the depth of the drafts of vessels became greater. Furthermore, this portion of Lake St. Peter, or this channel, was originally invested in Her Majesty as an improvement in the course of the River St. Lawrence under section 108 of the *B.N.A. Act* and schedule under subsection 2, rivers and lakes improvements and not under subsection 1, canals.

The St. Lawrence River Pilot, the navigator's bible, refers in no way to the channel across Lake St. Peter as being a canal.

I cannot, therefore, see how it is possible to conclude that this channel can be considered as a canal. It is not listed as a canal in the regulations and schedules issued under the *Department of Transport Act*; it is not under the supervision of the Chief of Canals; is is not referred to as a secondary or a mainline canal; it is not under the jurisdiction of the St. Lawrence Seaway Authority and it has never been treated as a canal in any official manner. The Crown had the burden of establishing that this channel was a canal in order to benefit from the exceptional advantages of section 660 of the *Canada Shipping Act* and has not discharged its obligation in this regard. A statute such as the present one, which purports to create an extraordinary right by reducing the liability of a tortfeaser

which is contrary to the ordinary rules of the common and the civil law, must, I believe, be given the most strict interpretation. But even taking a broad view of this matter, it appears to me that this watercourse where the accident took place, although improved by man, is still a channel and not a canal in the same manner as the remaining part of the river channel from Three Rivers, P.Q. to Quebec and from Quebec to the sea and this, of course, can in no sense be considered as a canal.

As the respondent has not succeeded in establishing that it falls within one of the essential conditions set down in section 660 of the *Canada Shipping Act*, this should be the end of the matter. In view, however, of an appeal, the further question of whether the Crown was in fault or privity should also be considered.

The Crown here also had to establish that it was not in actual fault or privity in respect of the cause of the damages claimed.

It took the position that as neither Mr. Pickersgill, the Minister of Transport on the date of the accident, nor Mr. Baldwin, the Deputy Minister, can be charged with personal fault in respect of the cause of the collision, there could be no fault or privity on the part of the Crown.

Counsel for the Crown urged that the only persons who can represent the owner here are the Minister and the Deputy Minister, that the owner of the canal is Her Majesty in Canada, i.e., the Governor General acting on the advice of his ministers (who are similar to the board of directors of a company) that one of the members of this board has been entrusted with the responsibility of administering a department and he is the Minister of Transport and Parliament has indicated in the *Department of Transport Act* that the Minister shall have an assistant who is appointed by the Governor in Council the Deputy Minister, and no one else has been designated by Parliament to act or represent the Crown. All those persons underneath the Minister and Deputy Minister are merely employees of the Crown to whom responsibilities are delegated. There are, in fact, in the Department of

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Transport six Assistant Deputy Ministers, a number of heads of branches and sections, but they are, according to the Crown, merely employees of the Department in the same manner as simple messengers or elevator operators.

Both of these officers, the former Minister of Transport, Mr. Pickersgill, and Mr. Baldwin, were produced as witnesses. They both stated that they were unaware that the lower pier of Pointe du Lac had been displaced over a period of years.

Mr. Pickersgill stated that he was not aware on or before the collision of the displacement of the Pointe du Lac pier and did not even know it existed.

Mr. Baldwin, the Deputy Minister of Transport, testified at greater length and described the ramifications of the Department of Transport and produced a chart, Exhibit C-5, which sets down the responsibilities of its various sections or personnel. He produced also a key chart, Exhibit C-4, which indicates the set-up of the Department from the Minister to the Deputy Minister to the various Assistant Deputy Ministers down to the personnel in the field. He stated that as far as aids to navigation are concerned, district marine agents were located in several areas, including Sorel, P.Q., and they, according to the chart, reported to the Assistant Deputy Minister, Marine Services, Mr. Gordon Stead, who is not an engineer. He added, however, that such agents were also under the Chief of Aids to Navigation Division, located in the Department of Transport, Ottawa. Mr. Baldwin explained that with the Postal Service, the Department of Transport is one of the largest departments in the government.

From Exhibit C-5, p. 1, it appears that the Assistant Deputy Minister, Marine, is responsible to the Deputy Minister for directions and co-ordination of all activities of Marine Services including that of the district marine agenices, who are responsible for "the direction and administration of activities pertaining to the construction, operation and maintenance of aids to navigation...".

Mr. Baldwin explained that although the district marine agents would not communicate with the Director of Marine Works but directly with the Assistant Deputy

Minister in all important matters, in some cases they would go to the Chief of Aids to Navigation Division.

The Marine Works Branch, however, according to the chart, Exhibit C-5, is also "responsible for the direction and co-ordination of all activities of the branch, involving the construction, maintenance and operation of marine aids to navigation in navigable waters throughout Canada".

Baldwin stated that once these branches and divisions were set up, he would only become personally involved in their actual operation in what he termed "under the management by exception principle in the day to day workings of the structure as a whole". He was concerned with the manner in which the responsibilities of the divisions or sections were discharged only in the case where if the Assistant Deputy Minister had a new policy problem he wished to bring to his attention and "something emerged under the management by exception principle or as part of the future programme review".

He stated that he also was not personally aware of the displacement of the pier of the Pointe du Lac range prior to the collision and never received or saw a report of any kind as to the condition of this pier, adding that correspondence or memoranda between the District Marine Agents, the Chief of Aids to Navigation, the Director of Marine Works, do not normally cross the Deputy Minister's desk. He said that he became informed of the displacement of this particular pier very close to the end of April 1965 by means of an oral report from the Assistant Deputy Minister of Marine to the effect that to the latter's "considerable surprise and considerable amount of disbelief at that stage", information had been received which suggested that there may have been a displacement of this pier and that an investigation was taking place to ascertain further facts.

He was not, he said, aware of the particular decision taken in the fall of 1964 to place a tower on the pier for the first time during winter navigation. His awareness, he says (at p. 77 of the transcript)

> would relate rather to the fact, that the Minister had discussed with the Deputy Minister, the Deputy Minister had discussed with the

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> Assistant Deputy Minister in broad terms the question of whether additional aids should be available in the St. Lawrence River during winter periods, because of the evidence of increased use of the River during the winter period and various policy considerations relating to the economic benefit of the movement—the problems of the reaction of the Atlantic Provinces and similar matters would come up in the discussion—a policy decision might result, but as it did, I believe in this case, but the Marine Services should be given discretion to do something more than they had been doing within reason and then the matter would be left to the Marine Services Branch to determine what was reasonable and technically feasible.

I should say here that Baldwin is not an engineer and prior to coming to Ottawa, taught modern history at McMaster's for one year and admits he has no technical or engineering knowledge at all of the type of navigational aids involved in this case.

He was told by counsel for the Crown that the reasons for judgment herein fault the Department for not having a system of checking the position of the particular types of aids with which we are concerned in this case and gave a lengthy answer which I believe can be resumed as follows: He stressed that the function of the Deputy Minister was one primarily related to policy matters leaving the day to day operations in most cases to those who were heads of branches. He then stated (at p. 107):

> . . . the only method by which a department of the size and complexity and general physical scope of the Department of Transport can operate on a reasonably efficient management basis is by a high degree of delegation of operating responsibility right down the line and this has been the philosophy of the Department of Transport, so that there is a steady cone of delegation, if you will, with admittedly a major responsibility for day to day operating practices and actions resting not with necessarily with the Assistant Deputy Minister, but with the appropriate chief at whatever level may be the case. Physically no other approach would be possible in this type of management structure in my opinion.

Baldwin stated that when information reached him that the pier had definitely been displaced, he asked the Assistant Deputy Minister to take whatever action was necessary to deal with this problem. He was asked in cross-examination by Mr. Brisset (at p. 120 *et seq.* of the transcript) whether he agreed that a system should have been

established by whatever branch responsible to ascertain at all material times the position of aids to navigation in a system like the River St. Lawrence and answered as follows:

A. No, I don't think that any of my previous answers indicated—certainly was not intended to indicate my belief, that there was a lack of a system and that there was some system which needed to be established in this regard. My previous answers were intended to indicate—if I can make this adequately clear in a complex situation now, that the positioning and maintenance of aids to navigation does carry with it a need to be aware of the problems connected with continuation of location in any particular situation, but the method by which this is achieved is a method, which is—which is something which can best be done by assuming that the people at the appropriate level, whether it is field or headquarters, understand what their general job is in this connection and giving them reasonable initiative and flexibility in the matter of achieving those objectives.

Mr. Brisset then questioned him at p. 123 of the transcript as follows:

Q. . . . Now limiting myself to this later kind of aids to navigation, namely ranges and beacons, would you agree with me, that in the discharging of their functions, those responsible for the maintenance of these aids to navigation must of necessity have a method to use your system to check on whether they are at all times reliable and what—in that they serve the purpose, that they are intended to serve?

A. They should have some procedure for insuring, that the function is carried out—not necessarily the same procedure in every case.

He then, however, later added at p. 125:

A. . . . you may have one type of situation, where a check once every five or ten years is adequate and you may have another type of situation, where a check every few months or few weeks is adequate . . .

I do not think that it is sufficient in order to establish that it was not in actual fault or privity in respect of the cause of the damages claimed in this case for the Crown to merely say that the only two persons who can represent it are the Minister and Deputy Minister of Transport, that both being non-technical men were unfamiliar with the Marine Section of the Department and did not concern themselves with such matters as aids to navigation because

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the various branches and sections of the Department, including the Marine Section, were set up in such a manner that whatever obligations existed in such matters or whatever work was to be done was delegated down the line to eventually the men in the field. There is, of course, no question in this case that the men in the field, the District Marine Agents, were remiss in their duties and they have been held at fault in not taking the means necessary to insure that the piers on which the lights were left as the only fixed means of navigation for ships plying those waters in 1965 were properly located and had not been displaced (particularly when it was decided to use such lights for the first time in the fall of 1964 for the forthcoming 1965 winter season) and of warning navigators if they were displaced and such omission can be considered as involving the vicarious liability of the Crown. Such a responsibility, however, is not sufficient to involve the privity or personal responsibility of the employer or, as in this case, the Crown. Something more is required in order to prevent the employer from taking advantage of the limitation of liability provided under the *Canada Shipping Act*. From the decisions rendered, it appears to me that the notion of personal fault of an employer or as in this case, the Crown, involves drawing a distinction between the directing minds of the employer, a company, or a Department of the Crown, and inferior servants[18]. Generally speaking acts or states of mind of the directors or managers of a company, or of a large department, are imputed to the company or the Department so as to constitute personal fault, whereas, the acts or states of mind of inferior servants constitute merely vicarious fault (cf. *The Trucu-*

[18] In *The Lady Gwendolyn*, [1965] 2 ALL E.R. 283 at 295 Wilmer L.J. stated: ". . . but neither in the Court of Appeal nor in the House of Lords was it said that a person whose actual fault would be the Company's actual fault must necessarily be a director. Where, as in the present case, a Company has a separate traffic department, which assumes responsibility for running the Company's ships, I see no good reason why the head of that department, even though not himself a director, should not be regarded as someone whose action is the very action of the Company itself, so far as concerns anything to do with the Company's ships.

lent[19], where this doctrine was applied to the Crown and where the case of *Lennard's Carrying Co. v. Asiatic Petroleum Co.*[20] was followed).

It appears to me that the only way a proper distinction can be made in order to determine the type of responsibility involved in a particular case is to examine the circumstances of each case, the character and magnitude of the company's or Department's business and the authority delegated by the directors or the heads of the Department to the managing officers of the company or to the branches and sections of the Department.

That the employees in the field in the present case were at fault, as already mentioned, there can be no doubt. But there is also a finding, however, that they were not alone at fault and all those at the Ottawa office, during the whole period of the existence of the piers involved, i.e., from 1935 to 1965, who under the functional set up of delegation explained by Mr. Baldwin, were given responsibility for these navigational aids and thereby became the directing minds of the Department in this respect, were also, in my view, at fault. Their fault, however, is not the same fault as the fault committed by the District Marine Agents, but of a somewhat higher order which, nevertheless, caused the damage or contributed to it[21]. This different kind of fault was the omission[22] to supply or to order or set up a system of control or of checking the aids to navigation by the various branches, sections or personnel of the Department who had been entrusted with the responsibility of ensuring that such aids were properly maintained and their location from time to time ascertained in order to give timely warning to navigators. This was a

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[19] [1952] P. 1; [1951] 2 Lloyd's Rep. 308.

[20] [1915] A.C. 705.

[21] Marsden's Collision at Sea, Tenth Edition, at p. 189. "It has been said that to constitute actual fault the owner's action need not have been the sole or next or chief cause of the occurrence but it must be a contributory cause.

[22] In *Paterson Steamships Ltd. v. Canadian Co-operative Wheat Producers Ltd.* [1935] S.C.R. 617 Rinfret J. stated at p. 626 that "The words 'actual fault or privity' include acts of omission".

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responsibility which clearly falls within the province of an employer[23] and which may I add, if reasonably fulfilled, would have prevented this disastrous and costly collision.

That such a system was possible appears clearly in my view from the fact that a simple system of periodic triangulation or the placing of a couple of bridging marks on the shore would have allowed them to determine from time to time whether the piers were shifting. The standard of care required is not, in any case, that of perfection, but the standard of what would be done or left undone by a reasonable manager of Aids to Navigation in all the existing circumstances of this case would, it seems to me, be at least the setting up of a system of control as described above. Such a precautionary measure would, I should think, be commonly taken by people in charge of such important guides for navigation. The establishment of such a system, in view of the age of the piers involved in this case, the known impact of ice every spring, the reports of deterioration received, as wall as the report received

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[23] In *Hudson v. Ridge Co.* [1957] 2 All E.R. 229, Streatfield J. clearly describes the direct responsibility of employers at p. 230.

The question arises whether the employers are responsible. Counsel for the plaintiff did not contend that the employers were vicariously liable for any negligent act of a fellow servant: his contention was that they were primarily liable because they were guilty of a breach of their common law duty to take care for the safety of their employees. This is an unusual case, because the particular form of lack of care by the employers alleged is that they failed to maintain discipline and to take proper steps to put an end to this stupid skylarking which was likely to lead, or might lead, to injury at some time in the future.

As it seems to me, the matter is covered not by authority so much as principle. It is the duty of employers, for the safety of their employees, to have reasonably safe plant and machinery. It is their duty to have premises, which are similarly reasonably safe. It is their duty to have a reasonably safe system of work. It is their duty to employ reasonably competent fellow workmen. All of those duties exist at common law for the safety of the workmen, and, if, for instance, it is found that a piece of plant or part of the premises is not reasonably safe, it is the duty of the employers to cure it, to make it safe and to remove that source of danger. In the same way, if the system of working is found, in practice, to be beset with dangers, it is the duty of the employers to evolve a reasonably safe system of working so as to obviate those dangers, and, on principle, it seems to me that, if, in fact, a fellow workman is not merely incompetent but, by his habitual conduct, is likely to prove a source of danger to his fellow employees, a duty lies fairly and squarely on the employers to remove that source of danger.

from the Pilot of the *Trein Maersk* in 1964, was, in my view, obviously indicated in the present circumstances and all managerial levels to whom responsibility for these aids had been delegated should, I believe, bear responsibility for what I here term the failure of management which the facts disclose. The evidence also discloses that after the accident in 1965, a system, as explained by Mr. Baldwin, was immediately implemented.

He was indeed asked by Mr. Hyndman, one of the counsel for the suppliants, the following questions and gave the following answers at pp. 185 to 187 of the transcript:

Q . . . is it correct, that after this casualty in 1965, which is to say in 1965, '66 or '67 or even 1968, that a different system is implemented (sic) in the Department, whereby there is an annual check made of all such Aides to Navigation—annual or periodic checks?

A. It is my understanding of the situation, that some changes in operating procedures were made following the accident by the Aides to Navigation Branch, but it is further my understanding, that this did not take the form of an instruction in the sense of the phrase you have used, but in the sense of guide lines, that were used by the Aides to Navigation Branch to inform agents of various areas of checking, that they should keep an eye on.

Q. Right—by whom were you informed of this new directive or guide line or instruction or call it what you will?

A. I was informed by the Assistant-Deputy Minister for Marine, that such a step was under review and that at a later stage, that it was expected that the Aides to Navigation would make use of some guide lines, which in their opinion, would represent not a basic or major change, but a—if you like, an improvement in the light of new information...

It is quite impossible for me to conclude also from the above observations that the respondent has not breached a duty attached to its ownership and control of the pier involved herein nor that it has taken all reasonable means to prevent the damages caused by the thing it had under its care or control, which it had to do in order to successfully rebut the legal presumption of liability under article 1054 C.C. It therefore follows that I am not, of course, satisfied that the loss and damage in question in this case occurred without the actual fault or privity of the Crown and in my judgment, therefore, the claim on behalf of Her Majesty for limitation of liability fails and must be dismissed.

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There remains one matter of substance to be dealt with which is whether the suppliants are entitled to interest on the damages to be assessed against the respondent herein and, if so, at what rate.

My task in examining the various decisions of this Court as well as the Supreme Court has been considerably lessened by the well prepared written memorandum by counsel for the suppliants from which I will hereafter draw extensively.

The assumption has always been that as far as the Crown is concerned, no interest can be allowed against it unless there is a statute or agreement providing for it, cf. *Hochelaga Shipping and Towing Co. v. The King*[24] and *His Majesty the King v. The Royal Bank of Canada*[25].

The matter of interest is dealt with on a permissive basis and in the same manner in both section 53 of the *Exchequer Court Act* and section 18 of the *Crown Liability Act*, 1-2 Elizabeth II, chapter 30 and reads as follows:

Section 18:

18. The Minister of Finance may allow and pay out of the Consolidated Revenue Fund to any person entitled by a judgment under this Act to any money or costs, interest thereon at a rate not exceeding four per cent from the date of the judgment until the money or costs are paid.

There is also, of course, section 47(*b*) of the *Exchequer Court Act* which, however, deals only with written contractual claims. It reads as follows:

47. In adjudicating upon any claim arising out of any contract in writing, the Court shall decide in accordance with the stipulations in such contract, and shall not allow...

(*b*) interest on any sum of money that the Court considers to be due to the claimant, in the absence of any contract in writing stipulating for payment of such interest or of a statute providing in such case for the payment of interest by the Crown.

The question to be determined is whether the Crown has a special privilege with regard to the matter of interest or whether it is merely in the same situation as an ordinary defendant. It may well be, that as under the common law no interest was payable unless provided by a statute or an

[24] [1944] S.C.R. 138.

[25] [1948] S.C.R. 28.

agreement, the same rule was applied also to the Crown and permissive sections (53 of the *Exchequer Court Act* and 18 of the *Crown Liability Act*) were merely adopted to allow interest in meritorious cases.

It seems that generally speaking, interest was not payable on a debt at common law except in certain cases only and if provided by statute.

According to *Halsbury's Laws of England,* 3rd edition, vol. 27, at p. 8, paragraph 8, it is stated that:

> At common law, interest is payable (1) where there is an express agreement to pay interest; (2) where an agreement to pay interest can be implied from the course of dealing with the parties or from the nature of the transaction between the parties or from the nature of the transaction or a custom or usage of the trade or profession concerned; (3) in certain cases, by way of damages for breach of contract (other than a contract to pay money) where the contract, if performed, would to the knowledge of the parties have entitled the plaintiff to receive interest.

According to the same author, 3rd edition, vol. 11, at p. 21, paragraph 33 "the Crown is in the same position as a subject as regards interest on debts and damages, and on judgment debts and costs", and (cf. vol. 22, p. 782, paragraph 1662)

> Every judgment debt, including debts to and from the Crown, carries interest at 4 per cent per annum from the time of entering up judgment.

This meant that in most claims in tort the plaintiff could only get interest on the damages awarded from the date of the judgment and not from the date the cause of action arose. This was changed however in the United Kingdom by the *Law Reform (Miscellaneous provisions) Act* of 1934, which gave the court discretion to allow interest from the date the cause of action arose. The situation in Ontario apparently has not changed in this regard. The *Judicature Act,* R.S.O. 1960, c. 917, sections 35 and 36, provides that interest may be payable in certain limited cases. According to Holmstead and Gale on The Judicature Act of Ontario and Rules of Practice, vol. 1, 1968, at p. 275:

> In certain kinds of tort claims, interest may be allowed by way of damages, e.g. in the case of conversion of or trespass to goods, as noted above.

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> In other actions of tort, semble, that the general principles stated in *Borthwick v. Eldershe S.S. Company* [1905] 2 K.B. 516 at 520, viz: "where the withholding (of money) merely arises in the ordinary process of ascertaining the liability it could not properly be called wrongful."

Ridell J. in *Rowan v. Toronto Ry. Co.*[26] referred to the abhorrence of interest exhibited by the common law and the English objections to interest or usuary as being an explanation for the inability of the plaintiff to collect interest on his damages.

This practice, however, was in contrast to the practice in the Admiralty Court where interest was awarded in the case of the destruction of a ship from the date of the collision (cf. *The Northumbria*[27]; *The Amalia*[28]. In *Straker v. Hartland*[29], the Court of Chancery, hearing a matter which arose out of the collision of two vessels applied the Admiralty rule in allowing interest from the date of the collision.

The position taken in the present case appears to be, as already mentioned, that the Crown is not liable to pay interest unless there is some statute stating that it is so liable or there is a contract between the Crown and the suppliant which deals with the interest to be paid.

The earliest case cited as an authority for this proposition is *In Re Gosman*[30] where, in a very short judgment, the Court said:

> There is no ground for charging the Crown for interest. Interest is only payable by statute or contract.

In *Algoma Central Ry. Co. v. The King*[31] it was stated that the Crown is not liable for interest in Canada as well as in a number of other cases, but it does not appear from these decisions that the Crown holds a special position with regard to interest. It would, indeed, seem to be in the same position as a defendant was, or is at common law. In a number of cases originating in the Province of Quebec, even in actions against the Crown or its agencies, the Quebec practice of allowing interest from the date of the

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26 (1918) 43 O.L.R. 164.
27 (1869) L.R. 3A & E. 6.
28 (1863) 15 E.R. 778
29 (1864) 2 H & M 570.
30 (1881) 17 Ch. D. 771.
31 (1901) 7 Ex. C.R. 239.

institution of the action seems to have been followed. The position of the civil law as regards interest (cf. 1056 C.C.) varies from the common law and this was pointed out in the *Northumbria* (*supra*) at p. 10:

> But it appears to me quite a sufficient answer to these authorities to say that the Admiralty Court, in the exercise of an equitable jurisdiction, has proceeded upon another and different principle from that on which the common law authorities appear to be founded. The principle adopted by the Admiralty Court has been that of the civil law—that interest was always due to the obligee when payment was not made *ex mora* of the *obligor*, and that whether the obligation arose *ex contractu* or *delicto*.

The Quebec Civil Code provides in article 1056 that "the amount awarded by judgment for damages resulting from an offence or a quasi-offence bears interest at the legal rate as from the date when the action at law was instituted". This article was introduced on February 21, 1957. It appears, however, from a decision of the Quebec Court of Appeal in *Leduc et al. v. Laurentian Motor Products Ltd. et al.*[32] that it does not create a new right but merely specifies the manner in which the courts should give effect to a right already existing.

The first reported case establishing that the Crown is liable to pay interest in Quebec is *St. Louis v. The Queen*[33] where the Crown was sued for the balance alleged to be due on a contract. The Exchequer Court found in favour of the Crown, but on appeal the suppliant's claim was allowed, Taschereau J. stating at p. 665:

> Judgment will therefore be entered for $61,842.29 with interest from the 2nd of December, 1893, the date of the petition of right and costs.

There is no other reference to the payment of interest, no cases are cited and no reasons are given for allowing interest in this case.

Interest was also allowed in *Laine v. The Queen*[34] which was also a claim under a contract originating in Quebec.

The court comments at p. 128:

> With reference to interest, it has been the rule of this Court not to allow interest except where the same was made payable by statute

[32] [1961] Que. Q.B. 509. [33] (1896) 25 S.C.R. 649.
[34] (1896) 5 Ex. C.R. 103.

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or by contract. But in the case of *St. Louis v. The Queen,* lately decided in the Supreme Court and not yet reported, that Court, I understand, allowed interest to a contractor on the amount found to be due to him, from date affixed to his petition of right.

I do not understand that any reasons were given for departing from the rule laid down in *Gosman's* case but I assume that as the contract in question in *St. Louis'* case was performed within the Province of Quebec, the practice in force in that Province to treat the service of process as a demand of interest, and to allow interest from that date, was followed; the Court being, it would appear, of opinion that the Crown is bound by the rule or practice in that behalf in force in that Province. The rule is, it seems to me, a fair one. It affords at least a measure of relief and justice to suppliants who, in the absence of any statutory provision, or an express agreement, lose the interest on monies that may be found to be justly due to them from the Crown. The only question is as to whether or not the rule is applicable to a petition of right, and that I take to be settled as far as the Province of Quebec is concerned by the case to which I have referred. It may, perhaps, be thought to be unfortunate that the practice should not be uniform throughout Canada, but that is the question for the legislature.

With reference to the date from which interest should be allowed, I am not sure that it would be safe, as a general rule, to allow it from the date when the petition is signed; because in such a case, it would be very easy for the suppliant to antedate his petition. Besides, it would be unreasonable to hold the Crown liable on a demand of which it has had no notice. If the practice in force in Quebec is to be followed, it should, it seems to me, be followed as closely as possible; and I should think that interest should not be allowed at least prior to the date when the petition of right is filed in the office of the Secretary of State.

In 1897 in *Henderson v. The Queen*[35] the question of interest was again dealt with when the Crown was again found liable under a contract and the suppliant claimed interest. The suppliant was successful and the court stated at p. 49 that:

...interest was allowed upon the authority of the case of *St. Louis v. The Queen,* and not because I had myself formed any decided view that the plaintiff was entitled to it. Apart from that case, I should not be at all sure that the Crown is bound by the practice prevailing in Quebec to allow interest from the service of the Writ.

This case then went to the Supreme Court and Taschereau J. stated at p. 434:

A third ground of appeal taken by the Crown is upon the question of interest which the judgment appealed from allowed to the

[35] 6 Ex. C.R. 39, 28 S.C.R. 425.

Respondents upon the amount of the judgment since the date of the reference to the Exchequer Court.

Upon this point the appeal fails. The law of the Province of Quebec rules this case, and according to that law, such interest must be allowed upon a claim of this nature. This is not a case upon a written contract, so that Section 33[36] of the Exchequer Court Act does not apply.

The question of interest was dealt with also in accordance with the law of Quebec in *Ross v. The King*[37].

In *Leclerc v. The King*[38], the suppliant sought to recover damages suffered by reason of delay in transportation. The Court, per Audette J., held that the Crown was liable for the negligence of its employees and interest was awarded from the date at which the petition was left with the Secretary of State.

In *National Dock and Dredging Corp. v. The King*[39], Audette J. again found in favour of the suppliant and stated at p. 56:

> Following the decision of the Supreme Court of Canada in the case of *The Queen v. Henderson*, the cause of action having also originated in the Province of Quebec, the amount recovered will carry interest from the date the petition of right was left with the Secretary of State (Section 4, Petition of Right Act). This date may be established by affidavit. Failing which the interest will run from the date the petition was filed in this Court.

I should also refer to a more recent decision of the Supreme Court of Canada in *Langlois v. Canadian Commercial Corp.*[40], a Quebec case, where an agency of the Crown was sued in contractual damages and where the Court allowed interest in accordance with the law of Quebec on the basis that the obligation incurred by the corporate agency on behalf of the Crown was to be considered as having been incurred by the corporation itself. It was contended in the above case that had the defendant been the Crown and had the action been taken in the Exchequer

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[36] It is interesting to note that section 33 was the forerunner of section 47(*b*) of the present Exchequer Court Act.

[37] (1902) 32 S.C.R. 532.

[38] 20 Ex. C.R. 236.

[39] [1929] Ex. C.R. 40.

[40] [1956] S.C.R. 954.

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Court, it would not have been possible to obtain interest on the damages allowed as the contract in this case was one in writing which fell under the prohibition of section 47(*b*) of the *Exchequer Court Act*.

From this review of the case law it would seem that, with the exception of sections 47 and 53 of the *Exchequer Court Act* and section 18 of *The Crown Liability Act* the Crown holds no special position with regard to interest and is in the same situation as a defendant at common law and should, therefore, in this case be in the same position as a defendant in the province of Quebec. I would, however, go one step further and say that even if the law was that interest can be granted against the Crown only when authorized by statute or accepted by agreement, section 2(*d*) together with section 3(1)(*a*) and (*b*) of the *Crown Liability Act*, would in my view meet with the statutory requirement. If such is the case, claims originating in Quebec, founded on tort and governed by the *Crown Liability Act*, may possibly be dealt with in a manner different from claims originating in another Province. The question is an interesting one and in view of the large amounts involved in this case, an important one. Having regard to the language used in the *Crown Liability Act*, section 3(1)(*a*) and (*b*), it appears that the liability of the Crown for damages caused by tort (which in Quebec means under 2(*d*) delict or quasi-delict) is that of a private person of full age and capacity.

The *Crown Liability Act*, indeed, imposes a liability upon the Crown in such cases for damages as if the Crown was a private person and as far as the relevant law of the province of Quebec is concerned, such damages in such cases always bear interest at the legal rate as from the date when the action at law was instituted (1056 C.C.). The question here is whether section 18 of the *Crown Liability Act* which permits the Minister of Finance "to allow and pay out . . . to any person entitled by a judgment under this Act to any money or costs, interest thereon at a rate not exceeding four per cent from the date of the judgment

until the money or costs are paid", implies that in all claims against the Crown this is the only way interest can be granted.

The above section in my view does not set down such a rule. It deals only with the allowance of interest after judgment and, therefore, deals only with the allowance of interest from the date of the judgment to the payment of the amount awarded. It is also merely permissive, which in view of the reluctance of the common law in some cases to allow interest, gives the Minister a discretion when the common law of a Province may not grant any. This section, indeed, does not say that no interest is chargeable against the Crown, but merely that in some cases, interest may be granted. It would, I should think, take clearer language than this to set aside the right of a claimant from Quebec to obtain compensation for the damages and interest he is entitled to obtain under the laws of that Province and to which the *Crown Liability Act* refers in order to create the liability of the Crown in such cases. After a careful consideration of this matter, I can indeed reach no other conclusion without disregarding the clear language used in section 3(1)(*a*) and (*b*) and 2(*d*) of the Act. The suppliants will, therefore, be entitled to interest from the date of the deposit of their petition of right at a rate of five per cent (5%)[41] which is the legal rate mentioned in Art. 1056 C.C.

It therefore follows that suppliants' petition of right is maintained with costs and they are entitled to whatever damages may be assessed as hereinafter set down with interest at the rate of five per cent (5%) per annum from

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[41] Under section 91 of the BNA Act, Parliament alone can legislate on the subject of interest.

Under section 3 of the *Interest Act* R.S.C. 1952, c. 156, the legal rate of interest is set at 5%.

This statute deals also with the interest to be charged on judgments in sections 13, 14 and 15, but section 12 states that the above sections only apply to Manitoba, British Columbia, Saskatchewan, Alberta and the Territories. Although article 1056 C.C. was not attacked as being *ultra vires* in this case, it is interesting to note that in *Toronto Railway v. City of Toronto* [1906] A.C. 117 an Ontario statute regulating the payment of interest on debts was accepted as effective legislation.

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the date of the deposit of the petition of right. The proceedings taken by the respondent against the third party are dismissed with costs.

An order is issued amending paragraph 70 of the respondent's defence by adding after the words "les dépenses" in the first line thereof, the words, "et les dommages" with costs against the respondent in any event of the cause.

The increased cost of salvaging the vessel from where it capsized as compared to where it could have been taken downstream shall not be recoverable from the respondent.

The matter of assessing the suppliants' damages as well as the matter of determining the difference in the cost of salvaging the vessel from where it capsized as compared to where it could have been taken downstream, shall be determined by reference and in the event of an appeal, such reference shall take place after the appeal.

The respondent is not entitled to limit its liability under the *Canada Shipping Act* and its counterclaim in respect thereto is dismissed with costs. The costs, in the main action, in the third party claim and in the counterclaim shall be determined by taxation before the registrar, unless the parties by consent indicate, subsequent hereto, that they are prepared to have this Court determine such costs by the fixing of a lump or fixed sum in lieu of taxed costs at which time the matter may be further spoken to if necessary.

BETWEEN:

EMCO LIMITED ..... APPELLANT;

AND

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

Montreal 1968 June 17 Oct. 16

Income tax—Capital cost allowances—Buildings sold for value of land alone—Price treated as recaptured allowance—Subsequently adding amount back—Income Tax Act, secs. 11(1), 20(5)(e), 20(6)(g).

Two old buildings purchased by appellant company in 1954 in Montreal and Quebec were used by appellant in its business pending its location elsewhere and were sold in 1956 and 1957 to purchasers who demolished them. Appellant treated the purchase price received for the buildings in 1956 and 1957 as being recaptured capital cost allowances and reduced the undepreciated capital cost assigned to its property of that class accordingly. Following the decision of this court in *M.N.R. v. Steen Realty Ltd.* ([1964] Ex. C.R. 543) appellant added back the amounts so deducted in 1956 and 1957 on the ground that no part of the price received from the purchasers was for the buildings on the land but for the land only, and claimed capital cost allowances for 1960 on the increased amount.

Held, allowing an appeal from the Tax Appeal Board, appellant was entitled to the deduction claimed in 1960.

APPEAL from Tax Appeal Board.

Philip F. Vineberg, Q.C. for appellant.

M. A. Mogan for respondent.

NOËL J.:—This is an appeal from a decision of the Tax Appeal Board[1] which confirmed an assessment dated April 24, 1963, wherein a sum of $6,739.95 was added to the appellant's taxable income for its 1960 taxation year as capital cost allowance claimed in 1960 on amounts recaptured on disposal of a number of buildings situated in Montreal and Quebec City in the years 1956 and 1957 respectively.

The appellant, an Ontario company, located in London, Ontario, purchased in 1953, at which time its name was Empire Bros. Ltd., the outstanding shares of a Quebec company, called Thomas Robertson Ltd. which, at the time, was a client and to some extent in a small area in the eastern part of Ontario a competitor of the appellant. This company was in the plumbing and heating supply business and owned a number of buildings situated on

[1] 40 Tax A.B.C. 97.

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Craig Street and Common Street in the city of Montreal and on Ste-Marguerite Street, in the city of Quebec, from which it carried on its operations.

In January 1954, Thomas Robertson Ltd. was wound up and its assets, including the above mentioned buildings, passed directly on to the books of the appellant which from the date of purchase of the shares of the above corporation, in 1953, carried on its business operations in Montreal and Quebec City in these buildings until the Montreal buildings were sold in 1956 to the Montreal Star, a local newspaper, and the Quebec buildings, in 1957, to La Compagnie Paquet, a departmental store.

In accordance with section 144 of the *Income Tax Act*, the undepreciated capital cost of the buildings for the purpose of section 20 of the Act (as they had all been acquired by Thomas Robertson prior to the year 1949) was in 1956 and there is agreement by the parties on these figures, $42,252.37 for the Montreal buildings (of which $25,170.53 was for the Common Street building sold to a transport company and which is not relevant to the present appeal) and $17,081.84 for the Craig Street buildings, which is relevant to the present appeal. The undepreciated capital cost of the Quebec buildings in 1957 was $63,544.62 and the deemed capital cost of these buildings was $92,544.62.

The evidence discloses that the original building in Montreal had been constructed around 1887 and the upper part of this building on Craig Street from the ground up was rented to Union Electric for an amount of $480 per month. According to Mr. Stevens, chairman of the board of Emco Limited (the appellant), the building and premises were not satisfactory for their operations. The cost to operate in the Montreal building was very high in comparison to a modern warehouse; the shipping facilities were very limited and at certain times of the day, particularly when newsprint and other supplies of that type were being delivered to the Montreal Star, its next door neighbour, its laneway was blocked. There was no parking allowed on Craig Street and the appellant's business depends considerably on what is called pick-up business. Mr. Stevens stated that there was no question in their minds the day the appellant company acquired the buildings that they intended to dispose of this property.

The Quebec City property located at 673 Ste-Marguerite was in the shape of an "L", fronted on both Ste-Marguerite Street and Bridge Street and covered some 21,000 square feet.

Although appellant's predecessors had expended from 1940 to 1951 some $70,000 on the Quebec City buildings in either constructing or renovating them, Mr. Stevens stated, and the evidence discloses, that these premises also were not satisfactory for the requirements of their business, in that they were inadequate to receive and deliver goods. Furthermore, the warehouse part was on four levels and the movement of material was very difficult. He states that here also it was firmly fixed in his mind that economies could be effected by getting into a warehouse where material handling was less difficult.

The appellant operated its business from the above premises from the date of the purchase of the shares of Thomas Robertson Ltd., in 1953, until the year 1956, when it sold its Montreal properties on Craig Street to the Montreal Star for $300,000 and until the year 1957, when it sold its Quebec City properties to the Paquet Company for the sum of $215,000.

The deal for the Montreal property was closed in early 1955 and the appellant was allowed to use it until completion of its new premises and remained in the buildings until after July 1, 1956, when it was turned over to the purchasers. The evidence discloses that the appellant carried fire insurance on its Montreal properties in the amount of $1,100,000 although this was on the combined buildings (of Craig Street and Common Street) as well as their contents, which, according to the evidence, could reach at times an amount close to the full insurance coverage. Exhibit R-4 shows that the municipal assessment for the relevant Montreal properties was $102,900 for the buildings (including the one situated on Common Street) and $102,500 for the land.

The deed of sale of the Quebec properties was executed on July 19, 1957, and the appellant was given six months' time (and later a further additional 3 months) to vacate the premises in order to allow it to construct a new building. The appellant vacated the buildings some eight or nine months after signing the deed. During the period of occupancy by the appellant of the Quebec buildings after

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the sale, Emco undertook to pay and did pay the insurance premiums covering the buildings sold which were in an amount of $150,000. The municipal assessment for the property in Quebec for the year 1955-56 was $32,530 for the buildings and $15,170 for the land.

The appellant, upon the sale of its properties in Montreal in 1956, reduced its class 3 assets by an amount of $17,081.84, the undepreciated capital cost of the building sold, as being the proceeds of disposition for these buildings. When the Quebec property was sold in 1957, the appellant, instead of reducing its class 3 assets by an amount of $63,500.78 which correspond to the undepreciated capital cost of the Quebec building in 1957, inconsistently reduced it by an amount of $92,544.62 which happened to be the historical cost of the buildings. By so reducing in both instances the amount of its class 3 depreciables, the appellant, of course, reduced also the amount of capital cost it could have taken following their sale.

N. A. Robert Martin, the controller of the appellant company explained that as a result of a decision of this court in *M.N.R. v. Steen Realty Ltd.*[2] it reversed, in 1960, the above entries by adding back the amount of $17,081.84 and $92,544.62 and then calculated in that year its capital cost allowance from the increased amounts thus obtained.

It was indeed held *in re Steen Realty,* where the facts were very similar to the present case, that as the purchasers had paid the full price for the land alone and that it was not reasonable to regard any part of the sale price as being the consideration for the disposition of the buildings, no amount should be deducted for the value of the buildings. The appellant also felt, and for the same reason, that it did not have to deduct and should not have deducted in 1956 and 1957 any amounts for the sale of its properties in Montreal and Quebec.

Before dealing with the matter of the apportionment of the selling price of the appellant's real property between land and buildings, respondent's submission that the appellant is now barred from adding in 1960 amounts which it had deducted in the years 1956 and 1957 must now be considered. Counsel for the respondent urged that, under the theory of estoppel which he says applies here, the

[2] [1964] Ex. C.R. 543.

appellant is prevented from correcting, in 1960, the situation it created in 1956 and 1957. He submitted that where a person makes a representation of a fact and another person acts on it to his detriment, the person who makes the representation is estopped from denying the original representation. He suggested that in the present case, the allocation made by the taxpayer when the amounts were deducted in 1956 and 1957, was the representation and that the subsequent assessment on that representation was the acceptance of it or the action taken by the Minister thereon. Such a representation acted upon by the Minister cannot, he says, later be changed because such a change would be to the detriment of the Minister in that over the passage of time, it becomes more and more difficult for the Minister to ascertain what was in the minds of the vendor and purchaser at the time of the disposal to a point where it could become impossible to ascertain the true facts at the time of sale.

The framework of the Act, he says, is such that after assessment for a particular year and the expiration of the period of appeal, the matter is closed and there is no possibility of reopening it by means of a journal entry.

Counsel further submitted that even without the theory of estoppel, the appellant could not do what it did because under section 20(5)(*e*) of the Act, which deals with the calculation of undepreciated capital cost such a calculation must be consistent with prior years and that the only adjustments permissible are those which deal with transactions in the year. He indeed draws such a conclusion from the definition of undepreciated capital cost in section 20(5)(*e*) of the Act which indicates that the time at which a particular disposal takes place is essential to the proper application of the formula set down to calculate a capital cost at a particular time as it refers to the cost of depreciable property before that time minus the aggregate of the total depreciation allowed before that time.

According to the respondent, the appellant took a position in 1956 and 1957 upon two transactions in those years that some of the proceeds of disposition of its properties were referable to the buildings. This was accepted by the Minister by way of an assessment and the only possibility for the taxpayer to challenge that decision of the Minister was by way of an appeal or by having the Minister chal-

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lenge it by disallowing it. As this did not happen here, it is now too late to change it. He cannot, says he, reverse an allocation made on a series of transactions made a few years ago by means of a simple journal entry.

There is an answer to the position taken by the Minister herein in that one must not overlook the optional character of depreciation or of cost allowances. Indeed, the rates established for each class are applied to the undepreciated capital cost of the assets in that class as a whole and not to individual assets in that class and they are maxima rates as the taxpayer need not take the full amount allowed for depreciation in any given taxation year and may even take no amount at all and then take it in later years. Section 11(1) which sets down that such part of the capital cost of property "*may* be deducted in computing the income of a taxpayer..." indicates clearly the choice one has in this matter.

It may, of course, happen that a taxpayer does not obtain as much benefit or money out of taking capital cost allowances later rather than earlier as deceleration of capital cost is a depressant to the taxpayer. He may, however, have an interest in taking it later because he is not making enough or any profit at all, or is even suffering a loss and the cost allowance regulations under the Act are set up precisely to provide for such a situation.

In my view, it cannot be said that when the appellant deducted the amounts it did in 1956 and 1957, it made an allocation. It merely did not take the full amount of depreciation or cost allowance it was entitled to take under the Act and its regulations and this, it appears clearly, was done out of ignorance or a failure to appreciate the nature of the law. There was, however, no allocation made in its tax returns. The appellant in those years merely took less capital cost allowance, as it was under the Act entitled to take, and it was perfectly free to take, in 1960, a capital cost allowance to the extent allowed by the regulations at the undepreciated capital cost it was entitled to in that year. The only matter it had to determine in 1960 was what was the undepreciated capital in that year on which it was entitled to calculate the capital cost allowance it had a right to deduct. The appellant realized in 1960 that it had a greater amount of undepreciated capital cost on which it was entitled to calculate its capital cost than it

had after erroneously deducting the amounts it did deduct in 1956 and 1957 and, therefore, added them back to the pool of its assets.

The respondent claims that to allow such a correction to be made is detrimental to the Minister in that it becomes most difficult for him in later years to find out what is in the minds of the vendor and purchaser at the time of disposal. There is, in my view, no substance to this submission in that it is always (except beyond the four year period from the assessment, and this is not the situation here) the taxpayer who must rebut the facts assumed by the Minister in assessing him. The onus here is, indeed, on the taxpayer to establish that the deductions it made were in fact errors and if it does not establish the circumstances of the disposal of its property and rebut the Minister's assumptions, the assessments will be maintained.

I cannot see why the appellant cannot, in 1960, take whatever capital cost allowances it is entitled to take from a proper calculation of the undepreciated capital cost of its assets at that date even if it has prior thereto mistakenly calculated the undepreciated cost of its assets.

I also cannot see how such a course of action can or does upset what respondent claims is essential (the time at which a particular disposal takes place) to the proper application of the formula set down in section 20(5)(*e*) of the Act in order to calculate the capital cost which a taxpayer is entitled to deduct from his taxable income; nor does it give the appellant here any more than what it is entitled to receive under the Act and the pertinent regulations. As a matter of fact, in a sense the Department here gains from the procedure adopted by the appellant because the latter thereby pays too much too early and it cannot, in 1960, go back and recover whatever capital cost allowances it could have deducted in 1956 or 1957. It therefore follows that the appellant was not barred in 1960 from correcting the amount of its pool for its class 3 assets and the only question now remaining is whether or not it was right in assigning no part of the sale price to its buildings and then adding back as it did, the amounts it had deducted in 1956 and 1957.

Section 20(6)(*g*) of the *Income Tax Act* provides that where an amount can reasonably be regarded as being in part consideration for disposition of depreciable property

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and in part consideration for something else, the part that can reasonably be considered as being the consideration for such disposition shall be deemed to be the proceeds of disposition and the purchaser shall be deemed to have acquired the property at a capital cost to him equal to the same part of that amount. Is it reasonable to consider in the circumstances of the present case that any part of the price was consideration for the disposition of the buildings.

The property in Montreal consisted of some old buildings. There were some old buildings in Quebec City as well, some were renovated and one structure was built in 1951. Some of the buildings had been producing an annual net rental in Quebec of $840 and in Montreal of $5,760. It is difficult to estimate the full rental value of the buildings or their value to a concern that would want to pursue its operations therein, but it certainly would have been uneconomical for the vendor to hold on to them or even lease them out or for a purchaser to invest in them or in view of their inadequateness, even use them in his business.

It appears immaterial to me that the buildings may have had some continuing value to the appellant in the sense that in both cases it continued for a few months to use them until it had relocated elsewhere. This was of a transitional nature only and gave the buildings used after the sale no greater value than what they had at the time of the sales.

It is true that in both cases, insurance on the buildings was continued and the premiums were paid by the appellant for a few months during its occupancy after the sale until it relocated elsewhere. The insurance coverage of the buildings in Montreal, which would be part of the $1,100,000 coverage is somewhat indefinite as this covered the building on Common Street as well and also the contents of the building and its inventory. It was, however, a normal precautionary measure to continue this coverage during this period and until such time as the appellant had made proper arrangements to settle elsewhere, particularly with regard to the inventory which, if destroyed by fire, would have been disastrous. The insurance coverage in Quebec was in the amount of $150,000. It was, according to Mr. Stevens, an officer of the appellant, upon the purchaser's request that this insurance was continued not

because of the value to it of the buildings but because the destruction of the buildings would have permitted the purchaser to pay off part of the purchase price from the proceeds of the insurance. It is my view that in neither case the amounts for which the buildings were insured reflect the value of the buildings in the sale of the properties.

It is clear that we are faced here with a situation where, in both cases, because of the location of the buildings in a busy business sector of both cities, the best and most profitable use of these properties became their conversion into parking lots and this, of course, indicates that the buildings had been reduced to a nil value. The same situation would apply to a piece of machinery which became obsolete, and was scrapped, and was replaced by a new one. Under present capital cost regulations, the undepreciated value of the machinery, when scrapped, would still continue to be depreciated as well as the new machine purchased to replace it because (in view of the class system) a taxpayer can keep on taking depreciation on assets it no longer has.

It is indeed a truism that where land values are rising, the best and most profitable use of the property is to get rid of the buildings in order to use it for parking or to erect thereon a larger and more profitable building. As a matter of fact, the evidence discloses in both cases here that at the exchange level, the appellant's buildings had only a nuisance value. Mr. Brown of the Montreal Star even stated that if the building had not been on the Montreal property, the Star would have paid a higher price than it did and the same would apply to the Quebec City properties. The evidence also shows clearly that the purchaser of the appellant's properties had informed the appellant that they were being acquired for site purposes only and the buildings were demolished by the purchasers at their expense a few months after sales had taken place and immediately after the appellant had vacated the premises.

Counsel for the respondent agreed that had the appellant in both cases prior to the sales demolished the buildings, there would have been no question that no amount could have been allocated to the buildings. I can see no

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reason to treat the matter differently merely because the purchaser demolished the buildings after purchasing the properties.

I must, I believe, conclude, that the evidence indicates clearly that the bargaining between the parties, the meeting of minds on both sides in these transactions, were exclusively attributable to the value of the land and nothing was attributable to the buildings. I am, therefore, satisfied that no amount of the selling price of these properties can be reasonably regarded as proceeds of disposition of the buildings and the appellant was right in adding back as it did in 1960 the undepreciated cost of its buildings. The facts here, in my view, are no different than those found by this Court in *M.N.R. v. Steen Realty Limited (supra)* where no part of the sale price was attributed to the buildings and I see no reason to reach a different conclusion here.

Counsel for both parties agreed at the hearing that the amount to be added back is $92,544.62 for the Quebec buildings and $17,081.84 for the Montreal buildings.

The appeal is therefore allowed with costs and the matter is referred back to the Minister for reassessment accordingly.

Ottawa
1968
Oct 11
Oct. 23

BETWEEN:

PHILCO-FORD CORPORATION .....PLAINTIFF;

AND

RADIO CORPORATION OF AMERICA ....DEFENDANT.

Patents—Conflict proceedings—Commissioner permitting defendant to substitute claim—Whether in excess of his powers—Pleadings—Motion to strike out—Embarrassing allegation—Restricted nature of proceedings—Patent Act, s. 45(8).

Following the commencement of conflict proceedings defendant's claim in conflict was cancelled and a new claim substituted therefor and this claim was ultimately awarded defendant by the Commissioner of Patents. Plaintiff alleged *inter alia* that the Commissioner exceeded his authority in continuing the proceedings after the cancellation of defendant's original claim and in awarding the substituted claim to defendant and prayed *inter alia* for a declaration that such award was a nullity, that plaintiff was entitled to the original claim, and that defendant was not entitled to the substituted claim.

Held, certain of plaintiff's allegations should be struck out.

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1. Since the controversy following the cancellation of the original claim was confined to the subject matter of the substituted claim plaintiff's allegations and prayers for relief with respect to the original claim were embarrassing *Radio Corp. of America v. Philco Corp.* [1966] S.C.R. 296, referred to.

2 The controversy, though it arose because of the Commissioner's action in permitting the substitution of a new claim for defendant's original claim, went only to the validity of the patent which might issue, which was not the type of question which could be raised in conflict proceedings.

Texaco Development Corp. v. Schlumberger Ltd [1967] 1 Ex. C.R. 459; *Carborundum Co. v. Norton Co.* [1967] 1 Ex. C.R. 466, applied; *Kellogg Co v. Kellogg* [1941] S.C.R. 242; *International Minerals and Chemical Corp. v. Potash Co. of America* [1965] S.C.R. 3; *Standard Oil Co. v. Commissioner of Patents* (1958) 28 Sec. 11 C.P.R. 69 distinguished.

MOTION.

David Watson for plaintiff.

Russel S. Smart, Q.C. for defendant.

THURLOW J.:—This is a motion for an order striking out paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 19 and 20 of the statement of claim and paragraphs (a), (b) and (c) of the prayer for relief thereto on the ground that they relate to matters over which this court has no jurisdiction in an action commenced pursuant to section 45(8) of the *Patent Act* and "that in relation to the determination of the respective rights of the parties pursuant to section 45(8)" they are irrelevant and embarrassing.

Omitting the wording of claim C1 in paragraph 6 the impugned allegations read as follows:

5. By official letter dated January 15, 1962, written under section 45(2) of the Patent Act, R.S.C. 1952, c. 203 as amended, the Commissioner of Patents notified the plaintiff that conflict existed between its application Serial No. 638,606 and another application designated as 000,616, later identified as the defendant's application Serial No. 616,616, in regard to the subject matter as set forth in claim 1 of the plaintiff's application and designated by the Commissioner of Patents as claim C1.

6 Said claim C1 reads as follows:

. . .

7. By said official letter dated January 15, 1962, the plaintiff was advised that if it wished to contest the allowance of the Claim it must be retained in its application, otherwise the claim should be removed.

8 The plaintiff retained said claim C1 in its application

9. By official letter dated April 30, 1962, written under section 45(3) and (4) of the Patent Act, the Commissioner of Patents notified the plaintiff of the maintenance of conflicting subject matter

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in the other application designated as 000,616 and advised the plaintiff that the claim in conflict with application No. 000,616 was claim C1 aforesaid.

10. In compliance with section 45(4) of the Patent Act, the plaintiff was given three months in which to submit prior art and any arguments (other than those based on priority between the parties) against the allowance of the claim in conflict to any or all parties.

11. On July 6, 1962, the plaintiff filed a written submission with the Commissioner of Patents in reply to the official letter dated April 30, 1962.

12. By official letter dated September 21, 1966, purported to be written under section 45(2), (3) and (4) of the Patent Act, the Commissioner of Patents advised the plaintiff that claim C1 aforesaid had been cancelled by the applicants of application No. 000,616 and that extended prosecution of application No. 000,616 under section 45(4) had resulted in the presentation of a new claim as further defining the conflict to replace claim C1 aforesaid.

. . .

19. The plaintiff says that the Commissioner of Patents erred in:

(a) failing to award original conflict claim C1 to the plaintiff following the cancellation by the defendant of the original conflict claim C1 from its said application;

(b) continuing the said conflict proceeding following the cancellation by the defendant of said original conflict claim C1 from its application;

(c) awarding new conflict claim C1 to the defendant when it had cancelled the original conflict claim C1 from its application;

(d) permitting the defendant to assert a new claim to an embodiment of its alleged invention which was not patentably different from the invention defined in the original claim C1 which the defendant had cancelled from its said application.

20. The plaintiff further says that the Commissioner of Patents exceeded his statutory authority in continuing the said conflict proceeding and in awarding new conflict claim C1 to the defendant when the defendant had cancelled the original conflict claim C1 from its patent application Serial No. 616,616.

The statement of claim also alleged that new claim C1 had been put in conflict and had ultimately been awarded to the defendant and reference was made to section 66 to section 74 inclusive of the Patent Rules of which section 68 and section 69 read as follows:

68. Any party to a conflict may, at any time before the commencement of proceedings in the Exchequer Court, avoid the conflict wholly or partially by amendment or cancellation of any of the conflicting claims in his application, but he is not entitled to amend his application otherwise, except for the purpose of defining the conflict, if it contains any conflicting claim.

69. An applicant may not reassert any claim that has been amended or cancelled to avoid a conflict or assert any claim to an embodiment of his invention not patentably different from that defined in a claim so amended or cancelled.

The statement of claim went on to pray for a declaration that as between the parties thereto:

(a) The award by the Commissioner of Patents of new claim C1 to the defendant is a nullity.

(b) The plaintiff is entitled to the issuance of a patent containing original claim C1.

(c) The defendant is not entitled to the issuance of a patent containing original claim C1.

AND IN THE ALTERNATIVE

(d) Robert C. Moore and not G. C. Sziklai, is the first inventor of the subject matter of new claim C1.

(e) The plaintiff is entitled to the issuance of a patent containing new claim C1.

(f) The defendant is not entitled to the issuance of a patent containing new claim C1.

. . .

Section 45 of the *Patent Act* provides as follows:

45. (1) Conflict between two or more pending applications exists

(a) when each of them contains one or more claims defining substantially the same invention, or

(b) when one or more claims of one application describe the invention disclosed in the other application.

(2) When the Commissioner has before him two or more such applications he shall notify each of the applicants of the apparent conflict and transmit to each of them a copy of the conflicting claims, together with a copy of this section; the Commissioner shall give to each applicant the opportunity of inserting the same or similar claims in his application within a specified time.

(3) Where each of two or more of such completed applications contains one or more claims describing as new, and claims an exclusive property or privilege in, things or combinations so nearly identical that, in the opinion of the Commissioner, separate patents to different patentees should not be granted, the Commissioner shall forthwith notify each of the applicants to that effect.

(4) Each of the applicants, within a time to be fixed by the Commissioner, shall either avoid the conflict by the amendment or cancellation of the conflicting claim or claims, or, if unable to make such claims owing to knowledge of prior art, may submit to the Commissioner such prior art alleged to anticipate the claims; thereupon each application shall be re-examined with reference to such prior art, and the Commissioner shall decide if the subject matter of such claims is patentable.

(5) Where the subject matter is found to be patentable and the conflicting claims are retained in the applications, the Commissioner shall require each applicant to file in the Patent Office, in a sealed envelope duly endorsed, within a time specified by him, an affidavit of the record of the invention; the affidavit shall declare:

(a) the date at which the idea of the invention described in the conflicting claims was conceived;

(b) the date upon which the first drawing of the invention was made;

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(c) the date when and the mode in which the first written or verbal disclosure of the invention was made; and

(d) the dates and nature of the successive steps subsequently taken by the inventor to develop and perfect the said invention from time to time up to the date of the filing of the application for patent.

(6) No envelope containing any such affidavit as aforesaid shall be opened, nor shall the affidavit be permitted to be inspected, unless there continues to be a conflict between two or more applicants, in which event all the envelopes shall be opened at the same time by the Commissioner in the presence of the Assistant Commissioner or an examiner as witness thereto, and the date of such opening shall be endorsed upon the affidavits.

(7) The Commissioner, after examining the facts stated in the affidavits, shall determine which of the applicants is the prior inventor to whom he will allow the claims in conflict and shall forward to each applicant a copy of his decision; a copy of each affidavit shall be transmitted to the several applicants.

(8) The claims in conflict shall be rejected or allowed accordingly unless within a time to be fixed by the Commissioner and notified to the several applicants one of them commences proceedings in the Exchequer Court for the determination of their respective rights, in which event the Commissioner shall suspend further action on the applications in conflict until in such action it has been determined either.

(*a*) that there is in fact no conflict between the claims in question,

(*b*) that none of the applicants is entitled to the issue of a patent containing the claims in conflict as applied for by him,

(*c*) that a patent or patents, including substitute claims approved by the Court, may issue to one or more of the applicants, or

(*d*) that one of the applicants is entitled as against the others to the issue of a patent including the claims in conflict as applied for by him.

(9) The Commissioner shall, upon the request of any of the parties to a proceeding under this section, transmit to the Exchequer Court the papers on file in the Patent Office relating to the applications in conflict.

It will be observed that while the statement of claim alleges that new claim C1 is "not patentably different" from old claim C1 there is no allegation that the two claims are in respect of the same subject matter. In the course of argument counsel for the plaintiff conceded that if the two claims were not in respect of the same subject matter paragraph 19(a) of the statement of claim and paragraphs (a), (b) and (c) of the prayer for relief could not be supported since there is no longer any conflict in respect of original claim C1, and only new claim C1 has been put in conflict by the Commissioner. The controversy is there-

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fore confined to its subject matter.[1] Counsel was, however, not prepared to take a position on whether the subject matters were the same or not. In my opinion the pleading in its present state is therefore embarrassing and on this ground alone paragraphs 19(a) of the statement of claim and paragraphs (a), (b) and (c) of the prayer for relief should not be allowed to stand.

Counsel for the plaintiff, however, sought to support the remainder of the impugned allegations on the ground that assuming their truth, as must be done on an application of this kind, they would warrant the declaration sought by paragraph (f) of the prayer for relief that the defendant was not entitled to a patent for new claim C1. His position

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[1] *Vide Radio Corporation of America v. Philco Corporation* [1966] S.C.R. 296, where Martland J. speaking for the Court said at page 304:

> The important point is, however, that, since 1923, Parliament has made it clear in the provisions of the various *Patent Acts* that, notwithstanding the jurisdiction conferred by the *Exchequer Court Act* upon the Exchequer Court to deal with conflicting patent applications, the right to seek redress in that Court by an applicant is governed and limited by the provisions of the *Patent Act* respecting conflicting applications. The conclusion which I draw from the legislative history of the provisions of the *Patent Act* respecting conflicting applications is that, although jurisdiction is conferred upon the Exchequer Court by s. 21 of the *Exchequer Court Act* in cases of conflicting applications for a patent, the right of a party involved in such a conflict to attack the patent application of another party is governed by s 45 and such party is restricted to such rights as are conferred by that section. As previously stated, it is the opinion of this Court that proceedings under subs. (8) of that section are limited to the subject matter of the claims found to be in conflict by the Commissioner.

It might also be noted that while section 45(8) refers to "proceedings" in this Court it does not prescribe the type of such proceedings. That subject is dealt with by Rule 31 of the Rules of this Court which prescribes a somewhat special procedure. It reads:

> RULE 31
>
> Conflicting Applications For a Patent
>
> In any proceeding taken in the Court pursuant to subsec. 4 of sec. 22 of The Patent Act, as enacted by 22-23 Geo. V, c. 21, sec. 1, the applicant shall file with the Registrar of the Court a statement of his claim, and an office copy thereof shall be served upon the Commissioner and upon any other applicant and such applicant shall, within twenty-eight days after the service upon him of such statement of claim, file a statement in defence. Subsequent pleadings, if any, shall follow the general practice of the Court with respect to such pleadings.

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was that if he lost on the question of priority of invention but won on the question so raised of the right of the defendant to have a patent for new claim C1 the result would be a declaration of the kind referred to in section 45(8)(*b*) of the Act that neither party was entitled to a patent including the claim in conflict.

Notwithstanding the able argument put forward and in particular the submission that here, unlike the situation in the cases to be referred to, the question arises out of the action of the Commissioner in connection with the conflicting applications in permitting new claim C1 to be asserted after old claim C1 had been cancelled by the defendant from its application, the point, in my opinion, is simply one of the authority of the Commissioner with respect to an application pending before him, and, if sound, goes only to the validity of any patent he may issue for the claim. The point is thus one of the kind which this court has held may not be raised in an action under section 45(8). Thus in *Texaco Development Corp. v. Schlumberger Ltd.*[2] Jackett P. said:

> It might be of some assistance, in the event that there is an appeal from my order striking out paragraphs 9, 10, 13 and 14, if I indicate, very briefly, that, reading section 45 as a whole, it is my view that it provides for an interruption in an ordinary processing of an application for a patent for the sole purpose of deciding which of two applicants is the inventor (sometimes described as the first inventor) of an invention which is claimed by each of two applications pending in the Patent Office. This interruption in the ordinary processing of applications for patents is extraordinary and should, in my view, be restricted to the determination of the conflict which it is designed to resolve It is for this reason that, while I recognize that the words of paragraph (*b*) of subsection (8) read literally and by themselves are wide enough to include a consideration of such questions as whether the particular claim put in conflict by the Commissioner is an "invention" within the appropriate sense of that word and whether there is a statutory bar under paragraph (*b*) of subsection (1) of section 28 of the *Patent Act* to a grant of a patent to him, nevertheless, having regard to the scheme of section 45, it seems clear to me that paragraph (*b*) of subsection (8) thereof is referring only to the case where "none of the applicants is entitled to the issue of a patent containing the claims in conflict as applied for by him" *because the evidence has revealed that the real inventor of the invention described in the claims in conflict is some person other than the applicants who are before the Court.*
>
> All other objections to the granting of a patent to one of the applicants should be dealt with in the ordinary course of events as they would be dealt with if there had been no conflict proceedings

[2] [1967] 1 Ex. C.R. 459 at p. 465.

under section 45. To construe subsection (8) of section 45 as permitting such questions to be raised in the conflict proceedings converts those proceedings into a full scale impeachment action resulting in a protracted trial and, in my view, something quite different from the relatively simple proceedings contemplated by subsection (8) of section 45.

(The emphasis has been added.)

In *Carborundum Co. v. Norton Co.*[3] the position was even more closely similar to the present. Jackett P., said:

> Paragraphs 7 and 9(a) of the statement of claim in this case contain facts upon which the plaintiff seeks to establish that there is a bar to the grant of a patent to the defendant even if the defendant's inventor is the first inventor of the conflict claims. He endeavours to support the pleading of such facts as a basis for a prayer for judgment in his favour under paragraph (*d*) of subsection (8) of section 45.
>
> Notwithstanding the ingenuity of the argument of counsel for the plaintiff, I cannot escape the conclusion that such pleas are irrelevant to a claim for judgment under that paragraph. Paragraph (*d*) of subsection (8) of section 45 confers jurisdiction on the court to decide that "one of the applicants is entitled *as against the others* to the issue of a patent including the claims in conflict". (The emphasis is mine.)
>
> If the plaintiff alleges and proves that the Commissioner was wrong in not deciding that the plaintiff's inventor was the first inventor, the court can decide that the plaintiff is entitled as against the defendant to the issue of a patent including the claims in conflict. Such a decision can be made whether or not there is some other bar to the grant of a patent to the defendant. Any allegation of such a bar is therefore irrelevant to the claim for relief based on the contention that the plaintiff's inventor was the first inventor. On the other hand, a plea of some alternative bar to the grant of a patent for the conflict claim to the defendant cannot *by itself* be a sufficient basis for decision that the plaintiff is entitled to a patent containing the claim in conflict as long as the Commissioner's decision that the defendant's inventor was the first inventor of that claim remains intact. Such an alternative attack on the defendant's right to a patent is not, therefore, material to a claim for a decision under paragraph (*d*) of subsection (8) of section 45. It is unnecessary to support a claim based on a contention that the plaintiff's inventor and not the defendant's inventor is the first inventor and it is insufficient to support a decision as long as the finding that the defendant's inventor is the first inventor remains intact. I therefore reject the submission of counsel for the plaintiff in so far as paragraph (*d*) of subsection (8) of section 45 is concerned.
>
> Counsel for the plaintiff made an alternative argument with reference to paragraph (*b*) of subsection (8) in which he drew a distinction between the type of plea that was made in *Texaco Development Corp. v. Schlumberger Ltd.* and the type of plea that is made by paragraphs 7 and 9(a) of the amended statement of claim in this case.

[3] [1967] 1 Ex. C.R. 466 at p. 470.

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In *Texaco Development Corp. v. Schlumberger Ltd.*, the pleas that were involved were pleas which, if accepted, would operate to invalidate the applications of both parties. In this case, the pleas that are contained in paragraph 7 and in paragraph 9(a) would operate, if successful, to prevent the defendant from being granted a patent pursuant to his application, but would not affect the plaintiff's application for a patent.

While I recognize the distinction between the two classes of claims, the distinction is not, in my view, relevant to the grounds which caused me to put the interpretation on paragraph (*b*) of subsection (8) of section 45 that I did in *Texaco Development Corp. v. Schlumberger Ltd.* As I indicated in that case, I recognize that, read literally and by themselves, the words of paragraph (*b*) extend to include the grounds that were put forward in that case as well as the grounds that have been put forward in this case. Having regard to the scheme of section 45 as a whole, and having regard to the scheme of the *Patent Act* as a whole, as I understand it, I am of the view that paragraph (*b*) must be restricted to the issues that directly or indirectly relate to the resolution of the conflict that gave rise to the conflict proceedings in the first place.

See also *Hovercraft Development Ltd. v. De Havilland Aircraft of Canada Ltd.*[4] and *E. I. Du Pont de Nemours v. Allied Chemical Corp.*[5]

Counsel for the plaintiff relied on the judgment of the Supreme Court in *Kellogg Co. v. Kellogg*[6] but there the alternative claim, which was attacked but which the Court held to be cognizable in an action pursuant to section 45(8), was, in my opinion, one for a declaration under paragraph (*d*) of section 45(8). The case, therefore, as I read it, was not concerned with the point decided by the President of this court in the cases to which I have referred. The same applies to *International Minerals and Chemical Corp. v. Potash Co. of America*[7] where the Court was concerned with a plea of precisely the kind to which in the opinion of Jackett P., as expressed in the *Texaco v. Schlumberger Ltd.* case, paragraph (*b*) of section 45(8) is confined.

Reliance was also placed on the judgment of Cameron J., in *Standard Oil Co. v. Commissioner of Patents*[8] but that case, as I read it, merely holds that no appeal lies from a decision of the Commissioner under section 45(7) and is not in point. In particular it does not decide that a conflict action is a proper procedure to challenge the action

[4] [1967] 2 Ex. C.R. 205.
[5] [1967] 2 Ex. C.R. 151.
[6] [1941] S.C.R. 242
[7] [1965] S.C.R. 3
[8] (1958) 28 C.P.R. 69.

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of the Commissioner in permitting an applicant to add a claim to his application in the circumstance alleged in the statement of claim.

When, in the course of the argument, it became apparent that paragraph (f) of the prayer for relief was not concerned with a declaration under section 45(8)(*d*) but was directed to obtaining the declaration thereby sought for the purpose of section 45(8)(*b*) counsel for the defendant asked leave to amend the notice of motion so as to request as well that paragraph (f) be struck out. As I did not understand counsel for the plaintiff to contend that paragraph (f) would serve any other purpose the defendant will have leave to amend the notice of motion as requested and all the impugned paragraphs including paragraph (f) of the prayer for relief, will be struck out.

The defendant will have the costs of the motion in any event of the cause.

Toronto 1968

Sep. 10-11

Ottawa Oct. 28

BETWEEN:

VERNON C. HALE .....APPELLANT;

AND

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

Income tax—Employment—Benefit from—Travel expenses of insurance manager's wife attending sales conference—Income Tax, s. 5(1)(a).

The branch manager of a life insurance company was required by his employer to attend company sales conferences at various locations and the company also expected his wife to accompany him and to assist her husband by looking after the wives of salesmen from her husband's office and in supervising and guiding the branch delegation. The expenses of the wife in attending such conferences for travel, meals and hotel accommodation were paid by the husband who was reimbursed by the company.

Held, payment of the wife's expenses by the company was not a benefit to the husband from his employment and therefore taxable under s. 5(1)(*a*) of the *Income Tax Act*. It was the wife who received the benefit.

INCOME TAX APPEAL.

William R. Latimer, Q.C. for appellant.

J. R. London for respondent.

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CATTANACH J.:—The Minister, in assessing the appellant to income tax in his 1963 taxation year, included, as part of the appellant's income, an amount of $388 paid to him by his employer, The Canada Life Assurance Company (hereinafter referred to as Canada Life, or the company), to cover the expenses of the appellant's wife for travel, meals and hotel accommodation incurred by her in accompanying the appellant, her husband, to the Canada Life sales conference held in Phoenix, Arizona on April 1 to 4, 1963.

It is from the inclusion of that amount as part of his income that the appellant now appeals.

During his 1963 taxation year the appellant was manager of the Central Ontario Branch of Canada Life at Hamilton Ontario where he was responsible for the administration of that office and the supervision of the life insurance salesmen there employed. His remuneration was by way of salary, bonuses and commissions on life insurance policies which he sold personally. It was agreed between the parties that the relationship between the appellant and Canada Life was that of employee and employer. The present appeal was argued upon that basis.

The appellant and John S. Harris, a vice-president of the company and director of agencies, as well as the officer in charge of conferences, who were the only witnesses called, testified convincingly respecting the business purpose of the biannual conferences organized by Canada Life exclusively for their personnel. Great care is exercised in selecting the site of such conferences. Among the prime considerations is the ready accessibility and minimum expense required for the personnel selected to attend. Normally a resort area is selected because the facilities are usually removed from centres of population and consequent distracting elements. I might mention that the reason for holding a number of conferences in resort areas of the United States was explained by the fact that the company does a large volume of business in that country through numerous branches there maintained which engage many salesmen.

These conferences are Canada Life meetings called for the specific purpose of increasing the potential of the company's sales organization by instructing the members

thereof on better selling methods and techniques in formal sessions and through mutual association in informal sessions.

While at the conference the activities of the salesmen are under the control and direction of the Canada Life with a full schedule of business programmes during normal working hours. A branch manager, such as the appellant was, is required to assist in the control and direction of the formal business sessions and to organize and participate in informal sessions thereafter, as well as to improve his own knowledge and capabilities. Particularly, a branch manager is required to supervise the delegation from his own branch.

The salesmen who are selected to attend are so selected on a production basis, that is, those who have sold a certain amount of life insurance, in the expectation that their exposure to teaching and associations with other salesmen and managers will make them still better salesmen.

No such production qualification is required for branch managers. Their attendance is mandatory as is that of the selected salesmen.

The conference held in Phoenix Arizona was from April 1 to April 4, 1963; and in my opinion the evidence conclusively establishes that these conferences are business conferences for the purpose of increasing the earning capacity of Canada Life and incidentally its salesmen and managers, despite the fact that there might be some social activity.

The policy of Canada Life in engaging salesmen was also outlined by the appellant and more particularly by Mr. Harris. The company has a strong preference for married men over those who are unmarried. It does not hire a married applicant as a salesman, who may be otherwise qualified, if his wife does not meet the company standards. The wife is interviewed separately and in person prior to hiring the husband, and the appellant testified that when he engaged a salesman this interview of the applicant's wife was done by his wife who reported her assessment of the wife to him. The company maintains a direct liaison with the wife through all stages of her husband's career. She is sent correspondence and pamphlets

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giving instructions and guidance on how to help her husband. While the wife is expected to passively accept irregular hours and fluctuating income she is also expected to be of positive help to her husband in a variety of ways peculiar to the life insurance business. While this role of a wife is present in every line of endeavour I do accept the testimony that it is even more so in the life insurance business. The Canada Life regards the combination of husband and wife as the selling unit in its business and takes active steps to foster the wife's participation, but they do not pay her. She is not an employee of the company. Conceivably she gets her reward indirectly from her husband's increased income resulting from her efforts.

A branch manager's wife serves in a like capacity. She would have assisted her husband in his progress through the ranks and, upon his achievement of reaching the apex of a branch manager, the company expects and urges her to continue her unpaid participation in the management of the sales operation.

I have indicated that the branch manager's attendance at the sales conferences is mandatory in the view of the company. It is my assessment of the evidence given before me that while the attendance of the wife of a branch manager may not be absolutely obligatory, nevertheless, in the absence of some very cogent and acceptable reason for not doing so, the necessity of her attendance is urged upon her husband by the company, so much so that it is tantamount to being obligatory in that repeated refusals, without cause, might be detrimental to her husband's status or advancement in the company.

In a questionnaire (Exhibit 2) circulated with the "invitation" to branch managers and selected salesmen to attend the Arizona conference, the question is asked if the recipient's wife will attend with "yes" or "no" answer spaces which would seem to indicate a choice. It is my understanding that if a negative answer is made, inquiry is made by the company to ascertain the reason.

It is also noted from the legend printed in red thereon that "no other member of family may attend" indicating that it is the wife who is singled out and no other member of the family may attend in her stead.

Obviously the company policy is that the wife's attendance at these conferences is an essential part thereof and pressure is brought upon the husband to prevail upon the wife to attend.

The evidence was that wives were expected to attend all planned business sessions at these conferences, some of which are devoted to matters of special interest to wives of insurance salesmen.

I am, therefore, satisfied that the company fully expected that the appellant's wife, Mrs. Hale, would attend this conference.

The appellant testified that Mrs. Hale had attended all previous conferences without fail. The delegation from the appellant's branch office at the Phoenix conference numbered eleven salesmen each of whom was accompanied by his wife making a total of twenty-two. Mrs. Hale assumed the responsibility for looking after wives of the salesmen, arranging the assignment of rooms in congenial company, finding their baggage lost in transit, urging their attendance at the business sessions and observing and reporting any absentees to her husband, the appellant, and performing a multitude of like tasks. She attempted to broaden her own knowledge of her husband's business by attending their instructional meetings. She counselled the salesmen's wives to do likewise and served as an example to them. She acted as the appellant's hostess at informal gatherings arranged by her husband for his colleagues and their wives and generally worked with him in the supervision and guidance of this branch delegation. The appellant and his wife occupied a three room cottage in the company of two salesmen and their wives. One such couple was specifically selected to share this accommodation because they were experiencing matrimonial difficulties, in the hope that Mrs. Hale might help to resolve those difficulties. In short she acted as a kind of mother superior to the branch salesmen's wives.

As I have intimated before, this conference was held for predominantly business purposes and on the evidence adduced I have no hesitation in finding that the appellant's wife actively participated therein. I cannot disabuse my mind from the conclusion that the detailed evidence

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of the appellant's wife's assistance to him as above recited was directed primarily to establishing that this was not a holiday for her at the company's expense.

The expenses of the appellant and Mrs. Hale were paid by the company. The appellant was given a cash advance of $618 to cover the travelling expenses of both for which he was not held accountable. The amount of the advance was arrived at by computing the most economic mode of travel, i.e. by rail by the most direct route, the meals to be consumed en route and an amount of $12 for taxi fares, also computed on a moderate basis and refundable if not used. The cost of the hotel accommodation of the appellant and his wife and the meals there consumed by them was paid directly to the hotel by the company. The amount attributed to Mrs. Hale's travelling expenses was $260 and that portion of the hotel account attributable to her accommodation was $128, making the total of $388 here in controversy.

The appellant and his wife left their home in Hamilton by air prior to the date set for the beginning of the conference in Arizona on April 1, 1963. They enjoyed a brief holiday in Mexico before arriving in Phoenix on that date. They also remained in Arizona for a brief period after the conclusion of the meeting to rest and so the appellant could continue to discuss business matters with two other branch managers whose wives were also present. The cost of this prior and subsequent holiday was borne by the appellant personally and has no material bearing on the issue here involved. I would add that the appellant's actual expense for his own and his wife's attendance at this conference, even without considering their additional excursions, was in excess of the non-accountable advance made and the hotel accommodation paid by the company which together totalled $873.

By section 3 of the *Income Tax Act* the income of a taxpayer for a taxation year is his income for the year from all sources inside or outside Canada, including his income from all offices and employment.

By virtue of section 5(1)(*a*) 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 the value of board, lodging and "other

benefits of any kind whatsoever . . . received or enjoyed by him in the year in respect of, in the course of, or by virtue of the office or employment".

Therefore the issue is to be determined on whether the appellant received or enjoyed a benefit of $388 in the respect of, in the course of, or by virtue of his office or employment in The Canada Life Assurance Company by reason of the expense paid attendance of his wife at the Phoenix conference within the meaning of section 5(1)(*a*) as is contended by the Minister to be the case.

The appellant contended that the sum of $388 was not income to the appellant because it was not a benefit to him under section 5(1)(*a*) and further that if a benefit was received, which he vigorously denied, such benefit had no monetary value to the appellant.

Counsel for the Minister submitted that the benefit the appellant received was the company of his wife, and, as emphasized in the evidence tendered by the appellant, the assistance she gave him during the conference. He further submitted that the true monetary measure of that benefit to the appellant was $388, the cost of the appellant's wife's attendance at the conference which was borne by the company.

The obvious intention of section 5 is to include in the taxable income of a taxpayer those economic benefits arising from his employment which render the taxpayer's salary of greater value to him.

The facts that it was pleasant for the appellant to have his wife along and that he enjoyed her company and assistance do not seem to me to be an economic advantage to him when her presence was due to his employer requiring it. Neither does it seem to me that the appellant received any advantage from his wife's presence at the conference additional to that he would receive from her in his home surroundings except that her assistance was exercised in a different milieu and as dictated by different circumstances.

It seems clear to me that the recipient of any alleged benefit which may have arisen from the circumstances above outlined, was the taxpayer's wife for it was she who received what flowed from the expenditure in question. It was she who was transported, fed and accommodated.

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The position from the taxpayer's point of view seems to me to be that the expenditure for his wife's expenses was an expense incurred by him at the insistence and request of his employer for which his employer had undertaken to pay. The money received by the appellant from his employer was simply reimbursement for that expense as was promised by his employer and, as I view the matter, results in no benefit to him within the meaning of section 5(1)(*a*). I might add that, in my opinion, the fact that the employer made such payment in part in advance of the event, rather than subsequent thereto, does not change the nature of the payment, nor does the fact that the hotel expenses were paid directly to the hotel by the employer, materially vary the nature of the payment.

Accordingly the appeal is allowed with costs.

Vancouver 1968

Sept. 26-27

Oct. 28

BETWEEN:

H. A. ROBERTS LTD. .....APPELLANT;

AND

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

Income tax—Termination of mortgage agency business—Whether compensation received capital or income.

In 1946 appellant company which carried on a real estate business in Vancouver was appointed mortgage agent for an insurance company and in 1960 for a second company, and later for a third company. In addition to its mortgage business appellant was also engaged in real estate, insurance, property management and appraisals. Its mortgage business, which was carried on separately from its other businesses, produced aproximately one-fourth of its total revenue. In 1963 appellant's three mortgage principals terminated their agencies and appellant received $73,600 from one principal and $10,000 from another as compensation.

Held, the sums so received by appellant on the termination of its agencies were income and not capital The agencies did not relate to the whole structure of appellant's business; the sums received were merely in lieu of future income.

Van Den Berghs, Ltd v. Clark [1935] A.C. 431; *Parsons-Steiner Ltd v. M.N.R.* [1962] Ex.C.R. 174; *Barr, Crombie & Co. v. C.I.R.* (1945) 26 T.C. 406; *Miller v. M.N.R.* [1962] Ex.C.R. 400; [1962] C T C. 199; distinguished. *Kelsall Parsons & Co.* (1938) 21 T.C. 608; *C.I.R. v. Fleming & Co. (Machinery) Ltd* (1951) 33 T.C. 57, applied. *Sabine v. Lookers, Ltd* (1958) 38 T.C. 120; *Jones v. M.N.R.* 63 DTC 964, referred to.

INCOME TAX APPEAL.

P. N. Thorsteinsson and *M. J. O'Keefe* for appellant.

J. R. London for respondent.

SHEPPARD D.J.:—This appeal by the taxpayer, H. A. Roberts Ltd. from an assessment by the Minister of National Revenue is on the contention that the sums received by the taxpayer in 1963 on the cancellation of mortgage agencies, namely $73,633.72 received from the Crown Life Insurance Company and $10,000 from the Burrard Mortgage and Investments Limited are capital and not income.

In 1929 H. A. Roberts Ltd., the appellant, was incorporated as a real estate company and has since carried on business at 562 Burrard Street, Vancouver. From 1929 to 1946 it carried on the usual real estate business exclusively. In 1946 it began a mortgage representative department and from 1946 to 1963 it carried on business in five departments: (1) real estate, (2) mortgages, (3) insurance, (4) property management, and (5) appraisals, and later in 1964 began a sixth, property development. The mortgage department began in 1946 when the appellant was appointed mortgage representative in British Columbia for the Crown Life Insurance Company. At first the appellant and another had an agency for the Crown Life but after the 7th June 1948, the appellant had the sole agency. For the appellant's services to the Crown Life it received 10% of the interest collected up to $100,000 and 7½% thereafter. On the 11th August 1960 the appellant was appointed as the mortgage representative of Burrard Mortgage and Investments Limited. In the result the head office and business of the appellant was carried on at 562 Burrard Street and the various departments other than the mortgage department occupied the first floor and the mortgage department the entire second floor with a staff eventually built up to thirteen. The appellant also had a mortgage agency for the Occidental Life Company of California and from time to time would obtain mortgages for individual customers. The mortgage department had a separate accounting system to conform to the demands of the respective mortgage companies represented, and had a cash register, purchased for $6,000, to render each month a statement of the principal and interest received. The mortgages were obtained at

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first from customers of the appellant, but latterly the majority of the mortgages were obtained through other real estate agents and therefore it was important that the mortgage department be carried on separate from the other departments in order to assure competing real estate agents that any business they brought, or information given, to the mortgage department would be treated in confidence.

The method of accounting and the income from respective departments in the appellant's business are shown in the balance sheets in Exhibit A(1). The balance sheet for 1963 shows that the income of the appellant's business was produced under five headings, *viz.* real estate in schedule 1; insurance in schedule 2; mortgage collections in schedule 3; property management in schedule 4, and appraisals in schedule 5. In each schedule the income thereby produced was entered and the direct expenses in producing that income, then the excess in each schedule was carried to Exhibit C and the general administrative expenses and other expenses of the business were there charged, and the balance is the net income of the business for that year.

Exhibit A(5) shows for the years 1959 to 1962 inclusive the mortgage commissions as 25%, 27%, 22% and 24% of the total revenue; real estate commissions 52%, 48%, 30% and 25%; and insurance commissions 10%, 8%, 27% and 33%. The amounts produced by the respective departments for the years 1958 to 1966 inclusive are shown in Exhibit R(1).

On the 24th February 1960 the Crown Life and the appellant agreed that the servicing fee would be 6% of interest collected and that the Crown Life would have the right to terminate the agency on ninety days' written notice and upon payment of ½% of the then unpaid balances of the mortgages being serviced by the appellant for the Crown Life.

Burrard Mortgage and Investments Limited had the right to cancel on payment of $20,000.

In 1963 the three mortgage companies terminated their agencies. The Crown Life terminated by notice of the 28th September 1962 effective the 1st February 1963, and by paying therefor $73,633.72. The Burrard Mortgage and Investments Limited also terminated, which it had the right to do, but entered into a dispute with the appellant as to

the amount payable and that was eventually settled at $10,000. The Occidental cancelled without payment as of right.

In making an assessment the Minister included as income the two sums received on cancellation and the appellant filed notice of objection and has now appealed on the contention that such sums are capital on the grounds—(1) that the mortgage representation was a separate business and therefore the sums paid were for the total loss of that business and were capital; (2) if the mortgage representation was not a separate business, then the cancellation by the Crown Life and Burrard Mortgage made such a substantial hole in the business of the appellant and so dislocated the business as to be a significant loss of part of the profit-making structure of the business and therefore capital.

The issue here, as to whether the sums received are capital or income raises questions of law as to the meaning of the applicable sections of the *Income Tax Act,* and of the written instruments of employment of the appellant and whether there is any evidence to bring the case within the sections of the *Income Tax Act,* but beyond that the ultimate question is one of fact.

In *Van Den Berghs, Limited v. Clark*[1] Lord Macmillan stated at p. 438:

> While each case is found to turn upon its own facts, and no infallible criterion emerges, nevertheless the decisions are useful as illustrations and as affording indications of the kind of considerations which may relevantly be borne in mind in approaching the problem.

That each case depends upon its own facts has been emphasized in *Kelsall Parsons & Co. v. C.I.R.*[2] by the Lord President.

In *Parsons-Steiner Ltd. v. M.N.R.*[3] Thurlow J. stated:

> What appears most clearly from these cases is that the question is largely one of degree and depends on the facts of the particular case and the inferences to be drawn therefrom.

The following facts, therefore, appear to be relevant: The appellant's business consisted of five departments, in fact, six after the commencement of the property develop-

[1] [1935] A.C. 431.
[2] (1938) 21 T C. 608, at p 619.
[3] [1962] Ex. C R. 174, at p 181.

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ment department, which is not important, but in all these departments the appellant was employed by each customer to render a service, and that service was largely to find someone to enter into a contractual relation with the customer employing the appellant. In real estate the listing was intended to lead to the relation of vendor and purchaser; in the mortgage department to obtain mortgagors for the customer as mortagagee; in the insurance department to sell a policy; in property management to obtain and manage a lease, and in the appraisal department the service probably would not result directly in a contractual relation between the customer of the appellant and a third person but would at least provide for a service by the appellant.

In all, these various departments were carried on by one corporation of H. A. Roberts Ltd. The various statements show the income derived from the respective departments and, while each department was charged with its direct expenses the accumulated income was charged with certain general expenses. In other words, all the various departments were treated as forming one business composed of the various departments whose respective incomes may be seen in Exhibits A(2), A(5) and R(1). The cancellation was of right by the Crown Life upon giving ninety days' notice and paying ½ of 1% of the unpaid balances of mortgages outstanding for Crown Life and by ninety days' notice and payment of $20,000 for Burrard Mortgage. After the cancellation the mortgage department was closed and the staff disbanded, the majority of them being absorbed by the Crown Life and the individual mortgagees who were customers of the appellant were serviced by the accounting department of the appellant. Therefore, while the mortgage department was a separate department, it was not a separate business.

The closing by the appellant of the mortgage department would not be wholly dissimilar to a departmental store closing one department, in that the same store would continue in the same business. The appellant carried on business under the same incorporation before opening the mortgage department and also after the closing of that department.

Both agreements, namely that with Crown Life and that with Burrard Mortgage provided for cancellation,

hence the appellant could not have expected either agreement to continue indefinitely any more than a listing of a property for sale, and the agreements, while continuing, did provide for services which produced income.

On the other hand, the appellant contends that the mortgage department was unique in that, if not a separate business, the cancellations and the necessary closing of the department caused such a significant loss of the profit-making machinery as to denote the sums paid were capital.

In the four following cases the amount paid for cancellation was deemed capital. In *Van Den Bergs, Ltd. v. Clark* (*supra*) by separate agreement the initial agreements of 1908, 1913 and 1920 were to terminate as of the 31st December 1927 rather than run to the 31st December 1940 and these three agreements provided for pooling of the profits and also for the manner of the company carrying on its business. Lord Macmillan, at p. 441, said:

> ...agreements of 1908, 1913 and 1920 being terminated as at December 31, 1927, instead of running their course to December 31, 1940. If the payment had been in respect of a balance of profits due to the appellants by the Dutch Company for the years 1914 to 1927, different considerations might have applied, but it is agreed that it is not to be so regarded.
>
> Now what were the appellants giving up? They gave up their whole rights under the agreements for thirteen years ahead. These agreements are called in the stated case "pooling agreements," but that is a very inadequate description of them, for they did much more than merely embody a system of pooling and sharing profits. If the appellants were merely receiving in one sum down the aggregate of profits which they would otherwise have received over a series of years the lump sum might be regarded as of the same nature as the ingredients of which it was composed. But even if a payment is measured by annual receipts, it is not necessarily itself an item of income. As Lord Buckmaster pointed out in the case of the Glenboig Union Fireclay Co. v. Commissioners of Inland Revenue: "There is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the test."

and at p. 442:

> The three agreements which the appellants consented to cancel were not ordinary commercial contracts made in the course of carrying on their trade; they were not contracts for the disposal of their products, or for the engagement of agents or other employees necessary for the conduct of their business; nor were they merely agreements as to how their trading profits when earned should be distributed as between the contracting parties. On the contrary the cancelled agreements *related to the whole structure of the appellants' profit-making apparatus. They regulated the appellants' activities, defined what they might and what they might not do,*

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> *and affected the whole conduct of their business.* I have difficulty in seeing how money laid out to secure, or money received for the cancellation of so fundamental an organization of a trader's activities can be regarded as an income disbursement or an income receipt.

(italics supplied)

and at p. 443:

> The agreements formed the fixed framework within which their circulating capital operated; they were not incidental to the working of their profit-making machine but were essential parts of the mechanism itself. They provided the means of making profits, but they themselves did not yield profits. The profits of the appellants arose from manufacturing and dealing in margarine.

The *Van Den Berghs* case is distinguishable in that the three agreements which the appellants consented to cancel were not ordinary commercial contracts made in the course of carrying on their business, but "regulated the appellants' activities, defined what they might do and what they might not do"... "related to the whole structure of the appellants' profit-making apparatus." Here the agreements cancelled were commercial contracts made in the course of the appellant carrying on this business as the services bargained for produced income and the appellant carried on the same business of real estate agent before the mortgage department was opened and also afterwards. Further, the employment of the appellant by Crown Life and Burrard Mortgage was made with the appellant in the course of its carrying on its business of real-estate agent, and that employment, if carried on in place of being cancelled, would have produced income for that business.

In *Barr, Crombie & Co. v. C.I.R.*[4], there, in 1924 the appellant had agreed to manage the ships of a shipping company for 15 years at agreed rates and in the event of the shipping company going into liquidation or ceasing to carry on business the remuneration to be paid until the date of expiry was immediately to become due and payable. In 1942 the shipping company went into liquidation and for the eight years which the agreement was to run the appellant received £16,000. It was held that that sum was a capital payment, not a trading asset. At the time of liquidation the appellant's revenue for managing ships was 88.23% or, roughly, 9/10th of its revenue and the shipping

[4] (1945) 26 T C. 406.

company was the sole employer except for four ships temporarily managed by the appellant for the government which amounted to only 2% of its revenue. Hence at the time of the cancellation nine-tenths of the appellant's revenue was derived from the shipping company and 10% from other sources.

The Lord President said at p. 410:

> Upon liquidation of the shipping company it is found that *the Appellant Company lost its entire business,* apart from the abnormal business above referred to which it had obtained from the Ministry of War Transport, and that in consequence of the liquidation the Company was forced to effect reductions of staff and salaries and to move to smaller premises. Upon these facts the Special Commissioners found that the sum of £16,306 16s. 11d. was remuneration under a service agreement and was a trading receipt on revenue account.

and said at p. 411:

> Lord Cave, L.C., in the case of British Insulated and Helsby Cables, Ltd. v. Atherton (1926) A.C. 205, at page 213; 10 T.C. 155, at page 192, said: "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital." And of course, one may equally say that an expenditure made once and for all as payment for abandoning or surrendering an asset is received by the recipient as a capital and not as a revenue payment, in the absence of any indication to the contrary. In the present case virtually the whole assets of the Appellant Company consisted in this agreement.
>
> . . .
>
> In Kelsall Parsons & Co. on the other hand, the payment was in return for the loss of a single agency out of about a dozen agencies carried on by the company, and the fact that the payment in that case did not represent the whole capital assets of the company is easily shown by the fact that in the year after the surrender of the single agency profits were no less than they had been the year before the surrender. . . .
>
> Here we are not dealing with a single payment in return for the surrender of the prospect of making profits in the final year of the agreement, but with *a payment for the surrender of an agreement while there was still a substantial period*—indeed, more than half of the period of the agreement—to run, and a period which extended to many years of accountancy for the purposes of this Company's business.

(italics supplied)

The *Barr Crombie* case is distinguishable as: (1) there the appellant "lost its entire business", but here, the appellant (Roberts) did not lose its entire business as shown by Exhibit R(1); (2) there the cancellation was by

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negotiation and not of right. In the Roberts case the cancellation was of right and was stipulated for in the agreements by Crown Life and Burrard Mortgage.

In *Parsons-Steiner Ltd. v. M.N.R.* (*supra*) the appellant was a manufacturers' agent and wholesale merchant dealing in china and related wares. From 1930 it represented Royal Albert line and from 1933 the goods of Doulton & Co. as exclusive agent. As exclusive agent it received commissions on all sales in Canada, and also bought and sold goods of Doulton, with the result that 80% of its business was derived from the Royal Albert and Doulton lines. The Doulton agreement was for one year from the 30th March 1933 determinable on three months' notice, but in fact it was continued to the 31st December 1955 and then terminated, not on notice but by agreement and the Doulton Company paying $100,000. It was held that except as to $5,000, which was admitted to be income, the remaining $95,000 received from the Doulton Company was capital.

Thurlow J. stated that 55% of the appellant's sales were Doulton products and said at p. 180:

> On the termination of the agency, two of the appellant's seventeen employees became employees of the Doulton subsidiary and thereafter orders addressed to the appellant for Doulton goods were referred to the Doulton subsidiary as the appellant no longer sold such goods even on its own account. In order to counteract the expected drop in sales the appellant employed several new salesmen and made a greater effort than formerly to augment sales of the lines which it still carried. There was no change made in the premises occupied by the appellant and no salaries were cut as a result of the loss of its Doulton agency. One new agency was obtained but no agency could be obtained for a line of figurines comparable with the Doulton line.

at p. 181:

> So far as I am aware, there is no case of this kind reported in Canada but a number of cases in the Courts of England and Scotland were cited in the course of the argument. What appears most clearly from these cases is that the question is largely one of degree and depends on the facts of the particular case and the inferences to be drawn therefrom. For the purposes of this case the distinction drawn in the cases appears to me to be summed up in the following passage from the judgment of Lord Evershed, M.R. in Wiseburgh v. Domville:
>
> > "Was this sum paid by way of damages in respect of this agency contract, "profits or gains" arising from the trade of the taxpayer as a sales agent? The argument of counsel for the taxpayer had the attraction of simplicity. He said the £3,000 was

paid to the taxpayer in exchange for a profit-earning asset which he had lost owing to the breach of the contract by the company, and it followed that it was a capital item. If the question were *res integra* that argument would be more attractive still, but it clearly will not stand as a test in the light of the authorities. For the most part these authorities are decisions of the Inner House of the Court of Session in Scotland which do not bind this court."

further at p. 185:

Turning now to the facts of the present case I think the evidence makes it plain that the loss which the appellant faced when Doulton & Co. Limited made known its intention to terminate the agency was not merely one of the loss of one of a number of agencies but of an agency which accounted for a large proportion of the appellant's total business and in which was included a line of figurines which alone accounted for a considerable portion of the business and which was unique in the trade. For twenty years the appellant had had the agency for that particular line of goods and had built up the market for these figurines and for the other Doulton products which it sold. While the loss of the agency would set the appellant free to take on competitive lines a market for some other manufacturers' dinner ware would have to be promoted and built up and there was not even such an alternative with respect to the *figurines for there was no comparable line* on the market.

at p. 186:

To the extent that there were any such commissions, I think, the payment would represent taxable income. Nor was it a *payment in lieu of commissions that might have been earned to a normal termination of the agency contract and which were lost because of a premature termination of it.*

and at p. 187:

. . . the payment in question was not income from the appellant's business, but was referable to the appellant's claim for loss of what it and Doulton Co. Limited *as well considered to be the appellant's interest in the goodwill and business in Doulton products in Canada.* In my view this was, to use Lord Evershed's expression, "a capital asset of an enduring nature". It was one which the appellant had built up over the years in which it had the Doulton agency and which on the termination of the agency the appellant was obliged to relinquish. The payment received in respect of its loss was accordingly a capital receipt.

(italics supplied)

The *Parsons-Steiner* case is distinguishable as there: (1) the agency agreement provided for an exclusive agency whereby the appellant would get a commission on all goods sold in Canada although the appellant did nothing and had nothing to do with the sale. No doubt that commission might be increased by the appellant increasing such sales in Canada by taking orders or by buying and reselling;

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(2) the cancellation of that agreement was negotiated. Although there was a means of termination as of right, that right was not exercised.

In this case (1) the agreements with Crown Life and Burrard Mortgage provided for services by the appellant, which services produced income, and (2) the stipulated payment on cancellation would be in lieu of such income.

In *Miller v. M.N.R.*[5] Thurlow J. quotes from *C.I.R. v. Fleming & Co. (Machinery), Ltd.*[6], as follows:

> The sum received by a commercial firm as compensation for the loss sustained by the cancellation of a trading contract or the premature termination of an agency agreement may in the recipient's hands be regarded either as a capital receipt or as trading receipt forming part of the trading profit. It may be difficult to formulate a general principle by reference to which in all cases the correct decision will be arrived at since in each case the question comes to be one of circumstance and degree. When the rights and advantages surrendered on cancellation are such as to destroy or materially to cripple the whole structure of the recipient's profit-making apparatus, involving the serious dislocation of the normal commercial organisation and resulting perhaps in the cutting down of the staff previously required, the recipient of the compensation may properly affirm that the compensation *represents the price paid for the loss or sterilisation of a capital asset and is therefore a capital and not a revenue receipt.* Illustrations of such cases are to be found in Van Den Berghs, Ltd. (supra) and Barr, Crombie & Co. Ltd. (supra). On the other hand when the benefit surrendered on cancellation does not represent the loss of an enduring asset in circumstances such as those above mentioned—where for example the structure of the recipient's business is so fashioned as to absorb the shock as one of the normal incidents to be looked for and where it appears that the compensation received is no more than a surrogatum for the future profits surrendered—the compensation received is in use to be treated as a revenue receipt and not a capital receipt. See e.g. Short Brothers, Ltd., 12 T.C. 955; Kelsall Parsons & Co. (1938) S.C. 238.

(italics supplied)

and further[7]:

> Provision was made in the agreement for commissions at specified rates for making sales of meters and so it appears to me that this is not included in the consideration for the 2½ per cent commissions. The substantial consideration for the 2½ per cent commissions, in my opinion, was the waiver by the appellant of his rights under the earlier agreement with McCowan and his consent to McCowan negotiating for a licence under the patent and this, I think, was the giving up by the appellant of a right of a capital nature in exchange for the right to the agency and the 2½ per cent commissions. In this view, the right to such commissions was also a right

[5] [1962] Ex. C.R. 400 at 410; [1962] C.T.C. 199, at 208.
[6] 33 T.C. 57, at p. 63.
[7] [1962] Ex. C.R. 416.

> of a capital nature whether or not the commissions when actually paid would have been income—a question which does not arise in these proceedings—and the $5,000 received by the appellant for the release of such right was also capital and not income. The appeal accordingly succeeds with respect to this item as well.

The *Miller* case appears distinguishable as that was the negotiated sale of an agreement fixing "the price paid for the loss of sterilisation of a capital asset".

In this case the agreements in question provided for services to be rendered by the appellant and the rate of payment for such services which would be income.

In the following cases the payment for the termination of an agency was held to be taxable income.

In *Kelsall Parsons & Co. (supra)*, the appellants were commission agents of manufacturers and held between nine and eleven agencies. One agency for three years was cancelled in the second year by the payment of £1,500. In the last year preceding the cancellation the appellant received from the agency £2,000 and in the year of cancellation its receipts were £4,259. The sum received on cancellation was held to be income. The Lord President, at p. 618, said:

> . . . The sum which the Appellants received was, as the Commissioners have found, paid as compensation for the cancellation of the agency contract. That was a contract incidental to the normal course of the Appellants' business. Their business, indeed, was to obtain as many contracts of this kind as they could, and their profits were gained by rendering services in fulfilment of such contracts.

and at p. 620:

> It was a normal incident of a business such as that of the Appellants that the contracts might be modified, altered or discharged from time to time, and it was quite normal that the business carried on by the Appellants should be adjustable to variations in the number and importance of the agencies held by them, and to modifications of the agency agreements, including modifications of their duration, which might be made from time to time.

and at p. 621:

> Their findings of fact include a finding that the Appellants had to build up a considerable technical organisation which could neither be collected nor dispersed at short notice, but that is something which falls far short of what Lord Macmillan described in Van Den Berghs case as the "fixed framework" of the Appellants' business. In my opinion the agency agreements entered into by the Appellants, so far from being a fixed framework, are rather to be regarded as temporary and variable elements of the Appellants' profit-making enterprise.

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Lord Moncrieff said, at p. 623:

> There appears, however, to have been a general distinction drawn in the cases which may be helpful in solving any particular problem. That distinction may perhaps be formulated as follows: (1) a contract may be made by a trader which is merely directed to result in trading profits being made; (2) a contract may be made by a trader which is directed to regulate the conditions under which he is to carry on his trade.

The test applied by the Lord President would appear here applicable, namely "That was a contract incidental to the normal course of the Appellants' business."

Again the first test adopted by Lord Moncrieff appears applicable, namely that the agreement and services were "directed to result in trading profits".

In *C.I.R. v. Fleming* [8] the company, since before 1903, had been sole selling agents in Scotland for a manufacturer but in 1948 the agency was terminated and payment was made of a sum designated as compensation for loss of the agency. It was held to be a trading receipt and the Lord President said, at p. 61:

> The problem thus belongs to a type exemplified by a number of recent cases in which, broadly speaking, the line has been drawn in the light of varying circumstances between (a) the cancellation of a contract which affects the profit-making structure of the recipient of compensation and involves the loss by him of an enduring trading asset; and (b) the cancellation of a contract which does not affect the recipient's trading structure nor deprive him of any enduring trading asset, but leaves him free to devote his energies and organisation released by the cancellation of the contract to replacing the contract which has been lost by other like contracts. It is not possible briefly to formulate the distinction exhaustively or with complete accuracy, as the circumstances may vary infinitely; but a sufficient indication of the relevant consideration is found by contrasting such cases as Van Den Berghs, Ltd. (supra) and Barr, Crombie & Co. (supra), in which the payment was held to be of a capital nature, with Short Bros. (supra) and Kelsall Parson & Co. (supra), in which the payment was held to be of a revenue nature.
>
> These and other cases cited to us are relatively easy cases once the governing principle has been established for on their facts they all fall more or less unmistakeably on either the one side or the other side of the line. In this instance the difficulty is created by the fact that "the substance of the transaction" cannot easily be equated with the formal deed by which the transaction received effect. Indeed I should almost be prepared to say that if attention is concentrated upon the business substance of this transaction the payment should be treated as a capital payment, whereas if attention is concentrated upon the form the payment should be treated as a revenue payment.

[8] (1951) 33 T.C. 57.

Prior to 1948 the agency in explosives for Imperial Chemical Industries Ltd., represented from 30 per cent to 45 per cent of the Company's total earnings in commissions. Their remaining activities arose from agencies for some eight machinery companies from which they derived from one-half to two-thirds of their receipts. No fixed period was attached to the agency for Imperial Chemical Industries, Ltd, which could presumably have been terminated at any time on reasonable notice.

Lord Russell said at p. 63:

> When the rights and advantages surrendered on cancellation are *such as to destroy or materially to cripple the whole structure of* the recipient's profit-making apparatus, involving the serious dislocation of the normal commercial organisation and resulting perhaps in the cutting down of the staff previously required, the recipient of the compensation may properly affirm that the compensation represents the price paid for the loss or sterilisation of a capital asset and is therefore a capital and not a revenue receipt. Illustration of such cases are to be found in Van Den Berghs, Ltd. (supra) and Barr, Crombie & Co Ltd. (supra). On the other hand when the benefit surrendered on cancellation does not represent the loss of an enduring asset in circumstances such as those above mentioned—where for example the structure of the recipient's business is so fashioned as to absorb the shock as one of the normal incidents to be looked for and where it appears that the compensation received is no more than a surrogatum for the future profits surrendered—the compensation received is in use to be treated as a revenue receipt and not a capital receipt. See e.g. Short Brothers, Ltd. (supra) and Kelsall Parsons & Co. (supra).

(italics supplied)

Lord Keith stated there was no apparent disruption or disorganization of the structure of the company's business.

The cancellation by Crown Life and by Burrard Mortgage cannot be said to have been "such as to destroy or materially to cripple the whole structure of the recipient's profit-making apparatus". The profits made in respective years as shown by Exhibit R(1) excludes that conclusion. The cancellation became effective in February, 1963. The profits for 1966 were the second largest and the profits increased for the years 1964, 1965 and 1966.

The appellant had only one department affected by the cancellation—but not "the whole structure" as the other departments remained.

Also the cancellation permitted the appellant "replacing the contract which has been lost by other like contracts", that is, by other services, and Exhibit R(1) indicates that was being done.

The appellant has contended that the mortgage representation is unique, but that does not mean that Crown Life

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or Burrard Mortgage exclusively lend on mortgage, but rather that companies lending on mortgage usually have their own department to obtain the mortgage and to make collections thereunder.

In *Sabine v. Lookers, Ltd.*[9], the respondent was a motor dealer and its sole trade was geared to the display, sale, service and repair of the products of one manufacturer under an agency agreement which contained a clause providing for renewal at the respondent's option on certain conditions. That agreement was terminated by a new agreement giving the dealer less security for renewal and a sum was paid in compensation for the loss of security. It was held that such sum was a taxable revenue.

In re *Morgan v. M.N.R. (T.A.B.)*[10]: In 1950 an agency contract was made with an insurance company and in 1952 was terminated by the insurance company paying $10,800 over three years. That payment was held to be income made pursuant to the termination clause, not as a re-purchase price for the agency contract.

In *Great Lakes Paper Co. v. M.N.R. (T.A.B.)*[11] a contract to purchase and supply for 20 years was cancelled after five years on payment of $250,000. That sum was held to be income.

In *Jones v. M.N.R. (T.A.B.)*[12] an agency contract with six months to run was terminated by payment of the sum of $7,500. That sum was held to be income.

In conclusion, the cancellation of the Crown Life and of the Burrard Mortgage agreements does not relate to the "whole structure" of this appellant's business within the *Van Den Berghs* case, nor cause a loss of the "entire business" as in the *Barr, Crombie* case, nor relate to a capital asset within the *Parsons-Steiner* case or the *Miller* case. On the contrary, the cancelled agreements were acquired in the course of the appellant's business and would have produced income had they continued and the sums paid were merely in lieu of future income. For that reason the appeal is dismissed with costs.

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[9] (1958) 38 T.C. 120.
[10] 61 DTC 14.
[11] 61 DTC 564.
[12] 63 DTC 964.

BETWEEN:

TORAZO IWASAKI .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Vancouver
1968
Sept. 30,
Oct. 1-3
Oct. 29

War Measures—Sale of property of Japanese evacuee—Whether breach of trust—Person "of Japanese race"—Whether order in council void for vagueness—Sale by Custodian to agent's company, effect—War Measures Act, R.S.C. 1927, c. 206, s. 3—Defence of Canada Regulations (Consolidation) 1941—Regulations Respecting Trading With the Enemy (1939).

In 1945 the Custodian of Alien Enemy property purporting to act under orders in council made under the *War Measures Act* sold for $5,250 certain land in British Columbia belonging to suppliant (who was born in Japan of Japanese parents) to a company in which the Custodian's agent had a 20% interest. Later the land was revalued and suppliant paid an additional $6,750 upon giving the Crown and the Custodian a release. Suppliant by petition of right demanded return of the land or damages on the ground that the Custodian held suppliant's land in trust to manage and return it to suppliant and that he committed a breach of trust by selling it.

Held, rejecting the petition, (1) the court could not entertain the claim for return of the land which involved rescission of the titles issued to the Custodian and subsequent titleholders since these were not parties to the proceedings, and (2) the orders in council did not create a trust and suppliant was therefore not entitled to damages or an account. *Nakashima v. The King* [1947] Ex. C.R. 486, discussed. Nor were the orders in council void for vagueness because made applicable to "any person of the Japanese race". *Reference re Validity of Orders in Council* [1947] 1 D.L.R. 577, referred to.

Held also, no conflict of interest arose because the Custodian sold the land to a company in which his agent had a 20% interest.

PETITION OF RIGHT.

J. R. MacLeod and *Daniel W. Small* for suppliant.

N. D. Mullins and *R. W. Law* for respondent.

SHEPPARD D.J.:—The suppliant, Torazo Iwasaki, alleges by petition that the Custodian as trustee for the suppliant as evacuee committed a breach of trust in selling land of the suppliant without any power of sale, or by selling to the specific grantee, Salt Spring Lands Limited, and for such acts of the Custodian the Crown is liable by *respondeat superior.*

The Crown in defence says:

(1) that there was no trust;

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(2) that there was no breach of trust in selling;

(3) that the suppliant's claim is barred by limitation of action and by laches;

(4) that the suppliant's claim is barred by release.

As the issue raises the effect of certain orders-in-council, it is convenient to recite the legislation in proper sequence. The *War Measures Act,* R.S.C. 1927, c. 206, s. 3 empowers the Governor-General-in-Council to enact such orders-in-council as he may deem necessary or advisable. That legislation has been held to be valid: *Japanese Reference* [1946] S.C.R., 248, affirmed [1947] 1 D.L.R. 577 (P.C.).

The first group of orders-in-council relates essentially to the person in declaring a protected area and by requiring any person of the Japanese race to leave that area. Those orders-in-council are order-in-council 5295, being the *Defence of Canada Regulations (Consolidation) 1941* which by s. 4 conferred the power to declare a protected area and to control the movement of persons therein; order-in-council 365 amended s. 4 by allowing the Minister of National Defence and the Minister of Justice to delcare the protected area and to require all or any enemy alien to leave; order-in-council 9760 declared a protected area in all land west of the Cascades, including Saltspring Island, where are situated the lands in question; order-in-council 1486 amended the *Defence of Canada Regulations, 1941,* by authorizing the Minister of Justice to require any or all persons to leave the protected area, and by order of the Minister of Justice of the 26th February 1942 every person of the Japanese race was to leave the protected area forthwith.

The second group of orders-in-council relates to the lands in question. Order-in-council 1665 established a security commission and s. 12 provided that all property situate in the protected area of British Columbia belonging to any person of the Japanese race and resident in such area should be vested in and subject to the control and management of the Custodian. Order-in-council 2483 amended order-in-council 1665 by defining a person of the Japanese race as follows:

> "Person of the Japanese race" means any person of the Japanese race required to leave any protected area of British Columbia by Order of the Minister of Justice under Regulation 4, as amended, of the Defence of Canada Regulations (Consolidation) 1941.

and by repealing s. 12 and substituting therefor the following:

> 12 (1) Subject as hereinafter in this Regulation provided, as a protective measure only, all property situated in any protected area of British Columbia belonging to any person of the Japanese race (excepting fishing vessels subject to Order in Council P.C 288 of January 13th, 1942, and deposits of money, shares of stock, debentures, bonds or other securities) delivered up to any person by the owner pursuant to an order of the Minister of Justice, or which is turned over to the Custodian by or on behalf of the owner, or which the owner, on being evacuated from the protected area, is unable to take with him, shall be vested in and subject to the control and management of the Custodian as defined in the Regulations Respecting Trading with the Enemy, (1939); provided, however, that no commission shall be charged by the Custodian in respect of such control and management.
>
> (2) The Custodian may, notwithstanding anything contained in this Regulation, order that all or any property whatsoever, situated in any protected area of British Columbia, belonging to any person of the Japanese race shall, for the purpose of protecting the interests of the owner or any other person, be vested in the Custodian, and the Custodian shall have full power to administer such property for the benefit of all such interested persons, and shall release such property upon being satisfied that the interests aforesaid will not be prejudiced thereby.
>
> (3) For the purposes of the control and management of such property by the Custodian, the Consolidated Regulations Respecting Trading with the Enemy, (1939) shall apply mutatis mutandis to the same extent as if the property belonged to an enemy within the meaning of the said Consolidated Regulations.

The *Regulations Respecting Trading with the Enemy, (1939)*, which are incorporated by reference by s. 12(3), defines Custodian by s. 23(1), vests the property of the enemy in the Custodian, and by s. 24(2) provides:

> This regulation shall be a vesting order and shall confer upon the Custodian all the rights of the original enemy holder, including the power of sale, management and otherwise dealing with such property rights and interests as he may in his sole discretion decide.

Additional powers of the Custodian are conferred by secs. 36 to 40 inclusive and 43 to 46 inclusive.

Order-in-council 469 empowered the Custodian to sell property of persons of the Japanese race.

Sec. 12(3) of order-in-council 2483 adopts by reference *Regulations Respecting Trading with the Enemy (1939). Consolidated Regulations* under order-in-council 3959 were in force and applied initially to the Custodian. On 13th November 1943 *Revised Regulations Respecting Trading with the Enemy (1943)* were substituted and the former *Regulations* were repealed.

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The facts follow.

The suppliant was born in Japan of parents who were also born in Japan and was naturalized as shown by certificate of Canada citizenship dated 19th June 1951. On the 5th April 1942 the suppliant, pursuant to the notice did register as a person of the Japanese race. The suppliant was subsequently evacuated and moved to Greenwood British Columbia and on May 23, 1943, the Custodian filed in the Land Registry Office in the City of Victoria a certificate of vesting of the suppliant's land.

In 1944 the Custodian issued a catalogue of real properties for sale by public tender which included the lands of the suppliant on Saltspring Island, and this catalogue states:

> Persons interested in the purchase of any of the properties listed herein are asked to contact the agent whose name is set opposite each property. These agents will be pleased to supply additional information and to arrange for the inspection of the property.

Also the catalogue referred interested parties for property on Saltspring Island, B.C. to Gavin C. Mouat of Ganges, B.C., described as an agent. The Custodian received offers from Captain Smith and Salt Spring Lands Limited to which the Custodian replied, saying that he required an independent valuation. The Custodian also received a third tender from one Bush which was refused as filed too late. D. K. Wilson, the evaluator of the Custodian, reported the value of the land at $5,000 and the Custodian thereupon wrote Smith and Salt Spring Lands Limited that he would not consider any offer of less than $5,000. Subsequently Salt Spring Lands Limited offered to purchase at $5,250 and that offer, being the highest, was ultimately accepted. By deed of the 1st March 1945 the Custodian conveyed to Salt Spring Lands Limited. Having received the purchase money the Custodian, on the 23rd May 1945 accounted to the suppliant.

By order-in-council 1810 of the 14th July 1947 it is recited that persons of the Japanese race were evacuated and claims have been made that they suffered pecuniary loss and therefore it was deemed advisable to appoint a Commissioner to investigate the claims and to make recommendations. H. I. Bird, then Justice of the Appeal Court, later the Chief Justice of British Columbia, was

appointed Commissioner. By letter of the 23rd May 1945 to the suppliant, the Custodian reported the sale of the land at $5,250 and reported the balance of $4,838.54 standing to the suppliant's credit. By letter of the 19th August 1947 the suppliant objected to the sale of his property, and by letter of the 28th August 1947 the Custodian remitted the balance standing to the credit of the suppliant and reported to him that Mr. Justice Bird had been appointed as Commissioner to investigate certain claims of persons of the Japanese race evacuated from British Columbia. Cheques were enclosed by letters of the 5th October 1948. Subsequently the suppliant was notified of the date of the hearing before the Commissioner and the suppliant gave evidence before the Commissioner and was there represented by counsel.

The Commissioner reported as follows:

> I have the honour to report upon the investigation into claims of persons of the Japanese race made by me pursuant to the terms of Order-in-Council P.C. 1810 of July 18th, 1947, as subsequently amended.
>
> Subsequently a policy of liquidation of the property of these evacuated persons was laid down by Order-in-Council P.C. 469 of January 19th, 1943. This policy was put into operation soon after, and on March 8th, 1943, two Advisory Committees were set up by the Custodian to advise the Director upon the disposition or effective use of real and personal property of evacuated persons of the Japanese race then vested in the Custodian.
>
> The first of these Committees was appointed for the Greater Vancouver area, the personnel of which comprised The Honourable Mr. Justice Sidney Smith, Justice of Appeal, British Columbia, as Chairman; Charles Jones, Esquire (then Alderman of the City of Vancouver and later Mayor); and K. Kimura, Esquire.
>
> The other Advisory Committee, known as the Rural Property Committee, had jurisdiction over all vested property situate outside the Greater Vancouver area, including Prince Rupert and the vicinity, Victoria and elsewhere on Vancouver Island, as well as the Fraser Valley. This Committee was composed of His Honour the late Judge David Whiteside, deceased, as Chairman; D. E. McKenzie, Esquire, New Westminster; Hal Menzies, Esquire, Haney, B.C., and J. J. McLellan, Esquire. Mr. McLellan resigned soon after his appointment and was replaced by William Mott, Esquire, Mayor of New Westminster.
>
> The personnel of these Advisory Committees was such as to provide complete assurance that the administration and liquidation of the property of evacuated persons under their auspices would be performed with competence and just consideration for the interests of the owners.
>
> I am satisfied on the evidence adduced before me that the very onerous task imposed upon the Director of the Custodian's office at

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Vancouver, under the guidance and with the assistance of the Advisory Committees, was competently performed, with due regard to the interest of the owners of such property, notwithstanding that the task had to be performed in an atmosphere of public hysteria induced by war The fact that I have found that in certain respects fair market value was not realized on sales made by the Custodian in no sense reflects upon the work of the Custodian's organization. On the contrary, the evidence brought out on this Inquiry strongly supports the conclusion that this organization, in spite of the magnitude of the responsibilities imposed upon it, has substantially succeeded in administering and subsequently selling property of evacuated persons with due regard to the owner's interest.

These Committees advised the Director in respect to all matters arising in connection with the administration and sale of real and personal property under their jurisdiction, including the disposal of all property vested in the Custodian under the Orders-in-Council before mentioned, the methods to be adopted in appraisal of such property, the offering of the same for sale, the prices which should be realized, and the terms of contracts for sale, as well as the leasing of lands the immediate sale of which was considered inadvisable by the Committees.

Dealing now with Group 2 above, being real property situate in rural areas other than those included in numbers 1 and 3: The parcels included in this group, as before noted, were widely distributed throughout the Province of British Columbia. Consequently, the Director of the Custodian's office in many instances was unable to obtain the assistance of appraisers with such outstanding qualifications as those who were retained to act in the urban area of Greater Vancouver, nor does it appear that the appraisers employed had the intimate knowledge of the properties appraised which was enjoyed by those retained in the urban area. Moreover, the Rural Advisory Committee, drawn largely from residents of the Fraser Valley, could not bring to their deliberations the same intimate knowledge of properties dealt with by them as was possible in the case of the Urban Committee. I have directed attention earlier to the fact that the Rural Advisory Committee found it necessary to adopt in all circumstances the price fixed by the appraisers. Furthermore, the market for real properties passed upon by the Rural Advisory Committee was a much more limited market than that available in the Greater Vancouver area.

The evidence satisfies me that all reasonable efforts were made by the Director of the Custodian's office, as well as the Rural Advisory Committee, to realize the fair market value on the sale of those properties. However, it is my conclusion that the circumstances before outlined did not permit of that realization to the same degree as in the case of properties in the Greater Vancouver area.

and further reported his conclusions:

Counsel for the claimant caused an appraisal to be made in June, 1949, by R. M. Hall, of Pemberton Homes, Ltd., Victoria, B C This appraisal shows that a cruise of the timber on this parcel was made in 1921 by Ryan, Hibbertson, Ltd., who estimated the timber stand to comprise 4,335,000 ft. Claimant sold part of this timber on a stumpage contract made in 1939, at $2.00 per M.

The logging contractors took out, in the period 1940 to 1944, approximately 1,250,000 ft. Hall estimates that from 3,000,000 to 3,500,000 ft. remained on the property at the date of sale, which then had a stumpage value of about $4.00 per M., i.e., that there was a value in timber alone of from $12,000 to $14,000.

Hall describes the sea frontage to a depth of approximately 300 ft. as being exceptionally valuable for building sites. He considers that this part of the land, comprising approximately 100 acres, could have been sold, if subdivided and road connection furnished, at about $5,000, i e, minimum $50.00 per acre. He appraises the property as at March, 1945 (the date of sale) at $12,000.00.

Mr. Hall's estimate of the value of 100 acres having water-frontage, i e, about $5,000, taken into consideration along with the value of timber as well as the remaining 400 acres of wild land lying back of the water frontage mentioned, in my opinion supports the conclusion that the property at the date of sale had a fair market value of not less than $12,000 00.

Since the property was sold by the Custodian at $5,250 00 I recommend payment to the claimant of the sum of $6,750 00, to which should be added any charges deducted by the Custodian from the purchase price paid to the claimant.

The Commissioner found that although the land had been valued at $5,000, yet the fair market value was $12,000, and therefore he recommended that payment of the excess of $6,750 be made. That amount was eventually paid to the suppliant pursuant to his release under seal dated 28th October 1950 whereby the suppliant purported to release His Majesty the King and the Custodian from all actions, claims and demands; the additional sum was paid to the suppliant or to his order. Subsequently these proceedings were commenced by petition of right.

The suppliant alleges in the petition of right:

I. a trust—The Secretary of State, the Custodian, took custody in trust for and in the interest of the suppliant;

II. a breach—The lands were vested in the Custodian and sold and conveyed by him to Salt Spring Lands Ltd;

III. that such breach imposed liability on the Crown.

The prayer for relief (clause G) asks:

(a) that the Crown return the lands or

(b) alternatively, pay damages of $1,500,000. The declarations preceding clause G are merely ancillary to the allegations and relief in clause G.

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As to the prayer for return of the lands the suppliant cannot succeed on the suppliant's own pleading. The return of the lands involves more than a simple action in ejectment, but involves also rescission of the title issued to the Custodian and any subsequent title, also the certificate of vesting and the deed from the Custodian to Salt Spring Lands Ltd. The remedy of rescission is a remedy to be obtained in equity (*Richards v. Collins*[1], excepting the Ontario Statutes not here applicable) and in equity a decree will not be made in the absence of a person who will be affected thereby. In *Tryon v. Peer*[2], Van Koughnet, C. at p. 316 stated: "It is a general rule that all parties interested in the subject matter of a suit should be before the Court..." In *Best v. Beatty, Calvert v. Beatty*[3], Masten, J. at p. 273 stated:

> Upon this ground it is that in all actions by persons claiming under a trust, the trustee or other person in whom the legal estate is vested is required to be a party to the proceeding; and the rule is the same whether the trust be expressed or implied.

(quoting from *Daniells Chancery Practice* (8th Ed.) pp. 151-2). Moreover, under the rule *audi alteram partem,* all such parties must be given an opportunity to plead and to present their case: *Manning v. Gieschen*[4]; *DeSmith on Judicial Review of Administrative Action,* p. 103. In the absence of such necessary parties as the Salt Spring Lands Ltd. and the present holder of the legal title, no decree for rescission can be made. It cannot be assumed that such persons could have no answer to this remedy, by election to affirm as in *Clough v. London and North Western Railway*[5]; *Barron v. Kelly*[6] or by laches as in *Lagunas Nitrate Co. Ltd. v. Lagunas Syndicate.*[7]

The alternative remedy to rescission is account. The obligation to account depends upon a trust. Where there is a trust there is the obligation to account; where no trust, there is no obligation to account. In *Civilian War Claimants Association v. The King*[8], Lord Buckmaster at p. 24 stated:

> Finally when the moneys were received, it is said that from and after that moment the Crown became a trustee. I have pointed out in the

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[1] (1912) 27 O.L.R. 390 at p. 398
[2] (1867) 13 Gr. 311.
[3] (1920) 47 O.L.R. 265.
[4] (1965) 56 W.W.R. 124
[5] (1871) L.R. 7 Ex. 26 at p. 34.
[6] (1918) 56 S.C.R. 455.
[7] [1899] 2 Ch. 392.
[8] [1932] A.C. 14.

course of the argument, and I repeat, that if that were the case, unless you are going to limit the rights which the beneficiaries enjoy, those rights must include, among other things, a claim for an account of the moneys that were received, of the expenses incurred, and the way in which the moneys have been distributed. Such a claim presented against the Crown in circumstances such as these would certainly have no precedent, and would, as it appears to me, invade an area which is properly that belonging to the House of Commons.

In *Barnes v. Addy*[9] and in *Mara v. Browne*[10] the evidence was not sufficient to make the defendants trustees, therefore the suit was dismissed. In *Barnes v. Addy, (supra)* Lord Selborne, L.C. at p. 251 stated:

> Now in this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort,* or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust.* But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees. Those are the principles, as it seems to me, which we must bear in mind in dealing with the facts of this case.
>
> If those principles were disregarded, I know not how any one could, in transactions admitting of doubt as to the view which a Court of Equity might take of them, safely discharge the office of solicitor, of banker, or of agent of any sort to trustees.

Equity does not give damages: *Erlanger v. New Sombrero Phosphate Co. Ltd.*,[11] except where provided by *Lord Cairns Act* (21 & 22 Vict. c. 27, s. 2) in lieu of injunction or specific performance and that is not this case. However, this suppliant alleges a trust and breach thereof as the basis of his petition, hence the claim for damages may be read as a claim for the personal remedy of account as the remedy arising out of a trust. The pleadings may be taken to allege:

I. a trust in the Custodian to the suppliant under orders-in-council 1665 and 2483;

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[9] (1874) L.R. 9 Ch. App. 244. [10] [1896] 1 Ch.D 199.
[11] (1878) 3 App. Cas. 1218

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II. the breach thereof in part by reason that order-in-council 469 authorizing a sale is alleged *ultra vires*, therefore there was a breach in the trustee having sold and conveyed to Salt Spring Lands Ltd;

III. for such breach the Crown is responsible in account.

Those allegations have not been made good.

I. The suppliant contends that the lands vested in the Custodian as trustee and that trust is inferred under the following circumstances:

The suppliant contends that the trust arises because any vesting under orders-in-council 1665 and 2483 is subject to the provisions of sec. 12 (order-in-council 2483) which provide that the vesting is "as a protective measure only" and limited to "the control and management of the Custodian" and "for the purpose of protecting the interests of the owner or other person" (s. 12(2)) and to administer "for the benefit of all such interested persons and shall release such property upon being satisfied that the interests aforesaid will not be prejudiced thereby" (s. 12(2)). "For the purpose of control and management" the *Consolidated Regulations* are made applicable (s. 12(3)).

In *Nakashima v. The King*[12], Thorson, P. at p. 494 points out the discretionary powers given to the Custodian under the *Consolidated Regulations Respecting Trading with the Enemy (1939)* (order-in-council 3959). By Sec. 21(2) he may deal with the interest of the enemy; by s. 23 he may have the property transferred to his name; by s. 38 he may liquidate; by s. 40 he may dispose of the property publicly or privately. Further by s. 40 the property is free from attachment or execution; by s. 50 the Custodian is not liable for any charge; by secs. 42 to 44 he may set up an office and engage a staff, have full control over his funds and may deposit in any bank and may pay office expenses therefrom. Those powers, and particularly the discretionary powers of the Custodian are inconsistent with any trust.

Again, in referring to the alleged limitations, "as a protective measure only" and "to the control and manage-

[12] [1947] Ex. C.R. 486.

ment of the Custodian", which the suppliant alleges limit the application of the *Consolidated Regulations*, Thorson P. in the *Nakashima* case states at p. 496:

> In my opinion even if this were conceded, it would not alter the character of the Custodian's powers and duties. His discretionary powers might be more limited in scope than in the case of alien enemy property but the difference would be one of degree rather than of kind. He would still have very wide, free discretionary powers in the field of control and management. And if Order-in-Council P.C. 469 of January 19, 1943 is valid there would be no difference at all in the scope of the Custodian's discretionary powers as between alien enemy property on the one hand and Japanese evacuee property on the other.

and Thorson, P. thereafter stated that order-in-council 469 was valid, in the following words (p. 504):

> It was, therefore, within the power of the Governor-in-Council to pass Order-in-Council P.C. 469 of January 19, 1943, embodying the terms against which the Suppliants protest and they were validly enacted. The Custodian has, therefore, the lawful right to liquidate, sell, or otherwise dispose of the property vested in him, the properties of the Suppliants.

It therefore follows that the Custodian is under no trust in favour of an alien enemy, but all the rights and powers of the alien enemy in the property are vested in the Custodian, and the Custodian is in the same position with reference to evacuee property.

The *Nakashima* case refers to *Consolidated Regulations Respecting Trading with the Enemy (1939)* contained in order-in-council P.C. 3959 of 27 August, 1940. Those *Regulations* were cancelled on 13th November 1943 and *Revised Regulations Respecting Trading with the Enemy (1943)* were substituted therefor, but these *Revised Regulations (1943)* have not lessened the powers of the Custodian in that the equivalent sections are included sometimes under different numbers. The Custodian is vested with the property (s. 21(1)) and all the rights of the enemy (here evacuee) (s. 21(2) and s. 22), with power of sale (secs. 38, 40(1)), with discretion to release (s. 39) and to deal with property (secs. 21(2), 38, 39); vested property is excepted from attachment (s. 49); the custodian is not liable for charge or tax (s. 50) and may deduct his charges (s. 44). There appears to be no material lessening of the powers of the Custodian by the *Revised Regulations (1943)* and hence it is immaterial whether there is applicable to the Custodian the *Consolidated Regulations* P.C.

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3959 referred to in the *Nakashima* case or the *Revised Regulations (1943)*. Both depend upon the *War Measures Act*, R.S.C. 1927, c. 206, s. 3(2) and hence are conditioned that once the Governor-in-Council has considered "that the order is necessary or advisable for any of the purposes mentioned that is the end of the matter" *Nakashima* case, p. 504.

The suppliant contends that the orders-in-council 1665, 2483 and 469 are void in that the words "any person of the Japanese race", are so vague and indefinite as to be without clear meaning, and as such race is the basis of application of orders-in-council, therefore the orders-in-council are void. If that contention were sound, the contention would put the suppliant out of court in that the suit would be for the Custodian's wrongful taking of the lands and the remedy would be by rescission as in *Richards v. Collins, supra,* but not for trust as alleged in the petition; in this proceeding there could be no rescission for want of necessary parties such as Salt Spring Lands Ltd.

In support of his contention the suppliant has cited *Noble and Wolfe v. Alley*[13]; in that judgment other words excluding sale to designated races appeared in a restrictive covenant which covenant the court was asked to enforce specifically by way of injunction, and this the court refused to do because a restrictive covenant to be enforced must have the same clarity as the court requires in a condition subsequent to a grant. As a condition subsequent is subsequent to and in derogation of an absolute grant, the condition subsequent must be clearly expressed else it is defeated by the preceding intention to grant. Hence, that case is distinguishable as different words are there used in other circumstances, that is, in a restrictive covenant. Here the words "any person of the Japanese race" appear in orders-in-council, which orders-in-council have been held valid in the *Nakashima* case. Also, in *Reference re Validity of Orders-in-Council 7355, 7356 and 7357,* the words "persons of the Japanese race" appear in order-in-council 7355 and in the recitals of order-in-council 7357, and the words "of the Japanese race" appear in s. 2 of order-in-council 7355 and in secs. 2 and 4 of order-in-council 7357; and all orders-in-council were held valid in the Supreme Court of

[13] [1951] 1 D.L.R. 321.

Canada ([1946]S.C.R. 248) and in the Judicial Committee of the Privy Council ([1947] 1 D.L.R. 577). Under such judgments the words must be taken to be not vague or indefinite and not affecting the validity of the orders-in-council.

Further, no statute has been declared void because the words thereof are indefinite. In *Fawcett Properties Ltd. v. Buckingham County Council*,[14] Lord Denning at p. 516 stated:

> My Lords, it is a bold suggestion to make that these words, taken as they are from a statute, are void for uncertainty. Counsel for the appellants was unable to point to any case where a statute had ever been held void for uncertainty. There are a few cases where a statute has been held void because it is meaningless but none because it is uncertain... But when a statute has some meaning even though it is obscure, or several meanings, even though there is little to choose between them, the courts have to say what meaning the statute is to bear rather than reject it as a nullity.

It follows that the words "any person of the Japanese race" are not vague or indefinite and they do not invalidate the orders-in-council.

The suppliant contends that there is no evidence that he is of the Japanese race and therefore no evidence that he comes within the orders-in-council 1668, 2483 or 469. On the contrary, there is ample evidence. In the suppliant's examination for discovery he gave his name as Iwasaki Torazo, or, in English, Torazo Iwasaki. That is not an English name. Questions 5-10- he was born in Japan of Japanese parents who were born there.

Order-in-council 9760 required every person of the Japanese race to register with a Justice of the Peace or the R.C.M.P. There was an order to leave the protected area. The suppliant registered to leave and was evacuated as shown by letter of the 17th September 1942 by the suppliant's solicitor. The suppliant's lands were vested in the Custodian because he was of the Japanese race. Finally, under order-in-council 1810, a Commission was set up to hear claims of persons of the Japanese race of which the suppliant was notified. The suppliant then appeared as a person of the Japanese race with counsel before the Commissioner and there gave evidence. Following the hearing the lands were valued by the Commissioner at $12,000.00

[14] [1960] 3 All E.R. 503.

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and the excess over the previous selling price was paid to the suppliant or on his order and he gave a release. The suppliant was of the Japanese race; that is more readily found than the alternative, that he received money under false pretences.

II. The suppliant further contends that there was a breach of trust: the suppliant contends that order-in-council 469 is void as in derogation of the *War Measures Act*, R.S.C. 1960, c. 209, s. 3(2), which reads:

> 2. All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation.

The suppliant has cited *Reference re Regulations (Chemicals) under War Measures Act* [1943] 1 D.L.R. 248, where Duff, C.J.C. said at p. 263:

> Section 7 of the *War Measures Act* must prevail over paragraph 4 of the Order-in-Council since it is not open to the Governor-in-Council to derogate from the provisions of the *War Measures Act* except...

The suppliant's contention is that orders-in-council 1665 and 2483 set up a trust of the Custodian to the suppliant to keep the lands for the suppliant, and s. 3(2) of the *War Measures Act* preserved that right of *cestui que trust* in the suppliant, therefore order-in-council 469 in authorizing a sale was in derogation of the rights of the suppliant as *cestui que trust*, which rights were preserved by s. 3(2) of the *Act*, hence order-in-council 469 was in derogation of the statute and was invalid. That contention fails for the following reasons:

(1) The contention depends upon the Custodian holding as trustee but the Custodian did not hold under any trust but held absolutely.

(2) The Order-in-Council 469 was held valid by the *Nakashima* case, p. 504, and that finding concludes the matter.

(3) The contention is based on the misconstruing of s. 3(2) of the *War Measures Act*. The purpose of s. 3(2) is seen in *Maxwell on Interpretation of Statutes* (11th

Ed.) p. 390, namely, that at common law a statute when repealed was deemed never to have existed except as to completed transactions, hence if a person committed an offence against a statute and the statute was repealed before conviction therefore he went free althrough an information had been laid. The purpose of s. 3(2) was to prevent such results following the varying, extending or repealing of an order-in-council. Hence the section (3(2)) means that the validity of anything done is determined by the law including orders-in-council then existing, notwithstanding an order-in-council be subsequently varied, extended or revoked. But the subsequent varying, extending or revoking is valid because that power is expressly conferred by s. 3(2).

No trust was created for the suppliant under orders-in-council 1665 and 2483; that was excluded by the *Nakashima* case, *supra*. Further, order-in-council 469 is valid as held in the *Nakashima* case, being within the express power of s. 3(2) to vary, extend or revoke.

The suppliant also contends that the breach of trust occurred by the Custodian selling to Salt Spring Lands Ltd., in that G. C. Mouat was an agent of the Custodian and had also a 20% interest in the company, therefore the Custodian's duty and interest were in conflict.

The Custodian did sell to Salt Spring Lands Ltd. by deed of 1st March, 1945 and G. C. Mouat did have an interest in Salt Spring Lands Ltd. to the extent of 20% and was also a director at all material times.

Further, the catalogue of properties for sale issued by the Custodian referred to G. C. Mouat as an agent, and referred prospective purchasers to G. C. Mouat, and it has been held that when a trustee or fiduciary puts himself in a position where his duty to his principal and his interest are in conflict, the trustee or fiduciary may be held a trustee of any secret profit or advantage.

In *Parker v. McKenna*[15], the director of a company took an assignment by the purchaser of an executory agreement by such purchaser with the company, and the directors were held liable to account for their profit on the

[15] (1874) 10 L.R. Ch.A. 96.

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transaction, as the conflict arose by reason of the duty being in the directors to enforce the agreement for the company and it was their interest as assignees to relax the enforcement.

In *Boston Deep Sea Fishing & Ice Co. v. Ansell*[16], the defendant shareholder of another company received a commission on business he introduced to that other company and he, an officer of the plaintiff, had induced the plaintiff to contract with the other company.

The difficulty in the case at bar is in seeing what is the conflict, that is, between what interest and what duty. The Custodian sold to Salt Spring Lands Ltd. but the Custodian had no interest in that company and was not selling to himself. Hence there was no conflict on the part of the Custodian. G. C. Mouat was not selling. There is no evidence that Mouat's duty as agent was in any wise inconsistent with his purchasing in person the lands in question or that his minority interest in the company was inconsistent with that company buying, because Mouat was not selling, and his being agent may have had nothing to do with buying or with selling. The selling was by the Custodian with the advice of a committee consisting of Judge Whiteside and two other persons who were all above reproach. In the report of the Commissioner (Bird, J.A., later C.J.B.C.) he commends the Custodian for making records available, approves the advisory committees; states that the work of the Custodian was well performed and that real efforts had been made to get fair value for the real property.

In Appendix III the Commissioner found that the real value of the lands formerly owned by the suppliant was $12,000 and not $5,000 as had been reported by the Custodian's real estate agent (Wilson). The selling was by the Custodian with the help of the advisory committee.

The position of this Custodian is stronger than that of the bank manager in *The Bank of Upper Canada v. Bradshaw*[17]. There a bank manager was alleged to be liable for the deficiency of a loan which he as bank manager had made for the bank to a company in which he had an interest. Lord Cairns at pp. 489-90 stated:

> It is said, either that he should have given no accommodation to the Company, or, at all events, that before doing so he should have

[16] (1888) 39 Ch.D. 339.

[17] (1867) L.R. 1 P.C. 479.

told the Bank that he was interested in the Company, a fact which it is alleged the Bank did not know. And it is contended that he should be made liable for the deficiency upon this account. Their Lordships are desirous in no way to qualify or to abridge the doctrine of law prevailing in almost all systems of jurisprudence, that any one standing in the position of an Agent cannot be allowed to put his duty in conflict with his interests, and they are certainly not prepared to rest the application of the doctrine on the amount of the interest, adverse to that of his employer, which the Agent may be supposed to have. But it is to be observed that in the present case the dealings between the Bank and their customer were dealings in which the customer was not *Bradshaw,* but an incorporated Company, *Bradshaw* being a shareholder in that Company, distinct in point of law from the Company itself. It is also to be observed that *Bradshaw* had been appointed to manage the business of the Bank in the midst of a community consisting of individuals and of incorporated trading companies similar to the *Telegraph Company,* in which companies *Bradshaw* might or might not hold shares. Now their Lordships entertain no doubt, that if any case of bad faith or fraud were shewn to occur in dealings between the Manager and corporations in which he was a shareholder, dealings of that kind could not be supported. But their Lordships think that the just conclusion to be drawn from the facts, and from the course of business in the present case, is, that it was within the power of *Bradshaw,* as Manager of this Bank, to deal in the ordinary and proper course of banking business, not merely with the individuals, but also with the trading corporations of the place in which he was placed as Manager, and to deal in that way with the trading corporations, even although he himself might hold shares in any one of them. And if that be the true view of the position and authority of *Bradshaw,* it cannot, their Lordships think, be denied that the advance made to the *Telegraph Company* upon the account that I have described, was entirely a legitimate act in the course of the ordinary business of the Bank. Their Lordships, therefore, preserving entirely intact the general rule as to the conduct and duty of Agents, are not prepared to hold that *Bradshaw* exceeded his power or authority in dealing with the *Telegraph Company* in the way that has been described.

There is neither alleged nor proved any bad faith by the Custodian in the case at bar and the finding of the Commissioner, Bird, J. A. precludes any bad faith in selling the property. Hence as there was no trust there could be no breach and assuming a trust, there was no breach proven in this instance.

DEFENCES:

The Crown as respondent relies upon the limitation that any action for the recovery of land must be commenced within twenty years: *Statute of Limitations,* R.S.B.C. 1960, c. 370, s. 16. Here no land may be recovered because of the absence of necessary parties, and it has not been argued whether or not the remedy *in personam* has been

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barred by analogy after some shorter period, as in *Knox v. Gye*[18]. Hence the defence by limitation need not be decided.

The crown has also contended that the claim of the suppliant is released by the release of 28th October 1950 given by the suppliant under seal to the Crown and the Custodian, whereby the suppliant has released all his rights. Such a "release under seal" would divest an obligation to account: *Debussche v. Alt*[19].

The suppliant contends that the order-in-council 469 authorizing the sale is *ultra vires* of the Governor-in-Council and is therefore a nullity, therefore the release having been given pursuant to such order-in-council releases a nullity and is ineffective: *Great North-West Central Railway v. Charlebois*[20]. The doctrine of *ultra vires* applies to statutory companies and where such company purports to enter into a transaction beyond its powers, there it is no person and the transaction is a nullity as in *Sinclair v Brougham*[21], but that doctrine of *ultra vires* has no application to a natural person, which is stated in *Bonanza Creek Gold Mining Co. v. The King*[22] by Viscount Haldane at p. 584:

> In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of *ultra vires* applies.

and at p. 577:

> For the company it is said, is a pure creature of statute existing only for objects prescribed by the Legislature within the area of its authority, and is therefore restricted, so far as legal capacity is concerned, on the principle laid down in *Ashbury Railway Carriage and Iron Co. v. Riche,* L.R. 7 H.L. 653,

and at p. 584 Viscount Haldane referred to a prerogative company having "a general capacity analagous to that of a natural person".

The release was given under seal by the suppliant, a natural person, and the doctrine of *ultra vires* cannot apply thereto.

In any event, this contention fails in that order-in-council 469 is not *ultra vires: Nakashima* case, *supra,* at p. 504.

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[18] (1871) L.R. 5 H.L. 656
[19] (1878) 8 Ch.D. 286 at p 314.
[20] (P C) [1899] A C. 114
[21] [1914] A.C. 398.
[22] [1916] 1 A.C. 566.

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The basis of the suppliant's complaint is without foundation. The complaint is that orders-in-council 1665 and 2483 set up a trust to return the lands to the suppliant, wherefore the lands vested in the Custodian as trustee under duty to manage and return, and that order-in-council 469 in authorizing a sale, was void. That was in error; there was no trust: *Nakashima v. The King* (*supra*) and the vesting in the Custodian was absolute; nor was there any breach of trust.

Further, the suppliant contended before the Commissioner that the lands were of greater value than that realized by the Custodian; and the Commissioner reported the additional value of the lands and that value so found was paid to the suppliant under a release under seal of all his claims. That release still stands.

In conclusion, there is no merit in the suppliant's petition of right, therefore the proceeding is dismissed with costs payable by the suppliant to the Crown as respondent.

QUEBEC ADMIRALTY DISTRICT

Montreal 1968 Oct. 8

Ottawa Oct. 31

BETWEEN:

LE MARIN DENIS BARTHE .....DEMANDEUR;

AND

LE NAVIRE S/S *FLORIDA* ET AUTRES .....} DÉFENDEURS;

AND

PAUL E. NOËL .....APPELÉ EN GARANTIE.

Admiralty—Breach of contract to employ seaman—Whether within Admiralty jurisdiction—Whether claim for damages or for wages—Quebec civil law—Admiralty Act, R.S.C. 1952, c. 1, s. 18(1)—Canada Shipping Act, R.S.C. 1952, c. 29, secs. 200, 214(2).

Plaintiff brought action on the Admiralty side alleging that he was engaged in Montreal in mid-April 1966 as second cook of the S.S. *Florida* at $350 a month but was informed on December 15th that the ship would not sail that year, and he claimed $700 plus interest from October 15th and in default of payment sale of the ship.

Held, on an interlocutory motion, the action was within the court's Admiralty jurisdiction.

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1. If regarded as an action for damages for breach of contract to employ plaintiff aboard defendant ship the action was indistinguishable in principle from an action for damages for breach of contract for wrongful dismissal and thus was within Admiralty jurisdiction in virtue of s. 18(1) of the Admiralty Act. *The Great Eastern* (1867) L.R. 1 A. & E. 384; *The Blessing* (1878) 3 P.D. 35; *The Ferret* (1883) 8 App. Cas. 329; *The Lady Eileen v. The King* (1907) 11 Ex. C.R. 87; *Roberts v. The Tartar* (1908) 11 Ex. C.R. 308; *The City of London* (1839) 1 W. Robinson's Admiralty R. 88, referred to.

2. If regarded as a claim for wages for work for which plaintiff held himself available (a claim based on s. 200 of the *Canada Shipping Act*) Admiralty jurisdiction arose under s. 214(2) of the *Canada Shipping Act*. (*Fraser v. North Shipping and Transportation Ltd.* 1968) 69 D.L.R. (2d) 596, referred to.) By the law of Quebec if plaintiff did not accept defendants' repudiation of the contract his claim for wages subsisted. *Simard v. The Canada Steamship Co.* [1916] Que. S.C. 105; *Furness Withy v. Recorder E. J. McManamy & Young et al* [1943] Que. S.C. 276, referred to.

3. Plaintiff's right to a maritime lien in respect of his claim should be dealt with at the trial if necessary when the precise nature of his claim was established.

APPLICATION.

Jean Carouzet for demandeur.

Raynold Langlois for défendeurs.

JACKETT P.:—On Tuesday, October 8, an application was made before me under Rule 72 of the Admiralty Rules[1] to have certain questions of law raised by the pleadings in this action decided forthwith.

The substantive allegations in the statement of claim read as follows:

> 1. En ou vers la mi-octobre 1966, il fut engagé par le Capitaine du S/S *Florida*, M. Paul Noël au bureau de placement des marins à Montréal pour servir en qualité de second cuisinier sur le défendeur, le navire S/S *Florida*, au salaire convenu de $350.00 par mois;
>
> 2. Le Capitaine du défendeur lui ayant assuré que le navire S/S *Florida* devait prendre la mer huit à quinze jours après la date de son engagement, le demandeur se tint prêt et disponible à compter de son engagement à servir en qualité de second cuisinier sur le défendeur et il ne rechercha pas d'autres positions à partir de cette date;
>
> 3. Comme on lui avait dit qu'il devrait aller rejoindre le navire S/S *Florida* à Jacksonville aux États-Unis, le demandeur fit les démarches nécessaires auprès du consulat des États-Unis pour obtenir un visa de transit dans ce pays et produit sous la cote P-1 son passeport portant ledit visa à la page 13;

[1] 72. Either party may apply to the Court to decide forthwith any question of law raised by any pleading, and the Court shall thereupon make such order as to it shall seem fit.

4. N'ayant reçu aucune instruction quinze jours après son engagement, le demandeur téléphona au Capitaine Noël pour savoir ce qui se passait, mais celui-ci lui répondit de ne pas s'inquiéter que le départ du défendeur le S/S *Florida* était un peu retardé;

5. Huit ou dix jours après, le demandeur retéléphona au Capitaine du bateau défendeur et celui-ci lui re-affirma qu'il n'y avait pas lieu de s'inquiéter, qu'il ne s'agissait que d'un léger retard et qu'on allait le prévenir bientôt de son départ;

6. Finalement le demandeur, qui ne travaillait toujours pas dans l'attente de son départ en mer appela le Capitaine du bateau vers le 15 décembre 66 et celui-ci lui déclara alors que le bateau défendeur ne pourrait prendre la mer au cours de l'année 66, vue que la saison était trop avancée et que son départ était reporté au mois d'avril 1967;

7. Le demandeur a alors été obligé de chercher du travail et il a ainsi perdu deux mois de salaire à $350 00, soit $700 00, par la faute, l'incompétence, la négligence et l'incurie du bateau défendeur et de ses propriétaires, sa cargaison, son frêt et toutes autres personnes y intéressées;

8. Qu'en raison de cette faute et de cette incurie, le demandeur qui ne recevait aucun secours de l'assurance chômage, n'a pas cherché de travail pendant ces deux mois, comptant sur son emploi et ses salaires à bord du défendeur S/S *Florida* et il a dépensé le peu d'argent qu'il avait, se trouvait aux prises avec des difficultés financières inextricables;

9. Le défendeur étant par la suite revenu dans le port de Montréal, le demandeur a dû le faire arrêter pour sauvegarder ses droits et sa créance;

and the Prayer for Relief reads as follows:

PAR CES MOTIFS, PLAISE À CETTE HONORABLE COUR:

CONDAMNER le défendeur et ses propriétaires et ayant-droit à payer au demandeur la somme de $700.00 avec intérêt depuis le 15 octobre 1966, date à laquelle l'engagement du demandeur aurait dû commencer, et aux dépens;

ET À DÉFAUT par le défendeur ou ses propriétaires ou ses ayant-droit de payer ces sommes, ORDONNER que le défendeur soit vendu en justice pour, sur le produit de la vente, être le demandeur payé par préférence, en principal, intérêts et frais.

The statement of defence reads in part as follows:

3. A tout événement, la Cour de l'Échiquier en Amirauté n'a pas juridiction pour entendre cette cause;

4. La réclamation du Demandeur si réclamation il y a, est de la nature d'une action en dommages et ne confère aucun lien maritime ou autre sur le navire;

The notice of the application under Rule 72 reads in part as follows:

Les questions de droit sur lesquelles la Cour sera appelée à statuer sont les suivantes:

1. La juridiction de la Cour de l'Échiquier en Amirauté dans cette affaire;
2. Le défaut de lien maritime du Demandeur dans cette cause.

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The statement of claim is ambiguous in that it is not clear whether it sets up a claim

(a) for damages sustained by the plaintiff as a result of not being provided with employment on the defendant vessel pursuant to a contract that had been made with him to provide him with such employment,

(b) for wages for a period at the commencement of his period of engagement as a seaman during which he held himself available for work although his employer did not put him to work, or

(c) for one or other of those claims in the alternative.

Had an appropriate application been made, I should have been inclined to require the plaintiff to revise his statement of claim to remedy this ambiguity. That is not, however, the application with which I have to deal on this occasion.

Section 18 of the *Admiralty Act* reads in part as follows:

> 18. (1) The jurisdiction of the Court on its Admiralty side extends to and shall be exercised in respect of all navigable waters, tidal and non-tidal, whether naturally navigable or artificially made so, and although such waters are within the body of a county or other judicial district, and, generally, such jurisdiction shall, subject to the provisions of this Act, be over the like places, persons, matters and things as the Admiralty jurisdiction now possessed by the High Court of Justice in England, whether existing by virtue of any statute or otherwise, and be exercised by the Court in like manner and to as full an extent as by such High Court.
>
> (2) Without restricting the generality of subsection (1) of this section, and subject to the provisions of subsection (3) thereof, section 22 of the *Supreme Court of Judicature (Consolidation) Act, 1925,* of the Parliament of the United Kingdom, which is Schedule A to this Act, shall, in so far as it can, apply to and be applied by the Court, *mutatis mutandis,* as if that section of that Act had been by this Act re-enacted, with the word "Canada" substituted for the word "England", the words "Governor in Council" substituted for "His Majesty in Council", the words "Canada Shipping Act" (with the proper references to years of enactment and sections) substituted, except with relation to mortgages, for the words "Merchant Shipping Act" (and any equivalent references to years of enactment and sections) and with the words "or other judicial district" added to the words "body of a county", wherever in such section 22 to such *Supreme Court of Judicature (Consolidation) Act, 1925,* any of the indicated words of that Act appear.
>
> (3) Notwithstanding anything in this Act or in the Act mentioned in subsection (2), the Court has jurisdiction to hear and determine

(*a*) any claim

(i) arising out of an agreement relating to the use or hire of a ship,

(ii) relating to the carriage of goods in a ship, or

(iii) in tort in respect of goods carried in a ship,

(*b*) any claim for necessaries supplied to a ship, or

(*c*) any claim for general average contribution.

* * *

(6) The Court on its Admiralty side has and shall exercise such other jurisdiction and execute such power and authority, in or relating to admiralty matters, as

(*a*) heretofore have been conferred upon it by any Act of the Parliament of Canada, or

* * *

The only part of section 22 of the English statute set out in Schedule A to that Act to which any reference has been made by counsel reads as follows:

22. (1) The High Court shall, in relation to admiralty matters, have the following jurisdiction (in this Act referred to as "admiralty jurisdiction") that is to say:

(*a*) Jurisdiction to hear and determine any of the following questions or claims:

* * *

(iv) Any claim for damage done by a ship;

* * *

(viii) Any claim by a seaman of a ship for wages earned by him on board the ship, whether due under a special contract or otherwise, and any claim by the master of a ship for wages earned by him on board the ship and for disbursements made by him on account of the ship;

* * *

(*b*) Any other jurisdiction formerly vested in the High Court of Admiralty;...

If, properly understood, the plaintiff's claim in this case is for damages sustained by him as a result of not being provided with employment on the defendant vessel pursuant to a contract that had been made with him to provide him with such employment, I cannot conceive of any interpretation of the words "damage done by a ship" that would comprehend such a claim nor can I conceive of any interpretations of the words "wages earned... on board the ship" that would embrace such a claim.

That is not, however, an end to the matter, in so far as the plaintiff's claim is to be regarded as one for damages, inasmuch as, by virtue of subsection (1) of section 18 of the *Admiralty Act*, the jurisdiction of the Court on its

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Admiralty side extends to "the like places, persons, matters and things as the Admiralty jurisdiction now possessed by the High Court of Justice in England, whether existing by virtue of any statute or otherwise".

It would seem to be clear that Admiralty jurisdiction in England has always extended to a claim by a seaman for compensation in the nature of damages for wrongful discharge before the term of his engagement has expired. See *The Great Eastern* [2], *The Blessing* [3], and *The Ferret* [4]. This jurisdiction has been exercised by the Admiralty Court in Canada.

See *The Ship Lady Eileen v. The King*[5] and *Roberts v. The Ship "Tartar"*[6].

I cannot see any distinction in principle between an action for damages for breach of contract for wrongfully dismissing a seaman and an action for breach of contract based on a failure to provide a seaman with the work for which he has been engaged, and it would appear that Admiralty jurisdiction in England extends to such a case. See *The City of London*[7].

My conclusion is, therefore, that if, properly considered, the plaintiff's claim is for damages sustained by him as a result of not being provided with employment on the defendant vessel pursuant to a contract that had been made with him to provide him with such employment, this Court has jurisdiction in the matter by virtue of subsection (1) of section 18 of the *Admiralty Act*.

I turn now to consider the question as to whether the Court has jurisdiction if, properly understood, the plaintiff's claim in this case is "for wages" for a period at the commencement of his period of employment as a seaman during which he held himself available for work although his employer did not put him to work.

The plaintiff's claim for "wages" would appear to be based upon section 200 of the *Canada Shipping Act*, R.S.C. 1952, chapter 29, which reads as follows:

> 200. A seaman's right to wages and provisions shall be taken to begin either at the time at which he commences work or at the time specified in the agreement for his commencement of work or presence on board, whichever first happens.

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[2] (1867) L.R. 1, A. & E. 384.
[3] (1878) 3 P.D. 35.
[4] (1883) 8 App. Cas. 329.
[5] (1907) 11 Ex. C.R. 87.
[6] (1908) 11 Ex. C.R. 308.
[7] (1839) W. Robinson's Admiralty Reports, Vol. I, page 88.

This section makes it clear that a seaman's right to "wages" shall be taken to begin either when he actually commenced to work or "at the time specified in the agreement for his commencement of work or presence on board" whichever first happens.

In the case of a seaman's claim for wages, it would seem that the Court has jurisdiction, where the amount is in excess of $250, as it is here, by virtue of section 214 of the *Canada Shipping Act*, R.S.C. 1952, chapter 29, which reads as follows:

> 214. (1) The Admiralty Court does not have jurisdiction to hear or determine any action, suit or proceeding instituted by or on behalf of any seaman or apprentice for the recovery of wages not exceeding two hundred and fifty dollars, except in the following cases:
>
> (*a*) where the owner of the ship is insolvent within the meaning of the *Bankruptcy Act;*
>
> (*b*) where the ship is under arrest or is sold by the authority of the Admiralty Court;
>
> (*c*) where any judge, magistrate or justices, acting under the authority of this Act, refers the claim to such court; or
>
> (*d*) where neither the owner nor the master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore.
>
> (2) Except as provided by this Part no other court in Canada has jurisdiction to hear or determine any action, suit or proceeding instituted by or on behalf of any seaman or apprentice for the recovery of wages in any amount.

While subsection (2) of section 214 is not as explicit as it might be, the proper view would appear to be that that subsection confers on the Admiralty Court exclusive jurisdiction in respect of all claims by seamen "for the recovery of wages" to which subsection (1) of section 214 does not apply. See *Fraser v. North Shipping and Transportation Ltd.*[8] per Hyde J. at page 597.

It seems clear that, according to the law applicable to such matters arising in the Province of Quebec, where there has been a breach of contract by an employer of a seaman, the contract of employment nevertheless subsists and can be made the subject of a claim for wages unless the employee has accepted the repudiation of the contract, in which case he is entitled to damages. See *Simard v. The Canada Steamship Company*[9] and *Furness Withy v.*

[8] (1968) 69 D.L.R. (2d) 596.

[9] [1916] 50 S.C. 105.

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Recorder E. J. McManamy & Young et al.[10] If this be the general principle, it seems clear to me that that principle applies in a case where an employee has been engaged for a period and holds himself available for work from the commencement of the period, although he has never been set to work.

My conclusion is, therefore that if, properly understood, the plaintiff's claim in this case is "for wages" for a period at the commencement of his period of engagement as a seaman during which he held himself available for work although his employer did not put him to work, this Court has jurisdiction in the matter.

My decision on the first question of law raised by the application is therefore that the Exchequer Court of Canada on its Admiralty side has jurisdiction in this matter.

With reference to the second question of law raised by the application, namely, the question as to whether the plaintiff is entitled to a maritime lien in respect of his claim in this case, I have come to the conclusion that that question should not be decided on the pleadings, but should only be decided when the precise nature of the plaintiff's claim has been established. My judgment in respect of that question will therefore be that it be referred to the trial judge to be determined by him if, and to the extent that, it becomes necessary to decide it in order to dispose of the action.

The defendants will be ordered to pay to the plaintiff his costs of and arising out of the application under Rule 72.

[10] [1943] five S.C. 276.

BETWEEN:

ALPINE FURNITURE COMPANY LIMITED ..... APPELLANT;

AND

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

AND BETWEEN:

MONTE CARLOS FURNITURE COMPANY LIMITED ..... APPELLANT;

AND

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

Toronto 1968 Sept. 16-17 Ottawa Nov. 8

Income tax—Direction that two companies be deemed associated—Onus of proving separate existence not tax reduction—Income Tax Act, secs. 39, 138A(2) and (3).

G and his wife held respectively 53.4% and 26.6% of the issued shares of a company which manufactured modern furniture designed by the husband and fine furniture designed by the wife. The remaining 20% of the company's shares was held by *H*. When the sales of both classes of furniture became approximately equal *G* and his wife, who differed as to the conduct of the business, consulted their accountant, their solicitor, and a tax expert, and on their advice incorporated two new companies on January 28th 1963. *G* held 80% of the issued shares in one of the new companies and his wife held 80% of the issued shares in the other, and *H* held all the remaining shares in both new companies. The new companies acquired the business of the old company and carried it on in equal partnership precisely as before. The old company had earned annual profits ranging from $10,619 in 1960 to $27,635 in 1962 and profits were known to be increasing in 1963 when the new companies were incorporated. The profit of the two new companies' partnership for 1964 was $72,805, i.e. $36,402.50 for each company. In assessing the two new companies for 1964 the Minister invoked s 138A of the *Income Tax Act* and directed that they should be deemed associated with the result that $35,000 of their combined profits instead of $35,000 of each company's profit was taxable at the lower rate.

Held, dismissing the companies' appeals, they had failed to meet the onus on them of establishing that none of the main reasons for their separate existence was to reduce the tax otherwise payable as required by s. 138A(3)(*b*)(ii).

In re C.I.R. v. Brebner [1967] 1 All E.R. 779 distinguished.

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ALPINE FURNITURE CO. LTD *et al* *v.* MINISTER OF NATIONAL REVENUE

INCOME TAX APPEAL.

Wolfe D. Goodman for appellants.

Frank L. Dubrule for respondent.

CATTANACH J.:—The appeals of the two appellants named in the above styles of cause against their respective assessments to income tax in respect of their 1964 taxation years were conveniently heard together by consent because both appeals arose from the identical circumstances and transactions which affect both appellants' liability to income tax in an identical manner.

Those circumstances and transactions are accordingly outlined.

Prior to February 1963 a furniture manufacturing business was carried on by Newport Chesterfield Company Limited, a joint stock company incorporated on March 25, 1959.

The voting shares, 500 in number, were held as follows:

Harry Weiner	200	40%
Leo Goldstein	200	40%
Viljo Helin	100	20%

Mr. Weiner was described in evidence as a silent partner by which, I assume, was meant that he did not participate in the actual management of the company in respect of production and sales, but only by way of investment.

Leo Goldstein was a designer of modern furniture and was the managing director and sales manager. The modern furniture designed by Mr. Goldstein was described by him as gimmick furniture and low priced. It was not sold through exclusive retail outlets but rather through discount houses and like outlets and was designed to appeal to purchasers of modest means.

Mr. Helin was an upholsterer and in charge of production, shipping and like duties.

Sarah Goldstein, the wife of Leo Goldstein, was employed by the company as a bookkeeper for which she had special qualifications, and she was responsible for the clerical and office end of the enterprise.

However Mrs. Goldstein combined an artistic temperament and ability with her practical attributes. She was a designer of fine furniture particularly in the French Provincial style.

On September 27, 1961, Mr. Weiner's holding of 200 shares in Newport Chesterfield Company Limited was purchased by Mr. and Mrs. Goldstein. Mr. Goldstein purchased 67 shares and Mrs. Goldstein purchased the remaining 133 shares so that from that time forward until February 1, 1963, the outstanding voting shares in the company were held as follows:

Leo Goldstein	267	—	53 4%
Sarah Goldstein (his wife)	133	—	26.6%
Viljo Helin (a stranger in the tax sense)	100	—	20%

Upon her acquisition of the above substantial share interest in the company Mrs. Goldstein's participation in the type of product turned out became greater. Apparently she wished to exploit her talents as a designer of fine and higher priced furniture and to that end to direct the production facilities of the company, in part at least, to the manufacture of this type of furniture rather than exclusively to the production of modern and lower priced furniture designed by her husband.

In compliance with her desire, one set of French Provincial furniture designed by Mrs. Goldstein was manufactured by the company and shown at a furniture show held in Toronto Ontario in January 1961. This furniture show, which is held at regular intervals, is of paramount importance to furniture manufacturers because prospective purchasers resort to it to see the new lines and to place their orders. This was done before Mrs. Goldstein became a shareholder in the company. Later two more sets of provincial furniture were manufactured.

During the year 1962, presumably at the insistence of Mrs. Goldstein over the opposition of her husband, the manufacture of fine furniture increased while the manufacture of modern furniture decreased comparably. It was estimated by both Mr. and Mrs. Goldstein that in mid 1962, during the months of June, July and August one of the biggest buying times, that the manufacture and sale of fine furniture accounted for approximately 25% of the

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total volume of the company's sales in terms of dollars, whereas by October 1962 that volume had increased to approximately 50%.

The foregoing estimates of the comparative production of fine furniture and modern furniture were merely estimates by the witnesses because the company kept only one set of books with no breakdown between the two types of furniture produced. While discrepancies occurred between the evidence given by the witnesses on examination for discovery and at trial as to the precise dates of the first manufacture and sale of fine furniture and as to the comparative percentage of the volume of production of the two lines of furniture at particular times, nevertheless, I am prepared to accept the foregoing estimates at the times indicated as being reasonably accurate.

It might well be that the decision to introduce the line of fine furniture designed by Mrs. Goldstein resulted in increased sales and consequent increased profits but in any event the sales and profits of Newport Chesterfield Company Limited showed progressive increases in the years 1960 to 1963 as is demonstrated by the following table extracted from Exhibit "J".

Year Ending	Sales	Gross Trading Profit	Profit Before Income Taxes	Provision for Income Taxes
Mar. 31/60	317,042.14	67,381.81	10,619 09	2,500 00
Mar. 31/61	475,220.40	113,765.98	26,510.51	6,427 46
Mar. 31/62 .. .	557,222 43	118,780.50	27,635 05	6,356 07
Jan. 31/63	635,692 06	162,165 97	47,427.47	15,890 26

Mr. Goldstein testified he knew that profits were increasing but that, as at February 1, 1963, he did not know the precise amount of the profit for the ten month fiscal period ending January 31, 1963, because he did not know the effect of inventory and labour until subsequent to stock taking and completed accounting which ended some time in March, 1963.

There was a definite clash of personalities between Mr. and Mrs. Goldstein resulting from the conduct of the business. Mrs. Goldstein deplored her husband's lack of orderliness including his habit of shaving prices to make a sale without informing the office so that proper billing could be made. Further their conflicting interests in fine furniture

and modern furniture posed a challenge one to the other. Both parties testified that their disagreements reached such proportions that they contemplated separating both in their business and domestic lives.

At this time Mr. Goldstein was in control of the company by reason of his ownership of a clear majority of the voting shares. Mrs. Goldstein insisted that, in fairness, her share holding interest in the business should be equal to that of her husband because, as she put it, her contribution was equal to his.

It was contemplated that Mr. Goldstein should transfer sixty-seven of his shares to Mrs. Goldstein so that each would own 200 shares, but that plan was discarded by both of them, even before they consulted a solicitor, if my recollection of the evidence is correct. The obvious reason for abandoning such method was that in the event of a dispute between Mr. and Mrs. Goldstein relating to the operation of the business, Viljo Helin, by voting his shares in favour of one of the disputants, could carry the issue to the frustration of the other, thereby wielding the balance of power, a circumstance that neither Mr. or Mrs. Goldstein was willing to accept.

They discussed their problems with the auditor of the company, Murray Rumack, whom they knew socially and professionally, several times during the currency of their controversy. Eventually when that dispute had apparently reached a critical stage Mr. Rumack recommended that they should consult a solicitor. They did not seek the advice of their usual solicitor, who was a general practitioner and in their opinion not competent to advise on their particular problem. On the recommendation of Mr. Rumack and, I presume, that of their own solicitor they consulted a solicitor well known for his knowledge of taxation matters. Mr. Goldstein testified that he did not know the reputation of this particular solicitor as a specialist in taxation matters but rather he consulted him because of his knowledge of corporate matters, presumably on the theory that if the business difficulties between him and his wife were resolved their domestic difficulties would also be resolved. At such discussions their own solicitor was present.

As a result of such discussions and upon the advice received Mr. and Mrs. Goldstein instructed the incorpora-

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tion of two companies, Alpine Furniture Company Limited and Monte Carlos Furniture Company Limited, the appellants herein, to which I shall refer sometimes hereinafter as Alpine and Monte Carlos. The companies were incorporated pursuant to the laws of the Province of Ontario by letters patent both bearing the identical date of January 28, 1963.

In Alpine 100 shares were issued of which Leo Goldstein owned 80 and Viljo Helin owned 20.

Similarly in Monte Carlos 100 shares were issued of which 80 were owned by Mrs. Sarah Goldstein and 20 by Viljo Helin.

Accordingly, Alpine and Monte Carlos were not associated with each other within section 39(4) of the *Income Tax Act*[1].

Alpine and Monte Carlos then entered into a partnership agreement dated February 1, 1963, for the purpose of manufacturing furniture under the firm name and style of Newport Chesterfield Company with both partners investing an equal amount of capital and sharing profits or bearing losses equally. The term of the partnership was to continue until both parties mutually agreed to determine it.

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[1] 39 (4) For the purpose of this section, one corporation is associated with another in a taxation year if, at any time in the year,

(*a*) one of the corporations controlled the other,

(*b*) both of the corporations were controlled by the same person or group of persons,

(*c*) each of the corporations was controlled by one person and the person who controlled one of the corporations was related to the person who controlled the other, and one of those persons owned directly or indirectly one or more shares of the capital stock of each of the corporations,

(*d*) one of the corporations was controlled by one person and that person was related to each member of a group of persons that controlled the other corporation, and one of those persons owned directly or indirectly one or more shares of the capital stock of each of the corporations, or

(*e*) each of the corporations was controlled by a related group and each of the members of one of the related groups was related to all of the members of the other related group, and one of the members of one of the related groups owned directly or indirectly one or more shares of the capital stock of each of the corporations.

By a specific provision in the agreement Leo Goldstein was employed by the partnership as general manager, Viljo Helin as production manager and Sarah Goldstein as bookkeeper, positions similar to those which had been held by those persons in Newport Chesterfield Company Limited.

By an agreement also dated February 1, 1963, between Newport Chesterfield Company Limited and Alpine and Monte Carlos as partners in the partnership known as Newport Chesterfield Company, the company sold and the partnership purchased the business formerly carried on by Newport Chesterfield Company Limited for the price of $210,000.35 by assuming liabilities totalling $114,382.87 and by the partnership giving a promissory note for the balance in the amount of $95,623.48. Specific provision was made in paragraph 4 with respect to the sale of accounts receivable and inventory pursuant to sections 85D and 85E of the *Income Tax Act*.

Mr. Goldstein testified that following the foregoing arrangements the partnership carried on two separate and distinct manufacturing operations on the same premises, one the manufacture of fine furniture under the general direction of Mrs. Goldstein, the other being the manufacture of modern furniture under general direction of himself with Mr. Helin superintending the production of both lines. He also testified that there were two sets of workmen whose work was done on one or other of the lines of furniture with no interchange of workmen whatsoever. He also indicated that the same separation applied to salesmen employed by the partnership. The salesmen of the fine furniture did not sell modern furniture, and the reverse situation applied, because the purchasers differed radically. He also testified that there were in effect two factories in the same premises with a physical separation.

As I assess the evidence I cannot see that there was any change in the physical operations as they had been conducted upon the introduction of the manufacture of fine furniture designed by Mrs. Goldstein, and which soon amounted to approximately 50% of the total sales volume by Newport Chesterfield Company Limited, and those that were conducted when the partnership took over on February 1, 1963, with the exception that an efficient system of stock control was introduced by Mrs. Goldstein.

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Immediately upon the incorporation of Alpine and Monte Carlos the health labels required to be attached to newly manufactured furniture were changed to name either Alpine or Monte Carlos as the manufacturer rather than Newport Chesterfield Company Limited. After a short time these labels were required to be changed from Alpine or Monte Carlos to indicate Newport Chesterfield Company, the partnership, as being the manufacturer to correspond to the fact. Accordingly the name of the manufacturer on the labels was the same as formerly except for the omission of the concluding word "Limited".

The same workmen and salesmen were employed by both the company and the partnership. Mr. and Mrs. Goldstein and Mr. Helin continued to be employed in substantially the same positions in the partnership as they had formerly held in the company and the partnership conducted its business from the same premises as the company had until a later move to better premises. The partnership continued with one set of books, as the company had done, with no breakdown between the two different lines of furniture produced.

The suggestions by the chartered accountant, that the different operations should be conducted by two separate companies rather than by the partnership being superimposed, or that there should be two sets of records for the partnership rather than a common set, were rejected by Mr. and Mrs. Goldstein in the interest of economy. Mrs. Goldstein estimated that keeping of a common set of books resulted in a saving between $8,000 and $10,000. Mr. Goldstein testified that the question of a tax advantage was not discussed when the arrangement was proposed, but he did admit that it was discussed after the arrangement had been implemented on February 1, 1963. In this testimony he was supported by Mrs. Goldstein.

Section 39(1) of the *Income Tax Act* provides that the tax payable by a corporation under Part I thereof is 18% of the first $35,000 of taxable income and 47% of the amount by which the income subject to tax exceeds $35,000. However, subsections (2) and (3) of section 39 provide that when two or more corporations are associated with each other the aggregate of the amount of their incomes taxable at 18% is not to exceed $35,000.

Section 39(4) defines the circumstances under which a corporation is associated with another. As I have previously indicated Alpine and Monte Carlos are not associated within those circumstances and the present appeals were argued upon that basis.

A reference to the information contained in Exhibit "J" shows that until the ten month period ending January 31, 1963, Newport Chesterfield Company Limited never earned a profit in excess of $35,000, but that it earned a profit of $47,427.47 for that period. Mr. Golstein admitted that he knew the profits of that company were increasing in each year and that while he did not know the precise amount of profit for the period ending January 31, 1963, until some three or four months later, nevertheless, he did know that there had been a substantial increase. I think it is reasonable to infer that he knew, or at the very least could have expected that the profit for that period would be in excess of $35,000. Again referring to Exhibit "J" the profit of the partnership comprised of Alpine and Monte Carlos is shown to have been $72,805.24, a still further substantial increase over that of the company, Newport Chesterfield Company Limited, for the immediately preceding financial period.

If Alpine and Monte Carlos were not associated then each would have earned a profit of approximately $36,402 which is an equal share of the $72,805.24 profit of the partnership for its 1964 taxation year. Each such share of the profit is slightly in excess of $35,000. I compute the tax payable by Alpine and Monte Carlos on their respective profits of $36,402 to be $7,971, or a total tax of $15,942.

Assuming that Alpine and Monte Carlos had been associated within section 39(4) then under section 39(1) and (2) I would roughly compute the tax payable upon the partnership profit of $72,805.24 for its 1964 taxation year to have been $26,252.62. (In making such computations I have added the Old Age Security tax at 3% to the percentages of 18% and 47% in section 39(1).)

Accordingly if Alpine and Monte Carlos were associated the tax payable would have been approximately $26,-252.62, whereas if they were not associated the tax payable by each of them would have been $7,971 or a total of

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approximately $15,942. Therefore if the appellants were not associated there would be a tax reduction of approximately $10,310.62.

Section 138A(2) which is applicable to the 1964 and subsequent taxation years reads as follows:

> 138A ...
>
> (2) Where, in the case of two or more corporations, the Minister is satisfied
>
> (*a*) that the separate existence of those corporations in a taxation year is not solely for the purpose of carrying out the business of those corporations in the most effective manner, and
>
> (*b*) that one of the main reasons for such separate existence in the year is to reduce the amount of taxes that would otherwise be payable under this Act
>
> the two or more corporations shall, if the Minister so directs, be deemed to be associated with each other in the year.

Pursuant to the provisions of section 138A(2) the Minister directed that Alpine and Monte Carlos were deemed to be associated companies for the purposes of section 39 for the 1964 taxation years and assessed the appellants accordingly.

An appeal from an assessment made pursuant to a direction by the Minister under section 138A(2) is provided in subsection (3) which reads in the relevant part thereof as follows:

> 138A. . .
>
> (3) On an appeal from an assessment made pursuant to a direction under this section, the Tax Appeal Board or the Exchequer Court may
>
> (*a*) confirm the direction;
>
> (*b*) vacate the direction if
>
> . . .
>
> (ii) in the case of a direction under subsection (2), it determines that none of the main reasons for the separate existence of the two or more corporations is to reduce the amount of tax that would otherwise be payable under this Act; or
>
> (*c*) vary the direction and refer the matter back to the Minister for reassessment.

Under this subsection this court is given the power to make an independent determination of the main reasons for the separate creation of the two appellant companies which the Minister has directed should be taxed as associated corporations.

Under section 138A(2) the justification required for the exercise of the Minister's direction is that (1) the separate existence of the appellants herein is not solely for the

purpose of carrying on the business of those corporations in the most effective manner and (2) one of the main reasons for their separate existence is the reduction of taxes which appears to presuppose two conditions precedent to the exercise of the discretion by the Minister.

However under section 138A(3)(*b*)(ii) this court may vacate the direction made by the Minister under subsection (2) if it determines that "none of the main reasons" for the separate existence of the two or more corporations is to reduce the amount of the tax payable and this court is not authorized by section 138A(3) to substitute its finding for that of the Minister under section 138A(2)(*a*) that the separate existence of two or more corporations is not solely for carrying on the business in the most effective manner. It would seem to me that the findings of the Minister under paragraphs (*a*) and (*b*) of section 138A(2) are, in reality, only one finding to the effect that the separate existence of two corporations is not solely for business purposes and is to reduce taxes for which reason reference is made to section 138A(2)(*b*) in section 138A(3)(*b*)(ii) and no reference is made therein to section 138A(2)(*a*).

By section 138A(3) this court is authorized on appeal from an assessment resulting from a direction by the Minister to (*a*) confirm the direction of the Minister, (*b*) vacate that direction, or (*c*) vary the direction which is comparable to the court's power on appeals from assessments to income tax under section 100(5) of the Act. Notwithstanding the difference in language an appeal under section 138A(3) is made in the same manner as an appeal under section 100(5) and is subject to the same principles paramount among which is that the onus is on the taxpayer "to demolish the basic fact on which the taxation rested".

Thus the issue that emerges for determination is that none of the main reasons or the separate existence of Alpine and Monte Carlos was to reduce the amount of taxes that otherwise would have been payable.

Counsel for the appellants contended that the sole motivating reason for the implementation of the arrangement described above was that it offered a clear and realistic solution to the business problems faced by Mr. and Mrs. Goldstein in a sensible manner. He pointed out that this

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arrangement ensured that Mr. and Mrs. Goldstein would participate equally in the business of the partnership and the control thereof through the instrumentality of Alpine and Monte Carlos and that in the event of a dispute between them Mr. Helin, by virtue of his share ownership, would not have the balance of power as was formerly the case. He added that the arrangement would facilitate splitting the business into two parts, the fine furniture business going to Monte Carlos and the modern furniture business going to Alpine, controlled respectively by Sarah and Leo Goldstein, upon the dissolution of the partnership in the event of an insoluble dispute between them.

The same results could have been achieved by a variety of other means such as the continuation of Newport Chesterfield Company Limited with Mr. and Mrs. Goldstein holding an equal number of shares and by Mr. Helin entering into a voting agreement amongst other arrangements but from which no tax advantage would result.

It was established in evidence that it was suggested that the business of Newport Chesterfield Company Limited should be divided along the lines of fine and modern furniture to be carried on by Monte Carlos and Alpine respectively without the superimposition of the partnership but that such suggestion was rejected by Mr. and Mrs. Goldstein in the interest of the saving effected by keeping a common set of books for the partnership. It follows that they were anxious to carry on the partnership business in a most efficient and economic manner and were conscious of the savings to be effected thereby.

The fact that there may be two ways to carry out a *bona fide* commercial transaction, one of which would result in the imposition of a maximum tax and the other would result in the imposition of much less tax, does not make it a necessary consequence to draw the inference that in adopting the latter course one of the main objects is the avoidance of tax. (See *In re Commissioner of Inland Revenue v. Brebner*[2], Lord Upjohn at page 784). However, the foregoing proposition contemplates that the sole purpose to be accomplished is the *bona fide* commercial transaction.

[2] [1967] 1 All E.R. 779.

In the course of his remarks counsel for the appellants readily admitted that a substantial tax reduction would be effected but he contended that the tax advantage was incidental to the pursuit of a genuine business advantage and therefore irrelevant.

In the light of the remarks of Lord Upjohn (*supra*) I would agree with his contention assuming I were convinced that the business advantage was the sole motivating reason for entering into the arrangement here adopted.

Thus the question for determination again stands out in sharp relief and, which I repeat, is that none of the main reasons for the separate existence of Alpine and Monte Carlos was to reduce the amount of tax.

That question is one of fact to be decided upon the evidence adduced and the proper inferences to be drawn from that evidence and the onus of establishing that the sole main reason was that of business consideration falls upon the appellants. In my view the appellants have failed to discharge that onus. The actual physical business operations were carried on precisely as they were before under Newport Chesterfield Company Limited. Both Mr. and Mrs. Goldstein were desirous of effecting savings in bookkeeping for which reason the partnership was formed and one set of books kept rather than separate businesses being conducted by each appellant, a suggestion which had been made but rejected by them. They were not unaware of the incidence of income tax. Newport Chesterfield Company Limited had paid substantial income tax by way of instalments. The partnership agreement made specific provision for the treatment of accounts receivable and inventory for income tax purposes. Mr. and Mrs. Goldstein sought and obtained professional advice from specialists in the income tax field. It was known prior to February 1, 1963, that the profits of the company would likely be in excess of $35,000, although the precise amount was not known.

It is inconceivable to me in this day when the incidence of tax is always present that persons with the business experience and acumen which Mr. and Mrs. Goldstein possessed would have been oblivious of the tax advantage that might result from the arrangement adopted and it is even more inconceivable that the incidence of tax was not

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raised and discussed with them by the specialists whom they consulted. I say this despite the fact that Mr. Goldstein testified that the question of income tax was not discussed with their professional advisers prior to February 1, 1963, when present arrangement was implemented, although he admitted that it was discussed subsequent to that date. I think that I must infer from the nature of the plan adopted and the circumstances proceeding its adoption that the probability of a reduction in the amount of income tax payable was one of the main reasons for the adoption of the arrangement even though Mr. Goldstein gave evidence to the contrary.

For the foregoing reasons I confirm the direction of the Minister and dismiss the appeals with costs.

Montréal 1968 22 octobre

Ottawa 12 novembre

ENTRE:

YVES POULIOT ..... DEMANDEUR;

ET

J. R. BALDWIN ..... DÉFENDEUR;

ET

L'HONORABLE PIERRE ELLIOTT TRUDEAU, *ès-qualité* ..... MIS-EN-CAUSE.

Couronne—Pilote—Brevet de pilote suspendu permanemment—Règlement général de la circonscription de pilotage de Québec, arts. 19(1), 21(C P. 1957-191 et amendements)—Loi sur la marine marchande, S R C. 1952, ch. 29, art. 329 (f) (iii)—Règlement concernant la gouverne des pilotes—Règlement ultra vires.

A la suite d'une enquête, le défendeur, en sa qualité de l'Autorité de Pilotage pour la Circonscription de Québec, a suspendu permanemment le brevet de pilote du demandeur après l'avoir trouvé coupable de consommation de boissons enivrantes alors qu'il était dans l'exécution de ses fonctions à bord d'un navire, contrairement aux dispositions de l'article 19 du Règlement général de la Circonscription de Pilotage susdite.

Cet article du Règlement édicte que:

> 19. (1) Il est interdit aux pilotes de consommer des boissons enivrantes, ou de consommer des narcotiques ou d'en faire usage, pendant qu'ils sont de service ou à la veille de l'être, et l'Autorité doit retirer le brevet de tout pilote qui contrevient à ces dispositions.

Ce pouvoir ainsi accordé à l'Autorité de Pilotage vient de la *Loi sur la marine marchande,* S.R.C 1952, ch. 29, art. 329, paragraphe (*f*), (iii):

> 329. Sous réserve des dispositions de la présente Partie (VI) ou de toute loi pour lors en vigueur dans sa circonscription de pilotage, toute autorité de pilotage a, dans sa circonscription, par règlement ratifié par le gouverneur en conseil, le pouvoir à l'occasion
>
> . . .
>
> *f*) d'établir des règlements concernant la gouverne des pilotes ...visant à assurer leur bonne conduite à bord et à terre, leur assiduité et l'accomplissement efficace de leurs fonctions à bord et à terre;...prévoyant la tenue d'enquêtes, soit devant l'autorité de pilotage, soit devant toute autre personne sur toutes matières relevant de la présente Partie; et sans restreindre la généralité de ce qui précède, établir des règlements relatifs à tout pilote...qui dans les limites de la circonscription pour laquelle il est breveté ou en dehors,
>
> (iii) fait fonction de pilote ... sous l'influence de boissons enivrantes ou de narcotiques pendant qu'il est de service ou à la veille de l'être.

Par sa procédure, le demandeur, attaquant la légalité de l'article 19(1) du Règlement susdit, demande que cet article soit déclaré invalide, illégal, irrégulier et *ultra vires* et que l'ordonnance du défendeur suspendant permanemment le brevet du demandeur soit annulée. La Cour a fait droit à ces conclusions.

Jugé: Entre autres offenses que l'autorité de pilotage peut créer par règlement en vertu de l'article 329(*f*) le sous-paragraphe (iii) précise que l'usage de boissons enivrantes ne devient une infraction que s'il détermine un certain degré d'intoxication chez un pilote en service ou sur le point d'être appelé. Il semble donc que l'offence prévue à l'article 19(1) ne se fonde pas sur ce texte de l'article 329(*f*)(iii) de la Loi, car le demandeur n'est pas accusé d'avoir été «sous l'influence de boissons enivrantes ..pendant qu'il était de service ou à la veille de l'être» mais simplement «d'avoir consommé des boissons enivrantes alors qu'il était dans l'exécution de ses fonctions».

2. Parce qu'il s'écarte des lignes tracées par l'article 329(*f*)(iii) en décrétant une offense qui n'y est pas déclarée le règlement 19(1) est inadmissible.

ACTION en annulation d'un Règlement de pilotage.

Raymond Caron pour le demandeur.

Paul Coderre pour le défendeur.

DUMOULIN J.:—Le demandeur, Yves Pouliot, détient, depuis 1956, un brevet de pilote pour la circonscription de pilotage de Québec et il s'est acquitté des fonctions de cette charge jusqu'au 9 mai 1967.

A l'article 2 de l'exposé des motifs d'appel (Statement of Claim), il est dit que:

> 2. Le 28 décembre 1966, le demandeur fut avisé par lettre qu'une enquête devait être tenue à son sujet le 5 janvier 1967 à Montréal

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pour étudier une accusation à l'effet que le 2 juillet 1966, alors qu'il agissait comme pilote à bord du S.S. *Nixon Berry*, il aurait consommé une boisson alcoolique contrairement à l'article 19(1) du Règlement Général de la Circonscription de Pilotage de Québec,...

Bien que cela ne puisse guère influer sur l'issue de l'instance, il n'est pas sans intérêt de noter, à l'article 3, que:

> 3. Le demandeur a requis les services d'un avocat qui, malheureusement, n'a pu être présent lors de l'audition de sa requête le 5 janvier 1967.

Ce contretemps ne saurait être imputé, il va sans dire, au Commissaire enquêteur qui, cependant, n'aurait pas davantage encouru le reproche de procrastination si, dans les circonstances, il eût accordé à l'inculpé l'ajournement nécessaire à la présence de son aviseur légal. A l'article 16 de l'exposé d'appel, Pouliot fait acception de ce procédé hâtif, alléguant que:

> 16. ... l'absence du procureur du demandeur lui a causé un préjudice grave et irréparable et l'a empêché d'avoir une défense pleine et entière.

Ce seul fait, je le répète, n'autoriserait aucunement le maintien de l'appel mais dénote, par ailleurs, chez le commissaire Whittet, une précipitation qu'il n'eût pas été blâmable d'éviter.

La conclusion de cette enquête est relatée à l'article 6 de l'exposé des griefs et je cite:

> 6. Le 9 mai 1967, le défendeur en sa qualité de Autorité de Pilotage pour la Circonscription de Québec a retiré au demandeur son brevet de pilote d'une façon permanente après l'avoir trouvé coupable d'avoir consommé des boissons enivrantes alors qu'il était dans l'exécution de ses fonctions le 2 juillet 1966 à bord du S.S. *Nixon Berry* contrairement aux dispositions de l'article 19(1) du Règlement Général de la Circonscription de Pilotage de Québec...

Comme cet appel ne soulève, essentiellement, que des questions de droit, sauf une dénégation de culpabilité, je passerai sans plus à l'examen des motifs sur lesquels le demandeur se fonde pour postuler l'annulation de la sentence rendue contre lui le 9 mai 1967, moyens qu'il expose aux articles 40, 41 et 42 de ses procédures littérales.

> 40. ... l'article 19 (1) du Règlement Général de la Circonscription de Pilotage de Québec sur lequel est basée cette enquête est invalide, illégal, irrégulier et ultra vires des pouvoirs qui peuvent être accordés à l'Autorité de Pilotage suivant l'article 329 de la Loi de la Marine Marchande;

41. En effet, suivant 1952 S.R.C. chapitre 29, article 329(*f*)(iii) l'Autorité de Pilotage ne peut établir des règlements relatifs à la consommation de liqueurs enivrantes par tout pilote que s'il fait fonction de pilote sous l'influence de boisson enivrante ou de liqueur alcoolique pendant qu'il est de service ou à la veille de l'être;

42. En conséquence, l'Autorité de Pilotage qui détient des pouvoirs délégués ne peut exercer plus de pouvoirs que ceux que lui accorde la Loi de la Marine Marchande.

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Conformément à ce qui précède, il est demandé:

Que soit annulée l'Ordonnance du défendeur en date du 9 mai 1967 suspendant pour une période permanente le brevet numéro Q-105 du demandeur Yves Pouliot comme étant non fondée et pour causes d'irrégularités et d'illégalités;

Que soit déclaré invalide, illégal, irrégulier et ultra vires l'article 19(1) du Règlement Général de la Circonscription de Pilotage de Québec.

A l'audition, le savant procureur du défendeur a spontanément reconnu la juridiction de la Cour *ratione materiae*. Au surplus, l'exploit de défense est la négation en fait (ou peu s'en faut) et en droit des allégations de la demande.

Une remarque préliminaire s'impose, savoir, qu'il n'eût pas été inopportun pour la demande de tenter une critique de l'article 21(1)(*a*) et (*b*) du règlement C.P. 1172, selon sa teneur amendée, à la date du 23 juin 1965, indépendamment de la soumission du défendeur à la juridiction de la Cour. Puisqu'il ne s'agit pas, présentement, d'une disposition d'ordre public, qui, seule, pourrait saisir le tribunal *proprio motu*, je m'abstiendrai de tout autre commentaire à ce sujet.

Serrant de plus près le thème du litige, je passe à l'article 19, sous-paragraphe (1) qui édicte que:

19. (1) Il est interdit aux pilotes de consommer des boissons enivrantes, ou de consommer des narcotiques ou d'en faire usage, pendant qu'ils sont de service ou à la veille de l'être, et l'Autorité doit retirer le brevet de tout pilote qui contrevient à ces dispositions.

Cette disposition prohibitive et punitive, édictée par l'Autorité de pilotage, circonscription de Québec, en vertu de ses attributions réglementaires, crée une offense pour le pilote qui consomme de l'alcool alors qu'il est dans l'exercice même de ses fonctions ou sur le point de l'être.

Tout règlement, de la nature de celui dont il s'agit, découle d'une délégation d'autorité et n'est valide que s'il n'excède pas les termes de son acte constitutif.

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En outre, ce pouvoir délégué étant une restriction de la liberté individuelle, son action reste soumise pour autant au principe fondamental d'une stricte interprétation.

A mon humble avis, je ne sache pas qu'il y ait d'autre texte qui puisse habiliter le règlement 19(1) que l'article 329 de la *Loi sur la marine marchande,* S.R.C. 1952, ch. 29, aux paragraphes (*f*) et (iii) ci-après reproduits:

> 329 Sous réserve des dispositions de la présente Partie (VI) ou de toute loi pour lors en vigueur dans sa circonscription de pilotage, toute autorité de pilotage a, dans sa circonscription, par règlement ratifié par le gouverneur en conseil, le pouvoir à l'occasion
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> . . .
>
> *f*) d'établir des règlements concernant la gouverne des pilotes ... visant à assurer leur bonne conduite à bord et à terre, leur assiduité et l'accomplissement efficace de leurs fonctions à bord et à terre, . prévoyant la tenue d'enquêtes, soit devant l'autorité de pilotage, soit devant toute autre personne, sur toutes matières relevant de la présente Partie; et sans restreindre la généralité de ce qui précède, établir des règlements relatifs à tout pilote ... qui dans les limites de la circonscription pour laquelle il est breveté ou en dehors,
>
> . . .
>
> (iii) fait fonction de pilote ... *sous l'influence de boissons enivrantes ou de narcotiques pendant qu'il est de service ou à la veille de l'être.*

(Les italiques, ici ou ailleurs, ne sont pas dans le texte.)

Initialement, l'on doit s'interroger sur l'exacte portée de cet article 329 de la *Loi sur la marine marchande,* question à laquelle M. le Juge Pigeon, parlant au nom de la Cour Suprême du Canada, répond de façon concluante, dans l'instance tout récemment décidée de *D. R. Jones and J. A. Maheux vs Herman E. Gamache* et *Herman E. Gamache vs The Minister of Transport*[1]:

> ...Le pouvoir de faire des règlements attribué aux autorités de pilotage par l'article 329 de la Loi est bien loin d'être illimité. On a même pris la peine en le leur attribuant de faire une réserve expresse des dispositions de la partie de la Loi où il se trouve ainsi que de celles de toute loi en vigueur dans la circonscription.

Le savant juge, insistant sur la dépendance d'un règlement eu égard à son texte d'institution, ajoute, et je retiens cela uniquement, que: «Lorsque l'on examine les textes auxquels le législateur a ainsi voulu *que tout règlement fût subordonné* . . .».

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[1] [1968] 1 R.C de l'É 345

Le paragraphe (*f*) du même article 329 permet, nous l'avons vu, «d'établir des règlements *concernant la gouverne des pilotes*», en anglais «make regulations for the government of pilots». L'affaire *Gamache v. The Minister of Transport* (*supra*) mettait en question, entre autres points, la signification réelle de ces expressions «gouverne» et «government». Les règlements dont l'invalidité fut prononcée alors, soit le paragraphe (2a) de l'article 15 et les paragraphes (1) et (5) de l'article 24 du *Règlement général de la circonscription de pilotage de Québec,* décrétaient le classement des pilotes en trois catégories, les ordres A, B et C, d'importance décroissante. Autre est l'objectif que se propose le règlement 19(1), mais la définition des vocables précités, suggérée par M. le juge Pigeon, demeure nécessairement invariable; la voici:

> Peut-on trouver un texte ayant clairement pour effet d'autoriser l'autorité de pilotage à faire un tel règlement? Le seul texte que l'on ait invoqué devant nous c'est cette partie du paragraphe *f*) de l'article 329 de la Loi qui permet d'«établir des règlements concernant la gouverne des pilotes...»; en anglais: «Make regulations for the government of pilots». Dans l'une ou l'autre langue, ce texte ne vise que la conduite des pilotes. Littré définit «gouverne»: «ce qui doit servir de règle de conduite dans une affaire». «Government» a plus d'un sens mais dans le contexte il est clair qu'il est pris dans celui que le Shorter Oxford English Dictionary indique en second lieu: «the manner in which one's action is governed».

L'application de ceci au cas présent provient de ce qu'il faut situer ce pouvoir de réglementation dans le contexte de l'entreprise libre, où chaque pilote est un entrepreneur libre au même titre que l'avocat, le médecin ou tout autre professionnel. Il s'agit d'un règlement pour la «*gouverne*» des pilotes mais considérée, toujours, dans le domaine de la libre entreprise.

Cet article-clé, 329, au paragraphe (*f*), désigne les offenses que l'autorité de pilotage peut créer par règlement. Parmi ces manquements au devoir, le sous-paragraphe (*f*)(iii) précise que l'usage de boissons enivrantes ne devient une infraction *que s'il détermine un certain degré d'intoxication chez un pilote en service ou sur le point d'être appelé.* Il semble donc que l'offense prévue à l'article 19(1) ne se fonde pas sur ce texte de l'article 329(*f*)(iii) de la Loi, car le demandeur n'est pas accusé d'avoir été «*sous l'influence de boissons enivrantes... pendant qu'il était de service ou*

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Dumoulin J

à la veille de l'être» mais simplement «*d'avoir consommé des boissons enivrantes alors qu'il était dans l'exécution de ses fonctions*».

En l'occurrence, tout se résume à savoir si l'autorité locale de pilotage par un règlement pour la «gouverne» des pilotes peut interdire le droit d'un pilote de consommer une boisson alcoolisée alors qu'il serait de service ou au moment de le devenir, que cette boisson affecte ou pas ses facultés mentales. Autrement dit, le manquement reproché au demandeur est-il dans le contexte répressif du paragraphe (*f*)?; puis, enfin, l'article 329, paragraphe (*f*)(iii) n'a-t-il pas pour effet de définir et, par conséquent, de restreindre la faute censurée à l'état d'intoxication, c'est-à-dire, d'être sous l'influence des boissons enivrantes?

L'usage modéré des liqueurs alcooliques serait-il de nature à nuire à la bonne conduite d'un pilote prudent, à l'accomplissement efficace de sa tâche, plus que pour aucun autre professionnel? A tout événement la Loi même ne va point jusque-là et ne réprime que l'abus. Quant au soussigné, que l'on ne se méprenne pas, il ne lui incombe point d'apprécier la sagesse, possiblement très réelle, du règlement attaqué, mais seulement sa stricte légalité.

Parce qu'il s'écarte des lignes tracées par l'article 329(*f*)(iii) en décrétant une offense qui n'y est pas déclarée, le règlement 19(1) est inadmissible.

Pour les motifs ci-haut explicités, faisant droit aux conclusions du demandeur-appelant, je tiens pour illégal, irrégulier, invalide et *ultra vires* l'article 19(1) du *Règlement général de la circonscription de pilotage de Québec*. La Cour ordonne aussi que soit annulée l'ordonnance du défendeur, datée le 9 mai 1967, suspendant permanemment le brevet Q-105 du demandeur Yves Pouliot.

Le demandeur-appelant aura droit de recouvrer les frais encourus, après taxation.

Ottawa
1968

Sept. 30,
Oct. 1-4

Nov 18

BETWEEN:

NATIONAL CAPITAL COMMISSION .....PLAINTIFF;

AND

BENJAMIN MARCUS .....DEFENDANT.

Expropriation—Market value of expropriated parcel—Principles governing determination—Parcel taken for national capital's Green Belt—No immediate requirement for parcel.

Evidence—Expert witnesses—Valuation of expropriated land—Evidence of sales of comparable property—Hearsay—Admissibility of—Exchequer Court Rule 164B.

On these proceedings to determine the market value of a 13½ acre parcel of vacant land expropriated by the National Capital Commission in June 1961 for the national capital green belt evidence of expert witnesses was given by affidavit under Exchequer Court Rule 164B and *viva voce*. The owner's two experts valued the parcel respectively at $67,500 and $54,000 and the Commission's expert at $27,000 All three experts based their valuations on sales of comparable properties but none adequately explained the reasons for his conclusion. One of the comparable properties reported on by the experts was a 10 acre parcel acquired in April 1961 for $50,000 by a lumber company as a site for a building supply business. That parcel's characteristics were similar to those of the expropriated 13½ acre parcel.

Held, the 13½ acre parcel should be valued at $30,000 The only real difference between it and the 10 acre parcel acquired by the lumber company two months earlier was that there was a present requirement for the latter while merely a possibility of the 13½ acre parcel being required, which lessened its immediate value. *Cedars Rapids Mfg and Power Co. v. Lacoste* [1914] A.C. 569; *Fraser v. The Queen* [1963] S.C.R. 455, applied.

Held also, the evidence of the expert witnesses as to sales of comparable properties based on information received from persons not called to testify (although not relied on for the purpose of testing the experts' opinions, for which purpose it was admissible though hearsay: *City of Saint John v. Irving Oil Co.* [1966] S.C.R. 581) was admissible, on the footing of an implied agreement by the parties, to establish the basic facts of those transactions.

INFORMATION to determine compensation payable for expropriated land.

Eileen M. Thomas, Q.C. for plaintiff.

K. E. Eaton and *T. A. MacDougall* for defendant.

JACKETT P.:—This is an information under the *National Capital Act*, chapter 37 of the Statutes of 1958, and the *Expropriation Act*, R.S.C. 1952, chapter 106, to determine the compensation payable for certain property in the

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Township of Nepean in the County of Carleton, expropriated by the National Capital Commission on June 14, 1961.

It is common ground that the only question that has to be decided is the market value of the property in question at the time of the expropriation. Such property, at that time, was vacant land and was not being used by the owner.

By the information it is made to appear that the plaintiff is willing to pay $29,000 (less an advance payment made on October 5, 1961, in the sum of $22,500) as compensation for the property in question. By the defence the defendant claims that he is entitled to compensation in the sum of $75,000 (less the aforesaid advance payment) with interest.

There has been filed an agreement of facts by which it was agreed that the lands in question (hereinafter referred to as the "expropriated property" or the "subject property") consisted of 13½ acres, were vacant, unserviced and unimproved, and were generally flat and at grade with adjoining roads, and by which it was agreed that there was no zoning by-law applicable to such lands although there was a Township by-law restricting disposition of land in the area in parcels under ten acres without the consent of a planning board.

Counsel for the parties have agreed that the expropriation was for the purpose of the "Green Belt" and that reference may be made to the judgments in *National Capital Commission v. Munro*[1] for any necessary information concerning this National Capital project. I shall refer to such judgments only to the extent that that appears to be necessary for the appreciation of what is involved in this case. A passage in the judgment of the Supreme Court of Canada, which was delivered by Cartwright J., as he then was, at page 667, reads as follows:

> It is conceded by counsel for the respondent, and so stated in their factum, that the appellant's lands were taken for the purpose of establishing the Green Belt proposed in the Master Plan for the development of the National Capital Region. . . .
>
> . . . I propose, for the purposes of this appeal, to accept the following conclusions that counsel for the appellant and for the intervenant seek to draw, . . . (ii) that the legislative history of the predecessors of the *National Capital Act* indicates that Parliament,

[1] [1965] 2 Ex. C.R. 579; [1966] S.C.R. 663.

up to the time of the passing of that Act, contemplated that the "zoning" of the lands comprised in the National Capital Region should be effected by co-operation between the Commission established by Parliament and the municipalities which derive their powers from the Provincial Legislatures, and (iii) that it was only after prolonged and unsuccessful efforts to achieve the desired result by such co-operation that Parliament decided to confer upon the National Capital Commission the powers necessary to enable it to carry out the zoning contemplated in the Master Plan.

The "Master Plan" in question is the Greber Plan of the National Capital Commission, which dates from about 1947. Gibson J. reveals something of the problems that this plan met in a passage from his judgment at pages 594-5, reading as follows:

> . . . failure of the representatives of the Townships of Gloucester and Nepean in particular to persuade the persons representing the Government of Ontario and the City of Ottawa (when they met at various times to consider the request of the National Capital Commission that they adopt the latter's Master or General (Greber) Plan as their respective official plans under the Ontario *Planning Act,* and to pass zoning or land use by-laws only in accordance with the same) that compensation should be paid to the owners of land whose rights were liable to be diminished by the passing of zoning or land use by-laws, was one of the main reasons that the National Capital Commission General (Greber) Plan was not so adopted and implemented in the area where the subject property is.

The parties have also agreed to a "Summary of Extracts from Reports in Ottawa Newspapers relating to Greenbelt Development between December 26, 1947, and June 19, 1958" being part of the evidence in this case. This summary shows in "capsule" form what the interested public was given to understand as to what they could expect in matters relating to the much discussed "Green Belt". The next stage in the history of this matter, after the events referred to in the newspaper summary, is the *National Capital Act,* chapter 37 of the Statutes of 1958, which received royal assent on September 6, 1958. By that Act, the National Capital Commission was given powers in connection with the National Capital Region, which includes Nepean Township, that were wide enough to authorize the expropriation of the land in question in this case.

Some of the dates in connection with the Green Belt that may have some significance in this case are

1947: Greber Report

1947: A green belt from two to four miles wide encircling Ottawa was "set down" by the Ottawa Planning Area Board on the recommendation of the National Capital Commission.

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1947 to 1955: Partially effective efforts to restrict development in the Green Belt by action of municipal authorities.

1955: (July 27) Prime Minister St. Laurent announced a Federal Government decision that Central Mortgage and Housing Corporation should refuse to underwrite mortgages on homes in the Green Belt.

1956 (July) Ban on Central Mortgage and Housing Corporation loans was partially lifted.

1956. (August) Joint Parliamentary Committee recommended that the Green Belt be preserved, and, failing provincial legislation to safeguard it, the Federal District Commission be given cash to expropriate land required to maintain it.

1958: (June 18) Prime Minister Diefenbaker told Parliament it would be asked to appropriate money to purchase Green Belt land for the Crown.

1958· (September 6) *National Capital Act* became law.

1961· (June 14) Land that is subject of these proceedings was expropriated.

There were approximately 44,000 acres of the Green Belt in Nepean Township. About 14,000 acres were purchased by the plaintiff before June 12, 1961. About 14,000 acres were expropriated in 1959. The balance of 16,000 acres were expropriated by three expropriations on April 12, 13 and 14, respectively, of which one was the expropriation by which the defendant's land was taken.

The expropriated property was acquired by the defendant on November 9, 1956, from Thomas E. Robertson for $8,000, or an average cost of approximately $593 per acre. In the year of the expropriation it was assessed at $2,700,[2] or $200 per acre.

The defendant put in evidence two opinions of real estate appraisers concerning the value of the expropriated land on June 14, 1961. They were

Mr. Whelan — $67,500 or $5,000 per acre, and

Mr. Young — $54,000 or $4,000 per acre.

One opinion was put before the court by the plaintiff concerning the value of the expropriated land on June 14, 1961. It was

Mr. Crawford — $27,000 or $2,000 per acre.

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[2] That it is not entirely immaterial to refer to a municipal valuation for assessment purposes appears from various decisions, e.g., *The King v. Halin*, [1944] S.C.R. 119 at pages 126 and 134.

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The expropriated property, which has a frontage of 350 feet on Highway 15, has an irregular shape and its measurements and configuration are best appreciated by looking at the following diagram:

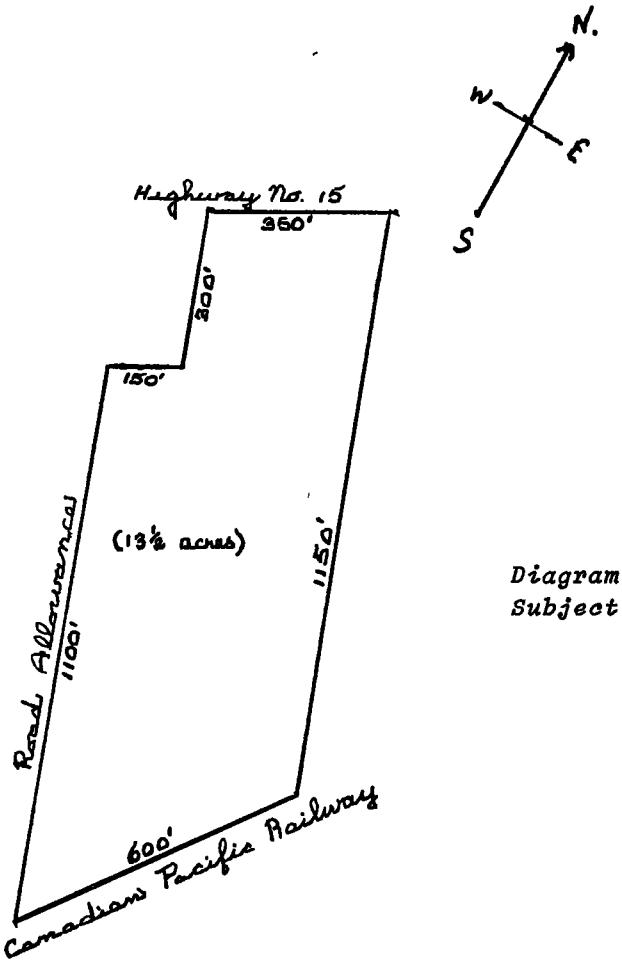

Diagram of Subject Property

Highway 15, which commences at the intersection of Carling Avenue and Richmond Road in the City of Ottawa (not far from the westerly limit of the city) and proceeds towards Carleton Place in a generally southwesterly direction, intersects with the route of the Queensway a short distance after it leaves the city and then enters the Green Belt on that side of the city less than a quarter of a mile from the Queensway. There is a distance of about four and one-half miles on Highway 15 from the point where it enters the Green Belt on the east (city) side to the point where it emerges from the Green Belt on the west side.

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For almost two miles of that distance, however, Highway 15 passes through Bell's Corners, a hamlet that has been excluded from the Green Belt. About two miles of Highway 15 are in the Green Belt west of Bell's Corners and, as already indicated, the subject property has a frontage of 350 feet on the south side of this part of Highway 15 some one-half mile west of Bell's Corners.

At the point where Highway 15 re-enters the Green Belt on the west side of Bell's Corners, it is intersected by the main line of the Canadian Pacific Railway with the result that properties within a certain distance from that point of intersection can have a frontage on the south side of the highway and also have a frontage on the north side of the railway. The subject property is such a property and has a frontage of 600 feet on the railway.[3] (It is to be borne in mind that, similarly, properties within a certain distance to the east of the intersection between the highway and the railway can have a frontage on the north side of the highway and also a frontage on the south side of the railway. This will be a factor to keep in mind in considering the comparability of at least one property that is the subject of a sale that must be considered.)

The subject property also had a frontage of some 1,110 feet on an allowance for a side road.

One reason for the difference in the various measurements of the subject lot is that it does not comprise a lot at the corner created by the intersection of Highway 15 and the side road, which lot has a frontage of 150 feet on Highway 15 and of 300 feet on the side road.

Generally speaking, it would seem that the areas that are of greatest interest in considering the market value of the subject property are the areas fronting on either side of Highway 15 in the part of the Green Belt west of Bell's Corners on the one hand (which I will refer to as the "Green Belt area") and the areas fronting on either side of Highway 15 in Bell's Corners between Richmond Road[4]

[3] There is no direct evidence that the owner of a property fronting on the main line of this railway can arrange for a siding on some practicable basis, but it is an inference that can be drawn from the evidence that several properties on this same line had such a service.

[4] Richmond Road and Highway 15 form a corner in Bell's Corners that is about 11.5 miles from Parliament Hill. The Richmond Road referred to here starts at Bell's Corners and runs in a southwesterly direction. It is not to be confused with Richmond Road in Ottawa to which reference has already been made.

and the western limit of the Hamlet, on the other hand (which I will refer to as the "Westerly Bell's Corners area"). East of Richmond Road there is a subdivision called "Lynwood Village" which started to develop in 1958 on the south side of the highway and my impression is that the character of the neighbourhood on either side of Highway 15 east of Richmond Road in 1961 was well urbanized and quite different from that of the Green Belt area or the westerly Bell's Corners area.

There were at least three differences between the westerly Bell's Corners area and the Green Belt area in 1961 that have been put forward expressly or implicitly as factors that tended to create differences in the prices for which land could be bought and sold in the two areas, *viz:*

(a) lands in the Green Belt area were, so it is said, less saleable for certain purposes because potential purchasers for such purpose would not acquire lands for a permanent purpose when they had reason to believe that they would not be allowed to use them for such purposes permanently;

(b) there was a bad "S" curve going through a subway under the railway between the two areas, and this may have been a deterrent to development in the Green Belt area that did not apply to the westerly Bell's Corners area; and

(c) the Green Belt area was further from Ottawa than the westerly Bell's Corners area and it may be that, on that account, the commercial and industrial development of properties adjoining the highway was further advanced in the westerly Bell's Corners area than in the Green Belt area.

I turn now to the evidence of the various witnessess put forward by the parties as experts to give opinion evidence as to market value of the subject property at the time of the expropriation.

The first such witness was James H. Whelan of Ottawa whose evidence-in-chief on behalf of the former owner is contained in an affidavit filed under Rule 164B, the portion of which containing his opinions reads as follows:

> 5. At the request of the defendant, I personally examined the property described in paragraph 2 of the information filed herein and

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carried out a complete investigation into all matters that in my opinion related to value of the said property for the purpose of providing an opinion as to its market value as of the 14th day of June 1961, the date of expropriation referred to in the said information.

6. In my opinion the market value of the said property, as of the 14th day of June, 1961, was in the total amount of $67,500, or $5,000 an acre

7. In my opinion, as of that date, the highest and best use of the said property would have been utilization for commercial purposes, taking advantage of its road and rail facilities.

8. The following facts concerning the said property were disclosed by my investigation and were considered by me in arriving at my opinion as to market value:

(a) The said property, which comprises an area of approximately 13.5 acres, as scaled from the expropriation plan, has a frontage of approximately 350 feet along the south side of Provincial Highway No. 15, and measures approximately 1100 feet along its westerly boundary, 600 feet along the northerly boundary of the Canadian Pacific Railway lands adjoining to the south, and 1150 feet along its easterly boundary.

(b) The westerly boundary of the said property fronts on the concession road running between Concessions 5 and 6, Rideau Front, Township of Nepean.

(c) The said land was vacant and fairly level with some scrub growth on it.

(d) At the date of expropriation, there was no by-law governing land use of the said property but it was subject to a subdivision control by-law passed by the Township of Nepean on March 18th, 1955, known as By-law No. 11-55.

(e) I have been informed by officials of the Township of Nepean and verily believe that, as of the date of expropriation, the nearest services were located at Lynwood Village, approximately 1 and ½ miles east of the said property on the south side of Provincial Highway No. 15.

(f) The said property could be reached by Provincial Highway No. 15, which is a paved, two-lane highway extending from the westerly limits of the City of Ottawa to the Town of Carleton Place and intersecting with the following main access routes to the centre of the City of Ottawa:

(i) Richmond Road, which is a paved, two-lane street running through the City of Ottawa to its intersection with Provincial Highway No. 15 at Britannia;

(ii) Carling Avenue, which is a paved, divided highway running west from Bronson Avenue to its intersection with Provincial Highway No. 15 at Britannia; and

(iii) The Queensway, which is a high-speed, controlled-access, divided highway which traverses the City of Ottawa from its easterly boundary to beyond its westerly boundary, where it intersects Provincial Highway No. 15 approximately 2 and ½ miles east of the said property.[5]

[5] There is some doubt in the evidence whether this highway was in full operation at the time of the expropriation, but there is no doubt that it was only a matter of months until it would be open all the way if it was not open at that time.

(g) The said property was also served by the main line of the Canadian Pacific Railway which forms its southern boundary.

9. The following neighbourhood data were considered by me in arriving at my opinion as to market value:

(a) The Bell's Corners area east of the subway where the Canadian Pacific Railway tracks crossed over Provincial Highway No. 15 had been developing for some years prior to the date of expropriation and this development speeded up with the beginning of the Lynwood Village subdivision in 1958.

(b) Computing Devices had established on the north side of Provincial Highway No. 15 across from Lynwood Village as well as McGlashan Silverware and the Motorways Express Terminal.

(c) On the south side of Provincial Highway No. 15 a shopping centre was developed in connection with Lynwood Village.

(d) There were also several retail gasoline service stations as well as Steenbakkers Lumber, Blackwood Hodge Limited, and Shawnee Pre-Cast Products Limited.

(e) The area lying to the west of the Canadian Pacific Railway right of way was in the early stages of urbanization since a motel had been built, several sites had been sold to gasoline companies, an equipment company had located on the north side of Provincial Highway No. 15, and land had been assembled and shaped for a golf club west of the said property.

10. In my opinion, in the absence of public knowledge of Greenbelt proposals by the Federal District Commission and later the National Capital Commission, the areas on both sides of Provincial Highway No. 15 lying to the west of the Canadian Pacific Railway right of way would have been developed to the same extent as the areas lying east of the said right of way.

11. My opinion as to market value is based on a study of the sales of comparable properties lying both east and west of the Canadian Pacific Railway right of way since all of these sales have the same road influence and some have the added influence of access to the Canadian Pacific Railway tracks.

12. Attached as Exhibit A to this Affidavit is a summary of the sales of comparable properties considered by me in reaching my opinion as to market value.

13. Those sales referred to in Exhibit A considered to be the most reliable guide to the value of the said property were analyzed and interpreted and adjustments were made for various factors influencing value, following which all of the available information was correlated into my final estimate of the market value of the said property as of the date of expropriation.

While Mr. Whelan says in his affidavit that he has considered, in reaching his opinion as to market value, the "sales of comparable properties" summarized in Exhibit A to his affidavit and that those sales in Exhibit A considered by him to be "the most reliable guide to the value of the property" were "analyzed and interpreted", and that adjust-

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ments were made "for various factors influencing value" following which "all of the available information was correlated" into his "final estimate of the market value of the said property", he was not, when he was giving his evidence orally, able to make me understand how he had accomplished this task.

In the first place, it should be noted that he did not, as his affidavit indicates, consider all the sales that he mentioned in his affidavit. The sales that he considered in the Green Belt, according to his verbal testimony, may be enumerated as follows:[6]

Year	Parties	Acreage	Average price per acre	Average per front foot	Depth
1955	Berlin to Imperial Oil....	1·66	$4,819	$16	150′
1957	Robertson to Westwell. ..	1·03	$1,456	$10	300′
1958	Robertson to MacDonald .	10	$1,500	$15	435·6′
1961	Berlin to Texaco	1·06	$9,433	$33⅓	150′
1961	Berlin to McFarland.....	1	$5,000	(No frontage on Highway 15)	
1961	Berlin to N.C.C.	80·46	$1,053	(Partial frontage on Highway 15)	

The two sales mentioned by him in the Green Belt which he says that he disregarded are

1956	Berlin to Leduc	14·09	$1,774	(No frontage on Highway 15)	
1956	Droeske to B.A. Oil. ..	·993	$9,566	$45	208′

His position as to what effect should be given to Green Belt sales and as to the relationship of sales outside the Green Belt to values in the Green Belt is not clear to me. He says in his affidavit that, in the absence of public knowledge of the Green Belt proposals by the Federal District Commission and later the National Capital Commission, the areas on Highway 15 in the Green Belt would have been developed to the same extent as areas lying east of

[6] N B. All averages per front foot in these reasons have been computed by the court. None of the witnesses gave any such information. Other information about a particular sale may come from the evidence of any witness and not necessarily from the witness whose evidence is being summarized.

the railway. He also says in his affidavit that, in his opinion, at the time of the expropriation "the highest and best use of the said property" would have been "utilization for commercial purposes, taking advantage of its road and rail facilities", but, in his verbal evidence, he said that, by 1960, the Green Belt was well known and real estate brokers advised people not to buy there. Nevertheless, in the course of his verbal testimony, Mr. Whelan said that he did consider the six sales in the Green Belt indicated above in arriving at his "estimate of value".

Of the twenty-one sales mentioned in Mr. Whelan's affidavit as "sales of comparable property" outside the Green Belt, Mr. Whelan informed the court during his verbal testimony that he had disregarded eleven[7] in arriving at his valuation of the property. Those that he says that he did rely on may be enumerated as follows:

Year	Parties	Acreage	Average price per acre	Average per front foot	Depth
1958	Robertson to Ballentine	8	$ 1,500	$22	632·6′
1958	Robertson to Braun	21	$ 1,500	(Partial frontage)	
1958	Robertson to Lobel	10	$ 1,500	$26	759′
1959	Braun to Mount Royal Paving	11·158	$ 2,628	(Rear land)	
1960	Braun to Carleton Culvert	5·65	$ 1,414	$18	450′
1960	Moore to Steenbakkers	24·78	$ 1,908	(Rear land)	
1961	Braun to Gervais	3·7	$ 2,700	(Rear land)	
1961	Lobel to Hodgins	10	$ 5,000	$87	759′
1961	N.C.C. to Kassirer	2·67	$ 2,921	(Rear land)	
1962	Steenbakkers to Horwitz	8·734	$ 3,435	(Rear land)	

While Mr. Whelan gave very useful evidence about the general development of properties along Highway 15 as it

[7] He did indicate under cross-examination that he relied on one of these "re size". Among those that he said that he disregarded is a sale in 1960 by Robertson to Nepean Hamlet Realty of 72.98 acres across the road from the Hodgins property for an average price of $2,371 per acre. This parcel had a partial frontage on the highway. I was quite unable to understand the reason why Mr. Whelan disregarded this sale but nevertheless based his opinion on another sale or sales in Bell's Corners Hamlet.

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passes through Bell's Corners and the Green Belt and for some distance the other side of the Green Belt, and gave very persuasive evidence of a gradual conversion from farm lands to commercial and industrial lands as the influence of the growing city made itself felt, I was not able to form any idea from his testimony as to how, after considering all the sales he considered, he reached the conclusion that the subject property had an average market value of $5,000 per acre.[8]

Indeed, and this comment applies to all witnesses put forward as experts on value, his evidence left me almost completely in the dark as to how "Those sales... were analyzed and interpreted" and as to how "adjustments were made for various factors influencing value". I cannot accept a valuation that appears to be based on one sale only if I do not understand the reasoning by which a conclusion has been reached to base the market value on that sale alone (to the exclusion of all the other sales), and I cannot accept a valuation based on many sales if I cannot appreciate how it was derived from those sales so that I may form my own conclusion as to the weight of the reasoning on which the valuation was based. Whether, therefore, Mr. Whelan's final result was based solely on the Hodgins Lumber sale, or was based on all the sales that he says that he took into account, I cannot adopt his opinion that the subject property had an average market value of $5,000 per acre.[9] It follows also from my inability to appreciate how the opinion was reached that I cannot adopt it subject to some adjustment.

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[8] His evidence as to the sale by Lobel to Hodgins just before the expropriation would explain to me how he reached the result that he did if that were the only sale that he says that he considered, and it has been very useful to me in arriving at the result that I reach on my own analysis of the market information.

[9] If Mr Whelan had qualified as a person who had a personal knowledge of the real estate market in the area in question by reason of participation in it as broker or principal over a long period of time, and had expressed an opinion, simply based on such experience, that the subject property would have fetched $5,000 per acre in June, 1961, I should have felt bound to pay some heed to that opinion even though he could not explain by some logical process how he reached it. I think it is fair to say, however, that, while Mr. Whelan and Mr. Crawford each had considerable actual experience in buying and selling land, *in this case,* all three of the "expert" witnesses made it clear that they were basing their opinions on their training and experience as "appraisers" rather than upon practical experience in the particular market.

The second witness put forward to give opinion evidence on market value was Gerald I. M. Young of Toronto, whose evidence-in-chief on behalf of the former owner is contained in an affidavit filed under Rule 164B, the portion of which containing his opinion reads as follows:

8 At the request of the defendant, I personally examined the property described in paragraph 2 of the information filed herein and carried out an investigation into matters affecting the value of the said property for the purpose of providing an opinion as to its market value as of the 14th day of June, 1961, the date of expropriation referred to in the said Information.

9. In my opinion the market value of the said property, as of the 14th day of June, 1961, was in the total amount of $54,000 00

10 In my opinion, as of that date, the highest and best use of the said property would have been its utilization for commercial purposes, possibly in conjunction with utilization for industrial purposes of the rear portion of the said property.

11. The following facts concerning the said property were disclosed by my investigation and were considered by me in arriving at my opinion as to market value:

(a) The said property is located on Provincial Highway No. 15 which is a busy two-lane paved highway connecting Ottawa with Kingston via Provincial Highway No. 29 and with Toronto via Provincial Highway No 7. The said property also adjoins a gravel side road running between Concessions 5 and 6, Rideau Front, in the Township of Nepean. The intersection of that road with Provincial Highway No. 15 lies approximately 3 and ½ miles west of the limits of the City of Ottawa and ½ mile west of the Hamlet of Bell's Corners

(b) The said property consists of an area of approximately 13.5 acres and has the following approximate dimensions.

Frontage on Provincial Highway No 15	350 feet
Northern boundary not fronting on that Highway	150 feet
Easterly boundary	1,140 feet
Southern boundary along Canadian Pacific Railway property	600 feet
Westerly boundary adjoining side road between Concessions 5 and 6	1,110 feet
Remaining westerly boundary not adjoining that road	300 feet

(c) The said property is, and was at the date of expropriation, vacant, unimproved land which is practically flat and at grade with adjoining roads although the rear of the property is a few feet higher than the front portion adjoining Provincial Highway No. 15.

(d) Canadian Pacific Railway tracks running along the land adjoining the southern limit of the said property cross Provincial Highway No. 15 diagonally from northeast to southwest approximately 2,400 feet east of the said property As of the date of expropriation, that highway entered an S-bend and passed through a narrow bridge at the point where it was crossed by the Canadian Pacific Railway tracks. Subsequent to the date of expropriation, that highway was straightened

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and widened at that point. Pyrofax Gas, Hodgins Lumber and other industries to the east of the said property are served by railway sidings from these Canadian Pacific Railway tracks.

(e) Although, at the date of expropriation, no municipal services were available to the said property, all subdivisions in the hamlet of Bell's Corners to the east were supplied with water by means of a private central well system and it is understood that well water was in abundant supply. A sewage treatment plant at Shirley's Bay, which opened in 1962, is now connected to local sewerage services in newly developed subdivisions at Bell's Corners. By-law No. 21-59, authorizing stage 1 of the treatment plant project, was passed on December 10, 1959, and Ontario Municipal Board Order dated August 25, 1960 approved agreements for the construction of the treatment plant. Schedule "A" to one of the authorizing by-laws shows the said property as included in the sanitary sewer drainage area to be served by the treatment plant.

(f) No applicable zoning by-law was in force at the date of expropriation but the said property was subject to subdivision control under Township of Nepean By-law No. 11-55 passed on March 18, 1955 under section 24 of *The Planning Act*.

12. The following facts concerning development at the time of expropriation of nearby properties lying to the west of the Canadian Pacific Railway tracks were also disclosed by my investigation and were considered by me in arriving at my opinion as to market value:

(a) A Pyrofax Gas Depot was located on the south side of Provincial Highway No. 15 approximately 1,300 feet east of the said property.

(b) A G. and G. Auto Service body shop with a British Petroleum franchise was located immediately to the east of the said property.

(c) Imperial Oil Limited had purchased land on the south side of Provincial Highway No. 15 at the southwest corner of its intersection with the gravel road adjoining the said property, but that land had not been developed.

(d) A retail furniture store known as the "Little Blue Barn" was located on the north side of Provincial Highway No. 15 approximately 700 feet west of the said property.

(e) The property adjoining the "Little Blue Barn" to the west was used by B.A. Oil Company Limited.

(f) The Cedarview Motel was located on the south side of Provincial Highway No. 15 approximately ½ mile west of the said property.

(g) A Texaco service station was located to the west of the Cedarview Motel on the south side of Provincial Highway No. 15.

(h) Another motel, "Charlie's Motel" (now the Kanata Motel) was located on the south side of the highway and approximately 1 mile west of the subject property.

(i) North of this was a construction equipment depot.

(j) There were also approximately 15 or 20 houses located along Provincial Highway No. 15 between the said property and the westerly limit of the Township.

13. The following facts relating to development at the time of expropriation of nearby properties lying to the east of the Canadian Pacific Railway tracks were also disclosed by my investigation and were considered by me in arriving at my opinion as to market value.

(a) The hamlet of Bell's Corners was under development immediately east of the said tracks on both sides of Provincial Highway No. 15.

(b) A garden nursery business was located approximately 1,500 feet east of the said tracks.

(c) A heavy equipment warehouse was under construction for the W. L. Ballentine Company Limited on a 8 acre site located approximately 1,000 feet east of the garden nursery

(d) Close to the intersection of Provincial Highway No. 15 with the Richmond Road at Bell's Corners, Steenbakkers operated a retail and wholesale lumber and builders' supply business.

(e) The Bruce MacDonald Motor Lodge and an Imperial Oil service station were located approximately 1,500 feet to the east of Steenbakkers.

(f) Unit Pre-Cast Specialties Limited operated on a 10 acre site close to the Canadian Pacific Railway tracks on the north side of Provincial Highway No 15.

(g) Hodgins Lumber Limited had commenced building on a 10 acre site to the east of Unit Pre-cast Specialties Limited for the purpose of carrying on a lumber and building supply business.

(h) Immediately east of the Hodgins Lumber Limited development, Carleton Culvert Co. Ltd. occupied a site of 5 6 acres, and to the rear of that site the operations of Mount Royal Paving and Supplies Limited were located on an 11 7 acre parcel adjoining the railway tracks.

(i) A trailer park was located east of Moodie Drive in the hamlet of Bell's Corners.

(j) Computing Devices of Canada Limited occupied a large establishment opposite the Bruce MacDonald Motor Lodge.

(k) Approximately 20 houses were scattered along the section of Provincial Highway No 15 lying between the Canadian Pacific Railway tracks and the Bruce MacDonald Motor Lodge.

(l) Two parallel and adjacent transmission line easements of the Hydro Electric Power Commission for Ontario with a total right of way width of 250 feet, diagonally crossing Provincial Highway No. 15 about 2,500 feet east of the Canadian Pacific Railway tracks, crossed the properties occupied by Hodgins Lumber Limited, Carleton Culvert Co. Ltd and W L. Ballentine Company Limited.

(m) To the south of Provincial Highway No. 15 approximately 590 subdivision lots were improved with houses in a residential subdivision development known as Lynwood Village, for which the assessment roll prepared in 1961 for 1962 taxes showed a total population of 1,849. As part of that development a shopping plaza was under construction to the south of Provincial Highway No. 15 and east of the Bruce MacDonald Motor Lodge.

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14. In arriving at my opinion as to market value of the said property, I have had regard to 9 sales of lands lying on both sides of Provincial Highway No. 15 to the west of the said Canadian Pacific Railway tracks and within 3,300 feet of the said property. Particulars of the said sales are set forth in a schedule attached as Exhibit A to this affidavit.

15. In arriving at my opinion as to market value of the said property I have also had regard to 12 sales of lands lying on both sides of Provincial Highway No. 15 to the east of the said Canadian Pacific Railway tracks in the hamlet of Bell's Corners. Particulars of the said sales are set forth in a schedule attached as Exhibit B to this affidavit.

16. Items 3, 4 and 5 of Exhibit B are resales of the land referred to in Item 2 thereof.

17. The Hydro easements affecting the lands referred to in Items 1, 2, 4, 6 and 7 of Exhibit B prohibit the erection of buildings or the use of land within the easement areas for open storage so that the effective areas purchased in each case and effective prices paid therefor have been calculated as follows:

Item	Actual Area (acreage)	Actual Price (per acre)	Effective Area	Effective Price (per acre)
1	8	$1,500	5·7	$2,100
2	21	$1,500	18·6	$1,695
4	5·656	$1,414	3·256	$2,450
6	10	$1,500	7	$2,140
7	10	$5,000	7	$7.140

* * *

19. All of the sales referred to in Exhibits A and B were of unserviced land, (only item 8 of Exhibit "B" was subsequently serviced, in 1965 or 1966), and it is my understanding that all of the said sales were made at arm's length.

Mr. Young's oral evidence shows that he placed "greatest reliance", in reaching his valuation of $54,000 ($4,000 per acre) for the subject property, on the purchase in April 1961 (his Item 7) made by Hodgins Lumber from Lobel of a 10 acre parcel in the westerly Bell's Corners area, running from Highway 15 to the railway, for $50,000. Having regard to the factors taken into account by Mr. Young (the Hydro easement over the Hodgins Lumber property when there was none on the subject property, the greater highway frontage of the Hodgins Lumber property in relation to the subject property, the public road allowance along one side of the subject property when there was none along

either side of the Hodgins Lumber property, and the greater distance of the subject property from the city, for example), as already indicated, I find that transaction to be of great assistance. My difficulty is that there were other transactions to some of which Mr. Young assigns a supporting role without my being able to appreciate how they lead to the result that he assigns to them,[10] and some of which he says should be ignored for reasons that do not appear to me to be valid. He says, for example, that he ignores all purchases by the National Capital Commission completely because the Commission had expropriation powers;[11] he suggests that sales in the Green Belt after the Government announced that it was seeking authority to

[10] For example, in supporting his valuation by putting a value of $9,000 per acre, or $21,700, on the front 300 feet of the subject property, which has a frontage of 350 feet, and a value of $2,750 per acre on the balance, he arrived at the figure of $9,000 per acre for the first 300 feet by considering (*a*) a sale for $8,000 by Berlin of 1.66 acres (500 feet frontage by a depth of 150 feet) some distance west of the subject property to an oil company in 1955, (*b*) a sale in 1960 (Torontow) of .48 acres (100 feet frontage by a depth of 208 feet) for $2,500, and (*c*) a sale in 1961 (price fixed in 1959) to an oil company (Texaco) of 1.06 acres (299.68 feet frontage on the highway and a depth of 150 feet) for $10,000. As I interpret these sales they may be summarized as follows:

Year	Acreage	Frontage	Depth	Average price per acre	Average price per front foot
1955	1·66	500′	150′	$4,819	$16
1959	1·06	299·68′	150′	$9,433	$33·5
1960	·48	100′	208′	$5,208	$25

Having regard to the fact that the less the depth, the greater should be the average value per acre, it is not evident how these sales lead to an average value of $9,000 per acre for the front 300 feet of the subject property, even if one assumes an immediate demand for parcels of this kind in June, 1961. It is even more difficult to see how they lead to a per front value of over $60 per foot for the front 300 feet of the subject property, which is the effect of putting a value of $21,700 on a parcel with a frontage of 350 feet.

[11] While there may have been reason to examine a purchase by such an authority with care or even scepticism because it had expropriating powers, or was otherwise in a position of strength, in my view, it was wrong in principle to ignore them entirely for that reason. See *Gagetown Lumber v. The Queen*, [1957] S.C.R. 44, per Rand J. at pages 55-6, where he quotes *inter alia*, *O'Malley v. Commonwealth*, per Holmes C.J.: "We cannot say merely because of the name of the purchaser that the sale was not a fair transaction in the market ...

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acquire the area should be ignored;[12] and he says that certain sales should be ignored because the area bought was too large although he gives, apparently, considerable weight to other sales of properties that were correspondingly smaller than the subject property. None of these reasons (except possibly the one as to size, which cuts both ways) is, in my view, a reason for refusing to give any consideration to the sales in question in determining what a reasonably prudent purchaser would have paid to a reasonably prudent vendor for the subject property, at the time of the expropriation (leaving aside for the moment the legal argument of counsel for the defendant as to the effect of the Green Belt proposal). Again, Mr. Young also says that he did not take the price paid by the defendant for the subject property in 1956 into consideration although he does take into consideration a sale made in 1955 by Berlin to Imperial Oil of a parcel of 1.66 acres. I can find very little support, in the principles that have been laid down by the courts for determining market value, for Mr. Young's various decisions to disregard completely the respective classes of transactions that he decided to disregard.

The sole witness put forward by the plaintiff to express an opinion as to the market value of the subject property at the time that it was expropriated was James Austen Crawford of Ottawa. The portion of his affidavit as filed under Rule 164B dealing with his opinion, reads as follows:

> 4. That at the request of the National Capital Commission I examined the property located in Lot 35, Concession 5, Rideau Front, Township of Nepean, comprising approximately 13.5 acres, (which property is the subject of this action) in order to advise the Commission of my estimate of market value as of the day of expropriation.

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[12] For example, one short extract from his evidence reads:

"THE WITNESS: Well, I am making the distinction because the lands east of the track were not in the Greenbelt; it was land that was in a free market and not in the Greenbelt.

HIS LORDSHIP: What do you mean by a free market?

THE WITNESS: Well, where purchasers are able to buy the land without any question of it perhaps being required by the public authority in the near future."

He also indicated that he valued the subject property "as though free from the adverse effect which the Green Belt might have had."

5. That in my opinion the market value of the said property on the day of expropriation, namely, June 14th, 1961, was the sum of $27,000.00.

6 That annexed hereto and marked Exhibit "A" to this my affidavit is the outline of the information and material on which I have based my opinion.

Exhibit "A" to Mr. Crawford's report is a document called an "Appraisal" of the subject property. The substantive portion of the appraisal reads as follows:

The purpose of the appraisal is to estimate the market value of the subject property as of June 14, 1961.

Market value may be defined as that amount of money that a willing owner will accept and a willing purchaser will pay for the exchange of ownership of a parcel of real estate where both are fully informed of the present use and potential uses of the property.

AREA DATA

The City of Ottawa in 1961 reported a population of about 277,000. Being the Capital of Canada, the Federal Government was the major employer but some industry was attracted to the greater Ottawa area, for the most part in the Township of Nepean

The Township of Nepean, in which the subject property is located, lies to the west and south west of the city. The Township contained about 69,000 acres of which approximately 17,000 acres was included in the Green Belt.

For many years prior to the Second World War studies were undertaken with a view to servicing and containing a sprawling city. By 1954 rumours of a Green Belt became most persistent. It was not known whether it would be by zoning or ownership.

Some two years later, in 1956 the Central Mortgage and Housing Corporation declined to loan funds on subdivisions serviced by wells and septic tanks. On appeal to the Ontario Municipal Board one or two subdivisions were approved.

The National Capital Commission began to acquire property by purchasing from owners prepared to sell Thus land in the Green Belt area slowly began to come under ownership of the Commission.

The boundaries of the Green Belt which embraced about 40,000 acres of land in total, were defined in 1958. Few changes in boundaries have taken place.

Taking an area of land out of potential subdivision use placed a greater demand on vacant land between the City of Ottawa and the inner limits of the Green Belt.

In examining population trends, the Township of Nepean has in 1961 become more popular than for the Township of Gloucester. This was primarily due to an indifferent water supply in Gloucester and lack of sewage collectors Whereas, at that time, the Township of Nepean was in the process of developing the Nepean Trunk Collector Sewer. Some years later the Queensway Collector Sewer was installed connecting into the main collector.

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The following table compares the rate of growth for the two Townships and records the building permits issued for the Township of Nepean for 1955 to 1961—

Year	Population	Single Family Permits	Apt. Permits	No. of Units or Apts.	Value of Residential Permits	Industrial and Commercial Permits
1955	8,167	331			$ 4,538,011	18
1956	10,695	280			$ 4,820,639	23
1957	10,963	279			$ 4,382,242	36
1958	11,756	470			$ 6,427,273	30
1959	13,724	556			$ 8,960,545	50
1960	16,566	937			$ 16,712,936	46
1961	21,055	1,205	3	298	$ 17,559,840	38

A neighbourhood is a segment or section of an area that is defined due to homogeneity of peoples and enterprise or through natural or man made division of boundaries.

The subject neighbourhood may be considered as being bounded on the east by the Canadian Pacific Railway and on the west by the town line which is the easterly boundary of the Glen Cairn Subdivision.

The aforementioned railway line is the westerly limit of Bells Corners Hamlet which includes the residential subdivision of Lynwood Village and the N.C C industrial area

The (subject) neighbourhood was sparsely developed and mainly used for farming with some residential and commercial holdings.

The old S turn underpass which was the scene of many accidents and which considerably reduced development to the west, has now been replaced with a modern structure.

Highway 15 links the City of Ottawa, approximately 2 miles east of Bell's Corners to a network of highways that leads to the Rideau Lakes Tourist Area and the highway itself leads to Toronto. It is the shortest route and carries a heavy flow of intercity traffic as well as commuter traffic to and from the employment center of Bells Corners and Ottawa.

(At this point the Appraisal contained the legal description of the subject property)

* * *

ASSESSMENT

The subject property was assessed in 1961 as follows:—

Land—$2,700.00

ZONING

There was no land use zoning by-law applicable to the subject lands at the date of expropriation There was, however, a subdivision control by-law in force.

DATE OF APPRAISAL

The subject property is appraised as of June 14, 1961.

HIGHEST AND BEST USE

This is the legal use most likely to produce the greatest net return over a given period of time in money and amenities.

The subject enjoys access to a railway right-of-way and highway frontage. The subway east of the property has a detrimental effect.

In the circumstances and having regard for the market it is considered that as of the date of the appraisal the highest and best use is speculative

DESCRIPTION OF THE SUBJECT SITE

Containing approximately 13 5 acres it lies on the south side of Highway 15 (now Highway 7) and runs back to the north limit of the Canadian Pacific Railway right-of-way.

The west boundary is the road allowance between concessions 5 and 6 The easterly boundary is unfenced. Out of the northwest corner a block with 150 feet frontage on the highway and 300 feet frontage on the road allowance has been sold

The parcel has frontage of 350 feet on the highway, 1,090 feet approximately on the road allowance, 600 feet on the railway and an easterly boundary of approximately 1,140 feet.

According to the soil map for the County of Carleton the subject is Farmington said to be shallow soil over limestone bedrock.

The topography generally is gradually sloping downward from west to east. The surface is uneven with many areas throughout where either rocks protrude above the surface and in others where there is no soil over the flat rock.

Other than a mature tree inside the highway boundary the front 500 to 600 feet is clear of trees and underbrush. There are a couple of low knolls.

From that point there is a ribbon of trees and underbrush to the rear of which is a cleared area lying in the center and toward the south west corner. The easterly portion of the rear half drops less gently into a more heavily wooded area.

A rather heavy copse of underbrush lies along the road allowance approximately 200 feet from the railway

The highway boundary is marked by a wire fence on steel posts. Along the road allowance is a shallow ditch and hydro line on wood posts. A wire fence on wood posts marks the railway right-of-way.

Inside the northerly boundary the area excepted out is partly fenced with wire on wood posts Parallel to the railway right-of-way is a row of posts about half the width running to the east boundary.

The site has not been used agriculturally. It is growing to grass and weeds with approximately one-third clear of trees and underbrush Mature trees are few and of no merchantable value.

The only services available to the subject land are electricity and telephone.

(At this point the Appraisal contained particulars of some 27 "Comparable Sales".)

* * *

As a result of the foregoing comparables after giving consideration to the various points of difference including road frontage and depth, the market value of the subject property as of the date of the appraisal is estimated to be $2,000 00 per acre. Which for 13.5 acres indicates a total value of $27,000 00

Final estimate of value—

TWENTY-SEVEN THOUSAND DOLLARS

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Like the other two witnesses who expressed an opinion as to the market value of the subject property at the time of the expropriation, Mr. Crawford, in his oral evidence, said that he viewed the subject property, he searched for sales in the entire area, he considered the comparable sales, and he then arrived at his value, which, in his case, was $27,000, or $2,000 per acre. He failed, however, to make me understand how he reached that decision.

Mr. Crawford did say that he relied on the sale of three properties (four sales) more than the others. These may be summarized as follows:

Year	Parties	Acreage	Average price per acre	Average per front foot	Depth
1958	Roberts to MacDonald...	10	$1,500	$15	435'
1958	Storey to Kassirer.....	10·22	$1,000	$ 8	333'
1961	Kassirer to N.C.C.....	10·22	$2,000	$16	333'
1961	Berlin to N.C.C..... ..	84·7	$1,000	(Partial frontage on highway)	

He also gave evidence regarding the Hodgins Lumber Company purchase, on which the other two witnesses relied so strongly. He said that the Hydro Company, some years after Hodgins bought the land in question subject to the Hydro easement for $50,000, paid Hodgins $17,064 for the land over which the easement ran so that the net cost of the land to Hodgins was only about $33,000. There was, however, no evidence that Hodgins had any reason to anticipate any such windfall when it bought the property in 1961, and I am of opinion therefore that this approach must be rejected because, in considering the effect of a transaction as evidence of the market existing at the time it was entered into, it is the terms and circumstances of that transaction that must be considered and not the net cost of the land to the purchaser as a result of that transaction coupled with some subsequent transaction not foreseeable at the time.

Mr. Crawford also gave evidence that the publicity about the Green Belt caused prospective purchasers to lose interest

in properties in the Green Belt and that there was a resulting flow of values into areas between the Green Belt and Ottawa and such areas as Bell's Corners Hamlet, which he described as a "protected" area in the middle of the Green Belt. The general effect of his evidence was that, in his opinion, the Green Belt publicity and the acquisition of lands prior to 1961 for the Green Belt caused values in the Green Belt to fall and those in Bell's Corners to rise, but it is not too clear to me just when, in his opinion, these movements in values occurred.

It is clear from Mr. Crawford's evidence that he regarded the bad "S" underpass where Highway 15 went under the railway as being a factor that depreciated values of properties in the Green Belt area as compared with properties in the westerly Bell's Corners area.

When I attempt to make use of Mr. Crawford's opinion as an aid to determining market value of the subject property at the time of the expropriation, I find myself in the same position as when I attempt to make such a use of Mr. Whelan's opinion or Mr. Young's opinion.

In the case of each of these witnesses, after saying that he has considered certain matters (which are, generally speaking, proper matters to consider), the witness says that he has reached a certain conclusion as to market value of the subject property at the time of the expropriation. But when, for the purpose of assessing what weight, if any, to give to one of these opinions, one attempts to ascertain how the witness has allowed various factors mentioned by him to enter into the production of his ultimate conclusion, or why he had discarded certain of them as being of no importance in reaching a valid conclusion, one is faced with a lack of any such information in respect of many factors and, in respect of others, reasons for disregarding them that seem to lack validity. It follows that I must reach my own conclusion making the best use I can of the information and ideas that the witnesses and counsel have made available to me.

What I must do, as I understand it, is put myself in the position of a person owning the subject property just before the expropriation willing to sell, but under no compulsion to sell, and capable of appreciating all the factors bearing

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on what a reasonably prudent and competent person would take into account in the circumstances, and consider what amount he would insist on having before he would sell; and I must put myself in the position of a person desiring to buy a property such as the subject property just before the expropriation but under no necessity of obtaining that particular property, and capable of appreciating all the factors bearing on what a reasonably prudent and competent person would take into account in the circumstances, and consider what is the highest amount that he would be prepared to pay to acquire the property.

The first important fact, as it seems to me after a long and careful examination of the evidence, that such a person would have in his mind is that urbanization was, in 1961, gradually creeping out along Highway 15 from the City of Ottawa. Eastern Bell's Corners was, by that time, quite well developed with a housing area and a motel and other commercial establishments to the south of Highway 15, and various business operations established to the north of the highway. Commercial and industrial development was already making itself felt in western Bell's Corners and isolated properties were being acquired and developed in the Green Belt area for commercial and residential purposes. Housing developments were in an embryo stage immediately to the west of the Green Belt area.

A second fact of great importance to any such potential vendor or purchaser was that, ever since 1947, a "Green Belt" was mooted which would encompass this very area and that, while its accomplishment had not been worked out in a very clear-cut way by the various levels of government, nevertheless, steps had already been taken to stop building subdivisions and, by 1958, the Government of Canada had made it clear that it was going to purchase the land to ensure that the Green Belt area maintained the character deemed necessary for an appropriate National Capital District.

What this would have meant to a businessman of perspicacity, as I see it, is that a new and financially powerful purchaser had come into the market for the Green Belt area properties, which included the subject property. He would realize, of course, that the steps taken by the Government in connection with the Green Belt would have the effect, which according to the evidence they did have, of

discouraging developers of property for housing subdivisions from coming into this area, and of discouraging individuals and companies seeking properties for specific commercial or industrial developments from coming into this area. On the other hand, he would, I should have thought, with some reason, have guided himself by the view that, the Government having decided that these properties were to be acquired and used for public purposes and other purposes acceptable from the point of view of the Green Belt concept, those purposes must be regarded as being at least as important as, and at least the equivalent of, the "highest and best use" to which the lands in the Green Belt would have been put if the Green Belt policy had not been adopted and put into execution by the Government. In other words, a potential vendor of a property such as the subject property, while he would not have the possibility of a sale to a company wishing to establish a business such as that of Hodgins Lumber, would have substituted therefor the possibility of sale to a government for a public institution or to some other person having "Green Belt" approval for some other establishment (which type of user would, I should have thought, make just as good use of the physical characteristics of the subject property) and would expect to be paid as much by such a purchaser as he would have been paid by a purchaser for commercial or industrial purposes; and a government or other purchaser for a "Green Belt" type of institution or establishment could not properly have expected to get such a property for less than would have had to be paid by a purchaser who would have bought it if the Green Belt had not been set up.

In my view, therefore, a potential vendor or purchaser of the subject property just before the expropriation in 1961 would have taken the market as it was with all the effect that the entry of the Government as a purchaser some years previously had had on the values of land along Highway 15 both in the westerly Bell's Corners area and in the Green Belt area.

I am further of the view that such a vendor or purchaser would not have been intimidated by the fact that the National Capital Commission had been given powers to expropriate for Green Belt purposes. I fully recognize that persons not aware of their rights after an expropriation, or not equipped or prepared to enforce such rights, might not

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have been capable of dealing on equal terms with such a potential purchaser, but, in my view, the market price must be determined on the basis that the reasonably competent vendor or purchaser (whose conclusion on the matter is our theoretical test) is a person both competent and prepared to exercise his legal remedies, if necessary, to obtain his legal rights. (It will, of course, be a relevant consideration in considering the comparability of a sale to consider whether it was a sale to the National Capital Commission by some person who, through ignorance or lack of means or otherwise, may have failed to bargain from as strong a position as should have been available to him.)

One other matter of a general character on which I should express my conclusion as a preliminary matter is that, as we are considering what price would be negotiated by a person who is not under pressure and who has in mind the creeping urbanization of Highway 15, the potential vendor or purchaser would not be unduly affected by the difficult "S" underpass where the highway intersected the railway. He would have had in mind that such obstacles to the free flow of traffic would be eliminated in the normal course of adjustment to spreading urbanization.

In considering what importance a potential purchaser or vendor would have attributed to sales of other properties, one factor of importance, as it seems to me, is that consideration of the average price per acre for which some other property was sold can be a very misleading means of comparison unless due weight is given to the proportion of the land in question that was close enough to a highway, side road or railway to have special value as frontage land as compared with the proportion of "rear" land that was remote from any such frontage. For example, if highway frontage has a value for commercial or industrial reasons, while two lots may have the same acreage, if one has 300 feet frontage for a depth of 150 feet, it will be more valuable than the other that has 150 feet frontage for a depth of 300 feet, all other things being equal.

Similarly, in considering "comparable sales", it would seem, from an examination of sales information and as a matter of general and common experience, that substantially more is, generally speaking, paid for a property by a purchaser who has an immediate requirement for that

property himself than would be paid for the same property by a purchaser (a dealer or speculator) who buys for re-sale to a person with such a requirement if and when he materializes. (The difference is analogous to the difference between a sale of goods at retail and a sale of the same goods to a jobber or wholesaler.)[13]

It would also seem obvious that purchasess of areas of such a size that they would require subdivision before being used for normal industrial, commercial or residential use, whether or not there is an immediate demand for the property when subdivided, are at prices considerably less on the average per acre than prices at which parcels of a size convenient for such development are sold[14].

For an example of how both these considerations may have been operating in the market under consideration, compare the sale by Robertson to Nepean Hamlet Realty of 72.98 acres at an average price per acre of $2,371 per acre with the sale a few months later by Lobel to Hodgins Lumber of property right across Highway 15 of 10 acres at $5,000 per acre, and this notwithstanding that the 72.98 acre parcel had, apparently, very good although broken Highway 15 frontage, very good railway frontage, very good side road frontage, and relatively less Hydro easement diasability than the Lobel property. Normally, a larger property would be bought by a dealer or speculator for resale in parcels and such a purchaser is not going to pay the aggregate of what the various persons with immediate requirements for parts of the property would probably pay as that would leave him no reasonable possibility of profit on re-sale.

As I appreciate the expropriated property, its highest and best use was to hold it until a requirement arose for

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[13] This is an example of contingent value arising from adaptability for a possible use as compared with realized possibility arising from a purchaser appearing with an immediate requirement for such a use. Compare *In re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16.

[14] This would seem to have been the principle on which Mr. Whelan based his reason for including in his list of sales a reference to the sale by O'Neill to Assaly (his #12). He also testified in a general way that ". . . they usually pay more per acre for a smaller parcel than they do for a larger parcel . . ." Mr. Young was also of the opinion that ". . . generally smaller lots will sell for more".

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its development as a single property for a public institution or other "Green Belt" establishment that could utilize to advantage its highway, railway and side road frontages just as Hodgins Lumber utilized the highway and railway frontages of the property that it acquired. The real difference between the Hodgins Lumber property at the time it was acquired and the expropriated property is that in the case of the Hodgins Lumber property there was a present requirement for it for that use while in the case of the expropriated property some months later, there was merely a possibility of its being so required, albeit a very good possibility.

No witness put before the court a factual picture of the supply of, and demand for, sites of the general character of the subject property in the Ottawa area immediately before the expropriation. There was some evidence to suggest that industrial sites that were available in 1961 on railway sidings in the City of Ottawa were very expensive, and there was evidence by one witness that, while he did not know of such site on Highway 15 in Nepean Township, he did know of sites with highway and railway frontage of approximately the size of the subject property that were available elsewhere in Nepean Township. That was evidence that came out incidentally in the course of cross-examination.

There is some slight evidence, as I have indicated, that there were other sites like the subject property in Nepean Township. I should have thought that others in the general Ottawa area would have competed with those in Nepean Township on or off of Highway 15, some being more sought after for one type of demand and others being more sought after for other types of demand. I have no evidence, however, as to whether there was any scarcity of such sites to meet any demand for them.

I am struck, moreover, with the fact that there was no evidence at all of any immediate demand for sites such as the subject property either for industrial or commercial purposes, for government undertakings, or for any other purpose. In the absence of any evidence that there was,

just before the expropriation, any such demand in the market, I must conclude, as I have already indicated, that the probable willing purchaser for a site such as the subject property at that time was a dealer or speculator buying to hold for re-sale when such a demand did arise.

In the light of what I know from the evidence of the history of the real estate market in the area in question, I think that sales prior to 1959 must be disregarded as being too remote from the time of the expropriation to be of any assistance, in the absence of some indication as to trends in value, and I have been unable to detect any. I am also of the view that transactions involving one or two acre parcels or less for such purposes as filling stations, small individual residences, etc., must be disregarded inasmuch as they not only suggest an acquisition to meet an immediate need for a special purpose, but they will generally reflect some amount in respect of depreciation in the value of other land as a result of severance. (In the case of Berlin to McFarland, an additional reason for regarding it as not being any aid in valuing the subject property is that it was apparently acquired to give the purchaser access from other property that he already owned to a public road and thus the vendor was in a particularly good bargaining position that would not apply to ordinary sales. In addition, the vendor was parting with the only access that he had to the railway for a very large parcel of land.)

For various reasons, specific sales mentioned in the evidence can be excluded from consideration, or only used with substantial adjustment, in valuing the subject property. Although the property sold by Berlin to the National Capital Commission just before the expropriation on June 14, 1961, is very close to the subject property, the average price per acre at which that property was sold, namely, $1,000, must be regarded as very substantially below the market value at the same time of the subject property inasmuch as it was a sale of an area sufficient for several different institutions or other foreseeable developments. Other factors that may have brought that price even lower in relation to the ideal market is the fact, as has been reported,

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that Berlin desired to turn the land into money to be used for other purposes and the fact, which is admittedly merely a supposition, that he may have been prepared to take a somewhat lower price than he could otherwise have got in order to avoid long-drawn-out negotiations with a government agency. The Craig to the Federal District Commission transaction is another transaction where, apparently, the same factors may have come into play. Again, I cannot overlook the possibility that the sale by Kassirer to the National Capital Commission in 1961 may have been at an average price per acre somewhat below the ideal market for the subject land, notwithstanding its closeness in time and locality, because it was probably part of larger negotiations between Kassirer and the National Capital Commission involving another transaction, because it was low and subject to being under water at times, and because it did not have the railway and side road frontages that the subject property did. At the same time it must not be overlooked that it had, comparatively, much better Highway 15 frontage. Finally, as pointed out by Mr. Crawford, the establishment of Mount Royal Paving on the adjoining land probably created a dust and noise situation that affected the value of the property sold to Carleton Culvert in 1960 so that that sale is practically speaking of no help.

There would appear to be no doubt, on any appreciation that I can make of the matter on the material before me, that the sale that is of greatest assistance is the sale from Lobel to Hodgins Lumber just before the expropriation. The general characteristics of the two properties are comparable. Both properties have frontage on Highway 15 and on the Canadian Pacific Railway line. The expropriated property is only a few minutes further from Ottawa than the Hodgins Lumber property. While the expropriated property was 13½ acres, the Hodgins Lumber property was only 10 acres. The Hodgins Lumber parcel had more Highway 15 frontage than the subject property, about the same railway frontage as the subject property, no side road allowance frontage, and was subject to an easement that was a serious disability. The subject property had over 1,100 feet of side road allowance frontage, had 3½ acres

more area, and was not subject to any Hydro or other easement. I am of the view that, in 1961, if it were not for the Green Belt, a person wanting a property for the sort of development that Hodgins Lumber had in mind would have paid $50,000 for the subject property just as willingly as Hodgins Lumber paid that amount for the property that it acquired at that time. That being so, on the basis that I have already laid down, that the subject property was equally valuable for government institutions or other Green Belt purposes, as it would have been for commercial or industrial purposes if it were not for the Green Belt, I am of the opinion that if such a property had been required at that time for such a purpose, the parties would have reached agreement on a price of about $50,000. As, however, there is no evidence of any such realized requirement at that time and it is a matter of valuing it on its potentiality for such a purpose, I am of opinion that, looking only at the Hodgins Lumber purchase, the proper price to put on it is $30,000, being the highest price that, I should have thought, a dealer or speculator would have paid to acquire it for re-sale to such a purchaser, if and when one appeared, and the price for which an owner of the property willing to sell it at that time, but under no pressure, would have sold it.

When I take into account the various considerations that I have enumerated in connection with other transactions, they do not cause me to change the conclusion that I have reached, based on the Hodgins Lumber transaction.

Having regard to the extreme difficulty I have encountered in trying to reach a conclusion on the question of market value in this case, it might not be superfluous for me to attempt to explain my thinking in a more general way. In *Cedars Rapids Manufacturing and Power Co. v. Lacoste*[15] per Lord Dunedin (quoted by Ritchie J. in *Fraser v. The Queen*[16]), Lord Dunedin said at page 576:

> Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though

[15] [1914] A C. 569.

[16] [1963] S.C.R. 455, at pages 472-3.

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> adaptability . . . is really rather an unfortunate expression) the value . . . is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.

Adapting that reasoning to the facts of this case, in my opinion the market value of the expropriated property is the amount to be arrived at by "the imaginary market" that would have ruled if the expropriated property had been exposed for sale immediately before the expropriation. As far as the evidence goes, there was not at that time any project on foot that created an immediate demand for a property having the characteristics of the expropriated property, but Ottawa was growing and it was obvious to any one who studied the evidence in this case that there was a large potential demand for properties such as the expropriated property in areas such as that where that property was located, not only for commercial and industrial purposes, but also for governmental developments (public buildings, laboratories, etc.) and other developments of a similar character that are attracted to the National Capital area. If, therefore, that property had been exposed for sale just before the expropriation, I have no doubt that some trader or speculator would have been prepared to buy with a view to holding it until this potential demand became realized and the property could be re-sold at a profit to a purchaser who needed it for a project ready to go ahead. Such a dealer or speculator would obviously not pay the amount for which he hoped to be able to re-sell because his object would be to make a profit. The best estimate that I can make of the amount for which such a trader or speculator would hope to be able to re-sell at some time in the not too distant future is $50,000 (based on my comparison with the property bought by Hodgins Lumber at that time). The highest price that I can conceive of a trader or speculator paying for a property yielding no income in the hope of re-sale at $50,000 is $30,000. Having regard to the risks involved, $30,000 would be a large amount to hazard in the hope of realizing a profit of $20,000 at some indefinite time in the future, but, having regard to the public knowledge

that the Government had already decided to acquire all the land in the area, I am inclined to think that it would have been regarded by such a trader or speculator as a fair risk.

There remains for consideration the argument of counsel for the defendant based on the following decisions:

1. *Kramer v. Wascana Centre Authority*, [1967] S.C.R. 237.
2. *Re Gibson and City of Toronto*, (1913) 28 O.L.R. 20
3. *Pawson v. The City of Sudbury*, [1953] O.R. 988
4. *Cunard v. The King*, (1910) 43 S.C.R. 88.

The argument was that the announcement by the Prime Minister in 1958 of the Government's intention to seek funds from Parliament for the purchase of Green Belt lands must be regarded as the commencement of the scheme resulting in the expropriation and that any diminution in value by reason of that Green Belt scheme must be disregarded in determining the compensation payable. In view of my conclusion that the entry of the Government into the market for Green Belt lands not only did not reduce the market value of such lands but probably resulted in higher prices having been paid for properties purchased in the general area between the Prime Minister's announcement and the expropriation, it becomes unnecessary for me to consider this submission on behalf of the defendant. The question nevertheless arises as to whether application of the same general principle results in the necessity of disregarding any increase in value by reason of the Green Belt scheme. If that were so, I have been unable to see on what basis I can regard the scheme as commencing in 1958. As it seems to me, the possibility of acquisition for a Green Belt became a factor in the market value of the subject lands at least as early as 1947; but I have no evidence to show that it became a "realized possibility" prior to the filing of the expropriation documents. The decision in 1958 was a decision to seek authority to purchase Green Belt lands. In the circumstances, I cannot distinguish the facts, from this point of view, from those in *Fraser v. The Queen.*[17]

[17] [1963] S.C.R. 455, per Ritchie J at pages 472 to 477.

I regard the reasoning in that case as being so analogous that I have set out the relevant portion of Mr. Justice Ritchie's reasons in an appendix to these reasons.

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Before concluding these reasons for judgment, I must deal with a problem that now presents itself to me in a light in which I did not see it during the course of argument.

Practically all, if not all, the evidence concerning the "market" that was put before the Court in this case consisted of facts stated by the three "experts" in explaining the basis for their respective opinions. Some of that evidence was evidence as to facts within the personal knowledge of the expert. Most of it, however, was hearsay. Indeed, I think it is probably true that all evidence concerning "comparable sales" was hearsay.

No objection to any of such evidence on the ground that it was hearsay could have been sustained having regard to *City of Saint John v. Irving Oil Co. Ltd.*[18] per Ritchie J., delivering the judgment of the Supreme Court of Canada, where he said, at pages 591-2:

> It would be unnecessary to say more than this were it not for the fact that it was strenuously contended in the course of argument before us that the opinion of the expert appraiser called by the City to testify as to the land value per square foot of the expropriated property was inadmissible on the ground that it was hearsay evidence which was based upon calculations made from unrecorded interviews which the appraiser had had with forty-seven persons who had been parties to sales of land in the area. In this regard, Ritchie J.A. made the following findings:
>
> > "Based on the study he had made of market conditions in the area as represented by forty-six unidentified and one identified transactions, Mr. de Stecher applied a unit value of $40 per front foot . . . Opinion evidence as to the value of land based on such a foundation was inadmissible It was admitted by the Board despite strong objections of counsel for the Company. The validity of an opinion such as expressed is only as good as the validity of the information on which it is based. The precise information obtained in respect of all forty-seven transactions, including price and the dimensions and physical characteristics of each property should have been submitted to the Board."
>
> This opinion was in accordance with a decision rendered by the same judge on behalf of the same bench of judges in respect of evidence of the same witness in *McCain v. City of Saint John, (1965) 50 M.P.R. 363,* where he said:
>
> > "Much of his (Mr. de Stecher's) opinion evidence was founded on hearsay information obtained from sources not always disclosed.

[18] [1966] S.C.R. 581.

> In the course of making his appraisal, Mr. de Stecher compiled a market survey covering sales of as many properties in the area during the preceding four years as he could obtain information on . . . The report indicates the market survey rests on a foundation of hearsay and is restricted mainly to sales by trustees of estates to public bodies. When an appraiser elects to rest his valuation of real estate on sales of comparable properties, he should testify he has examined each of them.
>
> The greater part of the de Stecher evidence, including the appraisal report, was inadmissible."

Counsel on behalf of the City of Saint John pointed out that if the opinion of a qualified appraiser is to be excluded because it is based upon information acquired from others who have not been called to testify in the course of his investigation, then proceedings to establish the value of land would take on an endless character as each of the appraiser's informants whose views had contributed to the ultimate formation of his opinion would have to be individually called. To characterize the opinion evidence of a qualified appraiser as inadmissible because it is based on something that he has been told is, in my opinion, to treat the matter as if the direct facts of each of the comparable transactions which he has investigated were at issue whereas what is in truth at issue is the value of his opinion.

The nature of the source upon which such an opinion is based cannot, in my view, have any effect on the admissibility of the opinion itself. Any frailties which may be alleged concerning the information upon which the opinion was founded are in my view only relevant in assessing the weight to be attached to that opinion, and in the present case this was entirely a question for the arbitrators and not one upon which the Appeal Division could properly rest its decision.

It seems clear, therefore, that an expert may express his opinion as to value and, in so doing, may inform the court as to the "information upon which the opinion was founded" even though such "information" has been "acquired from others who have not been called to testify" and that it will then be for the arbitrator or the court, as the case may be, to determine the "weight to be attached to that opinion" after assessing it in the context of the information on which it was based. That is the way in which I appreciated the situation during the trial and I assumed that it was because counsel similarly understood the law that I did not hear objections to much of the evidence given in this case on the ground that it was hearsay, though it sometimes constituted a somewhat extreme type of hearsay even for an expropriation case.

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My problem is whether hearsay information so received from an expert concerning comparable sales or other market information for the purpose of testing the value of his opinion as to value can be used for any other purpose.

In this case, I have concluded that I cannot base a conclusion as to the market value of the expropriated property on any of the opinions as to value expressed by the experts either by adopting the opinion as such or by adopting it subject to making certain adjustments for factors to which, in my view, the expert gave too much or too little weight. If the situation is that, because I cannot use his opinion as to value, I must disregard all the hearsay evidence that he put before the Court, I am left in the position that I have no evidence as to "comparable sales" and have, indeed, no material upon which I can make a finding as to market value.

The absurdity of the result that I would reach by applying the rules of evidence to the testimony put before the court by the parties in this case in such an inflexible manner constrains me to seek some more sensible approach.

Pursuant to the rules of this court, each of the parties in this case filed affidavits setting out the evidence-in-chief of their experts,[19] and copies of such affidavits were served upon the opposite parties. All comparable sales upon which the respective experts relied as evidence of the market were thus brought to the attention of the opposite party before trial. Having that opportunity to consider the other party's expert's evidence in advance of trial, I think it is fair to conclude that each party made such attack as it thought was open to it on the market information being relied on by the other party. On that assumption, I feel warranted

[19] I do not want to be taken as expressing an opinion that there was full compliance in this case with Rule 164B. In my view, each of the experts gave much hearsay evidence that he should not have been allowed to give because it was not in his affidavit. The same comment applies to his explanation of his conclusion from his market information. In my view, an expert should not, in his affidavit, say he relied on twenty sales and then, in his verbal testimony, say that he really relied only on some of them.

in concluding from the manner in which the trial actually proceeded that, subject to isolated transactions that were attacked and to which I have paid no attention, there was an implied agreement by the parties as to the basic facts of the transactions to which the various experts referred and that the court is entitled, therefore, to rely on such transactions in reaching a conclusion as to market value, even though it is not based in whole or in part on the actual conclusions of any of the experts.

This is the basis on which I have reached the conclusion in this case that I have already expressed.

There will be judgment in the usual form based on my finding that the market value of the expropriated property at the time of the expropriation was $30,000. Before judgment is pronounced, I must be satisfied that the pleadings have been revised to make the description of the expropriated property accord with the understanding upon which the trial took place. When that has been done, if the parties can jointly submit a proposed pronouncement, I will proceed to pronounce judgment accordingly. Otherwise, either party may move for judgment.

APPENDIX

Fraser v. The Queen, [1963] S.C.R. 455, per Ritchie J at pages 472 to 477:

The respondent's counsel contends that the only potential value of the expropriated lands over and above their "bare ground" value was "solely and exclusively related to the scheme of constructing the causeway" and should accordingly have been excluded in fixing the value for the purposes of compensation. The leading authorities cited in support of this contention are: *Cedars Rapids Manufacturing and Power Co v. Lacoste*, [1914] A.C. 569; *Fraser v. City of Fraserville*, [1917] A.C. 187, and *Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendent of Crown Lands*, [1947] A.C. 565. None of these cases is, in my opinion, authority for the proposition that a hitherto undeveloped potentiality of expropriated property is to be entirely disregarded in fixing the value of that property for compensation purposes on the ground that the expropriating authority is the only present market for such potentiality and that it has developed a scheme which involves its use. These cases do, however, make it plain that the amount fixed by way of compensation must not reflect in any way the value which the property will have to the acquiring authority after expropriation and as an integral part of the scheme devised by that authority.

In the *Cedars Rapids* case, *supra,* Lord Dunedin stated the matter thus, at p. 576:

> "Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability . . . is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility."

It seems plain that the element of value which Lord Dunedin excluded in fixing compensation was the value as "a proportional part of the assumed value of the whole undertaking . . ." If there were any doubt about this, it is made plain at p. 577, where it is said:

> "Their Lordships have sought in vain in this testimony for any evidence directed to the true question as they have expressed it above. All the testimony is based on the fallacy that the value to the owner is a proportional part of the value of the realized undertaking as it exists in the hands of the undertaker. There are other fallacies as well, but that is the leading one, and is sufficient utterly to vitiate their testimony."

In *Fraser v. City of Fraserville, supra,* the original arbitrator had taken into consideration the value which the lands would have after expropriation as a part of the hydro-electric system to be operated by the City of Fraserville, and Lord Buckmaster observed, at p. 193:

> ". . . in truth the value which Mr St. Laurent (the arbitrator) fixed was the value of the property to the person who was buying and not to the person who was selling and it was not this value that he was appointed to determine."

In the *Pointe Gourde* case, *supra,* which is particularly relied upon by the respondent, the British Crown authorities expropriated the appellant's lands in Trinidad which were required by the United States of America in connection with the establishment of a naval base. The situation was that the appellants owned and operated a stone quarry situate on the expropriated lands which had a special suitability and adaptability for the purpose of producing and marketing quarry products and as such had a market value as quarry land prior to the acquisition. The original award of compensation made due allowance for the value of the quarry as a going concern and for the special adaptability of the land as a quarry but the item in dispute was a special award of $15,000 which related

> "not to the special suitability or adaptability of the land for the purpose of quarrying which existed before the acquisition, but to the special adaptability (to follow the language of the tribunal) which the quarry land possessed after acquisition in that its proximity to the naval base under construction made it specially suited to the needs of the United States."

It is to be noted that the "special suitability" for which the additional $15,000 award was made could not arise until after the acquisition of the land by the British Crown and after the lands had been leased to the United States Government for the purpose of building the base and that it only came into being because of the "special needs of the United States".

In giving his reasons for disallowing this item, Lord Macdermott further indicated what he meant by "an increase in value which is entirely due to the scheme . . ." when he said, at p. 572:

> "It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition. As it was put by Eve J. in *Southeastern Railway Co. v. London County Council* [1915] 2 Ch. 252 at 258: 'increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded'."

Earlier in his judgment, Lord Macdermott had characterized "the use of the quarry stone in the construction of the naval base" which is the subject of the disputed item as being 'at most . . . but a circumstance which added to the value to the United States of the use of the land as a quarry'.

The exclusion from the Court's consideration of 'increase in value consequent on the execution of the undertaking' to build a causeway and of any value based on the Crown acting under compulsion as a necessitous purchaser, does not mean that the value of the special adaptability to the owner at the date of expropriation is to be disregarded.

In this regard, like the learned trial judge, I adopt the reasoning of Lord Romer in the case of *Vyricherla Narayana Gajapatiraju (Raja) v. Revenue Divisional Officer, Vizagapatam* [*1939*] *A.C. 302* (hereinafter referred to as the *Indian* case) where he makes the following comment on the judgment of Rowlatt J. in *Sidney v. North Eastern Ry. Co.*, [*1914*] *3 K.B. 629*. Lord Romer there said, at pp. 322-323:

> "If and so far as this means that the value to be ascertained is the price that would be paid by a willing purchaser to a willing vendor, and not the price that would be paid by a "driven" purchaser, to an unwilling vendor, their Lordships agree. But so far as it means that the possibility of the promoter as a willing purchaser, being willing to pay more than other competitors, or in cases where he is the only purchaser of the potentiality, more than the value of the land without the potentiality is to be disregarded, their Lordships venture respectfully to differ from the learned judge.
>
> "For these reasons, their Lordships have come to the conclusion that, even where the only possible purchaser of the land's potentiality is the authority that has obtained the compulsory powers, the arbitrator in awarding compensation must ascertain to the best of his ability the price that would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same way that he would ascertain it in the case where there are several possible purchasers and that he is no more confined to awarding the land's 'poramboke' value in the former case than he is in the latter."

Although recognizing that an allowance must be made for the value of the special adaptability of the property in question as a source of rock for the causeway, the learned trial judge felt himself bound to assess the value in relation to the market which would have ruled if the lands had been put up for sale immediately before October 17, 1951, when Cabinet approval was given to the scheme, and in so doing he was governed by his interpretation of the following quotation from Cripps on Compulsory Acquisition of Land, 10th ed., at p. 4040, where it is said:

> "The value must be tested in relation to the market which would have ruled had the land been exposed for sale before the purchaser had secured any powers or acquired the other subject which made the undertaking a realized possibility.

"This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. But this does not mean that the fact that some particular purchaser might desire the land more than others is to be disregarded."

In apparent reliance on this authority, the learned trial judge went on to hold:

"In Canada, of course, the powers of the Crown to expropriate property for public works are statutory and ordinarily no special Act is required. It seems to me, however, that when Cabinet approval was given to the construction of the causeway on October 17, 1951, the undertaking of the construction thereof became a realized possibility and ceased to be a mere potentiality. The value of the lands expropriated, together with the special adaptability 'must be tested in relation to the market value which would have ruled had the land been exposed to sale prior to that date'. The subsequent preparation of the plan, the call for tenders, and the letting of the contract were merely steps in carrying out the scheme to which the Crown was already committed, and of themselves could not, in the circumstances, be considered as adding to the potential value to the special adaptability."

With the greatest respect, I am unable to treat the giving of Cabinet approval to the construction of the causeway as being equivalent to the exercise of powers of expropriation over the appellant's lands. In the case of an expropriation by the Crown in the right of Canada no question arises of securing special powers and in the present case there was no occasion to acquire the other land upon which the public work was to be constructed as the Strait of Canso was the property of the federal government. For these reasons in applying the language used by Cripps on Compulsory Acquisition of Land to the present circumstances it should, in my opinion, be read as meaning that:

"The value must be tested in relation to the market which would have ruled had the land been exposed for sale before the powers of expropriation had been exercised."

This same view was expressed by Roach J.A. in *Agnew v. Minister of Highways, [1961] O.R. 234 at 239, 27 D.L.R. (2d) 82,* with reference to the statutory power of expropriation conferred upon the Minister of Highways of Ontario.

By giving Cabinet approval to the plan to construct a causeway the Crown made it known that there was a probable rather than a possible market for the appellant's rock at the price which a willing purchaser would pay to a willing vendor, but taking this factor into consideration in fixing the value of the land is by no means the same thing as determining the value on the basis that the use of the appellant's rock as a part of the undertaking for the construction of the causeway had become a realized possibility.

The significance of the phrase "realized possibility" as employed in the authorities is illustrated by the following excerpt from the reasons for judgment of Lord Romer in the *Indian* case, *supra,* at p. 313:

"No one can suppose in the case of land which is *certain,* or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be. It is plain that in ascertaining its value the possibility of its being used for building purposes will have to be taken into account. It is equally plain, however,

that the land must not be valued as though it had already been built upon, a proposition that . . . is sometimes expressed by saying that it is the possibilities of the land and not its realized possibilities that must be taken into consideration."

When the property in question was taken from the appellant by the Province of Nova Scotia in 1950, the potential market for the rock which it contained was still a matter of speculation as no decision had been finally made about the causeway but when the lands were reacquired by the appellant on July 9, 1952, the years of speculation, study and planning concerning the building of this causeway had already culminated in the letting of a contract for its construction which contemplated the use of an estimated 9,000,000 tons of rock from these lands, and the potential market for this commodity had thus become a reality before the lands were reacquired by the appellant. It was these lands, with this potentiality, which were expropriated by the Dominion Government, and it is their value at the time of that expropriation which is required to be assessed for the purposes of compensation. In this regard, s. 46 of the *Exchequer Court Act,* R S C. 1952, c. 98, provides that:

"46. The Court, in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work, or for injury done to any land or property, shall estimate or assess *the value or amount thereof at the time when the land or property was taken,* or the injury complained of was occasioned."

BETWEEN: Toronto 1968

WOLF VON RICHTHOFEN .....APPELLANT; Nov. 12-13

AND

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

Income tax—Taxpayer carrying on farming and real estate business—Purchase of farm for use in farming business—Sale at profit—Whether capital gain.

Appellant operated a farm and also carried on a real estate business in farm properties. In 1960 he bought a 100-acre parcel of land near his farm and farmed it for two seasons before selling it at a substantial profit.

Held, allowing his appeal from an assessment to income tax on such profit, on the evidence appellant's sole purpose in acquiring the property was to incorporate it in his farm business.

INCOME TAX APPEAL.

J. E. Sheppard for appellant.

J. M. Halley for respondent.

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JACKETT P. (*orally*):—This is an appeal from a decision of the Tax Appeal Board dismissing the appellant's appeal from a re-assessment of the appellant's liability for income tax under Part I of the *Income Tax Act* for the 1962 taxation year.

The sole question in issue is whether a profit made by the appellant in 1962 from the sale of a parcel of land was a profit from a transaction entered into in the course of the current operations of a business, in which event the respondent properly included that profit in the computation of the appellant's income for the year, or was a profit from the sale of a capital asset of a business, in which event the profit should not have been included in computing the appellant's income.

The appellant, who lives near Campbellville, Ontario, was born in Germany, where he became a well-known owner and trainer of standard bred horses before he came to Canada with his family in 1951. When he came to Canada in 1951, the appellant purchased a farm near Campbellville and began a cattle-raising and dairy farm business which he continued to carry on until 1956 when he converted that business to a business of training horses. In order to establish himself as a trainer in Canada, the appellant purchased some inexpensive thoroughbred horses, trained them, and began to race them with such success that other owners began to hire the appellant to train their horses. By 1960, the appellant had some twenty horses under his care and supervision. The extent of this business may be appreciated by noting two sets of figures. During the years 1957 to 1962, the appellant had a revenue each year from winning purses by racing his own horses as follows:

1957 — $ 2,470 00	3 to 4 horses
1958 — $ 5,645 00	4 to 5 horses
1959 — $ 8,565 00	4 to 5 horses
1960 — $28,562.14	20 horses
1961 — $20,340 60	8 to 10 horses
1962 — $21,660.00	3 to 4 horses

During the same period, his revenues from boarding and training horses belonging to others were as follows:

1957 —	nil	
1958 —	$ 1,600.00 (estimated)	2 horses
1959 —	$ 1,635.00	3 to 4 horses
1960 —	$ 1,638.00	3 to 4 horses
1961 —	$16,547 03	20 horses
1962 —	$26,598.60	20 to 25 horses

Quite apart from these activities, which I will refer to as the appellant's farming business, the appellant had a substantial source of income during the years 1959 to 1962 from activities which I will refer to as his real estate activities.

The appellant knew many wealthy persons who lived in Germany and as a result of the political situation that existed there in the late 1950's, many of these persons were anxious to invest money abroad. The appellant assisted such persons to find land that they bought in the area near his farm at Campbellville.

In some cases, the appellant merely assisted his German acquaintances to find and choose land that they decided to buy, in which cases they made payments to him, which are referred to in the evidence as commissions. In other cases, he first acquired some interest in the land, either in partnership with real estate brokers or dealers, or alone, and then benefitted on the re-sale to the German purchasers by participating in the resulting profits. The extent of the appellant's revenue from his real estate activities appears from the following figures:

1959 —	Commissions	$36,436.28
	Profits	nil
1960 —	Commissions	$ 9,000.00
	Profits	$80,647.98
1961 —	Commissions	$32,722.08
	Profits	$30,500.00
1962 —	Commissions	$37,349.32
	Profits	nil

No problem has arisen in connection with the appellant's revenues from his real estate activities. He has made returns of these commissions and profits as income and paid income tax accordingly.

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The problem that has arisen arises with reference to a one-hundred acre parcel of land that the appellant himself purchased outright on August 18, 1960, for $10,000. This parcel is one and one-half to two miles from his farm and he says that he acquired it because he had an immediate need for it for the production of hay for use in his farming business and because he had the idea that ultimately he would use it for a horse breeding operation when he became too old to continue his boarding and training operations. In fact, he did take two crops of hay off the land in question for use in his farming business, but, by the latter part of 1961, he received an offer of over $30,000 for it, which he accepted and thus made the sale in 1962 that gave rise to the profit of $22,887.56 that is in issue in this appeal.

The Tax Appeal Board appears to have concluded that, as the appellant was in a business of trading in farm properties and as the profit in issue was the result of "turning to account of real estate acquired", it followed that the profit was a profit from that business.

The problem involved does not appear to me to be that simple. Certainly, if the property in question was acquired by the appellant with a view to re-sale at a profit, or if it was acquired with a view to using it in the farming business or re-sale at a profit as circumstances might make most expedient, then, in my view, when it was re-sold a little over a year after it was acquired, the sale must be regarded as having taken place in the course of the appellant's real estate activities and the resultant profit must be regarded as a profit from a business. If, on the other hand, at the time when the appellant acquired the property, the only purpose he had in mind for it was to incorporate it in his farming business, and if he did make it a part of the property on which he carried on his farming business, its subsequent sale would be a sale of a capital asset of that business even though it occurred within a very short time after acquisition.

Putting the matter another way, where a person carries on business as a trader in real estate and some other business at the same time, if he buys a parcel of land for re-sale at a profit and does so re-sell it, the resulting profit is a

profit from his trading business even though he found a use for the land in his other business during the period that he owned it; but, on the other hand, a profit that he makes upon the sale of land acquired for the sole purpose of being used, and that has in fact been used, as part of the capital assets of the other business is not, as such, a profit from his business as a trader in real estate, and the length of the period between purchase and sale of a parcel of land by such a person is not relevant except in so far as it is some indication as to whether the land was inventory of the trading business or a capital asset of the other business.

I must, therefore, decide whether the balance of probability on the evidence in this case is that the only purpose that motivated the appellant to acquire the property in question was to incorporate it in his farming business and that he did in fact make it a part of the property on which he carried on his farming business before he sold it.

In effect, the appellant's testimony in this Court, as I understood it, was as follows: One Robinson approached the appellant, knowing that he had something to do with arranging sales of farm properties in the area to wealthy Germans, to see whether the appellant could produce a purchaser for Robinson's 200 acre farm. Robinson's farm consisted of a 100 acre parcel without buildings (being the property in question) and a 100 acre parcel with farm buildings. The appellant recognized the 100 acre parcel without buildings as one that would fit into the needs of his own farming business and asked Robinson if he would sell the two parcels separately, but Robinson indicated that he wanted to sell both parcels at the same time although he did not insist on a single purchaser. The appellant arranged a sale to one of his German acquaintances of the parcel with the buildings and, by reason of his relations with these gentlemen, felt bound to make the other 100 acre parcel available to another, but, when it was declined by the latter gentleman, he bought it for himself. Subsequently, a little over a year later, the gentleman who declined it originally decided that he wanted it (apparently to round out his surrounding holdings) sufficiently

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to cause him to offer over $30,000 for it. At that price, the appellant came to the conclusion that the land was not worth as much to him for his farming business as the money that he was being offered for it, and he sold it.

The appellant was thoroughly tested on cross-examination. It was, for example, suggested to him that what he had in mind from the time he first acquired the land was its re-sale to the gentleman who subsequently bought it from him. The credibility of his story was challenged, for example, by an attempt to show that the reasons he gave for wanting the land for his farming operations were not sound. No effort was spared in putting the appellant to the defence of his story. At the end of the day, in my view, after observing the manner in which the appellant gave evidence as carefully as I could, I was of opinion that the appellant's story in its main outlines was not shaken. As I appreciate the matter, I do not have to decide whether the appellant's judgment in deciding to acquire the land for his farming business was sound. The question is whether he did, in fact, decide that it would make a good addition to his farming business at a price of $10,000 and did, in fact, acquire it for that purpose. I am satisfied, from his evidence, that that is the sole purpose that motivated him to acquire the land and that, for over a year, it was a part of the lands that he used in his farming business. I am also satisfied that the very high price that he was ultimately offered for it convinced him that it was wise to dispose of it and carry on his farming business without it.

For the above reasons, the appeal will be allowed with costs and the assessment will be referred back to the respondent to re-assess on the basis that the profit referred to in paragraph 15 of the Notice of Appeal is not part of the appellant's income for the 1962 taxation year.

BETWEEN:

RALPH J. SAZIO ..... APPELLANT;

AND

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

Toronto 1968 Nov. 14-15

Ottawa Dec. 2

Income tax—Coach employed by football club—Corporation controlled by coach substituted as employee—Whether remuneration paid corporation assessable as income of coach—Bona fides of transaction.

Appellant, who was employed as coach of a football club until December 1965 at an annual salary of approximately $20,000, resigned in 1964 and the club contracted to employ as coach until December 1965 at the same salary a company controlled by appellant and of whose issued shares all but one were held by appellant and his wife. The company, which also carried on some other businesses, employed appellant as general manager at a salary of $6,000 a year. Appellant was assessed to income tax on the amounts which the football club paid the company in 1964 and 1965 on the footing that those sums were in fact paid for appellant's personal services to the club and that the company received them as his nominee or agent.

Held, allowing the appeal, the contracts between appellant, the company, and the club were *bona fide* and governed the relationships between the parties thereto. The company was not merely a sham, simulation or cloak.

Kindree v. M. N. R. [1965] 1 Ex. C.R. 305, distinguished. *Crossland v. Hawkins* [1961] 2 All E. R. 812; *C.I.R. v. Peter McIntyre Ltd.* 12 T.C. 1006, referred to.

INCOME TAX APPEAL.

Wolfe D. Goodman for appellant.

Gordon V. Anderson for respondent.

CATTANACH J.:—These are appeals from two assessments made by the Minister dated March 23, 1967 in respect of appellant's 1964 and 1965 taxation years wherein the Minister added the amounts $20,143.30 and $22,143.30 to the appellant's income in those respective years and the income tax levied was increased accordingly.

The question involved is whether the amounts so added by the Minister to the appellant's income is income of the appellant, as is contended by the Minister, or income of a company incorporated under the name of Ralph J. Sazio, Limited, as is contended by the appellant.

The appellant became a football coach after an outstanding career as a football player in professional ranks. He was

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first engaged as an assistant coach by the Hamilton Tiger-Cat Football Club Limited (hereinafter referred to as the club) about 1950 in which capacity he contributed substantially to the success of the team operated by the club in the Canadian Football League. His coaching duties did not occupy his full time throughout the entire year and accordingly, as a prudent man, he engaged in other activities most likely as a hedge against the time when his services as a football coach would no longer be in demand.

His first activity, other than as a football coach, was as a life insurance agent from 1950 to about 1963. From that beginning he entered into a variety of other fields. If my recollection of the evidence is correct, the appellant held a share interest in a company engaged in a general insurance agency business known as Frank E. Bliss Limited in which I believe he subsequently terminated his interest. He was also part owner of R and S Insurance Limited together with one Robertson. I also recall that during his testimony the appellant mentioned that about this time he became the manager of a leasing company, that he had an interest in a restaurant called Mathers Restaurant and that he was managing a farm. I think that these multitudinous activities fully justify the allegation in paragraph 1 of the notice of appeal that "The appellant is a football coach and businessman residing in the City of Burlington" in the Province of Ontario.

After the conclusion of the 1962 football season the then head coach for the club terminated his engagement in that capacity in favour of the acceptance of a similar post with a competing team.

The appellant thereupon succeeded to the position of head coach. By an agreement dated February 20, 1963, between the appellant and the club, the appellant was employed as head coach for a three year period ending December 9, 1965, at an annual salary of $18,000 plus a bonus of $1,000 if the team played in the final game to determine the championship of the Eastern conference in any of the three years during the term of the contract plus a further bonus of $1,000 if the team played in the Grey Cup game in any of those three years.

On the advice of his auditor and solicitor the appellant caused to be incorporated, pursuant to the laws of the

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Province of Ontario, a private company under the name of Ralph J. Sazio Limited (hereinafter called the Company) by letters patent dated April 2, 1964, with an authorized capital of 3,600 preference shares of the par value of $10 each and 4,000 common shares without nominal or par value which common shares might be issued for an aggregate consideration of $40,000. Of this authorized capital stock only 1001 common shares without nominal or par value have been issued and are outstanding and of the 1001 common shares so issued the appellant holds 501, his wife 499 and Dr. C. C. Hopmans holds one. Dr. Hopmans has been the president of the Company since its inception, and the appellant has been the secretary for the same period. Mrs. Sazio, while a shareholder and director, has not been an officer of the company.

The objects for which the company was incorporated read as follows:

(a) TO engage in the business of furnishing advice and services with respect to the coaching of sports and athletic endeavours of every nature and kind and for this purpose to enter into, make, perform and carry out contracts of every kind with any person, firm, association, private corporation, public corporation, municipal corporation or body politic;

(b) TO acquire rights to the services of and to employ persons in any and all fields of sports and athletic endeavours of every nature and kind and to contract or deal with others with respect to the services of such persons;

(c) TO organize, reorganize and manage the business or operations of any other company, corporation, firm, business or undertaking whatsoever, and to receive in payment therefor fees, royalties, commissions and other remuneration in cash, securities or other property; and

(d) TO purchase, receive, hold, own, sell, assign, transfer, mortgage, pledge or otherwise acquire or dispose of shares, bonds, mortgages, debentures, notes or other securities, obligations or contracts of any company, corporation or association;

By letter dated April 15, 1964, the appellant tendered to the club his resignation as head coach to be effective May 1, 1964, which resignation was obviously accepted by the Club because by a memorandum of agreement dated April 15, 1964, the club agreed to employ the company, Ralph J. Sazio Limited, as its head coach for the term beginning May 1, 1964, and ending December 9, 1965, that is for the remainder of the term of the contract dated February 20, 1963, between the club and the appellant. The remunera-

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tion payable to the Company was identical to that payable by the Club to the appellant under the agreement dated February 20, 1963.

It is logical to infer that the club was willing to facilitate the appellant in his new arrangement and it is equally logical to infer that the club was anxious to ensure that the duties of head coach, to be performed by the company, would, in fact, be performed by the appellant personally even though he might perform such duties as an officer or employee of the company and further that the appellant would not, through the instrumentality of the company, engage in similar duties for any rival club. The foregoing inferences are substantiated in the correspondence exchanged between the solicitor for the appellant and the solicitors for the club being letters dated April 24, 1964, April 30, 1964 and May 12, 1964, introduced in evidence as Exhibits A-4, A-5 and A-6 respectively.

To ensure these ends the contract between the company and the club dated April 24, 1964, included paragraphs 3 and 8, reading as follows:

> 3. Ralph J. Sazio Limited shall well and faithfully serve the Club and use its best endeavours to promote the interest of the Club and during the term of this Agreement it shall restrict its entire business undertaking and operation and the efforts, endeavours, talents, business operation and undertaking of any of its officers, directors or servants to the business of the Club and shall not, without the consent in writing of the majority of the directors of the Club, engage in any other business or occupation or permit its officers, directors or servants to engage in any other business, operation or undertaking or occupation, other than for and on behalf of the Club.
>
> . . .
>
> 8. If the Company shall at any time, by reason of the death, illness, mental or physical incapacity of Ralph Joseph Sazio be incapacitated from carrying out the terms of this Agreement, according to its true intent, or if the said Ralph Joseph Sazio shall cease to be an officer, director or servant of Ralph J. Sazio Limited devoting his whole time, attention and talents to the business of the Company, the Club shall be at liberty to terminate this Agreement and the Club shall only be responsible to pay to the Company an amount for remuneration proportionate to the number of months served by the Company during such year.

By an agreement dated December 8, 1964 between the appellant and the company, the appellant was engaged as general manager of the Company at a remuneration to be determined by the board of directors from time to time. The salary so determined was $6,000 per year. By paragraph 5 of this agreement the appellant undertook not to

engage in any other business or occupation in respect of coaching of sports and athletic endeavours without the consent in writing of the board of directors of the Company and the board of directors of the Club.

It will be observed that from April 15, 1964, until the agreement dated December 8, 1964, there was no written agreement between the appellant and the company but in that interval the appellant did act as the general manager of the company and in my view the evidence confirms the allegation in paragraph 6 of the notice of appeal that, "Under an oral agreement made in the month of April, 1964, which was reduced to writing on December 8, 1964, the Appellant became an employee and general manager of the company."

By a further written agreement dated December 8, 1964, between the company and the club, the club again engaged the company as its head coach for a term beginning May 1, 1965 and ending December 9, 1969. This agreement replaced the former agreement between the Company and the club dated April 15, 1964, for the unexpired term of the former agreement and extended the term of engagement until December 9, 1969. The provisions of the latter agreement were identical with those of the former agreement with the exception of the term and, because of the success enjoyed by the football team, the former annual remuneration of $18,000 was increased to $20,000 per year with the same bonuses as formerly.

Pursuant to the agreement dated April 15, 1964, the company was paid the sum of $20,143.30 by the club during the 1964 calendar year and pursuant to the agreements dated April 15, 1964 and December 8, 1964 the company was paid the sum of $22,143.30 by the club during the 1965 calendar year.

The company included these sums in its income for the years in question in the income tax returns it prepared.

At this point I should mention that the company engaged in other activities under paragraph (*c*) of the objects of its incorporation.

The company entered into a contract with Brant Supply Services Limited to manage the affairs of that company which was engaged in the business of leasing and billing. The company also entered into a contract to act as manager

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and rental agent of 68 Charlton Avenue West Limited which owned an office building. The company was also engaged as the manager of a medical clinic and another company, Burlington Holding Limited, which owned an office building and engaged in a real estate business. Contracts were entered into by the company from time to time with other businesses.

In addition the company entered into a contract, presumably verbal, with a newspaper for a series of articles on matters pertaining to football, written by the appellant, the remuneration for which was paid to the company as well as a contract for a regular radio program and a weekly television program with Hamilton broadcasting stations which the appellant would conduct. Here again the remuneration was paid to the company. It frequently occurred that the appellant invited guests to appear on those programs who were reimbursed by the company and in some instances, when the appellant was unable to appear, the assistant coaches would conduct the programs on his behalf for which they were paid by the company.

The appellant described the duties of a head coach as falling into three main categories the first two of which he considered primarily as organizational in nature. These duties were (1) to set up an efficient scouting system to discover football players of outstanding ability and to engage those players, (2) to organize practices and assign the players engaged to those positions where their individual talents and abilities would be most effective and (3) to supervise the conduct of actual football games in which the team participated.

To perform these duties the head coach had, in the present instance, the assistance of two assistant coaches who were under contract with the club. However in conducting a spring training camp for high school players as prospective players for the club and in the conduct of training camp, the company hired additional personnel. It was my understanding of the evidence that these persons were selected and engaged by the company and when the club could be persuaded, either in advance or subsequently, to pay for their services, this was done but if the club declined to do so the responsibility for the payment of persons

engaged was that of the company. It would appear that, except for relatively insignificant amounts, the club bore this expense.

It was elicited in cross-examination that the coaching duties performed by the appellant, as manager of the company, were identical to those performed by him under his previous contract for personal service and that in the radio and television programs and press releases the appellant was therein personally referred to as the head coach. This the appellant conceded to have been the case but he persisted in his contention that this was not necessarily an accurate description of his capacity which was that the company was the head coach and he was the general manager of the company.

The assumptions upon which the Minister acted in assessing the appellant as he did are set out in the reply to the notice of appeal as follows:

> (*a*) the Appellant, Ralph Joseph Sazio was, throughout his 1964 and 1965 taxation years, an employee of the Hamilton Tiger-Cat Football Club Limited (hereinafter referred to as "the Club") and that as remuneration for his services in those years as a football coach, was entitled to receive from the said Club $20,143 30 and $22,143 30 in his 1964 and 1965 taxation years respectively;
>
> (*b*) that pursuant to the direction of or with the concurrence of the Appellant, the Club paid the said sums to Ralph J. Sazio Limited for the benefit of the Appellant or as a benefit that the Appellant desired to have conferred on Ralph J. Sazio Limited,
>
> (*c*) that the said sums of $20,143 30 and $22,143 30 were income of the Appellant from an office or employment within the meaning of sections 3 and 5 of the *Income Tax Act* and by virtue of section 16 of the *Income Tax Act* and were not income of Ralph J Sazio Limited;
>
> (*d*) that the sums of $20,143 30 and $22,143 30 were earned by the Appellant personally and were income of the Appellant for his 1964 and 1965 taxation years respectively, and were paid in respect of the Appellant's services, and not services rendered by Ralph J Sazio Limited to the Club;
>
> (*e*) that the series of agreements under which the Appellant purported to cause to be paid to Ralph J. Sazio Limited the remuneration paid by the Club for his services to the Club as a football coach did not constitute valid or *bona fide* business transactions but were in effect an attempt artificially to reduce the Appellant's income from his employment as a football coach for the Club;
>
> (*f*) the Appellant and Ralph J Sazio Limited were not persons dealing at arm's length.

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6. In making the reassessments dated March 23, 1967, the Respondent acted upon the further alternative assumption that the Appellant, through a series of contracts or other arrangements by which he has caused to be paid to Ralph J. Sazio Limited the remuneration for his services as a football coach, has in fact transferred or assigned to Ralph J. Sazio Limited, a person with whom the Appellant was not dealing at arm's length the right to amounts (viz. $20,143.30 and $22,143.30) that would, if the right thereto had not been so transferred or assigned, be included in computing the Appellant's income for 1964 and 1965 because the amounts would have been received or receivable by him in respect of those years and that accordingly the said amounts should be included in computing the Appellant's income for 1964 and 1965 by virtue of section 23 of the *Income Tax Act*.

7. The Respondent further says that in any event the said sums of $20,143 30 and $22,143 30 were amounts to which the Appellant was at all times beneficially entitled; that Ralph J. Sazio Limited was a mere puppet of the Appellant and that the said sums were received by it as nominee, agent or trustee for the Appellant; that the said sums were amounts of which the Appellant was at all times entitled to enforce payment. Accordingly, they were income of the Appellant for his 1964 and 1965 taxation years.

Counsel for the Minister in his argument submitted that the appellant was actually an employee of the football club and that the moneys here in dispute which were received by the company represented payment for the appellant's personal service to the club and that those payments were assigned or transferred to the company or that they were received by the company as the appellant's nominee or agent.

He further submitted that the agreements between the appellant and the company and between the company and the club were not valid business transactions. He also submitted that neither the appellant nor the club heeded certain of the provisions of the agreements except with respect to the payments here in dispute and accordingly suggested that the agreements should be disregarded as establishing the relationship of the parties thereto or as characterizing the moneys paid thereunder.

One of the provisions in the agreements to which counsel for the Minister made reference was that the company should not engage in any other business or occupation than that of supplying football coaching services to the club, or permit its officers, directors or servants to do so, without the consent in writing of the majority of the directors of the club.

The appellant readily admitted that the company did not obtain the consent in writing as contemplated by the provision in question but stated that the club, and all its directors were fully aware of the other activities engaged in by the company and were all agreeable thereto as well as that such tacit understanding had been reached prior to the execution of the contracts and that it continued throughout the currency thereof. There is no doubt in my mind that the parties mutually agreed to waive express and strict literal compliance with this particular provision, and that the club and its directors did not consider the other activities of the company as detrimental to the club's interests and accordingly agreed thereto, even though they did not do so in writing.

The other provision to which counsel for the Minister referred was one by which the club undertook to reimburse the company for travelling and similar expenses incurred by the company, its officers or servants on behalf of the club. There were instances where relatively insignificant amounts were expended by the appellant from his own funds for entertaining a prospective player at dinner and like expenditures for which the appellant was reimbursed directly by the club rather than charging those amounts to the company and the company being reimbursed by the club. However the appellant testified that all substantial expenditures were advanced to him by the company and reimbursed to the company by the club.

It is my view and assessment of the evidence in these foregoing respects that while there may have been these minor breaches of a technical nature which were countenanced by the parties, nevertheless the agreements were otherwise scrupulously adhered to by the parties.

There is no doubt whatsoever that the company is a properly constituted legal entity and that the company could legitimately carry on the objects for which it was incorporated. Any person rendering services may incorporate a company to render those services provided there is no prohibition of those services being performed by a corporation rather than a natural person.

An example of such a prohibition occurred in *Kindree v. M.N.R.*[1] where I expressed the view that the practice of

[1] [1965] 1 Ex. C.R. 305.

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medicine could only be carried on by a natural person which conclusion followed from the general tenor of the *Medical Act* and the code of ethics of the medical profession. I also intimated that a clause in the objects of the company insofar as it purported to authorize the company to conduct the practice of medicine must be ineffective.

In this case there is no such prohibition as was present in the *Kindree* case.

A company, from its very nature, must act through natural persons and there are numerous examples, particularly in the entertainment field, where well known persons have incorporated limited companies to exploit their talents.

In *Crossland (H.M. Inspector of Taxes) v. Hawkins*[2] Donovan L.J. said at page 814:

> The heavy incidence of surtax on large incomes has for some time led artists and others in the world of entertainment to adopt the device of forming a limited company which they control, and giving the company, by means of a service agreement, the right to their services In return the company pays the artist some modest salary The company then hires the artist out to whomsoever requires his services and itself obtains the consideration for them ...

In the next following paragraph he adds:

> All this is perfectly legitimate and indeed, in the case of persons whose high earnings may be short-lived, understandable. . . .

In *C.I.R. v. Peter McIntyre, Ltd.*[3] the respondent company carried on the business of auctioneers. The whole conduct of the business was in the hands of the managing director who held more than half the shares, the remainder being held by near relatives. The question arose as to whether the company could claim an exemption for profits of "any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on".

The Lord President (Clyde) pointed out the profits were earned by the company in the business carried on by it. That business consisted in performing for its clients the services of an auctioneer, valuator and estate agent. Such a business was, in part at least, what is known as a profession. Later he added, "For a professional business may be carried on by a company as well as by an individual;".

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[2] [1961] 2 All E R 812. [3] 12 T C 1006

Accordingly I conclude that, with respect to the football coaching activities, the company was fully competent to engage in those activities in the manner it did and that the agreements entered into between the appellant and the company and the club were *bona fide* commercial transactions all in furtherance of the company's legitimate objects and that they govern and determine the relationship between the parties.

Here the appellant and his company are two separate entities. In my view this is not a matter of form but rather a matter of substance and reality. Both the appellant and the company could sue and be sued in its own right and indeed there is nothing to prevent the one from suing the other if need arose.

Ever since the *Salomon* case[4] it has been a well settled principle, which has been jealously maintained, that a company is an entirely different entity from its shareholders. Its assets are not their assets, and its debts are not their debts. It is only upon evidence forbidding any other conclusion can it be held that acts done in the name of the company are not its acts or that profits shown in its accounts do not belong to it. The fact that a company may have been formed to serve the interests of a particular person is not sufficient to establish the relationship of principal and agent between that person and the company. In order to hold otherwise it must be found that the company is a "mere sham, simulacrum or cloak".

It is my view that the evidence in the present appeals is conclusive that such is not the case. It must also be borne in mind that the company engaged in a variety of activities other than supplying the football coaching services of the appellant and I can see no logical reason for segregating the football coaching services from those other activities.

It follows that the appeals are allowed with costs.

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[4] [1897] A C. 22

Toronto 1968 Nov. 14 Dec. 5

BETWEEN:

HARRY O. WAFFLE ..... APPELLANT;

AND

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

Income tax—Office or employment—Remuneration of—Sales incentive award—Pleasure trip for company officer and his wife—Whether benefit from office—Valuation of—Income Tax Act, s. 5(1)(a).

Appellant and *L* were officers and equal shareholders of a company which held a Ford dealership in Toronto. In 1964 the company met the objective of a sales incentive program conducted by Ford for its 135 dealers, and either appellant or *L* thereupon became entitled as their company's nominee to receive the award, a Caribbean cruise for two. In 1964 *L* and his wife, who had taken the trip awarded on earlier occasions, could not go, and appellant therefore took the cruise with his wife with a view to using the opportunity to discuss an enlargement of his company's dealership with Ford officials who were on the cruise. The trip was however purely a pleasure cruise.

Held, the cost of the trip to Ford for both appellant and his wife (agreed at $1,384) was a benefit received by appellant as remuneration from his office in his company and was therefore chargeable to tax by s. 5(1)(*a*) of the *Income Tax Act*. It was immaterial that the cost of the trip was paid by Ford and not by appellant's employer. *Goldman v. M.N.R.* [1953] 1 S.C.R. 211, applied. As the award was remuneration from appellant's office it was a benefit therefrom. *Ransom v. M.N.R.* [1968] 1 Ex. C.R. 293, referred to. Having regard to the broad language of s. 5 the award was taxable notwithstanding that it was not convertible into money by appellant. *Tennant v. Smith* [1892] A.C. 150, distinguished. The only standard for measuring the value of the award was its cost to Ford.

INCOME TAX APPEAL.

J. W. Brown for appellant.

F. J. Dubrule for respondent.

CATTANACH J.:—This is an appeal from an assessment to income tax by the Minister whereby an amount of $1,384 was added to the income of the appellant for his 1964 taxation year.

The amount of $1,384 represents the cost of a vacation trip for the appellant and his wife from Toronto, Ontario to Fort Lauderdale, Florida from where they embarked on a Caribbean cruise, and return to Toronto. It was agreed between the parties that the foregoing sum represents the cost of such trip to Ford Motor Company of Canada Limited (hereinafter referred to as "Ford").

The appellant is a shareholder and the secretary-treasurer of Thorncrest Motors Limited (hereinafter referred to as "Thorncrest"), a company incorporated pursuant to the laws of the Province of Ontario which carries on the business of a dealer in Ford Motor products in the western area of the city of Toronto. Thorncrest holds a franchise to deal in certain of the automobiles manufactured by Ford, but not all of them.

The appellant and George Ledingham own an equal number of the issued common shares in Thorncrest and they have owned those shares from the inception of Thorncrest. Later preferred shares were issued to the appellant and his wife and Mr. Ledingham and his wife in equal numbers. Neither Mrs. Waffle nor Mrs. Ledingham take any active part in the business of Thorncrest other than holding preferred shares.

As part of its general efforts to promote the sale of its products it has been the custom of Ford to organize sales incentive programs.

The program, the result of which gives rise to the present appeal, was described as "The Winning Combination" emphasizing the co-operation of Ford, as manufacturers, its dealers, and the sales managers and salesmen of its dealers to their respective mutual benefit.

Each dealer who wished to participate in the program was required to complete, prior to April 10, 1964, a document described as a "Dealer Participation Agreement and Registration Form" appended to which were the rules and instructions pertaining to this particular program, and to name therein the "dealer principal" who would accept the award provided by Ford if the dealer qualified therefor.

All Ford dealers in Canada were eligible for the awards if they registered in the program.

Dealerships were divided into categories within each region as outlined by Ford for the purpose of competing for the award of a Caribbean cruise for two to 135 winning dealers.

Dealership objectives were set by Ford and those dealers who met those objectives during the period of the program qualified for the award.

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Similar conditions were set for the sales managers and salesmen nominated by the dealers who were awarded lesser awards, but I am only concerned with the "dealer principal" in this instance.

Thorncrest completed the participation agreement and nominated George Ledingham as its "dealer principal" to accept the award of a Caribbean cruise for two if Thorncrest met its set objectives.

It was never explained in the evidence to my satisfaction what constituted a "dealer principal". I gathered that since many dealers were corporations, as Thorncrest was, and which, therefore, could not take the trip in the event of its winning, that corporate dealers were obliged to name a natural person in the participation agreement to take the cruise in the event of the corporate dealer qualifying and that the natural person so named should be a predominant shareholder and officer of the corporate dealer.

In any event it was established in evidence that Mr. Ledingham and the appellant who were equal shareholders in Thorncrest and its president and secretary-treasurer respectively were the only two persons who qualified as "dealer principals" of Thorncrest.

Mr. Ledingham had been named as "dealer principal" by Thorncrest in three previous programs initiated by Ford and which were conducted on a basis similar to the present one. In each instance Thorncrest met its sales objective and in each instance Mr. Ledingham, with his wife, took the trip offered as the award.

As previously intimated, Mr. Ledingham was again named as "dealer principal" by Thorncrest in the present program. However the participation agreement provided that a substitute "dealer principal" could be named to accept the award if circumstances required a change.

Thorncrest met its sales objective set for the period of the program by Ford and the "dealer principal" was awarded a vacation cruise for two, the expenses of which were to be paid by Ford.

Mr. Ledingham, because of his wife's illness, was unable to accept the trip. The appellant suffers from a physical handicap for which reason he had always been reluctant to embark upon a trip or cruise which was conducted for a large group of persons.

However it was considered by Mr. Ledingham and the appellant that one or other of them should accept the trip because Thorncrest was negotiating with Ford to extend its franchise to include the Lincoln automobile produced by Ford. It felt that an opportunity might arise during the cruise to discuss the extension of the Thorncrest franchise with officers of Ford who were also going on the cruise.

Accordingly the appellant and his wife went on the cruise which lasted eight days aboard an Italian luxury liner, the M/S *Franca C.*, which had been chartered by Ford for this express purpose with a full program of entertainment and sight-seeing arranged. No formal business discussions or meetings were arranged. It was purely a pleasure cruise.

The officers of Ford who went on the cruise did so to ensure that Ford received all the facilities and amenities for which it had contracted with the charterer.

An officer of Ford testified that the "dealer principal" named by the dealer could accept or reject the cruise, but if the cruise were rejected neither he nor the dealer would receive the cash equivalent of the cost thereof.

In assessing the appellant as he did, the Minister relied on the following assumptions set out in the reply to the notice of appeal as follows:

(*a*) In the taxation year 1964 the appellant received an expense paid vacation trip to the Caribbean for himself and his wife sponsored by the Ford Motor Company of Canada Limited;

(*b*) The said vacation trip was received and enjoyed by the appellant and his wife in respect of, in the course of, or by virtue of his office or employment in Thorncrest Motors Limited;

(*c*) In the alternative, the said vacation trip was received and enjoyed by the appellant and his wife by virtue of a benefit or advantage conferred on the appellant qua shareholder by Thorncrest Motors Limited, a corporation of which he was a shareholder;

(*d*) The appellant thereby received or enjoyed a benefit in an amount not less than $1,384 00 pursuant to paragraph (*a*) of s s. (1) of section 5, or in the alternative, para. (*c*) of s s. (1) of section 8 of the Income Tax Act, R S C. 1952 Cap. 148;

(*e*) The sum of $1,384 00 is to be included in the appellant's income for the 1964 taxation year pursuant to section 3 of the Income Tax Act

By section 3 of the *Income Tax Act* the income of a taxpayer for a taxation year is his income for the year from all sources inside or outside Canada, including his income from all offices and employment.

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By virtue of section 5(1)(*a*) 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 the value of board, lodging and "other benefits of any kind whatsoever ... received or enjoyed by him in the year in respect of, in the course of, or by virtue of the office or employment."

Therefore the first issue to be determined is whether the appellant received or enjoyed a benefit of $1,384 in respect of, in the course of, or by virtue of his office or employment in Thorncrest.

As I understood the argument of counsel for the appellant it was to the effect no benefit was received by the appellant in respect of, in the course of, or by virtue of his office or employment in Thorncrest within the meaning of section 5(1)(*a*) because, if there was a benefit to the appellant, it was not received by him from Thorncrest but rather it was received by him directly from Ford which is not his employer.

However he was prepared to concede that if there was a benefit and that benefit came to the appellant through Thorncrest and it constituted remuneration, then the amount received by the appellant is properly taxable.

I do not accede to the proposition that it follows from the fact that the person paying the cost is not the employer of the recipient that such payment does not accrue to the recipient in respect of, in the course of, or by virtue of his office or employment.

Here there was a "Dealer Participation Agreement" entered into between Thorncrest and Ford so that Thorncrest took part in the sales incentive program. The normal business of Thorncrest was selling the products of Ford. As an extra incentive and reward for the more vigorous conduct of that business by Thorncrest, Ford was willing to provide a "dealer principal" of Thorncrest, its sales manager and certain of its salesmen, certain awards over and above the remuneration normally received by them from Thorncrest subject to a prescribed quota being met. This arrangement between Thorncrest and Ford had been entered into on many occasions and it was a legitimate and normal business arrangement which Thorncrest was capable of making. Because the awards made by Ford were such that could

only be enjoyed by natural persons Thorncrest was afforded the privilege of nominating natural persons who, to be eligible to receive the awards provided by Ford, must be officers or employees of Thorncrest.

Accordingly it follows that the cost of the awards was borne by Ford as a consequence of circumstances arising in a business context and to conclude that the recipients of the awards did not receive them in respect of, in the course of, or by virtue of their office or employment in Thorncrest, would be an unwarranted restriction of the language of section 5(1)(*a*).

If authority need be cited for the proposition that the payment to the employee need not be made by the employer, it can be found in *Goldman v. M.N.R.*[1].

Since I have concluded that this particular award by Ford accrued to the appellant by reason of his office in Thorncrest, it follows that the award was a payment by way of remuneration and it cannot be construed as being a mere gift or present (such as a testimonial) made to the appellant on personal grounds.

The circumstances of the present appeal make such conclusion clear. This award was not received by the appellant as a testimonial in his personal capacity, but came to him by reason of his office in Thorncrest and by reason of him being the substituted "dealer principal" of Thorncrest in which capacity he must be assumed to have contributed to the success of Thorncrest in meeting the quota of sales and other conditions of the incentive program to qualify for the award.

There remains the question whether the award to the appellant constituted a benefit to him and if so whether the cost of the cruise to Ford, admitted to have been in the amount of $1,384, is the true measure of the benefit to the appellant.

The word "benefit" is nowhere defined in the *Income Tax Act*. In commenting upon section 5(1)(*a*) and (*b*) Noël J. said in *Ransom v. M.N.R.*[2] at page 307, "The Canadian taxation section uses such embracing words that at first glance it appears extremely difficult to see how anything can slip through this wide and closely interlaced legis-

[1] [1953] 1 S.C.R. 211.

[2] [1968] 1 Ex. C.R. 293.

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lative net." He went on to say that section 5 is concerned solely with the taxation of income identified by its relationship to an office and it must have been received as income from that office or employment.

Because I have found that the award the appellant received was remuneration from his office or employment, it follows logically therefrom that what he received was also a benefit. The obvious intention of section 5 is to include in the taxable income of a taxpayer those economic advantages arising from his employment which render the taxpayer's office of greater value to him.

Counsel for the appellant next submitted that since the award was not convertible into money, it is not taxable and, while admitting that the sum of $1,384 was the cost of the cruise for two to Ford, he further contended that such amount was not necessarily the value of the award to the appellant and that in any event the cost of the trip attributable to the attendance of Mrs. Waffle was not a benefit to the appellant.

There is no question that if the appellant had not accepted the award and went on the cruise, accompanied by his wife, he would have received nothing. I do not consider the fact that the appellant may have been motivated to accept the trip for possible business reasons to have any bearing on the matter. The fact remains that he did go on the trip with his wife.

The doctrine that no form of remuneration is taxable unless it is something which is money or money's worth and convertible into money stems from *Tennant v. Smith*[3] decided in the House of Lords as long ago as 1892.

I think that the language employed in section 5 to the effect that the "value of board, lodging and other benefits of any kind whatsoever", is to be included in taxable income, overcomes the principle laid down in *Tennant v. Smith (supra)*. Obviously board which has been consumed and lodging which has been enjoyed cannot be converted into money by the taxpayer either subsequently or prior thereto and, in my view, the identical considerations apply to "other benefits of any kind whatsoever".

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[3] [1892] A.C. 150.

The next question is to consider whether the value of the award is the cost thereof to Ford. I fail to follow how the true measure of the value of the award can be other than the cost of the award to Ford. There is no other standard which is applicable. I can see no grounds for holding that the amount should be limited to an estimate of an amount which the appellant might have spent on the trip himself if Ford had not borne that cost. The appellant knew what was being offered to himself and his wife and he accepted the award, although he would not know the precise cost of the award to Ford.

As I understand the intention of section 5 it is simply to bring the benefits of any kind whatsoever from an office or employment into tax, that is to say, what has been spent to provide those benefits.

Because the award was a cruise for the appellant and his wife and was so accepted by the appellant, it follows that his wife's presence was a benefit to him and the value of that benefit to him, for the reasons expressed above, is the cost to Ford of his wife's expenses.

Because of the conclusion I have reached on the first issue in this appeal, that is, that the amount of $1,384 is properly included in the appellant's income by virtue of section 5(1)(*a*) of the *Income Tax Act*, it is not necessary for me to consider the alternative submission on behalf of the Minister that the sum of $1,384 should be included in the appellant's income as a benefit or advantage conferred upon him as a shareholder of Thorncrest within the meaning of section 8(1)(*c*).

The appeal is, therefore, dismissed with costs.

Ottawa
1968
Nov. 12
Dec. 9

IN ADMIRALTY

BETWEEN:

SAINT JOHN TUG BOAT COMPANY LIMITED ..... PLAINTIFF;

AND

FLIPPER DRAGGERS LIMITED ET ALIOS[1] ..... DEFENDANTS.

Admiralty—Practice—Damages resulting from ship collision—Limitation of liability—Proper procedure—Canada Shipping Act, R.S.C. 1952, c. 29, secs. 657 and 658.

Following a collision between a ship and a tug boat an action for $460,000 damages was brought against the tug's owner and its captain by the ship's owner and wives and children of persons killed or injured. The tug's owner then brought action for a declaration limiting its total liability to $66,318 under s. 657 of the *Canada Shipping Act* and applied for a stay of proceedings in the first action.

Held, the application could not be dealt with until such time as a plea was entered in both actions indicating whether the plea of defendant or defendants in the first action contained an admission of liability for the maximum amount it or they would be called upon to pay if held to be entitled to limit its or their liability or contained no such admission and a plea was entered in the second action either admitting plaintiff's right to a limitation of liability or denying such a right and the plaintiff on the other hand, in such action, clearly admitted liability in such action for the maximum amount it would be called upon to pay if it was held to be entitled to limit its liability.

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[1] The other defendants are:

Florence Mary Boudreau, widow of Roderick Joseph Boudreau, for herself and as next friend of Charles D. Boudreau and Charlene T. Boudreau, Infants;

Julia Anne Boudreau, widow of Vernon Boudreau, for herself and as next friend of Julian V. Boudreau, Infant;

Charlotte Anne LeBlanc, widow of Camille LeBlanc for herself and as next friend of Guy LeBlanc and Michelle LeBlanc, Infants;

Martha Isabelle Boudreau, widow of Edgar J. Boudreau, for herself and as next friend of Billy Boudreau and Sharon Boudreau, Infants;

Margaret Frances LeBlanc, widow of Raymond C. LeBlanc, for herself and as next friend of Eric LeBlanc and Brenda LeBlanc, Infants;

Theresa Anne Bourque, widow of Stanley P. Bourque, for herself and as next friend of Cecille Bourque, Infant, and

All other persons having claims against the plaintiff by reason of the navigation of the Tug Boat *"Ocean Rockswift"* on the 22nd day of August A.D. 1967.

MOTION.

Donald M. Gillis, Q.C. and *J. H. Dickey, Q.C.* for plaintiff, applicant.

Brian Flemming for defendants, *contra.*

NOËL J.:—Around the 15th of March 1968 a writ of summons was issued and a statement of claim served on the defendants in action No. 606 of the central Admiralty registry of this court whereby Flipper Draggers Limited, the owners of the *M/V Silver King,* claim $120,000 damages from the defendants, the owners of the tug boat *Ocean Rockswift,* and its captain, Arthur Hartford Ells, occasioned by a collision between the *M/V Silver King* and the *Ocean Rockswift* on the 22nd of August 1967.

A number of plaintiff individuals also claim damages for the loss of life or injury to their husbands and fathers in this collision in an amount of $340,000.

On November 4, 1968, Saint John Tug Boat Company Limited, owners of the tug boat *Ocean Rockswift,* filed a statement of claim in action No. 622 of the central Admiralty registry of this court on all those plaintiffs in action No. 606, claiming:

a) a declaration that it is entitled to limit its liability pursuant to the *Canada Shipping Act,* and that it is not answerable in damages to the defendants or any other person beyond the aggregate amount of $221.0614 Canadian funds for each ton of the registered tonnage of the *Ocean Rockswift*;

b) a declaration that the tonnage of the *Ocean Rockswift,* ascertained in accordance with the *Canada Shipping Act,* is 300 tons and that the amount for which the plaintiff is liable in respect of loss of life or personal injury either alone or together with any loss or damage to property is, $66,318.42 ($221.0614 × 300) and no more, and that the amount for which the plaintiff is liable in respect of any loss or damage to property is (Canadian equivalent of 1,000 gold francs) at 300 tons and no more;

c) that the plaintiff be at liberty to pay into court the sum of $66,318.42 together with interest thereon and that upon payment into court of the said sum all

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proceedings be stayed in the said action No. 606 except for the purpose of taxation and payment of costs;

d) a declaration that the plaintiff is entitled to relief under the *Canada Shipping Act* against any other action or actions in respect of the said collision, and that the above named defendants and all and every person or persons interested in the motor ship *Silver King* or having any claim in respect of loss of life arising out of the said collision be restrained from bringing any action or actions against the plaintiff and/or the tug boat *Ocean Rockswift*;

e) that all proper directions should be given by this court for assessing and determining the lawful amount of all such claims and distributing the limitation fund.

The statement of claim shows that the owner of the *Ocean Rockswift* is, for the purpose of the action, prepared to admit that the collision was contributed to by the improper navigation of the *Ocean Rockswift*.

The plaintiff in action 622 now moves that its action in limitation of liability proceed and that the proceedings pending in action No. 606 be stayed.

The relevant statutory provisions are sections 657 and 658 of the *Canada Shipping Act*, R.S.C. 1952, chapter 29, as amended by chapter 32 of 1960-61 and chapter 29 of 1964-65. Those provisions now read as follows:

657. (1) For the purpose of sections 657 to 663

(*a*) "ship" includes any structure launched and intended for use in navigation as a ship or as a part of a ship; and

(*b*) "gold franc" means a unit consisting of sixty-five and one half milligrams of gold of millessimal fineness 900.

(2) The owner of a ship, whether registered in Canada or not, is not, where any of the following events occur without his actual fault or privity, namely:

(*a*) where any loss of life or personal injury is caused to any person on board that ship;

(*b*) where any damage or loss is caused to any goods, merchandise or other things whatsoever on board that ship;

(*c*) where any loss of life or personal injury is caused to any person not on board that ship through

(i) the act or omission of any person, whether on board the ship or not, in the navigation or management of the ship,

in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or

(ii) any other act or omission of any person on board that ship; or

(*d*) where any loss or damage is caused to any property, other than property described in paragraph (*b*), or any rights are infringed through

(i) the act or omission of any person, whether on board that ship or not, in the navigation or management of the ship, in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or

(ii) any other act or omission of any person on board that ship;

liable for damages beyond the following amounts namely:

(*e*) in respect of any loss of life or personal injury, either alone or together with any loss or damage to property or any infringement of any rights mentioned in paragraph (*d*), an aggregate amount equivalent to 3,100 gold francs for each ton of that ship's tonnage; and

(*f*) in respect of any loss or damage to property or any infringement of any rights mentioned in paragraph (*d*), an aggregate amount equivalent to 1,000 gold francs for each ton of that ship's tonnage.

(3) The limits on the liability of an owner of a ship set by this section apply in respect of each distinct occasion on which any of the events mentioned in paragraphs (*a*) to (*d*) of subsection (2) occur without that owner's actual fault or privity, and without regard to any liability incurred by that owner in respect of that ship on any other occasion.

(4) This section does not apply to limit the liability of an owner of a ship in respect of any loss of life or personal injury caused to, any loss of or damage to property or any infringement of any right of, a person who is employed on board or in connection with a ship under a contract of service if that contract is governed by the law of any country other than Canada and that law does not set any limit to that liability or sets a limit exceeding that set by this section.

658. (1) Where any liability is alleged to have been incurred by the owner of a ship in respect of any loss of life or personal injury, any loss of or damage to property or any infringement of any right in respect of which his liability is limited by section 657 and several claims are made or apprehended in respect of that liability a judge of the Exchequer Court may, on the application of that owner, determine the amount of his liability and distribute that amount rateably among the several claimants; such judge may stay any proceedings pending in any court in relation to the same matter, and he may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the Court thinks just.

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(1a) A judge of the Court in making a distribution under subsection (1) where there are claims in respect of loss of life or personal injury, and of loss of or damage to property or the infringement of any right, shall distribute rateably among the several claimants the amount at which the liability has been determined as follows:

(*a*) twenty-one thirty-firsts of the amount shall be applied in payment of claims in respect of loss of life and personal injury; and

(*b*) ten thirty-firsts of the amount shall be applied in payment of claims in respect of loss of or damage to property or infringement of any right, and to the satisfaction of the balance of any claims in respect of loss of life and personal injury remaining unpaid after distribution of the amount applied pursuant to paragraph (*a*).

(2) The President or a Puisne Judge of such Court, instead of exercising in person the powers conferred upon him by subsection one of this section may, by order of his court, commit to any District Judge in Admiralty of such Court the power to determine as aforesaid, whereupon such District Judge may proceed as if he were, and with the powers of, the Judge to whom such application of such owner was made.

(3) In making a distribution under this section of the amount determined to be the liability of the owner of a ship the Court may, having regard to any claim that may subsequently be established before a court outside of Canada in respect of that liability, postpone the distribution of such part of the amount as it deems appropriate.

(4) No lien or other right in respect of any ship or property shall affect the proportions in which any amount is distributed by the Court under this section amongst the several claimants.

There has been, in view of the language of section 658, a certain amount of confusion with regard to the procedure to be followed by the owner of a vessel who wishes to avail himself of the limitation of liability as contemplated by section 657 of the *Canada Shipping Act*.

A thorough and exhaustive examination of the following has made it possible to clarify somewhat the manner in which such a limitation of liability should be sought: *Merchant Shipping Act,* 1854 (U.K.) c. 104, secs. 502, 504, 505, 506 and 514; *Admiralty Court Act,* 1861 (U.K.) c. 10; *Merchant Shipping Act,* 1862 (U.K.) c. 63, s. 54; *Colonial Laws Validity Act,* 1865 (U.K.), c. 63, secs. 1 and 2; *Vice-Admiralty Courts Act,* 1863 (U.K.), c. 24; *British North America Act,* 1867 (U.K.) c. 3, secs. 91(10) and 129; *Navigation of Canadian Waters Act,* S. of C. 1868, c. 58, secs. 1, 12(1), (2), (3), (4a) and (4b); (S. of C. 1880, c. 29, secs. 13(1), (2), (3), (4a) and (4b); R.S.C. 1886, c. 79, s. 12);

Canada Shipping Act, R.S.C. 1906, c. 113, s. 921 (R.S.C. 1927, c. 186); *Judicature Acts,* 1873-74 (U.K.), c. 66; *Colonial Courts of Admiralty Act,* 1890 (U.K.) c. 27, s. 2(2); *Admiralty Act,* S. of C. 1891, c. 29; *Merchant Shipping Act,* 1894 (U.K.) c. 60, Part VIII, secs. 503-504 and 509; *Statute of Westminster* 1931 (U.K.), c. 47; *Admiralty Act,* S. of C. 1934, c. 31, secs. 3(1), (2), 4(1), 6, 32(1a), (1b) and 33; *Canada Shipping Act,* S. of C. 1934, c. 44, secs. 649, 650; R.S.C. 1952, c. 29, secs. 657 and 658 amended 1960-61, c. 32, s. 32; 1964-65, c. 39, s. 34(1a), (b), (3) and (4). The following decisions have also been considered: *M.S. Pacific Express v. The Tug Salvage Princess*[1]; *The Sonny Boy*[2]; *Williams & Bruce's Admiralty Practice,* 3rd edition, page 349, footnote K; *The Satanita*[3]; *Waldie & Fullum*[4]; *The Clutha*[5]; *Wahlberg v. Young*[6].

Considered in the light of such an historical review, the following conclusions can be reached on a tentative basis:

(a) section 657 limits the liability of the owner of a ship in the circumstances and to the amount set out therein;

(b) where the owner anticipates a claim from only one person, and is not concerned about protecting himself against other possible claims, he can avail himself of the limitation of liability by merely pleading it as a defence to an action[7];

(c) where the owner anticipates claims from more than one source, some procedure is required to distribute the fund among the various claimants, and such procedure is supplied by section 658;

(d) notwithstanding the express reference to the "judges" of the court, the "application" contemplated by section 658 may be made to the Exchequer Court of Canada but, in the absence of direction under subsection (2), the court can only act upon such an application when the President or one of the puisne judges of the court is sitting;

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[1] [1949] Ex C.R. 230.
[2] (1945) 61 B C R. 309.
[3] [1897] A C. 59.
[4] (1909) 12 Ex. C.R. 325.
[5] (1876) 45 L J.P D. and A. 108
[6] (1876) 45 L.J C.L. 783.
[7] See *The Queen v. Nisbet Shipping Co.* [1953] 1 S.C.R. 480 per Rand J. at p. 487.

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(e) if the owner wishes to be protected as against claims by persons who have not been made a party to the proceedings the Exchequer Court can only properly provide such protection by making an order under which the owner will have to advertise for possible claimants and give them a stipulated time in which to put in their claims (compare Order 75 Rule 35 of the English Rules)[8];

(f) in a case where the owner is satisfied that all possible claimants are parties to the proceedings he may be satisfied to proceed without obtaining an order for advertising, in which case he will not have protection as against any claimant who might subsequently appear and put forward a claim;

(g) where there is more than one possible claimant, but they have all joined as plaintiffs in an action commenced in the central registry of this court against the owner, it would seem to be appropriate procedure for the owner to counterclaim for an order under section 658 limiting his liability and distributing the amount of the fund among the plaintiffs;

(h) where an action has been begun against the owner, either

(i) in this court where all the claimants are not plaintiffs, or

(ii) in some other court (including an action in a district registry in Admiralty), the appropriate procedure would seem to be for the owner to make an application to this court by proceedings launched in the central registry for an order under section 658 of the Act—such an application can be made by way of an originating motion or an action commenced by writ or by statement of claim[9];

[8] The possibility of claims for damage by dependants (including infants) under sections 725 to 733 inclusive of the *Canada Shipping Act* 1952 chapter 29 should also be considered as well as an appropriate procedure to cause infants to be properly represented.

[9] It may well be that when there is an action on the central registry of this Court in which all possible claimants are not plaintiffs, it is permissible to proceed by counterclaim. Compare *The Queen v. Nisbet Shipping (supra)* per Rand J. at p. 487. Even in that case, however, it would seem preferable to proceed by way of a separate application.

(i) upon such an application, the court should be asked for directions and an order should be made setting out the course the matter is to take, which should be adjusted to the circumstances of the particular case; this might follow the English rules (0.75 r. 35) or might be worked out to suit the circumstances of the particular case having regard to the above conclusions. (None of the cases examined contain any helpful discussion of the procedure to be followed under either the English or the Canadian provisions and the matter can therefore be dealt with as though there were no authority).

In this case, as far as I can tell from the papers on the two files, there are two possibilities, namely:

(a) the owner of the *Ocean Rockswift* may be satisfied that all possible claimants are plaintiffs in action No. 606 or

(b) the owner of the *Ocean Rockswift* may consider it necessary to take the steps necessary to protect it against possible claimants other than the plaintiffs in that action.

In the first event, that is, that the owner is satisfied to be protected under section 658 against the plaintiffs in action No. 606, it would seem to have been sufficient for it to counterclaim in that action for an order limiting its liability and distributing the amount of the fund among the plaintiffs as provided by section 658. In such event, no good reason for proceeding by a second action which may increase costs, is apparent. In the second event, that is, that the owner considers it necessary to protect itself against possible claimants other than the plaintiffs in action No. 606, the second action is an appropriate method of proceeding.

The owner of the *Ocean Rockswift,* as plaintiff in this action, has therefore one of two choices: pursue the present action or take the appropriate steps under the rules to proceed by way of counterclaim in action No. 606 as suggested above.

If the owner of the tug boat *Ocean Rockswift* decides to continue this action, it should make an application as to

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the further conduct of this action including directions for advertising for other claimants, and such application should be supported by material establishing at least a *prima facie* case for limiting its liability. Upon the return of such an application, the application for a stay of action No. 606 may be renewed on supporting evidence of the plaintiffs' readiness to pay the limited amount and interest thereon into court and any other facts it may wish to argue bearing on the question whether or not in the circumstances action 606 should be stayed.

No action can, however, be taken on the present motion to proceed in the present action or to stay the proceedings in the first action (No. 606) until such time as a plea is entered in both actions indicating whether the plea of the defendant or defendants in the first action contains an admission of liability for the maximum amount it or they would be called upon to pay if held to be entitled to limit its or their liability or contains no such admission and a plea is entered in the second action either admitting plaintiff's right to a limitation of liability or denying such a right and the plaintiff on the other hand, in such action, clearly admits liability in such action for the maximum amount it would be called upon to pay if it was held to be entitled to limit its liability[10]. In either case, however, the plaintiff may still have to proceed in the first action if there is a possibility of common fault and if the determination of the proportion of liability of both ships for the damages caused is required to set off one against the other. What I have in mind is that the claimants other than the owner of the other ship may be entitled to a larger fund to satisfy their claims if the rules of set-off operate between the owners of the two ships insofar as their respective claims are concerned as they would in the case of a matter arising in the province of Quebec (cf. article 1188 C.C.).

There is also considerable doubt in my mind in the event the plaintiff is authorized to proceed with the present action whether I can stay the action taken against the second

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[10] Compare the *A. L. Smith & Chinook v. Ontario Gravel Freighting Co.* (51 S.C.R. 39 at 44) where Fitzpatrick C.J. stated that "It is not necessary of course, in this country, that the owner should admit liability before beginning the limiting proceedings, but liability must be admitted before a decree can be obtained (26 Halsbury p. 616, No. 971 and the cases there cited.

defendant in the first case (No. 606), Captain Arthur Hartford Ells, as he is in no way involved in the limitation action, and there is even some question as to whether his fund would be the same fund as that of the ship he was in charge of. Before any further application is made, some consideration should be given to the question whether under Admiralty practice a person may be sued as the next friend of an infant as the plaintiff purports to do in this action.

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It therefore follows that the present motion is premature and will be dismissed with costs.

BETWEEN:

ECONOMIC TRADING LTD. .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Montreal
1968
Dec. 10-11

Customs duty—Imported goods in sufferance warehouse destroyed by fire after duty paid—Claim for refund of duty—Whether goods in "custody" of customs officers—Customs Act, R.S.C. 1952, c. 58, secs. 62, 68, 96(1).

Suppliant's goods were brought into Canada by vessel and placed by the carrier in a sufferance warehouse operated by the carrier's agent and were there destroyed by fire after being duly entered for customs and payment of duty and after the customs officers had formally indicated that they could be delivered to suppliant.

Held, dismissing a claim under s. 62 of the *Customs Act* for refund of the duty paid, the goods were not in the custody of the customs officers while in the warehouse, which was an essential condition to the application of s. 62. While the officers had free access etc to the warehouse under s. 62 and the goods were subject to their control under s. 96(1), these circumstances did not amount to custody of the goods.

PETITION OF RIGHT.

Irving J. Halperin for suppliant.

J. P. Fortin for respondent.

JACKETT P. (orally):—This is a petition of right for refund of Customs duty under section 62 of the *Customs Act*,[1] which reads as follows:

62. Upon production of satisfactory proof to the Minister of the actual injury or destruction, in whole or in part, of any goods by

[1] R.S.C. 1952, c. 58, s. 62.

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accidental fire, or other casualty, while they remained in the custody of the officers in any Customs warehouse, or while in transportation in bond from one port of entry to another port of entry in Canada, or while within the limits of any port of entry and before they were landed under the supervision of the officers, the duties on the whole or the part thereof so proved to have been injured or destroyed may be abated or refunded, if the claim is made within thirty days after the date of the casualty, and due appraisement is made of the goods so alleged to be injured as soon as they can be examined.

With section 62, there should be read the following definitions in section 2 of the Act:

> 2. (1) In this Act, or in any other law relating to the Customs,
>
> * * *
>
> (*f*) "Customs warehouse" includes sufferance warehouse, bonding warehouse and examining warehouse;
>
> * * *
>
> (*n*) "officer" means a person employed in the administration or enforcement of this Act, and includes any member of the Royal Canadian Mounted Police;

It is common ground that the facts on which the suppliant relies satisfy all the factual conditions precedent to the application of section 62 except that it is not conceded by the respondent that the goods in question "remained in the custody of the officers" within the meaning of those words in that section. The other defence to the action relied on at trial is that section 62 confers a discretionary power on the Minister to abate or refund customs duty, but does not create a right in the importer to an abatement or refund.

The facts briefly are that the goods in question were taken off the vessel by which they were brought into Canada and were placed by the carrier in a sufferance warehouse operated by the carrier's agent. While there, they were destroyed by fire after they had been duly entered and customs duty had been paid on them and after the officers of customs had formally indicated that the goods could, as far as the *Customs Act* was concerned, be delivered to the suppliant.

Counsel for the suppliant has, I am satisfied, exhausted all possibilities on these facts of endeavouring to bring the matter within section 62. I do not propose to try to do justice to his argument, which involved a far reaching examination of the scheme of the *Customs Act*. I propose merely to indicate very briefly why I cannot come to a conclusion on the first point in favour of the suppliant.

There are four possibilities that have been envisaged as to the meaning of "custody of the officers" in section 62.

The first and most obvious one is the actual physical possession of the goods on behalf of the Department of National Revenue such as the officers would have if goods were taken to a customs warehouse under section 23(1). Clearly, the goods in question were never in such "custody".

The second possible meaning of "custody of the officers" is the one that the officers seem to have had in mind when they refused the suppliant's applications for refunds on a recital reading, "Entry being passed and released prior to fire". This possibility is that the custody of the officers contemplated by section 62 is the restriction imposed by the *Customs Act* on the removal of the goods from either the ship, a customs warehouse, or other similar place, so long as duty is not paid or some acceptable arrangement for payment thereof has not been made, which restriction is, of course, policed by customs officers. I do not need to come to any conclusion as to whether this or some similar meaning is the correct view of the word "custody" in section 62 because any such restriction had been removed before the destruction of the goods by fire.

The third view is that the powers contained in section 68 of the *Customs Act* create a "custody" within the meaning of that word as used in section 62. Section 68 reads as follows:

> 68. The unshipping, carrying and landing of all goods and the taking of the same to and from a Customs warehouse or other proper place after landing shall be done in such manner and at such places as are appointed by the collector or other proper officer, and the collector or other proper officer shall at all times have free access to any warehouse wherein are stored goods subject to duty, and may, when requiring entrance in the performance of his duty, lawfully force or break any lock or other fastening placed upon any such warehouse, or upon or in any premises necessary to be passed through in order to obtain access to such warehouse.

Counsel for the suppliant argues that the power of appointing the manner and the places for the taking of goods "to and from" a customs warehouse, and the right of "free access" to a warehouse where goods are, constitutes a concurrent "custody" of the goods sufficient to satisfy the requirements of section 62. I do not accept this submission. It does not seem to me that a right to regulate the movement of goods or the place where they are to be moved or

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the right of access to the place where they are can, by any stretch of the meaning of that word, be regarded as "custody" of such goods.

Finally, counsel for the suppliant argues that section 96(1) was applicable to the goods at the time of the fire and created a situation in which the customs officers must be regarded as having had custody for the purpose of section 62. Section 96(1) reads as follows:

> 96. (1) All the packages mentioned in any one entry, although some of such packages have been delivered to the importer, or some one on his behalf, are subject to the control of the Customs authorities of the port at which they are entered, until such of the packages as have been sent to the examining warehouse for examination have been duly opened and the contents examined and approved.

I do not express any opinion as to whether section 96(1) had any application to the goods in question at the relevant time. It is sufficient to say that, in my view, the fact that the goods were "subject" to control, if they were so subject to control, does not mean that there was an actual *de facto* "control" of the goods at the time, and, therefore, even if actual control as contemplated by section 96 would have been sufficient to satisfy section 62, a matter on which I express no opinion, it did not in fact exist.

I am, therefore, of the opinion that the suppliant has failed to show that the goods in question "remained in the custody of the officers" at the time that they were destroyed by fire and that the petition of right must be dismissed with costs.

While I do not, in the circumstances, have to say anything about the respondent's other defence, I should say, perhaps, that I would have had to be satisfied that the decisions following *Julius v. The Bishop of Oxford*[2] did not require, where the factual conditions precedent contemplated by section 62 were satisfied, that I imply a duty on the Minister to make the refund contemplated by that section.

[2] 5 A.C. 214.

BETWEEN:

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

AND

CROSSLEY CARPETS (CANADA) LIMITED ..... RESPONDENT.

Toronto 1968 Dec. 10–12

Ottawa Dec. 12

Income tax—Income Tax Act, R.S.C. 1952, c. 148, s. 110B—Additional tax on non-resident corporations, carrying on business in Canada—Residence of corporation—Dual residence—Whether taxpayer a "non-resident corporation".

The country of residence for income tax purpose under the *Income Tax Act* was in dispute in this case.

The respondent corporation was assessed an additional 15% income tax assessment pursuant to section 110B of the *Income Tax Act*, on the basis that it was a company non-resident in Canada in the taxation years 1961-62.

Held: That the place of exercise of paramount authority of central management and control of the subject corporation was divided between Canada and England and therefore this corporation was resident for income tax purpose in both England and Canada.

2. That the appeal of the Minister is dismissed upholding the conclusion reached by the Tax Appeal Board.

APPEAL from the decision of the Tax Appeal Board.

L. R. Olsson and *W. J. A. Hobson* for appellant.

W. R. Herridge for respondent.

GIBSON J. (*orally*):—The issue for decision is whether or not in its taxation years 1961 and 1962 the respondent Crossley Carpets (Canada) Limited is liable to pay an additional 15 per cent income tax pursuant to section 110B of the *Income Tax Act*, and calculated thereby, by reason of being a corporation non-resident in Canada during those years.

At all material times the respondent, an English corporation registered in England, carried on the whole of its carpet merchandising distribution business in Canada.

The Minister submits that the respondent corporation during those taxation years was not resident in Canada within the meaning of section 110B of the Act, but only resident in England. The respondent submits it was resident both in Canada and in England or, alternatively, resident in Canada only.

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I am of the opinion that the respondent corporation was so resident in England, and the only question for decision is whether or not it was also resident in Canada within the meaning of that section of the *Income Tax Act*.

The law, as I understand it, is that a corporation is resident, for income tax purposes, in the country where its central management and control is exercised, (see *De Beers Consolidated Mines, Limited v. Howe*[1]) and the place of central management and control is sometimes in the cases said to be the place of paramount authority, (see *The San Paulo (Brazilian) Railway Co. v. S. G. Carter*[2] and *American Thread Company v. Joyce*[3]) but if the place of exercise of paramount authority is divided between two or more countries then in my view the corporation is resident in each of those countries. (See *Swedish Central Ry. Co. v. Thompson*[4] and cf. *Unit Construction Co. v. Bullock*[5]).

The pure question of fact for decision by this Court (which as Lord Loreburn stated in the *De Beers* (*supra*) case at page 458 is "to be determined, not according to the construction of this or that regulation or by-law, but upon a scrutiny of the course of business and trading") is whether or not on the evidence the place of exercise of paramount authority of central management and control of the respondent corporation was divided between Canada and England during its taxation years 1961 and 1962.

The Tax Appeal Board on the evidence adduced before it came to the conclusion that the place of exercise of such authority was divided between Canada and England during those taxation years and held that the Minister's contention that the respondent (in those proceedings the appellant) was a non-resident corporation carrying on business in Canada was wrong and accordingly vacated the two re-assessments.

On the evidence adduced in this Court on the Minister's appeal from this decision I have come to the same factual conclusion as the Tax Appeal Board and agree with the result found by it.

The appeal of the Minister is therefore dismissed with costs.

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[1] [1906] A.C. 455.
[2] [1896] A.C. 31.
[3] (1913) 6 Tax Cases 163.
[4] (1925) 9 Tax Cases 342.
[5] [1960] A.C. 351.

Ottawa
1968
Dec. 4-5
Dec. 16

BETWEEN:

GEORGE EDWIN BEAMENT, MAURICE HAMILTON FYFE, ROBERT BARCLAY HUTTON and CANADA PERMANENT TRUST COMPANY, Executors and Trustees of the Estate of Arthur Warwick Beament, deceased. APPELLANTS;

AND

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

Estate tax—Valuation of shares—Contractual obligation on decedent's estate to wind-up company—Company's charter providing for distribution of surplus on winding-up—Reduction in value of shares—Whether obligation affects valuation for estate tax purposes—"Debts", "Encumbrances", meaning—Estate Tax Act, 1958, c. 29, s. 5(1).

In 1961 an investment company was incorporated at decedent's instance with class A and class B shares of $1 00 par value and equal voting rights. The class A shares provided for a 5% preferential dividend and the class B shares provided for dividends exclusively from earnings. The company's charter provided for distribution of surplus assets to class A shareholders on a winding-up. When the company was incorporated decedent and his two sons executed an agreement pursuant to which each son took up 12 class A shares, decedent took up 2,000 class B shares and by his will directed that the company should be wound-up on his death. On decedent's death in 1966 the company was wound-up as provided by his will and its surplus assets (which included capital profits of approximately $144,000) were paid to the class A shareholders. The executors of decedent's estate valued his class B shares for estate tax purposes at $10,725, which was the amount of the company's undeclared income on hand at decedent's death, but the Minister added thereto the amount of the capital profits. Subsequently he reduced his valuation of the class B shares to $110,000.

Held, dismissing the estate's appeal, having regard to the scheme of the *Estate Tax Act* for computing the value of property passing on death, in determining the fair market value of the class B shares no deduction could be permitted for the contractual obligation of decedent and his estate to wind-up the company which would result in the class B shares being converted to $10,725 cash. The estate had thus failed to show that the class B shares as the subject of a hypothetical sale were worth less than $110,000. *C.I.R. v. Crossman et al* [1937] A.C. 26, distinguished.

ESTATE TAX APPEAL.

M. H. Fyfe, Q.C. for appellants.

M. A. Mogan and *J. M. Halley* for respondent.

91300—3½

1968

BEAMENT *et al* v. MINISTER OF NATIONAL REVENUE

JACKETT P.:—This is an appeal by the estate of Arthur Warwick Beament from the assessment under the *Estate Tax Act* in respect of that estate.

There were two matters in respect of which the notice of appeal was filed, but the second matter was the subject matter of "Partial Minutes of Settlement" dated May 16, 1968, and filed in the court on May 29, 1968. In consequence I decided, at the opening of the trial, that there would be in the pronouncement of judgment a direction that the assessment under appeal be referred back to the respondent for re-assessment in accordance with such "Partial Minutes of Settlement" and that the appellant be entitled to be paid, in respect of such part of the appeal, costs in the sum of $100.

The only question remaining to be decided by the court is the question referred to in the notice of appeal as the "First Matter in Appeal". This is described in the notice of appeal as an appeal in respect of

> The increase by the Respondent of the value of 2000 Class B shares of the par value of $1.00 each in the capital stock of Lakroc Investments Limited by $144,239.14 from the value of $10,725.98 declared by the Appellants in their ET60 Return dated August 5, 1966.

By the reply to the notice of appeal as amended by order of the court dated October 2, 1968, the respondent took the position "that the fair market value of the said 2,000 Class B shares on May 24, 1966, was an amount not less than $110,000", and, during argument, counsel for the respondent made it clear that, while in making the assessment the respondent had assumed that on May 24, 1966 the value of the shares in question was $154,956.12, if the appellant is otherwise unsuccessful in attacking the basis of the assessment, the respondent consents to the assessment being referred back for re-assessment on the basis that the shares in question had a fair market value on May 24, 1966, of $110,000.

Lakroc Investments Limited was incorporated on March 15, 1961, with two classes of shares called Class "A" shares and Class "B" shares, respectively, each class having a par value of $1 per share and voting rights of one vote per share. Class "A" shares carried a right to a preferential dividend of 5 per cent per annum, and Class "B" carried a right to

"all the net earnings of the company arising from income received by it declared as dividends". There was an express prohibition, however, against payment of dividends "out of profits or gains from the sale of investments or other capital assets of the company". Finally, the company's charter provided that, upon winding up, after payment of the dividends expressly provided for the two classes of shares and after repayment of the amounts subscribed in respect of the shares, "the balance of the assets of the company shall be divided *pro rata* among the holders of the Class 'A' shares". The general scheme can be described in general terms as one under which, while the company remained in business, the holders of Class "A" shares received 5 per cent per annum on their subscriptions, if so much were earned, and the Class "B" shareholders received all the rest of the company's current earnings; and, on winding up, the holders of Class "B" shares received only the amounts subscribed for their shares and the Class "A" shareholders received all of what was left including any capital gains that were acquired by the company during its existence and were available for distribution.

On the day that the company was incorporated, the deceased, Arthur Warwick Beament, entered into an agreement with his two children. As this agreement is important, I shall quote the whole of it. In it the deceased is referred to as "the controlling shareholder", one child is referred to as "John", and the other is referred to as "Pat". The agreement reads as follows:

> WHEREAS the Controlling Shareholder is the father of John and of Pat and has informed them of his intention to incorporate a company under the provisions of The Companies Act of Canada with the name of Lakroc Investments Limited, or such other name as the Secretary of State of Canada may permit (herein called "the Company"), with an authorized capital of $50,000.00 divided into 5,000 Class "A" shares of the par value of $1.00 each and 45,000 Class "B" shares of the par value of $1 00 each;
>
> AND WHEREAS the Letters Patent incorporating the Company will provide in effect, in part, as follows:
>
> (*a*) The Class "A" shares will carry a fixed cumulative annual dividend of 5¢ a share but will not otherwise be entitled to any dividends;
>
> (*b*) The Class "B" shares shall be entitled to receive as dividends when declared all the other earnings or income of the Company; provided, however, that no dividends shall be paid out of profits or gains arising from the sale of investments or other capital assets of the Company;

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(c) On the dissolution or winding up of the Company or the liquidation of its business or assets or on any division of capital amongst its shareholders, and after the payment of any dividends due to the Class "A" shareholders and the payment to the Class "B" shareholders of any accumulated net earnings as defined above and the par value of the said Class "B" shares outstanding, the balance of the assets of the Company shall be divided pro rata among the holders of the Class "A" shares;

AND WHEREAS the Controlling Shareholder has represented that he will subscribe and pay for 1,997 Class "B" shares of the Company, which with the three incorporators' shares will result in 2,000 of the said Class "B" shares being outstanding;

AND WHEREAS the Controlling Shareholder has requested John and Pat each to subscribe and pay for 12 Class "A" shares of the capital stock of the Company at $1 00 a share and the said John and Pat have agreed so to do upon the representation of the Controlling Shareholder that he will make adequate provision in his Will for the distribution of the assets of the Company amongst its shareholders and the surrender of its Letters Patent as soon as conveniently may be after his death;

NOW THEREFORE in consideration of the premises, the parties hereto agree each with the other as follows:

1. John and Pat each covenant and agree that upon the incorporation of the Company they will subscribe and pay for 12 Class "A" shares of the capital stock of the Company at the price or sum of $1 00 each.

2. The Controlling Shareholder covenants and agrees that upon the incorporation of the Company he will subscribe and pay for 1,997 Class "B" shares of the capital stock of the Company of the par value of $1 00 each at par, and will pay such sum as is necessary to make the incorporators' shares fully paid

3. The Controlling Shareholder covenants and agrees that he will provide in his Will and maintain therein a direction to his executors to take all necessary steps as soon as conveniently may be after his death to cause the debts of the Company to be paid, its assets to be distributed rateably amongst the shareholders of the Company in accordance with the provisions of the Letters Patent incorporating the Company and to surrender the Letters Patent of the Company. The word "Will" as herein used includes any codicil or other testamentary document effective on the death of the Controlling Shareholder, by whatever name it may be called, and the words "Letters Patent" include any Supplementary Letters Patent.

4 Nothing herein contained shall be construed to prevent the Controlling Shareholder during his lifetime exercising his control of the Company to distribute its assets rateably amongst its shareholders in accordance with the said Letters Patent and to surrender the said Letters Patent.

In effect, the agreement provides for the deceased acquiring 2,000 Class "B" shares and for Pat and John acquiring 12 Class "A" shares each, upon the representation of the deceased "that he will make adequate provision in his will for

the distribution of the assets of the company amongst its shareholders and the surrender of its letters patent as soon as conveniently may be after his death".

The deceased, Pat and John did acquire shares as contemplated by that agreement, the company borrowed substantial sums of money and invested its capital so acquired in securities[1] from which, by the time of the death of the deceased, i.e. on May 24, 1966, it had realized a capital surplus of $99,729.09 and an unrealized accretion to the value of securities in the sum of $44,510.05, as well as earnings from securities which were paid out to its shareholders by way of the preferred dividends to the Class "A" shareholders—i.e. Pat and John—and ordinary dividends to the Class "B" shareholder—i.e. the deceased.

The deceased's will, at the time of his death, contained a clause reading as follows:

> 15. I DIRECT my Trustees, as soon as conveniently possible after my death, to do all things necessary to cause Lakroc Investments Limited to pay its debts, to distribute its assets amongst its shareholders and to surrender its charter.

After the death of the deceased, the company was wound up and the holders of the Class "B" shares received, in addition to repayment of loans made by the deceased to the company, repayment of the money subscribed for the Class "B" shares, while Pat and John received the balance of the assets in the sum of $152,963.40[2].

It is common ground that all that I have to decide is what amount should have been included in "aggregate taxable value" of property passing on the death of the deceased in respect of the 2,000 Class "B" shares (cf. section 2(1) of the *Estate Tax Act*), and it is also common ground that this question must be resolved in accordance with the statutory definition of "value" contained in section 58(1), which definition reads as follows:

> (s) "value",
>
> (i) in relation to any income right, annuity, term of years, life or other similar estate or interest in expectancy,

---

[1] Strictly speaking, much of the "loan" was the price at which the deceased sold securities to the company, which price was payable on demand and was never demanded during the deceased's lifetime.

[2] I assume that the discrepancy between this figure and the earlier figure results from gains arising between the death of the deceased and winding up.

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means the fair market value thereof ascertained by such means and in accordance with such rules and standards, including standards as to mortality and interest, as are prescribed by the regulations, and

(ii) in relation to any other property, means the fair market value of such property,

computed in each case as of the date of the death of the deceased in respect of whose death such value is relevant or as of such other date as is specified in this Act, without regard to any increase or decrease in such value after that date for any reason.

One cannot help but be struck in this case by the fact that the deceased caused the company in question to be incorporated, put into it a very large amount of capital (subscribed and loaned), operated it as an investment company that, in a relatively short time, accumulated very substantial capital gains, and so arranged things that, upon his death, those capital gains passed to his children, who do not appear to have participated in the venture except that they subscribed the relatively nominal amount of $12 each. Nevertheless, one must not be misled by this aspect of the matter. No attack has been made on the *bona fide* of the arrangements. No resort has been made by the respondent to any provision designed to deal with tax avoidance schemes where closely related persons are involved. It follows, therefore, as I appreciate the matter, that it must be appraised in the same way as it would be appraised if the Class "A" shares had been taken up by persons who were dealing with the deceased at arm's length and who subscribed very substantial sums for a relatively small annual dividend and a covenant by the deceased that the company would be wound up on his death so that they would then receive any capital gains that had been acquired by the company.

The question is therefore what was the "fair market value" of the 2,000 Class "B" shares "computed . . . as of the date of the death of the deceased?"

In fact, having regard to the contract under which the deceased acquired the shares, once the deceased died, all that his estate could realize out of the 2,000 Class "B" shares was

(a) the undistributed current earnings of the company, and

(b) the $2,000 that had been subscribed for the shares.

If, therefore, as of the time of his death or later, the shares were for sale on terms that they would continue, in some way, to be subject to the obligations assumed by the deceased under the contract, no person using reasonable judgment would have paid more for them than the sum of those two amounts, which is, in effect, the value of the shares as declared by the appellants. If, therefore, the correct approach to the question that has to be decided is that the fair market value is what a hypothetical willing buyer would pay to a hypothetical willing vendor to be put in the same position in relation to the shares as the deceased or his estate was on the date of his death, the appeal must be allowed. I think I may say that, by the end of the argument, that was common ground.

The other view of the matter—that put forward on behalf of the respondent—is, in effect, as I understand it, that the "fair market value" of the shares as of the date of the death of the deceased is what a hypothetical willing purchaser would pay to a hypothetical willing vendor for the shares on the basis that the purchaser would not be in any way subject to the obligations that the deceased had assumed by the contract. If that is the correct view, counsel for the appellant accepts it that he has not discharged the onus of showing that the position taken by the respondent's amended reply to the notice of appeal is wrong and judgment would go, as already indicated, referring the assessment back for re-assessment in accordance therewith.

The appeal therefore turns, as I appreciate it, on the narrow issue as to whether the property in question that passed from the deceased to his estate on his death was

(a) the 2,000 Class "B" shares as held by the deceased under the terms of the contract with his children concerning their acquisition, or

(b) the 2,000 Class "B" shares free from the obligations assumed by the deceased under that contract.

In fact, what passed from the deceased to his estate were the shares subject to the obligations assumed by the contract, and, as so held, they cannot be regarded as having a value to any sensible person of more than $2,000 plus undeclared current earnings. The problem that I have to resolve, as I understand it, is whether I can regard the

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"property" that passed from the deceased to his estate as being the "bundle of rights" represented by the shares minus the rights that the deceased gave up by executing the contract, or whether I am bound to regard the "property" that passed as being the "bundle of rights" represented by the shares and to regard the obligations under the contract as being a separate contractual matter between the deceased (or his estate) and his children that did not, in law, cut down the "bundle of rights" represented by the shares that passed from him to his estate.

The problem arises under the *Estate Tax Act,* a new statute enacted for the first time in Canada in 1958. As I view it, a problem under such an Act should be considered, at least in the first instance, by reference only to the words used by Parliament in the Act and without referring to decisions under legislation differently worded enacted in earlier times by other legislatures even though the general scheme of such other legislation is the same. Presumably, the Canadian Parliament chose different language in this modern statute in an endeavour to eliminate problems of interpretation arising under earlier legislative models. It will be time enough after considering the effect of the words in the statute under consideration by themselves to look at decisions under earlier statutes to see if they indicate some intent in the statute under consideration that did not appear from a consideration of the words of the statute by themselves.

I turn, therefore, to the *Estate Tax Act,* chapter 29 of 1958 as amended. The following portions of the Act seem to me to have some relevance to the problem before me.

> 2. (1) An estate tax shall be paid as hereinafter required upon the aggregate taxable value of all property passing on the death, at any time after the coming into force of this Act, of every person domiciled in Canada at the time of his death.
>
> (2) The aggregate taxable value of the property passing on the death of a person is the aggregate net value of that property computed in accordance with Division B minus the deductions permitted by Division C.
>
> * * *
>
> 3. (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,
>
> * * *

(*c*) property disposed of by the deceased under a disposition operating or purporting to operate as an immediate gift *inter vivos*, whether by transfer, delivery, declaration of trust or otherwise, made within three years prior to his death;

* * *

(i) property transferred to or acquired by a purchaser or transferee under the terms of an agreement made by the deceased at any time providing for the transfer or acquisition of such property on or after his death, to the extent that the value of such property exceeds the value of the consideration, if any, in money or money's worth paid to the deceased thereunder at any time prior to his death;

* * *

(3) For the purposes of paragraph (*c*) of subsection (1),

(*a*) the artificial creation by a person or with his consent during his lifetime of a debt or other right enforceable against him personally or against property of which he was or might be competent to dispose, or to charge or burden for his own benefit, shall be deemed to be a disposition by that person operating as an immediate gift *inter vivos* made by him at the time of the creation of the debt or right, and, in relation to any such disposition, the expression "property" in this Act includes the benefit conferred by the creation of such debt or right;

* * *

4. (1) Notwithstanding section 3, there shall not be included in computing the aggregate net value of the property passing on the death of a person the value of any such property acquired pursuant to a *bona fide* purchase made from the deceased for a consideration in money or money's worth paid or agreed to be paid to the deceased for his own use or benefit, unless such purchase was made otherwise than for full consideration in money or money's worth paid or agreed to be paid as hereinbefore described, in which case there shall be included in computing the aggregate net value of the property passing on the death of the deceased in respect of the property so acquired only the amount by which the value of the property so acquired computed as of the date of its acquisition exceeds the amount of the consideration actually so paid or agreed to be paid.

* * *

5. (1) There may be deducted in computing the aggregate net value of the property passing on the death of a person

(*a*) the value of

(i) any debts incurred by the deceased, and

(ii) any encumbrances created by him,

bona fide and for full consideration paid or agreed to be paid to the deceased for his own use or benefit, to the extent that such debts and encumbrances were outstanding immediately prior to his death; and

(*b*) reasonable funeral expenses and surrogate, probate and other like court fees in respect of the death of the deceased (but not including solicitors' charges or the expenses of administering property or executing any trust created by the deceased).

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(2) For the purposes of this section, a debt or other obligation of the deceased that was created or imposed by or under the authority of a statute shall, to the extent that such debt or obligation was outstanding immediately prior to his death, be deemed to be a debt incurred by the deceased as described in paragraph (*a*) of subsection (1).

* * *

58. (1) In this Act,

* * *

(*o*) "property" means property of every description whatever, whether real or personal, movable or immovable, or corporeal or incorporeal, and without restricting the generality of the foregoing, includes any estate or interest in any such property, a right of any kind whatever and a chose in action;

* * *

(*s*) "value",

(i) in relation to any income right, annuity, term of years, life or other similar estate or interest in expectancy, means the fair market value thereof ascertained by such means and in accordance with such rules and standards, including standards as to mortality and interest, as are prescribed by the regulations, and

(ii) in relation to any other property, means the fair market value of such property,

computed in each case as of the date of the death of the deceased in respect of whose death such value is relevant or as of such other date as is specified in this Act, without regard to any increase or decrease in such value after that date for any reason.

The scheme of the Act, as I read it, is as follows: Section 2 imposes an estate tax on the "aggregate taxable value" of all property passing "on the death", and aggregate taxable value is "aggregate net value" minus certain specified deductions. In computing "aggregate net value"

(a) section 3 requires that there be "included" the "value" of all "property" passing on the death, and

(b) section 5 provides that there may be "deducted" the "value" of

(i) "debts",

(ii) "encumbrances".

Applying this general scheme to a simple case where "property" that passed on death represented all the assets of an estate and "debts", and "encumbrances" represented all the liabilities of the estate, this statutory concept of "aggregate net value" would represent the net worth of the estate at the time of death. It seems clear, moreover, that what is contemplated is that, on the one side, there is to be included the full "value" of all "property" ignoring any debt or en-

cumbrance related to the property, and, on the other hand, there is to be deducted the "value" of all "debts" and "encumbrances" including any related to the "property" the value of which has been included. This system would seem to me to be a fair and reasonable basis for the estate tax scheme if the concepts of "debts" and "encumbrances" were wide enough to include all liabilities or obligations of the deceased that have to be honoured by his estate and that go to reduce the net worth of his estate. Unfortunately, it seems to me that the concepts of "debts" and "encumbrances" do not embrace all of the deceased's liabilities and obligations that must be honoured by his estate.

The word "encumbrance" in this context means, as I understand it, a claim, lien, or liability that is "attached to property" (cf. Shorter Oxford English Dictionary). The word "debt", in the absence of a special statutory definition, means "a sum payable in respect of a liquidated money demand, recoverable by action" (cf. *Diewold v. Diewold*[3]). Moreover, Parliament appears to have used the word "debt" in section 5(1)(*a*) in a sense that did not include obligations generally for, by section 5(2), it is provided that a statutory debt or "other obligation" imposed by statute shall be deemed to be a "debt" that falls within section 5(1)(*a*). It follows, as it seems to me, that no deduction is permitted for any liability in damages or other such obligation not based on a statute, no matter how substantial such liability may be.

My analysis of the scheme of the *Estate Tax Act* leads me to the conclusion, therefore, that what was intended was that the "value" of all property passing on death should be included in computing the estate tax base, but that there can only be deducted, in that computation, the value of some, and not of all, obligations of the deceased that pass to the estate. In other words, there seems to have been a deliberate intention, in the framing of the scheme of the statute, to impose the estate tax on a tax base that might, in some cases, substantially exceed the net worth of the estate even in a case where none of the lettered paragraphs of section 3(1) have any application.

Having reached that conclusion, I do not have too much difficulty in coming to a decision in this case, strange as

[3] [1941] S.C.R. 35 at page 39.

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the result would have seemed to me as long as I continued of the view that the basic concept of the *Estate Tax Act* was to impose the tax on a base computed by reference to the net worth of the estate.

Here the deceased owned shares which, considered by themselves, carried control of the company and enabled the holder to continue indefinitely to obtain the income (after payment of preferred dividends) from a very large fund. The appellants have failed to show that such shares (considered as subjects of sale by themselves between a hypothetical purchaser and hypothetical vendor) had a value of less than the $110,000 attributed to them by the respondent. This is so, as it seems to me, even though, on the day of the death of the deceased, the particular owner (i.e., both the deceased and his estate) had an obligation to take certain steps as a result of which the shares would be converted into a cash amount of some $10,725.98. That is a result that did not flow from the nature of the property itself but from a contractual obligation assumed by a particular owner of the property. From the point of view of the scheme of the *Estate Tax Act,* such an obligation falls in the same class as debts and encumbrances—i.e. potential deductions—except that, for some reason that I do not understand, the statute does not permit deductions in respect of obligations of the deceased or his estate other than debts or encumbrances.

I should not leave the matter without referring to *C.I.R. v. Crossman et al,*[4] which occupied such a large part of the argument. If I properly appraise what was decided in that case, it can have no application to this case because that case dealt with a problem arising out of limitations on the rights of the shareholders that were carved out of the shares themselves by the statutory documents by which those shares were created, whereas here the shareholder had full rights, as far as his property rights flowing from ownership of the shares were concerned, to continue the company in existence or to cause it to be wound up and to sell all such rights to anybody else; but he had contracted a personal obligation to somebody else that he would cause the company to be wound up. If, in this case, there had been something in the constitution of the company whereby its

[4] [1937] A.C. 26.

winding up followed automatically upon the death of the holder of the Class "B" shares, I should have had no difficulty in holding that, on the day of the deceased's death, no person in a market situation, no matter how unrestricted the market, would have paid any more than $10,725.98 to acquire the shares in question.

The appeal will be allowed and the assessment will be referred back to the respondent for re-assessment in accordance with the "Partial Minutes of Settlement" and the amended reply to the notice of appeal. As the respondent has been successful on the question that has been subject matter of the appeal since the filing of the amended notice of appeal, the respondent will have all its costs arising since that time and the appellant will be entitled to all its costs arising before that time. The one amount will be set against the other and there will be judgment for the difference in favour of the party that taxes the larger amount. As the costs on the "Second Matter in Appeal" fall in the period in respect of which the appellant is entitled to tax costs under this disposition of the matter, I will not make a separate order as to the costs of the Second Matter in Appeal as I had originally intended to do.

BETWEEN:

WILFRED ALAN WALKER and M. E. CLARK & SON LTD. .. SUPPLIANTS;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Edmonton 1968 Nov. 19-20
Ottawa 1968 Dec. 18

Petitions of right—Renewal clauses in leases of certain Crown lands—National Parks Act, S. of C. 1930, c. 33 (now R.S.C. 1952, c. 189)—42 years term of leases—1909 Regulations re-established by Order in Council P.C. 1336, June 6th, 1911, under Section 18(2) of the Dominion Forest Reserves and Parks Act, S. of C. 1911, c. 10—Saving provisions of section 36(c) of the Interpretation Act, S. of C. 1967-68, c. 7.

The issue was the enforceability of an alleged perpetual renewal clause in each of two leases held by the suppliants in respect to certain lands situated in Jasper National Park, Alberta.

Held: 1. That the applicable regulations under which these leases were originally granted were the 1909 Regulations as re-established by the Governor in Council by Order in Council P.C. 1336, dated June 6th, 1911, made under section 18(2) of the *Dominion Forest Reserves and Parks Act,* S. of C., 1911 c. 10.

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2. That the intention to covenant for perpetual renewal is unequivocally expressed in the renewal clauses in the subject leases, and also that there is no equivocation in the language employed in these relevant regulations and that those regulations gave the designated Minister, at this time, the power to grant leases containing a convenant giving the right of renewal in perpetuity; and that certain words contained in these covenants for renewal which the Minister had no power to insert at the time, are severable from the other clauses and can be disregarded, leaving the rest of the renewal clauses unaffected.

3. That the Parliament of Canada has not taken away the right of renewal contained in the subject leases by subsequent legislation and regulations in force now, because of the saving provisions of section 36(*c*) of the *Interpretation Act*, S. of C. 1967, c. 7.

4. That the fifth covenant of the two leases does not make applicable all Regulations in force at the original date of the subject leases or which were made thereafter in that behalf by the Governor in Council but instead the two leases are subject only to those Regulations which are in the nature of police regulations by reason of such fifth convenant in these leases.

5. That the Alberta *Land Titles Act* has no application to the issues herein;

6. That judgment go declaring that the suppliants are entitled to the relief sought by the petitions of right together with costs.

PETITIONS OF RIGHT tried on common evidence.

George H. Steer, W. C. and W. K. J. Mis for suppliants.

P. M. Troop for respondent.

GIBSON J.:—These two actions commenced by petitions of right were tried together on common evidence.

The issue in both is the enforceability of renewal clauses in each of two leases of certain lands situated in Jasper National Park, Alberta.

Presently, Jasper National Park is one of the National Parks of Canada constituted by the *National Parks Act*, Statutes of Canada 1930, chapter 33 (now Revised Statutes of Canada 1952, chapter 189).

The leases are from the respondent and are dated respectively October 1, 1924 (of the suppliant Walker) and October 1, 1925 (of the suppliant Clark). The renewal clauses are contained in the last two paragraphs of these leases and are identical in wording. The original term of each of these leases was 42 years and has expired. And each suppliant applied for a renewal of lease in accordance with these renewal clauses and was refused.

In the prayer for relief of these petitions of right the suppliants claim a declaration that they are entitled to renewal:

> for a further term of 42 years, commencing on October 1, 1966 and on October 1, 1967 respectively, containing all of the clauses in his or its original lease including the said clauses referred to in paragraphs 9 and 10, and 7 and 8, of their respective petitions, except as to rent to be paid, and that upon continuing to comply with the stipulations, terms and conditions of the said Indenture and upon paying the rent lawfully fixed from time to time, to successive renewals of the said term of 42 years forever.

The said renewal clauses read as follows:

> AND it is hereby agreed by and between the parties to these presents that if at the expiration of the said term of forty-two years the lessee shall be desirous of taking a renewal lease of the said demised premises, and shall of such desire prior to such expiration give to the Minister six months' notice in writing, and shall have paid the rent hereby reserved, and observed, performed fulfilled and abided by the stipulations, terms and conditions herein expressed and contained and on her part, to be observed, performed, fulfilled and abided by, then His Majesty, His successors or assigns shall and will grant unto the lessee the said demised premises for a second term of forty-two years, by a lease containing the like stipulations, terms and conditions as are in these presents expressed and contained, except as to the rent to be paid by the lessee during such second term, and that the amount of such rent, in case His Majesty, His successors or assigns, and the lessee shall fail to agree thereupon shall be fixed and determined by the award and arbitrament of three arbitrators, one of whom shall be named by the Minister, another by the lessee, and the third by the two so named, and said arbitrators in fixing the amount of such rent shall calculate the same altogether as ground rent of a parcel of land situated as the said premises shall then be situated, and the value of any buildings, tenements, houses or erections placed thereon by the lessee shall not be taken into account in fixing such rent; and the rent so to be fixed and determined shall be payable half-yearly as is hereinbefore provided with respect to the rent reserved under these presents, and shall commence immediately upon the termination of the term hereby granted.
>
> AND it is further agreed that if at the expiration of such second term the lessee shall be desirous of again renewing such lease, and shall give to the Minister the like notice as is hereinbefore provided with respect to the first renewal thereof, and shall have paid the rent, and observed, performed, fulfilled and abided by the stipulations, terms and conditions in the first renewal lease expressed and contained, then His Majesty, His successors or assigns shall and will grant a further renewal lease to the lessee for a further term of forty-two years, subject to the like stipulations, terms and conditions, as are hereinbefore provided with respect to such first renewal lease, the amount of rent to be payable under such second renewal lease to be fixed and determined in the manner above provided and set forth; and so on at the end of every renewal term; it being the true intent and meaning of these presents that

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at the end of the hereby granted term of forty-two years and also at the end of every renewal term of forty-two years, so to be granted as aforesaid, and upon the observance and fulfilment of, and compliance with the like requirements as are hereinbefore provided with respect to such first and second renewals, there shall be granted a further renewal term or lease of the said demised premises, containing the like stipulations, terms and conditions, and at a rent fixed and determined, as are hereinbefore respectively provided, and so on forever.

The lease of the suppliant Walker is of a cottage lot outside the townsite in Jasper National Park in a subdivision of Villa lots called Lake Edith Subdivision. His predecessor in title made application to lease these lands in this National (Dominion) Park of Canada and pursuant to the then relevant Regulations, after filing building plans and specifications with the Superintendent of the Park obtained a building permit and subsequently complying with the building requirements, built the cottage premises.

The lease of the suppliant Clark is of a commercial building lot in the townsite of Jasper National Park. The predecessor in title to Clark also made formal application to lease these lands in this National (Dominion) Park of Canada, filed building plans and specifications with the Superintendent of the Park pursuant to the then relevant Regulations, obtained a building permit and subsequently complying with the building requirements, built the commercial premises.

The term of the lease of the suppliant Walker expired on September 30, 1966 and as of that date this suppliant and his predecessors in title had paid the rent reserved, had performed, fulfilled and abided by the stipulations, terms and conditions expressed and contained in the lease and the suppliant Walker had, pursuant to the term of the lease on March 7, 1966, given six months' notice to the respondent of his desire to obtain a renewal of lease pursuant to the renewal clauses of the lease quoted above. The respondent did not grant and has not granted this suppliant a renewal of his said lease containing these two said renewal clauses above quoted, but instead tendered to him a lease of the said lands for a further term of 42 years commencing October 1, 1966, with no right therein of further renewal. This suppliant refused to accept the lease tendered to him by the respondent.

The term of the lease of the suppliant Clark expired on September 30, 1967, and, in like manner, as of that date the suppliant company and its predecessors in title had paid the rent reserved, had performed, fulfilled and provided by the stipulations, terms and conditions expressed and contained in the lease and this suppliant had, pursuant to the term of the lease on January 24, 1967, given to the respondent at least six months' notice in writing of its desire to obtain a renewal of the lease containing the said two last clauses of renewal above quoted. The respondent in this case also did not grant and has not granted to this suppliant company a renewal of the lease containing these said two last clauses of renewal above quoted, but instead tendered to it on September 30, 1966 a new lease for a further term of 42 years, with no right therein of further renewal. The suppliant company refused to accept this lease offered to it by the respondent.

After such refusals, the Superintendent of Jasper National Park informed each suppliant that he considered each to be an overholding tenant. The Superintendent did this by way of letter addressed respectively to each of the suppliants.

The suppliants then commenced these actions against the respondent.

For the purpose of adjudicating the issues in these actions, a determinative fact is that the lands described in each of these leases are located in one of the National Parks owned by Canada.

Since their first establishment, the National Parks of Canada have been the subject of considerable legislation by the Government of Canada and also a good deal of Regulations by Order in Council have been made under such legislation.

The substance of the adjudication in these actions, in brief, is the contractual lease rights of the suppliants under their said respective lease documents at the present time under and by reason of such legislation and Regulations.

A list of this legislation and Regulations is set out in Appendix "A" to these Reasons.

From this list, it will be noted that the first statute relevant to National Parks was *The Dominion Lands Act,*

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R.S.C., 1886, c. 45. This Act related to all lands in what is now Manitoba, Saskatchewan, Alberta and the territories owned by Canada.

From the lands described in that Act, then firstly there was carved out the Rocky Mountains Park (now Banff Park). This was done by the *Rocky Mountains Park Act,* S. of C. 1887, c. 32.

Then in 1906, there was next carved from the lands described in *The Dominion Lands Act,* the Dominion Forest Reserves. This was done by *The Dominion Forest Reserves Act,* S. of C. 1906, c. 14.

Then in 1911, there was carved from the Dominion Reserves, further Dominion Parks. This was done by *The Dominion Forest Reserves and Parks Act,* S. of C. 1911, c. 10 and Regulations made thereunder.

This latter Act also consolidated into one statute *The Dominion Forest Reserves Act,* relating (as stated) to "Forest Reserves" and the *Rocky Mountains Park Act* relating to "National Parks".

So, putting it another way, originally the "Forest Reserves" and "National Parks" were dealt with in separate statutes until 1911. The Parks were first dealt with by the *Rocky Mountains Park Act,* S. of C. 1887, c. 32 and the Forest Reserves were first dealt with by *The Dominion Forest Reserves Act,* S. of C. 1906, c. 14. Then in 1911, these two Acts were repealed and from that date until 1930, "Forest Reserves" and "National Parks" were dealt with by one Act, *The Dominion Forest Reserves and Parks Act,* S. of C. 1911, c. 10.

In 1930, by the Imperial Statute 21 Geo. V, c. 26, the *British North America Act, 1930,* the "Forest Reserves" (*inter alia*) owned by Canada situated in the Province of Alberta, were transferred to the Province of Alberta, but the Government of Canada for Canada retained ownership of the "National Parks", the Indian lands, veterans' lands and other lands and things, all of which is spelled out in that statute and the agreements forming part of it.

Going back and recapitulating, as of 1906 the three relevant Federal statutes then in force, (which were carried into the R.S.C. in 1906) were:

– *The Dominion Lands Act,* R.S.C. 1906, c. 55 (applicable to Manitoba, Saskatchewan, Alberta and the Territories of Canada).

– *The Dominion Forest Reserves Act*, c. 56.
– The *Rocky Mountains Park Act*, c. 60.

Then in 1911 by S. of C., c. 10, *The Dominion Forest Reserves and Parks Act* was passed.

This latter Act dealt with two separate and distinct matters, namely, firstly, with "Forest Reserves" and secondly with "National Parks" (or "Dominion Parks" as they were then called).

The scheme of this Act was as follows:

(i) that all the lands mentioned in the schedule to the Act were withdrawn from sale and no Dominion lands within the boundaries set forth in the schedule "shall be sold, leased or otherwise disposed of or be located or settled upon and no person shall use or occupy any part of such lands, except under the authority of the Act or of the Regulations made thereunder;"

(ii) that out of the lands set forth in the schedule, the Governor in Council under section 18 of the Act could from time to time "designate such reserves or areas within the forest reserves as he thought fit, to be and be known as Dominion Parks" and subject to the provisions of the Act, those parks were to be maintained and be made use of as public parks and pleasure grounds for the benefit, advantage and enjoyment of the people of Canada;

(iii) that under subsection (2) of section 18 of the Act, the Governor in Council was empowered to make Regulations with respect to the Dominion Parks; and

(iv) that under section 17 of the Act, the Governor in Council could make regulations for:

(*a*) the protection, care and management of reserves;

(*b*) the cutting and removal of timber, the working of mines, quarries and mineral deposits, the removal of sand, gravel, earth, stone or any other material, the pasturage of cattle, the use of hay lands, the establishment and use of reservoirs, water-power sites, power transmission lines, telegraph and telephone lines, and the granting of leases and permits therefor;

(*c*) the preservation of game, birds, fish and other animals, and the destruction of noxious, dangerous and destructive animals;

(*d*) the prevention and extinguishment of fire;

(*e*) the prevention of unauthorized business and traffic;

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(*f*) the removal and exclusion of undesirable persons and trespassers, and of persons making any unauthorized use of any reserve, or failing to comply with any regulation;

(*g*) the confiscation and disposal of things seized;

(*h*) all purposes necessary to carry this Act into effect according to its true intent and meaning.

It should be noted that Regulations made under section 18 of this Act were to apply to "National (Dominion) Parks" while Regulations made under section 17 of this Act were to apply to "Forest Reserves".

Regulations under both sections 17 and 18 of this Act were made and were in effect at all relevant times.

At all times, the Regulations dealing with "Forest Reserves" were different from the Regulations dealing with "National (Dominion) Parks". A consideration of the history of the "National (Dominion) Parks" Regulations demonstrates that the Regulations relating to "Forest Reserves" never did apply to "National Dominion) Parks".

The history of the "National (Dominion) Parks" Regulations is as follows:

(i) in 1889, by Order in Council P.C. 1350, the Governor in Council made the first set of Regulations for the control and management of the Rocky Mountains Park of Canada pursuant to section 4 of the *Rocky Mountains Park Act*. By section 13 of those Regulations, the Minister of the Interior had the power to cause certain portions of the park to be surveyed and laid out into building lots for the construction thereon of buildings for ordinary habitation and trade and industry and for the accommodations of persons resorting to the park and the power of lease given to the Minister of the Interior was prescribed in these words, *viz*: "may issue leases for such lots for any term, not exceeding 21 years at rentals to be from time to time fixed by him". By section 14 of those Regulations all leases of land within the park were subject to such Regulations;

(ii) on June 30, 1890, the said Regulations made in 1889 were rescinded and new Regulations were enacted. Insofar as the leasing of land was concerned, the change was that the Minister of Interior was, by paragraph 14 of those Regulations, authorized to

issue leases for such lots for any term, not exceeding 42 years, with the right of renewal, with rentals to be from time to time fixed by him;

(iii) the 1890 Regulations remained in force until 1909. On June 21, 1909 by Order in Council 1340, the Governor in Council made new Regulations to replace the 1890 Regulations. Whereas the 1890 Regulations only applied to the Rocky Mountains Park of Canada, these new Regulations were made to apply to that Park as well as to Yoho Park, Glacier Park, Jasper Park and Elk Island Park;

(iv) on June 6, 1911, the Governor in Council by Order in Council P.C. 1336, re-established the said Regulations of the National Parks of Canada, made in 1909. (*The Dominion Forest Reserves and Parks Act* came into force on May 19, 1911.)

(v) (an amending Act, S. of C. 1913, c. 18, amended section 18, but these latter Regulations were not changed then).

Instead, these latter Regulations remained in force until 1930. By virtue of section 9 of *The National Parks Act 1930,* these Regulations continued in force until repealed by Governor in Council. By Order in Council P.C. 1452 dated June 23, 1930, sections 2, 30, to 33 inclusive, and section 35 of the 1909 Regulations were rescinded and in respect of section 2 thereof the following Regulation was made and established to replace section 2:

> The Minister of the Interior may cause such portions of the park as from time to time he may designate to be surveyed and laid out in building lots, for the purposes of residence and trade and may issue leases to such lots for any term not exceeding 42 years, at rentals to be from time to time fixed by him and may issue licences for lots outside the townsite only for the entertainment of persons visiting the parks.

(vi) the 1909 General Regulations as amended in 1930 remained in force and effect, as amended, until 1947 when by Order in Council P.C. 5045 dated December 8, 1947 these Regulations were revoked and a new set of Regulations was made in place thereof entitled "General Regulations for the Control and Management of National Parks" and

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(vii) the 1947 Regulations remained in force and effect until 1954 when another set of Regulations made by Order in Council P.C. 1954-1918, on December 8, 1954 were passed which Regulations were also entitled "General Regulations for the Control and Management of National Parks". Then these Regulations were amended in 1962 to authorize the Minister to grant a lease for 42 years with an option for 21 years. These latter are the Regulations in force to-day.

So much for the history of the "National (Dominion) Parks" Regulations.

In 1923-1924 when the respective said subject leases of the suppliants were granted by the respondent, the Regulations in force firstly, respecting "National (Dominion) Parks" and, secondly, respecting "Forest Reserves" were as follows:

(i) Respecting "National (Dominion) Parks"

The June 21, 1909 Regulations made by Order in Council P.C. 1340, as re-established by Order in Council P.C. 1336 dated June 6, 1911, passed under the enabling authority of subsection 2 of section 18 of *The Dominion Forest Reserves and Parks Act 1911.*

(ii) Respecting "Forest Reserves"

The Regulations made by Order in Council P.C. 2028 dated August 8, 1913, (rescinding the Regulations of January 13, 1908 and October 19 (October 12) 1910) as further amended by Order in Council P.C. 2349 dated September 24, 1913 (which rescinded section 75 of the Regulations relating to Forest Reserves established by Order in Council of August 8, 1913 and substituted a new section 75).

So much for an outline of subject leases and relevant legislation and Regulations.

To determine the issues in both of these actions, it is necessary to resolve five questions, namely, firstly what were the applicable Regulations under which each of these subject leases was originally granted to the respective predecessors in title of the suppliants; secondly, whether the applicable Regulations authorized the designated Minister

at that time to grant leases of the respective lands described in these leases renewable in perpetuity; thirdly, whether the Parliament of Canada since the granting of the original leases and by the time in 1966 when the original term of 42 years in these leases had expired and the time for requesting the granting of renewals had come, has taken away the right to grant renewals in perpetuity if such right of renewal ever existed; fourthly, whether the fifth covenant in each of these leases makes applicable the present National Parks Regulations. The fifth paragraph of the leases read:

> That this lease and any renewal thereof, shall be subject to all Regulations for the control and management of Dominion Parks now in force, or which may hereafter be made from time to time in that behalf, by the Governor in Council.;

and fifthly, whether the Alberta *Land Titles Act* has any application to the issues herein.

As to the first question, namely, what is the applicable Regulation under which these respective leases were originally granted, it is the submission of the suppliants that these leases were granted pursuant to the Regulations P.C. 2028 passed August 8, 1913 under the authority of the 1913 statute amendment to *The Dominion Forest Reserves and Parks Act*, c. 18, of the Statutes of Canada 1913 assented to June 6, 1913, referred to above. Specifically, the suppliants submit that sections 64 and 65 of Regulation numbered P.C. 2028 passed on August 8, 1913, were the relevant enabling authority under which the suppliant Walker's lease was originally granted, and that section 75 of the said Regulation as amended by Order in Council 2349 on September 24, 1913, referred to above, was the relevant enabling authority under which the suppliant Clark's lease was originally granted.

These Regulations read as follows:

> 64. The Minister is authorized to lease lands for the following purposes, and under the conditions hereinafter provided:
> (*a*) Surface rights for mining claims.
> (*b*) Schools, churches, club-houses, sanitaria and cemeteries.
> (*c*) Summer resort lots.
> Conditions governing the leasing of lands for above purposes:
> (*a*) ...
> (*b*) ...
> (*c*) Leases for building lots within duly established summer resorts, on such form as is approved by the Minister, may be granted

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for a period of forty-two years renewable in like periods at a rental to be fixed by the Minister. Such rental shall be subject to readjustment in the year 1920 and at the end of each period of ten years thereafter.

Before a lease is issued in favour of any applicant he shall be required to execute an agreement by which he will undertake to erect and complete within one year to the satisfaction of the forest officer in charge of the reserve a building for residential purposes according to plans and specifications previously approved by the said forest officer, and on fulfilment of the terms of the agreement the lease shall be granted. No building shall be erected or used for other than residential purposes except by special authorization of the Minister.

(*d*) Leases shall not be transferable without the written consent of the Minister.

65. Permits for periods not exceeding one year for the construction of buildings, fences or other works or structure on forest reserves and the occupation of the lands necessary for any purpose authorized by the regulations may be granted by the Director or any other officer "acting under his instructions, subject to such terms and conditions as may be determined by the Minister. The Minister may in his discretion put the right up to tender."

75. The Minister may establish townsites in forest reserves in his discretion, may subdivide the townsites into lots and may lease the lots, fixing rentals and terms of payment, subject to the following conditions:—

(*a*) The lease of each lot shall be subject to the lessee's entering into an agreement to erect within one year a building satisfactory to the forest officer in charge of the reserve, and no lease shall be issued until the terms of the agreement have been complied with. Agreements shall not be transferable. Failure to fulfil an agreement shall render it liable to cancellation.

(*b*) If the townsite is being established in connection with mining or other industrial operations, the company carrying on such operations may be permitted by the Minister to lease such number of lots as may be necessary for the erection of buildings in connection with the operations, without restriction as to the buildings on individual lots.

The submission of the respondent on this question is that the said referred to 1913 Regulations passed pursuant to the 1913 amendment to *The Dominion Forest Reserves and Parks Act* were Regulations in respect to "Forest Reserves" only and were not Regulations which in any way related to "National (Dominion) Parks"; and further and instead that the Regulations with respect to "National (Dominion) Parks" which are relevant and were existing in 1923-1925 and were the authority under which both these subject leases were originally granted, were the said 1909 Regulations as re-established by the Governor in Council by Order

in Council P.C. 1336 dated June 6, 1911, made under section 18(2) of *The Dominion Forest Reserves and Parks Act*, S. of C. 1911, c. 10.

In my view, the submission of the respondent on this question is the correct statement of the applicable law.

As to the second question, namely, whether the applicable Regulations authorized the designated Minister at the time to grant the said leases renewable in perpetuity, it should be noted firstly, that there is no reason in law why a lease renewable in perpetuity cannot be granted if the words of the clauses giving the right to such renewal are clear and unequivocal. (See *Re Jackson v. Imperial Bank of Canada*[1], Falconbridge C.J.; and cf. *Wilson v. Kerner*[2], Teetzel J.; *Gooderham & Worts Ltd. v. Canadian Broadcasting Corp.*[3] Imp. P.C.); and secondly, that a covenant for perpetual renewal is not bad under the perpetuity rule (see *Shem Bridges v. John Hitchcock et al*[4]; *Woodall v. Clifton*[5]; *Rider v. Ford*[6]).

As to the wording in the renewal clauses in the subject leases, it is common ground and I agree that the intention to covenant for perpetual renewal is unequivocally expressed.

But there is a further problem. This further problem is whether or not there is any equivocation in the language employed in the Regulations which authorized the making of these leases, and if there is, do these Regulations also have to be in language unequivocally expressing the intention to give the power to grant a lease containing a covenant for perpetual renewal? In other words, does the rule of construction or interpretation applicable to covenants of perpetual renewal of a lease apply with equal force to the construction of a Regulation granting the power to make a lease containing such a covenant for renewal?

The relevant words from section 2 of the Regulations of the National Parks of Canada, 1909 P.C. 1340 as re-enacted 1911, P.C. No. 1340 prescribing the power under which the subject leases were granted containing the said covenant for

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[1] (1917) 39 O.L.R. 334.
[2] (1911-12) 3 O.W N. 769 at 770.
[3] [1947] 1 D.L R 417 (Imp. P.C.).
[4] (1715) 5 Bro. Parl. Cas. 6.
[5] [1905] 2 Ch. Div. 257.
[6] [1923] 1 Ch. Div. 541.

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renewal clauses are: "for any term not exceeding 42 years, with the right of renewal, at rentals to be from time to time fixed by him".

Do these words give the power to grant the right of one renewal only, as submitted by the respondent or the right of renewal in perpetuity as submitted by the suppliants? In other words, for example, do these words mean the same as if they read "with the right of one renewal" or "with the right of a renewal"; or do these words means the same as if they read "with right of renewal"?

As to this, I am of opinion that there is no equivocation in the language employed in these relevant Regulations, and that they gave the designated Minister at this time the power to grant leases containing a covenant giving the right of renewal in perpetuity. As a consequence, it is not necessary to express an opinion as to whether the rule of construction or interpretation applicable to covenants for perpetual renewal of a lease apply with equal force to the construction of Regulations such as the subject Regulations granting the power to make a lease containing such covenants.

There is also another part, however, to this second question that also must be resolved. It has to do with severability.

As to this, the Minister of the Interior at the time had the power by the Regulations quoted above to renew "at rentals to be from time to time fixed by him".

In the first of the two covenants for renewal clauses in each of the subject leases (quoted above in full) there appear the words "except as to the rent to be paid by the lessee during such second term, and that the amount of such rent, in case His Majesty, His successors or assigns, and the lessee shall fail to agree thereupon, shall be fixed and determined by the award and arbitrament of three arbitrators, one of whom shall be named by the Minister, another by the lessee, and the third by the two so named, and said arbitrators in fixing the amount of such rent shall calculate the same altogether as ground rent . . ."

There clearly was no power given at the time to the Minister of the Interior by the words from the Regulations quoted above to insert the above quoted words in this covenant for renewal clause in each of the leases. The

Minister's power only was to insert a clause implementing the power given by the words reading "at rentals to be from time to time fixed by him".

These same comments apply to the appropriate words used in the second covenant for renewal clause concerning the fixation of the rentals.

The problem is—are these words severable from the clause (and the applicable words in the second clause also severable from the second clause) and can they be disregarded leaving the rest of this clause unaffected? Putting it another way, if these words are removed, is there a rent clause left?

Specifically, are the words "except as to the rent to be paid by the lessee during such second term" (which would be the relevant words left in the first clause if the offending words were deleted) sufficient to reserve to the Minister, as was his only power, the right to fix the rent; or is this clause deficient in that there is no reservation of fixation of rent to the Minister, and as a consequence, the clause fails *in toto*; that is, is what is left of this clause, after such severance, too vague and uncertain to be enforceable, and therefore void; or putting it in other words, since the Regulations made under section 18 of *The Dominion Forest Reserves and National Parks Act,* at the material time, required the Minister of the Interior to reserve to himself the power to fix the rent from time to time in the subject leases and in any renewals thereof, and since the covenants for renewal in both the subject leases do not reserve to the Minister the power to fix the rent from time to time, and if it is permissible and the offending words are severed from these clauses, does it follow, as a matter of law, that each of these subject leases lack one of the essential terms of an agreement to renew a lease namely, the rent to be paid, so that the agreements to renew contained in the said two covenants to renew clauses in each of the subject leases are too vague or uncertain to be specifically decreed?

As to this, I am of opinion firstly, that the offending words are severable from each of the renewal clauses and can be disregarded, leaving the rest of the clauses unaffected; and secondly, that, on the true interpretation, these clauses do reserve to the designated Minister the power to fix the rent from time to time in the way it

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always was intended. It was intended that the designated Minister fix the rent payable pursuant to leases renewed under such covenants to renew by way of a general Regulation applicable to all leases of the same category as the subject leases in National Parks and not by a series of single Regulations applicable only to each individual lease of lands in National Parks, and therefore the subject leases do not lack this essential term of an agreement to renew a lease, namely, the rent to be paid.

As to the third question, namely, whether or not the Parliament of Canada has taken away the right of renewal if such renewal existed, the submission of the respondent is that these covenants for renewal in the subject leases have always been subject to the infirmity that at the time these covenants became operative, there must be authority to grant a lease in the terms of the covenants; and that if such power did not exist at that time, then, the covenants are unenforceable. Putting it another way, the submission is that, such covenants are subject to the implied condition that at the time when the renewal leases are to be granted, the lessor has the legal power and authority to grant the leases in the terms of the covenants. For this submission the respondent relies on: *Gas Light and Coke Co. v. Towse*[7]; *Rayonier B.C. Ltd. v. City of New Westminster*[8] Tysoe J.; and *Mauray v. Durley Chine (Investments) Ld.*[9].

It is clear that the Regulations in force now (which were the same as those in force at the expiry date of each of these leases, namely, 1966) as noted above, are different than the 1909 Regulations as re-enacted in 1911, under which the leases were originally granted; and that the Regulations in force now do not give the designated Minister the power to grant leases containing renewal clauses such as are in the subject leases.

In resolving this question, it is of relevant significance that the Imperial Statute of the *British North America Act 1930,* 21 Geo V, c. 26 above referred to, as Clause 1 reads:

> 1 The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding

[7] (1887) 35 Ch. Div. 519.

[8] (1961-62) 36 W W R 433 (B C.C A) at pp 441-42 and 444; (1962) 32 D.L R. (2d) 596 (S C.C)

[9] [1953] 2 Q B. 433.

anything in the British North America Act, 1867, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

(And the Agreement in the said schedule with respect to the Province of Alberta at Clause 1 reads:)

1. ... the interest of the Crown in all Crown lands ... shall, from and after the coming into force of this Agreement ... belong to the Province ... subject ... to any interest other than that of the Crown in the same, ...

(Underlining is mine)

And Clause 14 of that Act regarding National Parks is also of relevant significance. It reads:

14. The parks mentioned in the Schedule hereto shall continue as national parks and the lands included therein, as the same as described in the Orders in Council in the said Schedule referred to (except such of the said lands as may be hereafter excluded therefrom), together with the mines and minerals (precious and base) in each of the said parks and the royalties incident thereto, shall continue to be vested in and administered by the Government of Canada as national parks, but in the event of the Parliament of Canada at any time declaring that the said lands or any part thereof are no longer required for park purposes, the lands, mines, minerals (precious and base) and the royalties incident thereto, specified in any such declaration, shall forthwith upon the making thereof belong to the Province, and the provisions of paragraph three of this agreement shall apply thereto as from the date of such declaration.

(Underlining is mine)

The excerpts from the said Imperial Statute illustrate the usual legislative intent and result *qua* existing rights and liabilities of third parties other than the Crown in right of Canada and the Provinces.

Such legislative intent and result obtains generally in respect to all Government of Canada legislation and the Regulations made thereunder. This is so by virtue of section 36(*c*) of the *Interpretation Act*, S. of C. 1967-68, c. 7.

Section 36(*c*) of the *Interpretation Act* provides:

36 Where an enactment is repealed in whole or in part, the repeal does not

...

(*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed.

Each of the options to renew in these subject leases granted by the two renewal clauses created an interest in

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the lands described in the respective leases in each lessee suppliant (cf. *London and South Western Ry. Co. v. Gomm*[10]); and in my view, each lessee suppliant in consequence thereof, "acquired" a "right", or a "privilege", and by the same document the lessor respondent "incurred" an inchoate "obligation or a "liability" within the meaning of those words as employed in said section 36(*c*) of the *Interpretation Act.*

As a consequence, in my view, the renewal covenants in the subject leases are not subject to the infirmity that at the time they became operative, namely, 1966, there must be the current power by Regulations or legislation for the designated Minister to grant leases in the terms of these renewal covenants.

As to the fourth question, namely, whether the fifth covenant in each of the subject leases makes applicable all Regulations for the control and management of National Parks in force at the original dates of the subject leases, or which were made thereafter from time to time in that behalf by the Governor in Council, the suppliants submit that this provision refers to Regulations which may be made from time to time which are in the nature of police regulations, and not of the type, such as is the case here, empowering or not, the designated Minister to do what is in issue in this action. The respondent on the other hand submits that this provision makes all leases such as the subject leases subject to all Regulations for the control and management of the parks in force at the original date of the leases or which thereafter may be made from time to time by the Governor in Council without limitation as to type.

I am of the view that the suppliants' submission is the true interpretation of the meaning of the fifth covenant in the subject leases.

As to the fifth question, namely, whether the Alberta *Land Titles Act* has any application to the issues in these actions, the same may be resolved by considering two aspects of it and deciding:

Firstly, it is the rights as between the parties in these actions and not the rights as against any third parties that are in issue. For this reason, the matter of how the certificates of title respectively granted to the suppliants under

[10] (1881-82) 20 Ch. Div. 562 at 580.

the Alberta *Land Titles Act* read is irrelevant. The supporting documents can and must be looked at to determine the true interpretation of them as between the parties. (cf. *C.P.R. Co. and Imperial Oil v. Turta*[11]).

Secondly, contrary to the submission of the suppliants, I am of the view that it is irrelevant to this question (1) the fact that the designated Minister or Deputy Minister of the respondent in about 1917 requested the Government of the Province of Alberta to amend the Alberta *Land Titles Act* to permit the registration of duplicate originals or copies duly certified by the designated Federal Government officials of any leases or other registerable instrument or instruments in connection with or relating to the title to land situated within the area set out for National Parks; (2) or the fact that the respondent in 1922 and in 1925 filed or registered certain subdivision plans, in the Land Titles Office in Edmonton under the provisions of section 67 of *The Dominion Land Surveys Act;* (3) or the fact that the suppliants hold certificates of title or duplicate certificates of title issued under the Alberta *Land Titles Act* (even though at no time did the respondent ever file or register in Alberta Land Titles Office any title to the lands in the subject leases so that a certificate of title under the Alberta *Land Titles Act* was issued to the Crown respondent in respect to such lands). In my view, the title of the respondent to the lands described in the subject leases by reason of any of the above Acts and facts has not been brought under nor is it otherwise subject to the Alberta *Land Titles Act;* and the respondent, by reason of them, or any of them, is not estopped from challenging the validity of these renewal clauses in the subject leases.

In any event, in respect to this fifth question, there can be no estoppel in the fact of the express provisions in the Imperial Statute, *British North America Act, 1930* above quoted where at paragraph 15 of the Agreement respecting the Province of Alberta it is provided, among other things, in relation to National Parks, that "The Parliament of Canada shall have exclusive legislative jurisdiction within the whole area included within the outer boundaries of each of the said parks notwithstanding

[11] [1954] S C R. 427.

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that portions of such area may not form part of the park proper; the laws now in force within the said areas shall continue in force only until changed by the Parliament of Canada or under its authority, provided, however, that all laws of the Province now or hereafter in force, which are not repugnant to any law or regulation made applicable within the said area by or under the authority of the Parliament of Canada, shall extend to and be enforceable within the same, . . ." (cf. *Gooderham & Worts Ltd. v. Canadian Broadcasting Corp.*[12]). The relevant Regulations and legislation of the Parliament of Canada insofar as they are applicable to the determination of the issues herein are not repugnant to any provision of the Alberta *Land Titles Act*, in my view. But even if they were by virtue of this express provision in this Imperial Statute, there can be no estoppel.

In the result therefore, there will be Judgment declaring the suppliants are entitled to the relief sought by their petitions of right together with costs.

APPENDIX "A" TO THE REASONS FOR JUDGMENT
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LIST OF LEGISLATION AND REGULATIONS MADE THEREUNDER

Statutes of Canada

A.	1886 – chapter 54	*The Dominion Lands Act*
	1887 – chapter 32	*Rocky Mountains Park Act*
	1902 – chapter 31	An Act to amend *The Rocky Mountains Park Act*
	1906 R S C. – chapter 44	An Act to amend *The Rocky Mountains Park Act*
	1906 R S C. – chapter 14	*The Dominion Forest Reserves Act*
	1906 R S C. – chapter 55	*Dominion Lands Act*
	1911 – chapter 10	*The Dominion Forest Reserves and Parks Act*
	1913 – chapter 18	An Act to amend *The Dominion Forest Reserves and Parks Act*
	1916 – chapter 15	An Act to amend *The Dominion Forest Reserves and Parks Act*

[12] [1947] A.C. 66; [1947] 1 D L R 417 (Imp P C).

1918 – chapter 4	An Act to amend *The Dominion Forest Reserves and Parks Act*
1919 – chapter 17	An Act to amend *The Dominion Forest Reserves and Parks Act*
1919 – chapter 49	An Act to amend *The Dominion Forest Reserves and Parks Act*
1927 R S C. – chapter 78	*Dominion Forest Reserves and Parks Act*
1927 R S.C. – chapter 117	*Dominion Lands Surveys Act*
1928 – chapter 44	An Act relating to the submission to Parliament of Certain Regulations and Orders in Council
1930 – chapter 33	*The National Parks Act*

B Imperial Statute

1930 – 21 Geo V. – chapter 26	*The British North America Act*

C Statutes of Alberta

1917 – chapter 3	An Act to amend the Statute Law
1955 – R.S A. – chapter 170	*The Land Titles Act*

D Orders in Council — Regulations

1889 – P C. 1350	Regulations for the control and management of the Rocky Mountains Park of Canada
1890 – P.C. 1694	Regulations for the control and management of the Rocky Mountains Park of Canada
1909 – P C. 1340	Regulations of the National Parks of Canada
1911 – P C 1333	Re-establishing and making applicable to the Forest Reserves certain Regulations
1911 – P C 1336	Re-establishing and making applicable to the Dominion Parks, Regulations
1913 – P.C 2028	Regulations for Dominion Forest Reserves
1913 – P C 2275	Regulations Respecting Buildings in Dominion Parks
1913 – P C 2349	Amending Section 75 of the Regulations relating to Forest Reserves
1930 – P C 1452	Amending National Parks Regulations
1954 – P C 1954-1918	National Parks General Regulations
1958 – P C 1958-1100	National Parks General Regulations, amended
1962 – P.C 1962-268	National Parks General Regulations, amended.

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E. Orders in Council (Jasper Park)	Establishing The Jasper Forest Park
1907 - P C. 1323	
1909 - P.C. 1068	Substituting a new description for The Jasper Forest Park
1911 - P.C. 1165	Substituting a new description for Jasper Park
1927 - P.C 637	Addition to Jasper Park
1929 - P.C. 159	Additions to Jasper Park.

Ottawa 1968

Dec 17

Dec 20

BETWEEN:

LIBBEY-OWENS-FORD GLASS COMPANY ..... PLAINTIFF;

AND

FORD MOTOR COMPANY OF CANADA, LIMITED ..... DEFENDANT.

AND BETWEEN:

LIBBEY-OWENS-FORD GLASS COMPANY ..... PLAINTIFF;

AND

FORD MOTOR COMPANY OF CANADA, LIMITED ..... DEFENDANT;

AND

SELAS CORPORATION OF AMERICA, (INC.) ..... THIRD PARTY.

(No. 1)

Practice—Motion for summary judgment on defendant's admission—R 256B(2)—Action for infringement of certain claims in patent—Admission of infringement of patent—Ambiguity—Purpose of Rule

During the trial of an action for infringement of certain patent claims defendant's counsel wrote to plaintiff's counsel stating *inter alia* that defendant admitted infringement of the patents (but not indicating any specific claims) subject to argument as to their validity etc On the strength of that admission plaintiff moved under Rule 256B(2) for an order that defendant had infringed the four patents

Held, the admission was too ambiguous to support the order sought *Adcock et al v Algoma Steel Corp Ltd et al* [1968] 2 O R 647, approved Moreover Rule 256B(2) is not applicable that rule is intended to apply where there is more than one cause of action or claim, to permit one to be disposed of before the others.

MOTION.

C. R. Carson for plaintiff.

Donald F. Sim, Q.C. for defendant.

JACKETT P.:—In these two cases, in which the plaintiffs and defendants are the same, the plaintiff has moved for judgment under Rule 256B(2) which reads as follows:

> (2) A party may, at any stage of an action, apply for such judgment or order as he may, upon any admission of fact in the pleadings, or in the examination of any other party, be entitled to; and it is not necessary to wait for the determination of any other question between the parties; or he may so apply where the only evidence consists of documents and such affidavits as are necessary to prove their execution or identity without the necessity of cross-examination, or, where infants are concerned, and evidence is necessary so far only as they are concerned, for the purpose of proving facts that are not in dispute

In action No. B-288 the plaintiff claims against the defendant for alleged infringement of Canadian patents Nos. 653,277 and 488,745, and in action No. B-1015 the plaintiff claims against the defendant for infringements of Canadian patents Nos. 470,044 and 613,040.

On November 13, 1967, one of counsel for the defendant wrote to one of counsel for the plaintiff as follows:

> This will confirm the arrangements we have made with respect to the inspection of the Ford plant.
>
> (1) The inspection is now scheduled to take place at 12 30 p m. on Tuesday, November 28th, 1967.
>
> (2) The parties making the inspection will be yourself, Mr Henderson, Mr Nobbe and one technical representative of L-O-F.
>
> (3) You and each of the persons making the inspection have agreed that information obtained during the inspection will be used only for the purposes of the two pending actions and will not be used for any commercial or other purpose
>
> (4) The inspection is to be of the vinyl stretching operations carried on by Ford and of the prepressing and tacking operations
>
> (5) The inspection shall be without prejudice to your right to apply to the Court for further or other inspections.
>
> (6) L-O-F agrees to consent to and cooperate with Ford in obtaining an order directing a preliminary trial between the parties relating to the plea of license under patents Nos 486,072, 486,073, 488,745, 488,746, 513,738, 549,068, 726,061 and 727,546 and the plea based upon Section 58 in respect of patent No 653,277
>
> (7) Ford agrees that proceedings in the remaining portions of the actions may proceed in the normal course and undertakes not to seek any stay or delay thereof on the grounds of the separate and preliminary trial above referred to.

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Jackett P.

(8) Ford admits that it has infringed Canadian Patents Nos. 470,044, 488,745, 613,040 and 653,277 subject to and reserving all arguments as to validity, license and Section 58 in respect thereof.

Would you kindly indicate your acceptance of this and provide us with evidence that the parties making the inspection apart from yourself and Mr Henderson are aware of and consider themselves bound by the provisions of (3) above

On November 4, 1968, action No. B-228 went to trial pursuant to an order that the action be set down for a trial to be limited to the question whether, assuming the validity of patent No. 653,277, the defendant is liable for infringement of that patent. During the course of that trial, the question arose as to the effect of the part of the letter quoted above, which reads as follows:

> (8) Ford admits that it has infringed Canadian Patents Nos. 470,044, 488,745, 613,040 and 653,277 subject to and reserving all arguments as to validity, license and Section 58 in respect thereof

Mr. Justice Thurlow, who presided at that trial, has this among other matters under consideration at the present time.

In these circumstances, the plaintiffs motion under Rule 256B(2) is, in action No. B-228, "for an order that the defendant has infringed Canadian patent No. 488,745 in suit", and in action No. B-1015, "for an order that the defendant has infringed Canadian patents Nos. 470,044 and 613,040 in suit".

Counsel for the defendant moved for the dismissal of these applications on a number of grounds. I heard argument of counsel on the basis that, if I concluded that the motion should be dismissed, either

(a) because, there being a serious question to be argued, in the exercise of a proper judicial discretion, the application should be dismissed, or

(b) because the application is not for such a "judgment or order" as is contemplated by Rule 256B(2),

I will dispose of the motion accordingly, but, if I come to the conclusion that the application should be considered on its merits, the matter should be left over for further argument, possibly after Mr. Justice Thurlow has delivered his decision on the matter that he has under consideration.

Quite apart from the further material that counsel for the defendant has indicated that he would find it advisable

to put before the court, there is no doubt in my mind that the effect of paragraph (8) in the letter quoted above is so ambiguous that it would not be proper to grant a motion for judgment under Rule 256B on the basis thereof.

The statement of claim alleges that the defendant has "infringed the rights of the plaintiff" under the respective letters patent. The "Particulars of Breaches" specify, in respect of each patent, that "The plaintiff will rely upon" certain specified claims of the said letters patent.

If orders are granted in the terms sought by the applications, they would only determine that the defendant "has infringed" a particular Canadian patent. In such event, there would be no determination that the defendant has infringed the monopoly defined by any particular claim in a patent. There is, however, an attack on the validity of the patents and it may well transpire that some of the claims are valid and others are invalid. Such an order would, in such an event, be no basis for an ultimate judgment in the action in which it was made because it would not determine that there had been an infringement of a valid claim.

If, on the other hand, the applications are treated as being for orders adjudging that the defendant has infringed all the claims on which the plaintiff relies, if the plaintiff is to succeed on the motion, it must be on the basis that an admission by the defendant "that it has infringed Canadian patents Nos. 470,044, 488,745, 613,040 and 653,277 . . ." is an admission that the defendant has infringed every one of the claims in the respective patents upon which the plaintiff relies. Taking the words that I have quoted by themselves, it seems to me that it is at least arguable that it is no more than an admission that the defendant has committed at least one act of infringement in respect of each of the specified patents.

In the circumstances, having regard to the decision in *Adcock et al. v. Algoma Steel Corp. Ltd. et al.*[1] and the authorities referred to therein, I have come to the conclusion that the application should be dismissed with costs to the defendant in any event of the cause.

[1] [1968] 2 O. R. 647

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Had I not come to the above conclusion, I should, as I see the matter now, have come to the conclusion that the application would have had to be dismissed because the application for a declaration that the defendant has infringed any letters patent is not the sort of "judgment or order" contemplated by Rule 256B(2). In my view, Rule 256B(2) is intended for the cases where more than one cause of action or claim arises in the same legal proceeding and, having regard to admissions that have been made, a particular cause of action or other claim can be wholly and finally disposed of without waiting for the disposition of the other causes of action or claims in the proceeding.

The application in each action will be dismissed with costs to the defendant in any event of the cause.

Montreal
1968
Dec 18
Dec. 23

BETWEEN:

LORD ELGIN HOTEL LIMITED .....APPELLANT;

AND

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

Income tax—Ontario corporation appealing from dismissal of appeal by Tax Appeal Board—Dissolution of corporation whilst appeal pending—Status of appeal—Corporations Act, R.S.O. 1960, c. 71, s. 326a(b), construction of.

Lord Elgin Hotel Limited, an Ontario corporation, appealed to this court from the dismissal of an appeal by the Tax Appeal Board. Whilst the appeal to this court was pending the corporation was dissolved under s. 326(2) of the *Corporations Act*, R.S.O. 1960, c. 71.

Held, quashing the appeal, the corporation's existence was not prolonged by s. 326a(*b*) beyond three years from the dissolution. The judgment of the Tax Appeal Board dismissing the corporation's tax appeal could not be regarded as not "fully executed" within the meaning of s. 326a(*b*).

HEARING on order to respondent to show cause why appeal should not be quashed.

A. Garon and *G. J. Rip* for respondent.

Maurice A. Regnier, amicus curiae.

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JACKETT P.:—In this income tax appeal, there was argued before me, on an order made by the court of its own motion to the respondent to show cause, the question whether this appeal should be quashed on the ground that there is no appellant.

The circumstances giving rise to the show cause order are as follows:

1. On September 18, 1964, the Tax Appeal Board dismissed the named appellant's appeal from its income tax assessments for 1958 and 1959.

2. On January 7, 1965, the named appellant filed an appeal from that decision in this court.

3. On October 7, 1965, the Provincial Treasurer of Ontario made an order reading in part as follows:

> NOW THEREFORE KNOW YE that I, JOHN YAREMKO, Provincial Secretary and Minister of Citizenship, do by this order hereby cancel the Letters Patent of the following corporation:
>
> | NAME OF CORPORATION | DATE OF INCORPORATION |
> |---|---|
> | Lord Elgin Hotel Limited | January 5, 1950 |
>
> and declare that the said Corporation shall be dissolved on the Eleventh day of November A.D. 1965.

4. The notice of appeal having been amended on December 27, 1966, a reply was filed by the respondent on October 8, 1968, alleging *inter alia* that the appellant had been "declared to be dissolved on November 11, 1965".

5. On November 8, 1968, my brother Noël made an order reading as follows:

> Upon application by counsel on behalf of the appellant and upon hearing read the pleadings herein and upon hearing what was alleged by counsel on behalf of the appellant;
>
> THIS COURT DOTH ORDER that prior to the trial of this appeal, the following question of law:
>
> Whether the appellant will continue in existence after the 11th day of November 1968, notwithstanding the cancellation of its letters patent and its dissolution on the 11th day of November 1965, pursuant to subsection 2 of section 326 of the Corporations Act, Revised Statutes of Ontario, 1960, c. 71, with the consequence that this appeal will become a nullity,
>
> be decided by special case stated for the opinion of this Honourable Court on the 18th day of December 1968 at 2:00 o'clock in the afternoon.

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6. When the matter came on, pursuant to that order, for hearing before me, Mr. Regnier, who had appeared for the named appellant on the application for the order of November 8, 1968, appeared and indicated that he had formed the view that the appellant had ceased to exist on November 11, 1968, and had therefore concluded that whatever mandate he had had to act on behalf of the named appellant had come to an end so that he had not been able to agree on behalf of the named appellant to a special case, and could not appear for it at the hearing. That being so, it was impossible to proceed with the argument of the question of law pursuant to the order made by my brother Noël.

7. Nevertheless, it appeared that the question whether the named appellant was an existing person or not required to be determined before the court could know whether these appeals were before it, and counsel for the respondent indicated that he had instructions to contend that the appellant was still in existence. Furthermore, Mr. Regnier, who had prepared himself to take the opposite view, was agreeable to assisting the court in the matter. I therefore ordered the respondent to show cause why the appeal should not be quashed on the ground that there was no appellant, and I directed Mr. Regnier to assist the court as *amicus curiae*. That order reads as follows:

> The Court having assembled to hear the question of law set down by Mr. Justice Noël by his order of November 8, 1968, to be decided by special case;
>
> Mr. Regnier having explained to the court that he had not signed a special case because, before the case was ready to be signed the appellant, in his view, no longer existed, and he, Mr. Regnier, could not therefore regard himself as having any mandate to act for the appellant;
>
> It appearing from the letters patent incorporating the appellant (a copy of which is attached hereto as Schedule A to this order) and from the order of the Provincial Secretary of Ontario dated October 7, 1965 (a copy of which is attached hereto as Schedule B) that an order was made by the Minister purporting to dissolve the appellant with effect November 11, 1965;
>
> It is hereby ordered that this hearing be turned into the hearing of a show cause order directed to the respondent to show cause why the appeal should not be quashed on the ground that there is no appellant.

It is further directed that Mr. Regnier, who has prepared himself to make submissions on the legal question involved, be directed to assist the court on the hearing as an *amicus curiae*.

Counsel being ready, the argument proceeded forthwith after the order was made.

The relevant provisions of the *Ontario Corporations Act*, R.S.O. 1960, chapter 71, as amended, read as follows:

5. The Provincial Secretary may in his discretion and under the seal of his office have, use, exercise and enjoy any power, right or authority conferred by this Act on the Lieutenant Governor, but not those conferred on the Lieutenant Governor in Council.

* * *

326 (2) Where it appears that a corporation is in default for a period of one year in filing its annual returns under *The Corporations Information Act* or a predecessor thereof and that notice of such default has been sent by registered mail to each director of record in the office of the Provincial Secretary to his last address shown on the records of that office and has been published once in *The Ontario Gazette*, the Lieutenant Governor may by order,

(*a*) cancel the letters patent of the corporation and declare it to be dissolved on such date as the order fixes; or

(*b*) declare the corporate existence of the corporation, if it was incorporated otherwise than by letters patent, to be terminated and the corporation to be dissolved on such date as the order fixes.

(3) Where a corporation has been or is dissolved under subsection 2, the Lieutenant Governor, on the application of any interested person made within one year after the date of dissolution, may in his discretion by order, on such terms and conditions as he sees fit to impose, revive the corporation, and thereupon the corporation shall, subject to the terms and conditions of the order and to any rights acquired by any person after its dissolution, be restored to its legal position, including all its property, rights, privileges and franchises, and be subject to all its liabilities, contracts, disabilities and debts, as at the date of its dissolution, in the same manner and to the same extent as if it had not been dissolved.

326a Notwithstanding its dissolution under section 326, a corporation continues in existence,

(*a*) for a period of three years after the date of its dissolution for the purpose only of prosecution or defending any action, suit or other proceeding commenced by or against it prior to its dissolution; and

(*b*) until such time, beyond the three-year period mentioned in clause *a*, if necessary, as any decree, order or judgment of a court of competent jurisdiction in any such action, suit or other proceeding is fully executed.

It is clear that the named appellant was a corporation that had been created by letters patent and that the Provincial Secretary did, pursuant to section 5 of the

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Ontario Corporations Act, exercise the power conferred on the Lieutenant Governor by section 326(2) of that Act to cancel the letters patent of the corporation and declare it to be dissolved on November 11, 1965.

The only problem arises under section 326a. Counsel for the respondent agrees that, as far as paragraph (*a*) of that section is concerned, the named appellant's existence was only continued to November 11, 1968, for the purpose of prosecuting the appeals from the income tax assessments which had been commenced prior to its dissolution on November 11, 1965. He agrees further that he can only rely on paragraph (*b*) for a further extension of the existence of the named appellant if there is an order or judgment of a court of competent jurisdiction in a legal proceeding of the kind referred to in paragraph (*a*) that had been made before the expiration of the three-year period referred to in paragraph (*a*), and that was not "fully executed" on the expiration of that period.

Counsel for the respondent relies on the judgment of the Tax Appeal Board dismissing the appeal as being a judgment made before the expiration of the three-year period that is not as yet "fully executed". That judgment reads as follows:

> "The appeal herein is hereby dismissed."[1]

Counsel's submission was that, if the words of section 326a(*b*) are to have any meaning in respect of such judgment, it cannot be regarded as "fully executed" until the appeal proceedings have been finally disposed of by a judgment of the Supreme Court of Canada or by a judgment of this court from which no appeal has been taken within the prescribed time. I cannot agree that this argument assists the respondent. It seems clear to me that when the legislature talks in this context of a judgment or order having been "executed", it means that everything must have been done which, by the terms of the judgment or order, is required to be done and that, if a particular

[1] This is not, expressly or impliedly, an order or judgment requiring that anything be done. The taxes that were the subject of the assessment are collected by action quite apart from the appeal. They can, for example, be enforced as debts due the Crown under section 118 of the *Income Tax Act*, or by proceeding by way of "certificate judgment" under section 119. The Tax Appeal Board does not have the power, given to the Court in appeal proceedings by section 101, of ordering payment of the tax.

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judgment or order (such as the judgment of the Tax Appeal Board herein) does not require anything to be done, paragraph (*b*) of section 326a cannot be given any effect by reference thereto.

Counsel for the respondent agreed that if section 326a(*b*) has no application, the appellant is non-existent and the appeal must be quashed.

There will be judgment, therefore, quashing the appeal. There will be no order as to costs.

BETWEEN:

F. DAVID MALLOCH MEMORIAL FOUNDATION ..... APPELLANT;

AND

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

Toronto
1968
Dec. 13
Dec. 23

Estate tax—Aggregate taxable value—Computation of—Residuary bequest to charitable foundation—Whether exemption reduced by amount of succession duty and estate tax—Estate Tax Act, 1958, c. 29, s. 7(1)(d).

A testatrix died in Ontario in 1967 and by her will gave her estate to trustees in trust (1) to pay her debts, funeral and testamentary expenses and all succession duties, estate and inheritance taxes on bequests out of her general estate, (2) to pay certain legacies and (3) to pay the residue of her estate to appellant (a charitable organization) for charitable purposes. The net value of her estate was $847,836, legacies $379,397, Ontario succession duties $50,023, residue $418,416. In assessing estate tax the Minister assumed that the residue was charged with estate tax.

Held, such assumption was incorrect. The exemption allowed by s. 7(1)(*d*) of the *Estate Tax Act* for the charitable bequest to appellant was not subject to decrease by the amount of Ontario succession duty and federal estate tax, since neither the will nor any applicable statute (see *Ontario Succession Duty Act,* R.S.O. 1960, c. 386, secs. 12 and 26; *Ontario Devolution of Estates Act,* R.S.O. 1960, c. 106, secs. 2 and 5; federal *Estate Tax Act,* S. of C. 1958, c. 29, s. 18) made succession duty or estate tax payable out of the property comprised in the charitable gift nor payable by appellant as a condition of such gift.

M.N.R. v. Bickle Estate [1966] S.C.R. 479, distinguished.

APPEAL from estate tax assessment.

Everett Bristol, Q.C. for appellant.

G. W. Ainslie for respondent.

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GIBSON J.:—This is an appeal from an assessment dated January 2, 1968, under the *Estate Tax Act* wherein an estate tax in the sum of $59,592.04 was assessed in respect to the estate of Kate Daintry Malloch, deceased.

The special case stated by consent in this matter by the parties was as follows:

> The Appellant is a non-profit corporation without share capital incorporated under The Corporations Act of Ontario on April 8, 1964, and is duly qualified and registered as a Canadian charitable organization (Registration No. 0135608-03-13). Since its inception all the resources of the Appellant Foundation have been invested to produce income all or substantially all of which has been devoted to the making of gifts to other organizations in Canada constituted exclusively for charitable purposes and similarly qualified and registered
>
> Kate Daintry Malloch died testate on April 13, 1967, and by her will, a true copy of which is filed and will be referred to, she provided for a substantial gift to the Appellant charitable Foundation. The executors appointed by her will duly made and filed within the prescribed time the Return of Information required by section 11 of the Estate Tax Act. The Appellant was not called upon to make or file a return as a successor under said will.
>
> Kate Daintry Malloch left assets of an aggregate value of $842,735 04 of which $181,000 was in cash and bearer bonds, $611,000. in Canadian listed stocks, $35,000 in Ontario real estate and the balance in personal property. In addition there were gifts and dispositions inter vivos of $12,025. which increased the revised total value to $854,760 04. Aggregate net value (after debts) was $847,836.85.
>
> After deducting specifics and legacies totalling $379,397. and Ontario succession duty of $50,023 74, the value of the residue to the charitable Foundation, taking into account everything but estate tax, was $418,416 11 Assuming the whole of the charitable gift to be exempt under clause (i) of section 7(1)(*d*) of the Estate Tax Act, net estate tax, after provincial credit, would be $50,057.32
>
> The Respondent assessed estate tax at $59,592 04 on the assumption that the will gave the Appellant Foundation the residue of the estate charged with the burden of the payment of the estate tax paybale in respect of property passing on the death of said deceased.
>
> The question for the opinion of the Court is whether or not any part of any estate, legacy, succession or inheritance duties or any combination of such duties (including any tax payable under Part I of the *Estate Tax Act*) is, either by direction of or arrangement made or entered into by the deceased whether by her will or by contract or otherwise, or by any statute or law imposing such duties or relating to the administration of the estate of the deceased, payable out of the property comprised in the gift to the Appellant Foundation or payable by it as a condition of the making of such gift.

Section 7(1)(*d*) of the *Estate Tax Act* reads as follows:

> 7. (1) For the purpose of computing the aggregate taxable value of the property passing on the death of a person, there may be de-

ducted from the aggregate net value of that property computed in accordance with Division B such of the following amounts as are applicable:

. .

(*d*) the value of any gift made by the deceased whether during his lifetime or by his will, where such gift can be established to have been absolute and indefeasible, to

(i) any organization in Canada that, at the time of the making of the gift and of the death of the deceased, was an organization constituted exclusively for charitable purposes, all or substantially all of the resources of which, if any, were devoted to charitable activities carried on or to be carried on by it or to the making of gifts to other such organizations in Canada, all or substantially all of the resources of which were so devoted, or to any donee described in subparagraph (ii), and no part of the resources of which was payable to or otherwise available for the benefit of any proprietor, member or shareholder thereof, or

(ii) Her Majesty in right of Canada or a province, a Canadian municipality or a municipal or other public body in Canada performing a function of government,

minus such part of any estate, legacy, succession or inheritance duties or any combination of such duties (including any tax payable under this Part) as is, either by direction of or arrangement made or entered into by the deceased whether by his will or by contract or otherwise, or by any statute or law imposing such duties or relating to the administration of the estate of the deceased, payable out of the property comprised in such gift or payable by the donee as a condition of the making of such gift;

By reason of the relevant words in the proviso of said section 7(1)(*d*), the court is concerned with three questions, namely:

1. Was any part of the estate tax and succession duties *directed* by the will of the deceased *payable out of* the property comprised in the gift to the Foundation?

or

2. Was any part of the estate tax and succession duties *payable out of* the property comprised in the gift to the Foundation *by reason of any statute or law* IMPOSING such duties or relating to the administration of the estate of the deceased?

or

3. Was any part of the estate tax and succession duties *payable by* the Foundation *as a condition* of the making of the gift to it?

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By clause IV of her will, all of the deceased's property in this matter, (except personal belongings and other chattels bequeathed to her daughter) was disposed of, the relevant provisions of which are as follows:

> IV. I GIVE DEVISE AND BEQUEATH the remainder of my property and estate of every nature and kind and wheresoever situate to my Trustees upon the following trusts, namely:
>
> (1) To pay my just debts, funeral and testamentary expenses and all succession duties, estate and inheritance taxes that may be payable in connection with any gift or benefit given by me to any persons either in my lifetime or by survivorship or by this my Will or any codicil thereto, it being my intention that all such debts, expenses, duties and taxes shall be paid out of my general estate so that all benefits and dispositions given or made by me in my lifetime or by my Will shall be free and clear therefrom.
>
> (2) As soon as possible after my death to pay the following legacies:
>
> Here follow legacies to the deceased's mother, sister and six godchildren, totalling $55,500.
>
> (3) (a) To pay to my daughter, Mary Daintry Cole, the sum of Three Hundred Thousand Dollars ($300,000) or, at her option, to transfer to her stocks and securities of equivalent value for the whole or part of said sum.
>
> (4) To pay and transfer all the rest and residue of my estate to F. DAVID MALLOCH MEMORIAL FOUNDATION, a Corporation without share capital incorporated under the laws of Ontario, with the direction that the monies or property so given, or property substituted therefor, shall be held permanently by said Foundation and invested for the purpose of gaining or producing income to be used, applied or donated for such charitable and educational purposes as the Directors of the Foundation may from time to time determine.

The assessment above referred to assessed estate tax at $59,592.04 by treating the charitable gift as subject to the last or "minus" paragraph of clause (*d*) of section 7(1) of the Act and by applying the method of "successive approximations" in computing the tax.

Each of the three questions that are cited above, involves the quaere of whether the gift to the appellant Foundation is or is not entitled to full exemption under subclause (i) of said clause (*d*). If so, the appellant claims to be entitled to the amount of estate tax overpaid in accordance with the assessment, namely, $9,534.72, and interest thereon from date of payment.

The appellant among other things, submits:

1. that the first paragraph of the disposing clause IV of the deceased's will directed her executors and

trustees to pay all succession duties and estate taxes—"out of my general estate so that all benefits or dispositions given or made by me in my lifetime or by my will shall be free and clear therefrom". The second and third paragraphs of this clause provide for specific legacies totalling $355,500. The fourth and final paragraph gives—"all the rest and residue of my estate to F. David Malloch Memorial Foundation";

2. that therefore what the will gave to the charitable Foundation was all remaining property left after payment of debts, funeral and testamentary expenses, succession duties, estate taxes and legacies, subject to the testatrix's expressed intention that this gift and all other benefits given by her will should be free and clear of these duties and taxes;

3. that the will thus not only omits but expressly negatives any "direction" to pay estate taxes out of the charitable gift, and the fact that the amount of this gift cannot be ascertained until the amount of estate tax is known does not, in the absence of such direction, mean that the amount of the tax depends upon the amount of the gift so as to require the method of successive approximations to compute the tax;

4. that the only decided case dealing with the interpretation of section 7(1)(*d*) of the *Estate Tax Act* is *M.N.R. v. Bickle Estate*[1] and that this case is clearly distinguishable because of essential differences in language and intention between the Bickle will and that of Kate Daintry Malloch;

5. that the Bickle will left all his property to his executors upon three trusts. The first trust was—"to pay out of the capital of the residue of my Estate my just debts, funeral and testamentary expenses and all estate, legacy, succession and inheritance taxes or duties".

[1] [1966] S.C.R. 479.

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Gibson J.

The second trust was to set aside, for the benefit of members of the Bickle family, a sum equal to 50 per cent of the value of the whole estate less only the debts.

The third trust was—"to pay or transfer the residue of my estate to E. W. Bickle Foundation". The use of the word "residue" in this trust as well as in the first trust, coupled with the express direction to pay out of "the capital of the residue" all estate taxes and other death duties, together comprised a definite and express direction to pay these duties out of this charitable gift and the Supreme Court of Canada so found.

Mr. Justice Judson, delivering the Judgment of the majority of the court, said:

> *At page 482* — The difficulty of the problem is that the value of the charitable gift is, by definition, the value of the gift minus duty *where there is a direction to pay duty out of the charitable gift*. One cannot ascertain the amount of the charitable gift without first knowing the estate tax payable, and in turn, the amount of the estate tax payable depends upon the amount of the charitable gift
>
> *And at page 484* — This will gives the charity the residue of the estate charged with the burden of the payment of the duty.

6. that the first paragraph above quoted from the Bickle judgment is clearly only applicable to a case where, as there stated, there is in the will—"a direction to pay duty out of the charitable gift", in which case the amount of the tax would depend upon the amount of the gift. Conversely, it is submitted that in the absence of such a direction or some other requirement in the "minus" clause the amount of the tax does *not* depend upon the amount of the charitable gift and the whole of the latter is exempt from tax;

7. that this "minus" clause provides for deduction from the total exemption of a charitable gift of such portion of estate tax or succession duties "as is,—

> *either by direction* of or arrangement made or entered into by the deceased whether by his will or otherwise,
>
> *or by any statute or law* imposing such duties or relating to the administration of the estate of the deceased, payable out of the property comprised in such gift or payable by the donee as a condition of the making of such gift.

Accordingly, one or other of the above two conditions must exist to justify any reduction of the statutory exemption and the onus of establishing this lies upon the taxing authority;

8. that for the reasons already given, no direction can be found in the will of Kate D. Malloch to pay duties out of the charitable gift; nor can it be suggested that there was any arrangement made or entered into by her to this effect;

9. that the remaining question is whether any portion of the death duties—"is, by any statute or law imposing such duties or relating to the administration of the estate..., payable out of the property comprised in such gift or payable by the donee as a condition of the making of such gift"; and

10. that the underlined are the significant words and, there is nothing in the significant words and, there is nothing in the *Estate Tax Act* or in any other applicable statute or law which, in the absence of a direction in the will, requires payment of such duties out of the charitable gift or by the donee thereof.

The respondent, among other things submits:

1. that under the last will and testament of the deceased, the testator, after bequeathing her personal effects, devised and bequeathed the remainder of her property and estate to her trustees upon the following trusts:
   (a) to pay all her just debts,
   (b) to pay certain legacies, and
   (c) to pay and transfer all the rest and residue of (her) estate to F. David Malloch Memorial Foundation;

2. that the law of Ontario, in respect to the payment of debts, is as follows:

   (A) Subject to section 37 of the *Wills Act* the real and personal property of a deceased person comprised in a residuary devise or bequest except so far as a contrary intention appears from his will or any codicil thereto, is applicable ratably according

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to their respective values to the payment of his debts, funeral and testamentary expenses and the cost and expenses of administration.

Section 5 of *The Devolution of Estates Act*, R.S.O. 1960, c. 106 and *Re Way*[2].

(B) After the residue has been exhausted, the personal estate, unless the testator has exonerated it, is charged with the payment of the balance of the debts. But, it is not enough that the testator has charged his real estate with the payment of debts, it is necessary to find that the personal estate has been discharged.

Re Hopkins[3]
Re Watson[4]
Re Banks[5]
MacWilliams v. MacWilliams & Ray[6]

(C) If the residue of the estate is not sufficient to pay the debts, and if after recourse is had to the balance of the personal estate of the testator, there still remains unsatisfied debts, the remaining real property will be chargeable in order that the balance of the debts may be satisfied.

Re Hopkins (supra)
Re Swayze[7]; and

3. that the estate tax payable on the property passing on the death of the deceased was payable out of the residue, that is to say, payable out of the property comprised in the gift to F. David Malloch Memorial Foundation.

So much for the submissions of the parties.

The estate tax payable levied under the *Estate Tax Act* against the executor of an estate of a deceased, by reason of section 18 of that Act, is deemed "to be a debt due to Her Majesty incurred by the deceased immediately prior to his death". Section 18 reads:

18. (1) Where any amount is payable as tax under this Part pursuant to section 13 by the executor of the estate of a deceased, that amount shall, for the purposes of any applicable statute or law relating to the administration of estates, be deemed to be a debt due to Her Majesty incurred by the deceased immediately prior to his death.

(2) Nothing in subsection (1) shall be construed as authorizing the deduction, under section 5 of any amount as or on account of the amount referred to in subsection (1).

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[2] (1903) 6 O.L.R. 614.
[3] (1901) 32 O.R. 315.
[4] (1922) 52 O.L.R. 387.
[5] [1905] 1 Ch. 547, 549.
[6] [1962] O.R. 407; 32 D.L.R. (2d) 481.
[7] [1938] O.W.N. 524.

Ontario succession duties levied pursuant to the *Ontario Succession Duty Act*, R.S.O. 1960, c. 386, are, by reason of section 12[8] thereof, levied against every person to whom or for whose benefit any property situated in Ontario passed on the death of a deceased on the proportion of such property that so passed to him or for his benefit; and by reason of section 26[9] thereof, the executor, trustee or person acting

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[8] 12 (1) Every person resident in Ontario at the date of death of the deceased to whom or for whose benefit any property situate in Ontario passes on the death of the deceased is liable for the duty levied on the proportion of such property that so passes to him or for his benefit, together with such interest as may be payable thereon.

(2) Every person on whom duty is levied is liable for such duty, together with such interest as may be payable thereon.

(3) The duty levied by this Act shall be paid to the Treasurer.

[9] 26. (1) An executor, trustee or person acting in a fiduciary capacity is not, as such, personally liable for any duty levied by this Act, but no person in Ontario shall pay, deliver, assign or transfer to or for the benefit of the person beneficially entitled thereto any property that is vested in him as an executor, trustee or person acting in a fiduciary capacity at any time after the death of the deceased without deducting therefrom or collecting an amount sufficient to pay the duty levied on the proportion of the property passing on the death of the deceased to or for the benefit of such beneficially entitled person and the duty levied on such person, together with interest thereon.

(2) Every such executor, trustee or person who transfers any such property without so deducting or collecting the amount payable by the person beneficially entitled thereto is guilty of an offence and on summary conviction is liable to pay to the Treasurer as a penalty an amount equal to 150 per cent of the amount of such duty, provided that any such executor, trustee or person is not so guilty or so liable if he so deducts from the property transferred or so collects an amount sufficient to pay the duty and interest payable by the person beneficially entitled thereto as claimed in a statement made pursuant to subsection 1 of section 34 or in any other claim made by the Treasurer or as determined by any court.

(3) Any executor or trustee or any person who has any money for the payment of duty, interest or penalties shall be deemed to be a person who has received money for the Crown or for which he is accountable to the Crown within the meaning of *The Financial Administration Act*.

(4) Any person who may be required under the will of the deceased or any trust created by the deceased to pay the duty levied on any property that has come into his possession, or is vested in him or is under his control, or levied on any person to whom there is a transmission of any such property or to whom a disposition of any such property is made, has, for the purpose of paying such duty or raising the amount of the duty when already paid, power to raise the amount of such duty and any interest and expense properly incurred by him in respect thereof, by sale, mortgage, lease or pledge, of so much of such property as may be necessary for such purpose.

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in a fiduciary capacity for the estate of a deceased person is required to deduct from the assets of the estate coming into his hands an amount "sufficient to pay the duty levied on the proportion of the property passing on the death of the deceased to or for the benefit of such beneficially entitled person and the duty levied on such person together with the interest thereof".

By *The Devolution of Estates Act*. R.S.O. 1960, c. 106, s. 2, all assets of a deceased person in Ontario come into the hands of an executor or administrator subject to the payment of debts. Said section 2 reads:

> 2. (1) All real and personal property that is vested in a person without a right in any other person to take by survivorship, on his death, whether testate or intestate and notwithstanding any testamentary disposition, devolves to and becomes vested in his personal representative from time to time as trustee for the persons by law beneficially entitled thereto, and, subject to the payment of his debts and so far as such property is not disposed of by deed, will, contract or other effectual disposition, it shall be administered, dealt with and distributed as if it were personal property not so disposed of.
>
> (2) This section applies to property over which a person executes by will a general power of appointment as if it were property vested in him.
>
> (3) This section does not apply to estates tail or to the personal property, except chattels real, of a person who, at the time of his death, is domiciled out of Ontario.

In the case of *Re Smith*[10] the Court of Appeal of Ontario, Mr. Justice Middleton delivering the judgment at page 18, in interpreting this section, said:

> By *The Devolution of Estates Act*, R.S.O. 1927, ch. 148, sec. 2, originally passed in 1886 and subsequently much amended, it is provided that all property, real and personal, which is vested in any person shall, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives as trustees for the persons by law beneficially entitled thereto, and subject to the payment of debts, and in so far as such property is not disposed of in the course of administration to be administered, shall be dealt with and distributed as if it were personal property not disposed of.
>
> The effect of this statute is not to make real property personal property, but is to provide that real property shall descend to the same individuals as are entitled to receive and take personal property. It abolishes for this purpose the distinction theretofore existing between

[10] [1938] O.R. 16.

the course of descent of personalty and realty, and provides that those entitled under the statutes to the personalty shall also be entitled in like manner to the realty.

The order in which the assets of a deceased's estate are to be applied in the discharge of the debts and liabilities is regulated by section 5 of *The Devolution of Estates Act*, and the general law, namely, the residue first and if the residue is insufficient for that purpose, then *seriatim* the personalty and the realty is resorted to.

Section 5 of that Act reads:

> 5 Subject to section 37 of *The Wills Act*, the real and personal property of a deceased person comprised in a residuary devise or bequest, except so far as a contrary intention appears from his will or any codicil thereto, is applicable rateably, according to their respective values, to the payment of his debts, funeral and testamentary expenses and the cost and expenses of administration.

(See also, *Re Hopkins* (*supra*), and *Re Watson* (*supra*)).

In the case of *Re Hopkins* (*supra*) Mr. Justice Street at pages 317-18 states this proposition in this way, viz:

> *The Devolution of Estates Act*, R S O. ch. 127, vests the real as well as the personal estate of a deceased person in his personal representatives for the purpose of paying his debts, but except in the case of a residuary devise of real and personal estate which is specially provided for by the seventh section, the order in which the different classes of property were applicable to the payment of debts before the passing of the Act does not seem to have been disturbed by its provisions.

In the case of *Re Swayze* (*supra*) Mr. Justice Hogg at pages 527-28 also re-states this proposition of law as to order of application of assets:

> *The Devolution of Estates Act* by sec. 4, vests the real and personal estate of a deceased person in the hands of his personal representatives for the purpose of paying his debts, but except in the case of a residuary devise of real and personal estate, which is provided for, as has been pointed out, by sec. 5 of the Statute, the order in which the different classes of property are applicable to the payment of debts is not disturbed by the provisions of the Statute. The personal property of the deceased, unless there is something to the contrary expressed in the will, remains the primary fund for the payment of debts: *Re Hopkins Estate* (1900), 32 O.R. 315

The statute law in Ontario "relating to the administration of the estate of the deceased" is in a number of statutes.

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One of the most important of these statutes is *The Devolution of Estates Act*. Among other things, it prescribes certain rules as to administration of estates and order of administration.

I now have to answer, in relation to this estate, the three questions posed above, with which, as stated, the court is concerned by reason of the relevant words in the proviso of s. 7(1)(*d*) of the *Estate Tax Act*.

1. Was any part of the estate tax and succession duties directed by the will of the deceased payable out of the property comprised in the gift to the Foundation?

   In my view, no part of the estate tax and succession duties was directed by the will of the deceased to be payable out of the property comprised in the gift to the Foundation but instead, it is only in the residue of the residue of this estate that the Foundation has any property interest.

2. Was any part of the estate tax and succession duties payable out of the property comprised in the gift to the Foundation by reason of any statute or law IMPOSING such duties or relating to the administration of the estate of the deceased?

   In my view, no part of the estate tax and succession duties was payable out of the property comprised in the gift to the Foundation by reason of any statute or law imposing such duty because, as noted, by the *Succession Duty Act* Ontario succession duties are payable by the beneficiaries, and by the *Estate Tax Act* estate taxes are deemed to be a debt of the estate incurred in the same manner as any other debt of the deceased prior to the death of the deceased and payable by reason thereof. Nowhere in *The Devolution of Estates Act*, and particularly at section 2 or at section 5 is there a statutory imposition of such succession duties or estate tax, nor, further, any requirement that such duties and estate taxes be payable out of the property comprised in the gift to this Foundation.

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In addition, no part of the estate tax and succession duties are payable out of the property comprised in the gift to the Foundation by reason of any other statute or law "relating to the administration of the estate of the deceased". There is nothing in such branch of law imposing such duties or estate taxes, or so requiring.

3. Was any part of the estate tax and succession duties payable by the Foundation as a condition of the making of the gift to it?

In my view, it is clear from the wording of this will that no part of the estate tax and succession duties were payable by the Foundation as a condition of making of the gift to it.

The appeal, therefore, is allowed with costs and the assessment is referred back for the purpose of re-assessing, not inconsistent with these reasons.

ENTRE:

EASTERN CANADA SHIPPING LIMITED ..... PÉTITIONNAIRE;

ET

SA MAJESTÉ LA REINE DU CHEF DU CANADA;

ET

L'ADMINISTRATION DE LA VOIE MARITIME DU ST-LAURENT .... INTIMÉES.

Montréal 1968

4 et 5 juin, 23 sept.

Ottawa

24 décembre

Couronne—Contrat—Bail—Emplacement adjacent au canal Lachine—Décision du Ministre des Transports du Canada de fermer partie du canal—Action en recouvrement de dommages—Louage des choses—Arts, 1605, 1606, 1660 C.C.—Administration de la Voie Maritime du Canada, 15-16 Geo VI, c. 24—Corporation mandataire de la Couronne—Loi pourvoyant à l'administration financière du Canada, S.R.C. 1952, ch. 116, arts. 39 et 83—Règle sur le marché de l'État, C.P. 1964-1467, arts. 2 et 3—Pourparlers de règlement—Responsabilité contractuelle de la Couronne—Témoin expert.

Locataire depuis 1958 d'un emplacement adjacent au canal de Lachine, à Montréal, sur lequel elle avait érigé, tel que le bail le permettait, des entrepôts, bureaux et un garage aux fins d'y exercer son commerce de transport maritime et côtier d'acconage, la pétitionnaire réclame de

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l'intimée les dommages qu'elle aurait subis par suite de la décision du Ministre des Transports du Canada de fermer définitivement à la navigation la partie Est du canal à compter du 1er février 1965, la plaçant ainsi dans une enclave en lui enlevant un accès au port de Montréal ainsi qu'au fleuve St-Laurent, et, dès lors, la privant de l'usage de l'emplacement.

Ce bail avait été renouvelé le 15 février 1963 pour une période de cinq ans, du 1er avril 1963 au 31 mars 1968, avec la faculté pour la pétitionnaire de le renouveler pour une autre période de cinq ans. Chacun des contractants avait le droit d'y mettre fin au moyen d'un avis d'un mois de la part du bailleur si celui-ci requérait l'emplacement pour les fins d'intérêt public, et de trois mois de la part du preneur. A la suite de l'annonce de la décision du Ministre, des pourparlers de règlement s'amorcèrent entre les parties pour se terminer éventuellement par un échec. Dans l'intervalle, l'avis de résiliation du bail ne fut pas signifié à la pétitionnaire et celle-ci continua à utiliser, en partie, l'emplacement et les bâtiments y érigés qu'elle occupe encore.

Entre autres défenses, l'intimée a soutenu qu'elle n'avait aucune obligation légale de tenir le canal ouvert à la circulation fluviale; que ses seules obligations contractuelles à l'endroit de la pétitionnaire étaient celles prévues au bail; et que la connaissance acquise par la pétitionnaire de la fermeture éventuelle du canal de même que ses faits et gestes au cours des pourparlers de règlement la libéraient de donner l'avis prévu au bail.

Jugé: Il suffisait pour la pétitionnaire de poursuivre ici Sa Majesté la Reine même pour les actes commis par l'Administration de la Voie Maritime du St-Laurent comme agent de Sa Majesté puisqu'en vertu du statut qui l'incorpore (15-16 George VI, c. 24), cette corporation est déclarée un mandataire de Sa Majesté du Chef du Canada et qu'en fait, c'est à ce titre qu'elle a agi. Il y aura donc lieu de mettre l'Administration de la Voie Maritime du St-Laurent hors de cause comme partie à ces procédures car aucune conclusion, ne pourra, dans le jugement, être prise contre elle.

Le bail qui aurait pu être résilié suivant les modalités prévues au contrat ne l'a pas été et les droits et obligations des parties contractantes ont continué à subsister et subsistent encore.

La loi autorisant le louage de toutes sortes de choses tant corporelles qu'incorporelles (arts. 1605 et 1606 C.C.), le bail pouvait donc inclure non seulement l'emplacement mais ses voies d'accès de même que les deux bassins attenants disponibles pour le chargement et déchargement des navires, tels accès et usage faisant partie du bail, même si non énoncés au contrat, et sur l'utilité desquels la pétitionnaire était en droit de compter pour exercer son commerce (Juris-Classeur Civil, 1965, fasc. 15[1]—fasc. E[1]—No. 20).

Le fait de l'intimée de fermer l'accès à l'emplacement loué et de remplir les bassins attenants, donnait ouverture à une action en résiliation du bail avec dommages, sauf s'il s'était agi d'une décision pour cause d'utilité publique ou même d'une expropriation partielle (art. 1660 C.C.), auxquels cas cette décision prise pour le plus grand bien de la société et sans qu'elle soit la conséquence d'une faute du bailleur n'entraînerait aucune responsabilité quelconque. Ici, la preuve quant à ces exceptions fait défaut.

Une nouvelle situation de faits, agréée de part et d'autre en marge du bail, n'a pas ici l'effet de créer un nouveau contrat qui ait pu modifier le bail (art. 1022 C C.) lequel en conséquence, subsiste toujours.

La pétitionnaire affectée dans sa jouissance par la conduite de son bailleur a droit aux dommages subis par suite du manquement de ce dernier aux obligations du bail, la pétitionnaire, d'autre part, n'ayant renoncé au droit de recouvrer ses dommages du fait qu'elle a persisté au long des pourparlers de règlement, jusqu'aux présentes procédures, à réclamer une indemnité pour ses dommages et la perte qu'elle a subis.

L'approbation du Conseil du Trésor auquel les parties avaient convenu de soumettre le projet de règlement n'aurait pas été requise car le terme «marché» (ou «contract» dans le texte anglais) ne comprendrait pas une transaction comme celle qui s'était amorcée entre les parties ici (*Loi pourvoyant à l'administration du Gouvernement du Canada*, S.R C 1952, ch. 116, art. 39; *Le Règlement sur le marché de l'État* (C P. 1964-1467, art 2)). Au surplus, l'Administration de la Voie Maritime du St-Laurent ne serait pas sujette aux prescriptions de cette Loi et de ce Règlement puisqu'elle en serait exempte suivant l'article 3 du Règlement et que, par ailleurs, il n'appert pas que le Gouverneur-en-Conseil a, tel que prévu par l'article 83 de cette Loi, établi des règlements sur les conditions auxquelles une corporation de mandataire peut assumer des engagements contractuels.

D'autre part, un ministre de la Couronne ne peut engager la responsabilité contractuelle de la Couronne à moins qu'il soit autorisé à le faire par un statut ou une loi ou par un arrêté ministériel (*Walsh Advertising Company Limited v. The Queen* [1962] R.C de l'Éch. 115 aux pp. 123-124; *Drew v The Queen* [1956-60] R C. de l'Éch. 339; *The King v. George McCarthy et al* 18 R C. de l'Éch. 410). Or, il n'y avait au moment des pourparlers de règlement, aucune loi ou aucun arrêté ministériel qui permettait au Ministre des Transports d'engager la Couronne quant au règlement proposé. L'offre de l'intimée est donc tout simplement restée à l'étape d'ébauche de règlement.

Le témoignage d'un témoin expert basé sur des informations qu'il aurait recueillies de certaines personnes au cours de son enquête, est admissible afin de permettre au tribunal d'apprécier à sa juste valeur l'opinion du témoin (*City of Saint John v. Irving Oil Co. Ltd.* [1966] R C S. 581 à la page 592).

ACTION en recouvrement de dommages.

Michel Jetté et *Pierre Lamontagne* pour la pétitionnaire.

François Mercier, c.r. et *J.-P. Fortin* pour Sa Majesté la Reine.

Claude Ruelland pour l'Administration de la Voie Maritime du St-Laurent.

NOËL J.:—Par cette pétition, la pétitionnaire réclame des intimées un montant de $1,080,427.38, dommages qu'elle prétend avoir subis lorsque l'Administration de la Voie maritime du St-Laurent (ci-après appelée l'Administration)

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le ou vers le 27 mai 1964, annonça que le ministre des Transports du Canada avait décidé de fermer définitivement à la navigation la partie est du canal Lachine, à Montréal, P.Q., à partir du 1er février 1965, plaçant, par ce fait, la pétitionnaire dans une enclave en lui enlevant un accès vers le fleuve et le port et l'empêchant, à toute fin pratique, de se servir des lieux loués pour l'usage qui lui était destiné.

La pétitionnaire était installée sur le canal Lachine depuis l'année 1958 lorsque, le 15 février 1963, elle reloua de l'Administration, par bail sous seing privé, un emplacement de 109,300 pieds carrés adjacent au canal Lachine et situé entre les Bassins St-Gabriel, numéros 3 et 4, dans le quartier Ste-Anne, de la cité de Montréal, où elle avait réussi à se créer un commerce de transport maritime intérieur et côtier ainsi qu'un commerce d'acconage. Se prévalant de son droit de construire sur les lieux loués, la pétitionnaire, depuis 1958, y avait érigé des immeubles, soit des entrepôts, un garage et des bureaux et y avait fait des améliorations, le tout pour une somme qu'elle estime à $162,500. Ce bail (pièce P-2) était fait pour une période de cinq ans, soit du 1er avril 1963 jusqu'au 31 mars 1968 et la pétitionnaire avait le droit de le renouveler pour une période additionnelle de cinq ans. Le loyer était fixé à $8,197.50 par année payable en quatre versements égaux de $2,049.38 et les lieux loués situés sur le canal Lachine devaient être utilisés comme emplacement pour les bâtiments ou constructions du locataire avec droit de passage ainsi qu'au chargement et déchargement des navires. Ce bail comportait certaines clauses d'importance pour les fins de la présente réclamation dont l'article 12(a) qui donne au bailleur le droit de mettre un terme au bail sur un avis écrit d'un mois dans tous les cas où le bailleur aurait besoin de lieux loués pour des objets d'intérêt public; l'article 12(b) qui autorise le bailleur ou le locateur à terminer le bail en tout temps sur un avis écrit de trois mois et l'article 12(c) qui donne aussi au locataire le droit de mettre un terme au bail sur avis écrit de trois mois. Il y a aussi l'article 13 qui prévoit que sur résiliation ou terminaison du bail, le locataire devra enlever ses biens des lieux loués et à ses dépens de façon à les laisser en bon

état. A défaut d'enlever ainsi ces biens dans un délai raisonnable, le bail prévoit qu'ils deviendront la propriété du bailleur.

Il serait utile, je crois, de reproduire ci-après les articles précités.

> 12 (a) If the said land, or any portion thereof, should be required by the Lessor at any time during the currency of this Lease, for any public purpose, the Lessor may terminate this Lease by giving to the Lessee one month's notice in writing to that effect signed by the Legal Adviser of The St Lawrence Seaway Authority, and mailed addressed to the Lessee at his address mentioned herein or to his last known place of business or residence.
>
> (b) The Lessor may at any time terminate this Lease by giving to the Lessee three (3) months' notice in writing signed by the Legal Adviser of the St Lawrence Seaway Authority and mailed addressed to the Lessee at his address mentioned herein or to his last known place of business or residence
>
> (c) The Lessee may at any time terminate this Lease by giving to the Lessor three (3) months' notice in writing mailed in a prepaid registered envelope addressed to the Legal Adviser of The St Lawrence Seaway Authority, at Cornwall, Ontario
>
> 13. Upon cancellation or termination of this Lease, the Lessee shall forthwith remove, at his own cost and expense, the property of the Lessee from the land and premises of the Lessor, leaving and restoring said land and premises in a neat and clean condition to the entire satisfaction of the Superintending Engineer, provided that no property shall be removed from the premises until all rent has been fully paid; in case of default of the Lessee to remove his property within a reasonable period as determined by the Superintending Engineer, said property shall become the property of, and shall vest in the Lessor without any right to compensation on the part of the Lessee therefor.

C'est le ou vers le 29 mai 1964 qu'un communiqué de presse (pièce P-4) émanant de l'Administration annonça que le ministre des Transports du Canada avait décidé de fermer définitivement à la navigation la partie est du canal Lachine, à Montréal, à partir du 1er février 1965 et il serait utile d'en reproduire ici certains extraits:

> The Honourable J. W. Pickersgill, Minister of Transport, announced to-day, that the eastern end of the Lachine Canal in Montreal will be permanently closed to navigation after February 1st, 1965.
>
> The section affected by the closing extends from Wellington Street Tunnel, in the City of Montreal, to the limits of the Port, below Lock 1 This decision was prompted by the necessity for the World's Fair Corporation and the City of Montreal to extend University Street by a causeway across the canal, that will become the major access road from Montreal Island to the fair. In addition, this will permit

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the National Harbours Board to relocate their railway tracks to serve the Bickerdike Pier area of the Port . . .

. . .

Shipping companies that operate from wharves and sheds located in that section will be relocated in the Port of Montreal, and cargo destined to, or shipped from the remaining open section of the Canal to lower St. Lawrence and Atlantic ports can be transited via the seaway.

Le 6 août 1964, cette décision de fermer le canal était confirmée par une lettre du directeur de la région de l'est de l'Administration, adressée au président de la pétitionnaire (pièce P-6) et dont la teneur suit:

Cher monsieur,

L'Administration a pris connaissance de la lettre que vous m'adressiez le 3 juillet dernier et désire confirmer son intention de fermer la partie est du canal Lachine.

Quant aux pertes que la fermeture du canal Lachine pourrait vous occasionner, notre aviseur légal me prie de vous informer que les termes et conditions du bail en rapport avec sa résiliation s'appliqueront.

Il me fera plaisir de discuter votre point de vue sur cette question en n'importe quel temps.

Bien à vous,
René L'Heureux, Ing. P.
Directeur de la Région
de l'est.

Ce dernier transmit ensuite à la pétitionnaire un nouveau communiqué de presse (pièce P-5) émis par l'Administration en date du 19 novembre 1964, répétant les informations déjà contenues à son communiqué du 27 mai 1964 mais y ajoutant ce qui suit:

In issuing a reminder to marine and allied interests that the Lachine Canal will be closed to through navigation next year, the St. Lawrence Seaway Authority has announced that, on the portion of the canal that remains open, navigation will be restricted to ships whose masts extend no more than 59 feet above water level.

After February 1, 1965, the eastern end of the 80-year old 14-foot canal will be closed permanently. The section affected extends from Wellington Street Tunnel to the upper limits of the Port of Montreal, below Lock 1.

Seaway navigation, of course, proceeds by way of the south shore canal.

Ce n'est qu'au mois d'avril 1965 que les différents permis furent octroyés à la pétitionnaire lui permettant de s'installer dans le port de Montréal dans un endroit et dans des locaux cependant qu'elle prétend être moins avantageux que ceux qu'elle occupait au canal Lachine.

La pétitionnaire déclare que les décisions prises par l'Administration de fermer le canal Lachine ont eu pour effet de réduire à néant ses installations sur le canal et le déménagement de ses opérations dans le port de Montréal lui a occasionné des dépenses considérables. Le coût plus élevé de manutention des marchandises, l'augmentation des coûts de location et d'accostage des navires et de quayage dans le port de Montréal lui font aussi subir, dit-elle, des dommages très élevés.

De plus, allègue-t-elle, elle subit d'autres dommages parce que le changement de location a amené la perte d'une clientèle solidement établie et elle doit maintenant faire face à une forte concurrence de la part de compagnies installées depuis longtemps dans le port de Montréal. Elle subirait des dommages aussi parce que depuis la fermeture de la partie est du canal Lachine, elle a dû payer des taxes aux autorités municipales et scolaires.

Ces dommages, la pétitionnaire les fixe à $1,080,427.38 qu'elle réclame conjointement et solidairement des deux intimées parce que, dit-elle, ils ont été causés par le fait que l'intimée, l'Administration, n'a pas su lui assurer la jouissance des lieux qu'elle lui avait loués en vertu du bail (pièce P-2) et aussi parce qu'elle a participé à la décision de fermer la partie est du canal Lachine. La Couronne serait également responsable parce qu'elle a elle-même pris la décision, par l'entremise de son Ministre, de fermer le canal.

Notons avant d'aller plus loin que l'action n'aurait pas dû être dirigée contre l'Administration devant cette Cour et qu'il aurait suffi pour la pétitionnaire de poursuivre Sa Majesté La Reine même pour les actes commis par l'Administration comme agent de Sa Majesté puisqu'en vertu du statut qui l'incorpore (15-16 George VI, chapitre 24) cette Administration est déclarée être un mandataire de Sa Majesté du Chef du Canada et qu'en fait c'est à ce titre qu'elle a agi. Il y aura donc lieu de faire biffer l'Administration de la Voie maritime comme partie à ces procédures, car aucune conclusion ne pourra, dans le jugement, être prise contre elle.

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La pétitionnaire allègue de plus que les intimées ont reconnu leur responsabilité (a) en lui faisant une offre de règlement; (b) en donnant au Conseil des ports nationaux des intructions au sujet de sa relocation rendant ainsi possible cette relocation qui autrement aurait été impossible et (c) le ministre des Transports du Canada a reconnu la responsabilité de Sa Majesté la Reine, par l'entremise de son assistant exécutif, par une lettre (pièce P-1) signée par ce dernier en date du 13 janvier 1965.

La pétitionnaire réclame de plus, mais à titre subsidiaire, cependant, et sans préjudice à sa réclamation en dommages, une réduction du loyer qu'elle devra continuer à payer pendant la durée du bail et son renouvellement à $500 par année pour la dimunition de jouissance qu'elle a subie par suite des faits ci-haut relatés. La pétitionnaire, en effet, bien qu'elle se fut transportée dans le port de Montréal, continua quand même à occuper et à utiliser, mais pour 25% de son potentiel seulement dit-elle, et pour fins d'entreposage seulement, les anciens locaux situés sur le canal Lachine.

Les intimées, d'autre part, déclarent que l'Administration n'avait aucune obligation légale de tenir le canal Lachine ouvert à la circulation fluviale et les seules obligations contractuelles qu'elle assuma à l'endroit de la pétitionnaire sont exclusivement et seulement celles qui découlent du bail entre les parties intervenu le 15 février 1963 et produit comme pièce P-2; que parmi les conditions auxquelles l'Administration consentit à louer à la pétitionnaire le terrain dont il s'agit, cette dernière reconnut que le bailleur pouvait terminer le bail sur avis de trois mois et en aucun temps durant sa durée, tel que prévu à la clause 12(b) du bail. D'ailleurs, ajoutent-elles, et par surcroît, la pétitionnaire de par la nature même d'une partie de son commerce et de ses opérations à caractère maritime, savait ou devait savoir, que l'ouverture de la nouvelle voie navigable sur le St-Laurent en 1959, provoquerait à brève échéance la fermeture éventuelle du canal de Lachine et c'est pour cette raison bien spécifique que l'Administration s'était réservé le droit contractuel de résilier le bail selon les modalités prévues à la clause 12(b) du bail, réserve que la pétitionnaire accepte sans restriction. De toute façon, ajoutent les intimées, l'Ad-

ministration n'était pas tenue de signifier l'avis requis en vertu de la clause 12 du bail déjà produit, parce qu'elle ne pouvait savoir ou connaître les intentions de la pétitionnaire relativement à l'incidence de la fermeture de la section est du canal sur les opérations de la pétitionnaire. Elles allèguent de plus que la pétitionnaire a d'ailleurs toujours occupé lesdits lieux, continue encore aujourd'hui de les occuper et y conduit un commerce d'entreposage, lequel constitue une portion subtantielle de ses activités et en regard duquel la voie fluviale ne joue aucun rôle. Les intimées plaident enfin qu'à tout événement, et sans préjudice à ce que ci-dessus plaidé, la pétitionnaire n'a subi aucun dommage qui soit directement ou indirectement relié à la fermeture du canal et les quelques dommages qu'elle pourrait avoir subis, ce qui n'est pas admis mais au contraire expressément nié, doivent être contractuellement réduits à une indemnité équivalent à l'avis de trois mois, condition inhérente du bail et sans laquelle la convention ne serait jamais intervenue. Bien plus, disent-elles, la pétitionnaire relogée dans de nouveaux quartiers, possède un emplacement supérieur à celui qui fit l'objet de la convention, pièce P-2, et dont l'usage ne saura que lui profiter.

L'Administration, se portant pétitionnaire par reconvention (et ici aussi il faudra substituter à l'Administration, la Couronne qui pourra, s'il y a lieu, exercer le recours pour elle[1]) selon la règle 3B de cette Cour contre l'intimée par reconvention, Eastern Canada Shipping Ltd. réclame de cette dernière la somme de $30,740.70, représentant le loyer pour l'occupation des lieux décrits au bail, à compter du 1er janvier 1964 au 1er janvier 1968 inclusivement, par Eastern Canada Shipping Ltd., pour son avantage et profit et en considération desquels elle n'a pas versé le loyer précité et qu'elle refuse d'acquitter bien que dûment mise en demeure.

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[1] Voir à ce sujet le jugement rendu le 11 septembre 1968 non encore rapporté dans *Benta v N H B & Marquis* où la question de savoir si une tierce personne peut être poursuivie devant cette Cour est considérée Comme un agent de la Couronne peut poursuivre ou être poursuivi au nom de la Couronne, il n'y a pas lieu de se demander si un agent de la Couronne peut poursuivre ou être poursuivi nominativement

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Les intimées pour ces motifs demandent au tribunal de REJETER la pétition de droit de la pétitionnaire; d'ACCUEILLIR la contestation des intimées; de MAINTENIR la demande par reconvention de la pétitionnaire reconventionnelle, l'Administration de la Voie maritime du St-Laurent; de CONDAMNER Eastern Canada Shipping Ltd. à payer à ladite Administration la somme de $30,740.70 et de COMPENSER judiciairement s'il a lieu jusqu'à concurrence de ladite somme de $30,740.70 toute indemnité accordée en faveur de Eastern Canada Shipping Ltd. sur la pétition de droit.

La pétitionnaire dans sa réponse déclare que si elle avait su que le canal Lachine serait fermé à brève échéance à la navigation, elle n'aurait jamais loué des intimées un emplacement sur le canal et n'aurait pas fait à cet endroit les améliorations qu'elle y a faites. Elle admet qu'elle a occupé les lieux loués et continue encore de les occuper pour y faire un peu d'entreposage, mais nie que cet entreposage constitue une part substantielle de ses activités. Elle nie qu'elle possède maintenant dans le port de Montréal un emplacement supérieur à celui sur le canal et allègue que

a) la Voie maritime du St-Laurent avait octroyé un quai beaucoup plus long sur le canal Lachine que celui octroyé par le Conseil des ports nationaux à la pétitionnaire dans le port de Montréal;

b) d'autre part, la surface utilisable du quai occupée par la pétitionnaire est beaucoup moins grande au port de Montréal que celle autrefois utilisable sur le canal Lachine;

c) enfin, il en coûte beaucoup plus cher à la pétitionnaire pour opérer dans le port de Montréal que pour opérer dans le canal Lachine;

Cette réclamation fit l'objet d'une assez longue enquête et il serait utile, dès maintenant, de déterminer pourquoi la pétitionnaire, même à l'heure actuelle, occupe encore les lieux loués et pourquoi l'Administration ne s'est jamais, depuis la fermeture de la partie est du canal Lachine, prévalu du droit de résiliation que lui donne la clause 12(b) du bail.

Aimé Pinsonnault, le président de la pétitionnaire, déclare que dès le moment où monsieur Pickersgill, le ministre des Transports du temps, annonça le 27 mai 1964 la fermeture permanente de la partie est du canal Lachine, le commerce de sa compagnie à cet endroit fut sérieusement compromis et il devint «impossible de continuer d'opérer à toutes fins pratiques». «On nous obligeait», dit-il, «de cesser nos opérations ou de trouver une solution ailleurs». Il était encore possible à ce moment de contourner le problème en faisant faire aux navires un grand détour par les écluses de St-Lambert mais cela devenait peu rentable à cause du coût du trajet, la perte de temps des bateaux pour effectuer ce détour et les charges additionnelles de frais de pilotage et de droits maritimes. Un bateau, en effet, devait, pour suivre cette route, traverser la Voie maritime, revenir sur ses pas et retraverser cinq écluses (aller et retour) au lieu de deux. Cela occasionnait une perte d'au moins deux jours pour charger le bateau et pour traverser les écluses St-Lambert et Pointe-Catherine. Une restriction mise sur la hauteur des mâts des navires à cause d'un pont construit à ville Saint-Pierre et qui enjambe le canal aggrava la situation. Il n'y avait pas, d'après M. Pinsonnault, un bateau qui venait chez la pétitionnaire qui n'aurait pas eu des altérations coûteuses à faire pour réduire la hauteur de son mât. Quelques mois plus tard, soit en 1966, les deux bassins St-Gabriel, de chaque côté de l'emplacement de la pétitionnaire furent remplis et il ne fut plus possible pour les navires de s'y rendre même en passant par l'ouest du canal.

Pinsonnault écrivit le 10 juillet 1964 au directeur du port de Montréal pour lui dire qu'il espérait pouvoir s'installer dans le port de Montréal et ce dernier lui aurait tout simplement dit que «l'affaire était réglée et que l'on n'en entendrait plus parler». Ce n'est cependant que vers la fin de mai 1965 que la pétitionnaire réussit à s'installer dans le port de Montréal, après avoir obtenu tous les permis requis à cette fin. Pinsonnault déclare qu'il n'eut pas le choix et qu'il dut accepter finalement le hangar 27 dans le port bien que c'était un endroit difficile pour la navigation à cause d'un fort courant appelé Ste-Marie. Il faut en effet, dit-il, prendre des précautions spéciales en doublant les câbles et c'est

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un endroit dangereux pour les navires. Ce déménagement, selon Pinsonnault, aurait occasionné un changement dans la nature des opérations de la pétitionnaire qui, à partir de ce moment, n'aurait fait que du côtier pour pouvoir rencontrer les coûts de quayage minimums auxquels étaient assujettis les occupants du port. Les usagers doivent, en effet, garantir un certain tonnage par pied carré occupé et ce que la pétitionnaire occupait dans le port de Montréal représentait à peu près trois fois le tonnage que ses clients offraient à cet endroit. Pour pouvoir faire face à cette situation, la pétitionnaire aurait parfois, dit-il, accepté du travail de compagnies étrangères, en prenant des sous-contrats au prix coûtant «pour passer du tonnage dans nos hangars». Ce changement aurait aussi occasionné la perte d'un bon client qui représentait 50% du revenu de la pétitionnaire, soit le Transport Maritime et Aérien des Îles-de-la-Madeleine.

Quant aux constructions sur le canal Lachine, Pinsonnault prétend que depuis la fermeture du canal, elles ne lui sont d'aucune utilité bien qu'il dut admettre, à la p. 73 des notes sténographiques, que la pétitionnaire s'en servait encore:

> R Pour moi, elles ne sont pas utiles du tout pour le commerce que j'exploite Souvent, il faut agir en bon père de famille pour protéger la propriété, autant la nôtre que celle de la Voie maritime C'est arrivé à l'occasion que pour accommoder des clients on a pris un peu d'entreposage sur une bâtisse de jour en jour qui couvrait à peine nos frais

La pétitionnaire a de plus continué tout de même à payer les taxes foncières pour les bâtiments érigés le long du canal soit $6,629.64 pour 1964, $6,871.68 pour 1965 et $7,265.06 pour 1966.

Pinsonnault fut contre-interrogé par le procureur des intimées sur l'usage que son entreprise fait, ou a fait, des bâtiments de la rue Guy sur le canal, ou leur utilité et sur la question de savoir si on lui avait offert de résilier le bail à la p. 114 *et seq.* des notes sténographiques:

> D A quoi sert la rue Guy aujourd'hui?
> R On a peut-être vingt-cinq (25) pour cent (100) ou vingt (20) pour cent (100) de l'espace qui est occupé par l'entreposage temporaire que l'on prend pour une période des fois d'une semaine et simplement pour occuper notre gardien qui est là on est obligé de le maintenir pour protéger cela

et un peu plus loin, à la p. 115, il déclare:

R Cela ne nous intéresse pas de rester à la rue Guy, on serait prêt à déménager demain matin. En quarante-huit (48) heures, on partirait

D. Je vous parle au point de vue affaire, je ne fais pas de reproches. Vous me dites «cela ne vaut plus rien pour moi?»

R. Non, parce que mon commerce principal c'est le commerce de chargement et de déchargement de bateaux. Je ne peux plus le faire C'est simplement pour protéger notre propriété que l'on maintient un gardien là, ce qui nous coûte une couple de cents piastres par semaine

D La pièce P-3, dit ceci.
Upon cancellation of this lease the lessee shall forthwith remove at his own cost and expense the property of the lessee . . .
et ça continue Est-ce cela?

R Oui

D Pourquoi cela n'a-t-il pas été fait?

R Si on fait un mauvais marché, c'est un mauvais marché.

D Mais vous avez signé ce bail?

R Les beaux du Gouvernement ont toujours été faits dans ce sens-là J'ai mis une objection dans le temps, il a dit, «ça n'a jamais été mis en force».

D Avez-vous signé le bail?

R. Oui

D Vous êtes dans les affaires depuis l'âge de 14 ans?

R. Oui.

D. Voulez-vous prétendre que vous avez signé ce document et le bail avec un révolver?

R Non, je n'ai pas dit cela.

D Vous avez dit que c'était une clause de style?

R C'est ce que l'on m'a dit.

et à la p. 117, on lui pose les questions suivantes:

D Vous a-t-on jamais offert de résilier le bail de la rue Guy de le «canceller» ou de l'annuler?

R. Jamais

D. Vous jurez cela?

R Oui

D Vous rappelez-vous d'être à Ottawa le 16 novembre 1964?

R. Oui.

et un peu plus loin à la p. 118:

D. Dans votre procès-verbal, prenez le temps de le lire, je vous pose la question suivante «vous a-t-on jamais offert de résilier, de consentement mutuel le bail pour l'emplacement que nous appelons maintenant rue Guy»?

R Si on me l'a offert, je ne me rappelle pas.

D. Vous n'avez pas de copie de votre procès-verbal?

R. Oui, je l'ai ici.

D Prenez votre temps.

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LA COUR:

D Qui a préparé ce procès-verbal?
R. C'est moi et je me demande comment ils en ont une copie.
Me MERCIER:
D Vous rappelez-vous d'une discussion à ce sujet à l'assemblée du 16 novembre?
R. Pas sur la résiliation du bail.

et un peu plus loin à la p. 120:

D Vous dites qu'alors il n'a été aucunement question de résilier le bail de la rue Guy?
R Je ne vois pas que j'aurais pu parler de résiliation de bail sans compensation. Si on en a parlé, ça toujours été avec le but d'avoir une compensation.
D Est-ce que le sujet est venu sur le tapis. Est-ce que les mots «cancellation du bail de la rue Guy» a été discuté?
R. Je me rappelle entr'autre qu'on a parlé de l'annonce du communiqué de presse du 27 mai 1964, que nous avions perdu la jouissance de notre bail et qu'automatiquement il devrait être «cancellé». Que cela équivalait à une expropriation et qu'on devrait être rémunéré.
D. Vous reconnaissez avoir convenu la «cancellation» de ce bail là à des conditions que vous expliquez actuellement?
R. On a toujours discuté du bail, c'était le point principal.
D. Il a été question par vous de la rue Guy?
R. Oui.

Il faut, il me semble, conclure, malgré le peu d'empressement du président de la pétitionnaire à l'admettre, que la question de la résiliation du bail fut discutée même si Pinsonnault revendiqua en même temps un dédommagement pour les dommages occasionnés par l'enclave des propriétés de la pétitionnaire. Il semble aussi plausible que dans ces circonstances Pinsonnault ait pu prier l'intimée de ne pas se prévaloir de l'avis. Les extraits de la preuve ci-haut relatés semblent bien le démontrer et la lettre de la pétitionnaire, signée par M. Pinsonnault, du 8 janvier 1965 (pièce D-5) semble le confirmer lorsque ce dernier y déclare:

> We are particularly pleased to confirm that the Authority, realizing the precarious situation we find ourselves in for reasons beyond our control, has elected not to cancel our lease without cause, as such cancellation would have constituted undue enrichment at our expense.

Le témoignage de J. Carvell, le procureur de l'Administration, semble d'ailleurs établir que M. Pinsonnault ne voulait aucunement que le bail soit résilié.

> Q Now, at that meeting of November 16th, 1964, was the question of the occupation of the Guy Street premises by Eastern Canada discussed?

A. Yes, those were the premises on the Lachine canal.

. . .

Q In your presence, what was said about that specific subject?

A Mr. — an inquiry in general terms was made of Mr. Pinsonnault whether he wished to retain the Lachine Canal leasehold for other purposes than those he had put the premises to previously since it was — he had already indicated, that he was forced to move to the Port of Montreal and could not conduct his affairs from the Lachine Canal property.

Q. And what was Mr. Pinsonnault's reply?

A. Mr. Pinsonnault indicated that he would like to keep the premises on the Lachine Canal for use in connection with warehousing and related matters.

Il ressort donc de ces témoignages que le président de la pétitionnaire aurait non seulement demandé à l'intimée de ne pas se prévaloir de l'avis de résiliation, mais il lui aurait même demandé de continuer à utiliser les lieux loués, ainsi que les bâtiments qu'on y avait érigés bien que ces demandes survinrent au cours de pourparlers de règlement et furent toujours sujettes à l'achat par l'intimée des biens de la pétitionnaire pour la somme de $95,000 (avec dans l'occurrence une augmentation du prix du loyer que la pétitionnaire, cependant, ne s'engagea pas à accepter, comme nous le verrons plus bas) et à une indemnité pour les dommages que la pétitionnaire subissait par suite du transfert de ses opérations au port de Montréal.

Il semble bien que cette proposition d'acheter les biens de la pétitionnaire sur le canal lui fut transmise avant le 8 janvier 1965 puisque Pinsonnault, dans sa lettre de cette date (pièce D-5) mentionne le montant offert et déclare que si l'Administration achetait ses biens, il ne pouvait, à ce moment, s'engager à relouer les lieux loués à un loyer majoré. La pétitionnaire pourrait peut-être, disait-il une fois que sa position dans le port sera fixée, avoir besoin de ces lieux pour des fins d'entreposage et aimerait bien avoir, si possible, le droit prioritaire de les refuser. C'est ce qui ressort d'ailleurs du paragraphe 4, à la p. 2, de la pièce D-5, qui se lit comme suit:

> We fully realize that if the Authority purchases our capital assets on the leased premises, it can secure from third parties the higher rental mentioned in your letter. We cannot commit ourselves not to lease the premises anew at the higher rental simply because our basic operations are being relocated at great expense in the Port of

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Montreal. We *might,* once our position in the Port is ascertained, have a need for the present premises for storage purposes and would appreciate having the right of first refusal, if possible.

(Les italiques sont de moi).

La preuve documentaire, et plus particulièrement la lettre de Carvell à Pinsonnault erronément datée du 15 décembre 1965, et qui aurait dû porter la date du 15 janvier 1965, nous révèle que Carvell s'enquit ensuite auprès du président de la pétitionnaire pour savoir s'il devait demander à l'Administration d'obtenir l'autorisation du Conseil du trésor pour acheter les bâtiments et améliorations sur le canal au prix de $95,000 et si dans l'occurrence il voulait mettre un terme au bail ou s'il préférait continuer à occuper les lieux loués mais en majorant, dans ce cas, le prix du loyer. Carvell ajoute qu'il lui semble que Pinsonnault lui aurait alors déclaré (ce que ce dernier nie affirmant qu'il n'est jamais allé au delà de la demande de refus prioritaire (right of first refusal) contenue dans sa lettre, pièce D-5) qu'il serait prêt à payer un prix de location revisé:

Q . . . My question to you sir is this, did you get a reply to the question raised in this letter as regards the renewal of the rental?

A I don't believe—I believe I was satisfied with an oral indication that Mr. Pinsonnault would be prepared to pay the revised rental—I am not sure and I have not seen anything in looking through the file recently which was a written reply.

Dans une lettre en date du 25 janvier 1965 (pièce P-15), Pinsonnault semble prêt à accepter le montant de $95,000 pour les biens sur le canal mais sans, cependant, renoncer à réclamer les dommages que lui occasionnerait le déménagement de son commerce.

Carvell, contre-interrogé par le procureur de la pétitionnaire, donne certains éclaircissements sur la position prise par les parties à ce sujet lorsqu'il répond à la question suivante:

Q Well, I mean let's say that, the cancellation of the lease went with the ninety-five thousand dollars and it was not a question of cancelling the lease without money, is that not a fact?

A. Well, there was no question of cancelling the lease, it was a question of relieving against the hardship which Mr. Pinsonnault felt he was suffering in moving to the Port of Montreal by purchasing the assets at the Lachine Canal for their value and reflecting that in the rental to the tenant Eastern Canada Shipping had indicated

they would continue their tenancy, their new rental, their revised rental would reflect the value and any successor to Eastern Canada Shipping on the premises would be paying the cost of the buildings by having their rental calculated.

C'est en effet dans ces circonstances que la tentative de règlement s'amorça et que l'autorisation du Conseil du trésor fut sollicitée. Carvell déclare que l'Administration recommanda ensuite au Conseil de lui permettre d'acheter les biens pour le montant de $95,000 si un tel règlement convenait à la pétitionnaire mais cette recommandation fut rejetée par le Conseil.

A cause de ce refus, l'on ne put donner suite à la proposition de règlement et comme l'Administration ne signifia pas l'avis de résiliation qu'elle avait le droit d'utiliser en vertu du bail, la pétitionnaire continua à utiliser, en partie du moins, l'emplacement et les bâtiments sur le canal et elle les occupe encore aujourd'hui. L'intimée lui transmet trois fois l'an des comptes pour le prix du loyer échu que la pétitionnaire n'acquitte pas, cependant, parce que, dit-elle, les montants échus sont plus que compensés par les dommages que l'intimée lui doit.

Il serait utile, je crois, d'examiner d'un peu plus près la proposition de règlement de l'intimée et son acceptation par la pétitionnaire. Si l'on se réfère, en effet, aux paragraphes 3 et 5 de la première lettre de Pinsonnault à l'Administration, en date du 8 février 1965 (pièce D-5) l'acceptation par la pétitionnaire de l'offre de $95,000 pour ses biens est loin d'être claire. Il déclare, en effet, à ce sujet:

> If the proposed purchase of our capital assets for $95,000 means that insofar as the Authority is concerned, we would get a full and final release from the said lease, i e, that the lease would be terminated as of the date of the loss of our quiet enjoyment thereunder, we would accept such proposal if implemented at the earliest possible convenience.
>
> . . .
>
> If, on the other hand, by this proposal, the Authority means that all we are entitled to for our corporate existence and survival is payment for our capital assets and that we have no further recourse whatsoever against the Government, we must decline such offer because —
>
> (a) The existence of a company as a going concern involves much more than its capital assets

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(b) Such proposal would contradict the Government's promise, now being implemented in part by the Honourable the Minister of Transport and the National Harbours Board, that we are entitled to and are in fact being relocated in the Port of Montreal.

(c) The relocation to which we are already deemed entitled, involves the payment of all justifiable expenses and costs, as already explained at length in previous correspondence.

(d) The Authority would then purport to act for and bind all interested parties—The Minister of Transport and the National Harbours Board, who have already taken steps contradicting the Authority's proposal.

Subséquemment, la lettre de Carvell, du 15 janvier 1965 (pièce D-6) établissait clairement les conditions de ce paiement et la proposition de règlement complet et final qu'elle comportait. Il s'exprimait en effet comme suit:

> The Authority has carefully considered your claim, and I have advised that the only relief which would be considered is the purchase of your capital assets for an amount of $95,000. I have also indicated that, as a condition of doing so the Authority would require you to execute a release acknowledging full and final settlement of your entire claim.
>
> Since the St. Lawrence Seaway Authority acts herein for Her Majesty in right of Canada, a release to the Authority, would afford legal immunity to all agencies of the Canadian Government in relation to this claim for disturbance . . . I might point out, however, that this need not preclude assistance by the Authority or another Government Agency on a purely gratuitous basis.

Sur réception de cette lettre, Pinsonnault, dans sa lettre du 25 janvier (pièce P-15) lui répondit comme suit:

. . .

> We have to move and are being relocated under the Minister's instructions. Relocation means that we have to go from one location to another; this applies not only to our premises at the Authority, but also to our offices now leased from third parties. Moving costs money. We are not moving to what you call "equivalent premises" but to smaller and much more costly ones. The rent in the Port will be much higher. We will need much more equipment. We will have to create an entirely new clientele which may take some years to materialize. The Minister's promise of our relocation simply means that these factors cannot be ignored. If this is what you mean when you say: "I might point out, however, that this (i e, the purchase of our installations and improvements for $95,000—) need not preclude assistance by the Authority or another Government Agency" we agree fully, as long as the Agency involved falls under the jurisdiction of the Minister of Transport. We do not want to be given the run around. We do not care if

you call our relief "gratuitous" or "ex gratia" as long as we get it. We are quite aware of the Government's reticence to admit any liability but to us the Minister's promise to relocate us is clear and implicit enough.

On the basis of this letter we would accept the purchase of our capital assets by the Authority for $95,000—for immediate settlement and subject to agreement on the other factors involved. On the question of our leasing the present premises at a higher rental our position was made quite clear in our January 8th, 1965 letter to to the Authority in your care.

L'acceptation par Pinsonnault du montant de $95,000 pour les biens, mais sujette à une entente sur les autres items dont il parle dans sa lettre, est loin d'être un acquiescement pur et simple à la proposition de règlement complet et final de l'intimée et il s'ensuit, je crois, que cette acceptation conditionnelle ne pouvait lier l'Administration, même si l'approbation du Conseil du trésor n'avait pas été requise pour effectuer le règlement proposé.

Cet exposé de la preuve nous révèle une situation de faits qu'il est important de dresser dès maintenant pour la solution de ce litige. Tout d'abord, il semble bien que

(1) l'Administration n'a pas envoyé d'avis de résiliation du bail pendant les pourparlers de règlement qui se sont soldés par un échec lorsque le Conseil du trésor refusa d'approuver le paiement d'un montant de $95,000 à la pétitionnaire pour ses bâtiments et améliorations parce qu'on espérait de part et d'autre que le règlement s'effectuerait. Et pour des raisons qui n'ont pas été dévoilées au procès, mais probablement parce que, selon Carvell, Pinsonnault avait indiqué qu'il aimerait à utiliser les lieux loués pour fins d'entreposage (in connection with warehousing and related matters) elle n'a pas envoyé d'avis après ce refus;

(2) l'acceptation par la pétitionnaire de l'offre de $95,000 en règlement complet et final de toute réclamation faite par l'Administration fut toujours conditionnelle puisqu'elle exigeait en plus le règlement des frais de déménagement et de relocation dans le port de Montréal ainsi que les dommages subis par suite de ce déplacement, même si à un certain moment la Cou-

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ronne mentionna qu'il ne fallait pas écarter la possibilité que ces items pourraient être compensés par des paiements *ex gratiis*.

Si, en effet, l'on considère l'offre de règlement proposée et discutée entre les parties, Pinsonnault pouvait, en effet, à un certain moment, s'attendre: (1) de recevoir le montant de $95,000 (si l'autorisation du Conseil du trésor était obtenue et si sa compagnie signait une quittance complète et finale de toute réclamation); (2) d'être relogé dans le port; (3) de pouvoir utiliser les lieux loués tout en payant un loyer majoré et (4) d'être indemnisé par des paiements *ex gratiis* si les autorisations requises étaient données.

Examinons maintenant la position que prend la pétitionnaire en face de ces faits. Son procureur admet que si l'Administration avait utilisé la clause de résiliation, ses dommages seraient restreints à trois mois de dommages, mais elle n'a pas exercé le moyen que lui donne le bail et peu importe, dit-il, les raisons pour lesquelles elle ne l'a pas fait. La principale obligation de l'intimée, dit-il, c'était de fournir à son locataire un endroit pour le chargement et le déchargement des navires, tel que prévu au bail, et elle ne l'a pas fait. L'Administration n'ayant pas, par conséquent, fourni la jouissance paisible des lieux loués, a ainsi manqué à ses obligations à l'égard de la pétitionnaire en vertu de son bail et doit, par conséquent, payer les dommages qui en résultent. La pétitionnaire se réclame en effet de l'article 1612 C.C. (les parties ayant de concert accepté que c'est la loi du Québec qui s'applique ici) qui déclare que «Le locateur est obligé par la nature du contrat . . . 3. De procurer la jouissance paisible de la chose pendant la durée du bail» et de l'article 1641 C.C. qui donne au locataire un recours «3. Pour le recouvrement de dommages-intérêts à raison d'infraction aux obligations du bail, ou des rapports entre locateur et locataire.» L'article 1071 C.C. prévoit que «Le débiteur est tenu des dommages-intérêts, toutes les fois qu'il ne justifie pas que l'inexécution de l'obligation provient d'une cause qui ne peut lui être imputée, encore qu'il n'y ait aucune mauvaise foi de sa part» et l'article 1073 déclare que «Les dommages-intérêts dus au créan-

cier sont, en général, le montant de la perte qu'il a faite et du gain dont il a été privé;. . . .».

Il n'est pas inutile de souligner ici que l'objet du bail intervenu entre les parties comprend non seulement le droit d'ériger des bâtiments sur l'emplacement loué de l'Administration, mais aussi le droit d'utiliser cet emplacement pour le chargement et le déchargement des navires, y compris un droit d'accès ou de passage selon que le bail le décrit d'ailleurs sur sa page frontispice:

> Lands or Rights Demised· 109,300 sq. ft. of Canal reserve land located on wharf between St. Gabriel Basins Nos. 3 & 4 in the Ste-Anne Ward of the City of Montreal, Quebec, to be used for loading and unloading vessels and as a site for buildings of the Lessee, together with right of way.

La description des lieux loués apparaît au début du bail et se lit comme suit:

> ALL AND SINGULAR that parcel or tract of Lachine Canal Reserve Land (hereinafter referred to as "the said land") situate, lying and being on the wharf betwen St. Gabriel Basins Nos. 3 and 4 of the Lachine Canal, in the Ste. Anne Ward of the City of Montreal, in the Province of Quebec, rectangular in shape; its northeastern side measuring five hundred and eighty four and forty nine hundredths (584 49) feet being parallel to and forty six and five tenths (46 5) feet southwesterly of the face of the southwestern wall of the said Basin No. 3 and its southeastern side measuring one hundred and eighty seven (187) feet being parallel to and forty six and five tenths (46 5) feet northwesterly of the face of the Canal wall; the said land containing an area of one hundred and nine thousand three hundred (109,300) square feet, more or less, English Measure, its location being shown outlined red and coloured yellow on the plan No. SL-62-46 hereto annexed and it shall be used for loading and unloading vessels and for erecting thereon buildings in connection with the Lessee's businesses and operations.

Les articles 1605 C.C. et 1606 C.C. du reste indiquent clairement que l'on peut louer toutes sortes de choses tant corporelles qu'incorporelles et le dernier article prend la peine d'ajouter que si ces choses incorporelles «sont attachées à une chose corporelle, tel qu'un droit de servitude elles ne peuvent être louées qu'avec cette chose». Il était donc loisible à l'Administration de louer non seulement son terrain, mais aussi de lui assurer les voies d'accès qui per-

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mettent de s'y rendre, ainsi que les deux bassins nécessaires pour le chargement et le déchargement des navires. Il ne peut, par conséquent, s'agir ici, dans la description précitée des lieux loués, que d'une simple limitation de l'usage que pouvait faire le locataire des lieux loués.

Cet accès par le canal et l'usage des bassins étaient d'ailleurs absolument nécessaires aux activités ou opérations commerciales de la pétitionnaire et l'on peut prendre pour acquis qu'elle n'aurait pas loué sans ces avantages.

En France, où la loi quant à ce qui peut faire l'objet d'un bail est semblable à la nôtre, l'on a même décidé que de tels avantages font partie du bail sans même qu'il soit nécessaire de les énoncer[2]. Il s'agissait dans l'occurrence de l'accès aux lieux loués qui avait été modifié au détriment du preneur.

L'accès par le canal semble d'ailleurs, de l'aveu même de l'intimée, faire partie des obligations du bailleur. Elle n'a en effet en aucun temps soutenu le contraire et l'admet même puisqu'elle allègue, comme nous l'avons vu au paragraphe 17 de sa défense, que c'est pour pouvoir fermer le canal à la navigation qu'elle «s'était réservé le droit contractuel de résilier le bail selon les modalités prévues à la clause» 12(*b*).

D'ailleurs, si l'on s'en remet aux procureurs des parties, il n'y a aucune divergence d'opinion quant à ce qui a été loué. Le procureur des intimées admet même que la pétitionnaire «a loué deux choses, soit le terrain et les accès au terrain»—ajoutant même que «c'est dans le bail cela» et cela comprendrait et l'emplacement et les voies d'accès tant terrestre que par eau.

Il me paraît en effet clair que si le bail était intervenu entre deux particuliers ou deux corporations privées et que

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[2] Juris-Classeur Civil, 1965, fasc. 15[1]—fasc. E[1]—No. 20.

20.—Le bailleur ne doit rien faire qui restreigne l'usage de la chose louée tel qu'il est déterminé par le contrat. Cette obligation porte non seulement sur la chose principale, mais encore sur tous les avantages, même non énoncés au contrat, sur lesquels le preneur a dû compter comme utilité ou agrément de sa location (Cass. req. 25, avril 1893; D.P. 93, 1, 207.—Trib. civ. Seine 30 janv. 1897; D.P. 97, 2, 471.—Comp; Cass. req. 3 déc. 1901; D.P. 1903, 1, 331).

le bailleur avait ainsi fermé l'accès aux lieux loués et rempli les bassins que le preneur devait et pouvait, en vertu de son bail, utiliser pour l'exercice de son commerce, de façon à l'affecter sérieusement dans ses opérations, il aurait eu une action en résiliation du bail avec dommages.

En serait-il autrement parce que la fermeture du canal ici provient d'une décision administrative par l'entremise de la Couronne. Je ne le crois pas. Elle ne pourrait l'être, je crois, que s'il s'agissait d'une décision prise pour cause d'utilité publique et où le dommage en résultant en soit un dont souffre le public en général qui ne pourrait, pour cette raison seule, être recouvré. L'on pourrait, en effet, dans ce cas, se demander si un tel geste nécessaire pour le plus grand bien de la société et sans qu'il soit la conséquence d'une faute commise par le bailleur, puisse entraîner une responsabilité quelconque.

Or, bien qu'il apparaisse que la décision de fermer le canal ait été prise pour permettre à la Corporation canadienne de l'Exposition universelle et à la ville de Montréal de construire une route au-dessus du canal comme moyen d'atteindre de l'île de Montréal le site de l'Exposition, il n'est aucunement prouvé qu'il se soit agi là d'une décision prise pour cause d'utilité publique ou même qu'il s'agisse d'une expropriation partielle, telle que prévue par l'article 1660 du Code Civil[3] auquel cas, d'ailleurs, la pétitionnaire ne pourrait réclamer des dommages.

En serait-il autrement si une clause de résiliation facultative est insérée au bail pour prévoir l'éventualité de la fermeture du canal et que le preneur aurait demandé au bailleur de ne pas l'utiliser bien que, comme nous l'avons vu, cette demande fut faite dans les circonstances que nous connaissons. Si le preneur n'avait pas utilisé cette clause à sa demande, la pétitionnaire pourrait-elle se considérer lésée

[3] 1960. Si, pendant la durée du bail, la chose est entièrement détruite par force majeure ou cas fortuit, ou expropriée pour cause d'utilité publique, le bail est dissout de plein droit. Si la chose n'est détruite ou expropriée qu'en partie, le locataire peut, suivant les circonstances, obtenir une diminution du loyer ou la résiliation du bail; mais dans l'un ou l'autre cas, il ne peut réclamer des dommages-intérêts du locateur.

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dans son bail et réclamer des dommages comme si elle était dans la situation d'un locataire ordinaire frustré dans ses droits? Elle ne pourrait, il me semble, être empêchée d'exercer un recours ici que si par suite de cette demande de ne pas envoyer l'avis de résiliation et de continuer d'utiliser les lieux loués, je devais conclure qu'elle avait implicitement représenté à l'intimée que si sa demande était accordée elle renoncerait, dans l'occurrence, à réclamer des dommages contre elle ou que l'acceptation par l'intimée de ne pas envoyer d'avis et la permission accordée de continuer à utiliser partiellement les lieux loués serait incompatible avec l'action en dommages qu'elle entend maintenant exercer.

Il ne m'est pas cependant possible de déclarer que par sa conduite la pétitionnaire ait renoncé aux droits qu'elle peut avoir de recouvrer les dommages et la perte qu'elle a subis par suite du bris du bail par le preneur, car tout au long des pourparlers (avant comme après que l'intimée ait obtempéré à ses demandes) jusqu'aux présente procédures, elle a persisté à demander une indemnité pour ses dommages et la perte qu'elle a subis et elle les demande encore par la présente action. Si, en effet, comme je le décide, l'accès aux lieux loués par le canal formait partie du bail et que le preneur lui enlève cet accès la privant de la jouissance des lieux loués qui lui assurait le bail, elle possède encore un recours en dommages contre le preneur pour les dommages et la perte qu'elle a subis même si, d'une façon diminuée, elle continue à utiliser les lieux loués et même si, dois-je ajouter, elle a demandé au preneur de ne pas lui signifier l'avis de résiliation. Il ne m'est pas même possible dans les circonstances de cette cause d'inférer que cette demande du preneur de ne pas résilier le bail et d'utiliser partiellement les lieux loués, acceptée par le bailleur, puisse être considérée comme un nouveau contrat qui ait pu (selon l'article 1022 C.C.) modifier le bail. L'intimée, en effet, continue à transmettre au locataire à chaque échéance un compte pour le plein montant du loyer dû comme si le bail avait son plein effet. La preuve me permet tout au plus de déclarer que l'intimée, pour des raisons qui n'ont pas été dévoilées à l'enquête, n'a pas voulu exploiter son

droit de résiliation du bail contre la pétitionnaire et ne l'ayant pas fait, il me faut conclure que le bail subsiste toujours.

D'ailleurs, la seule position prise par les procureurs des intimées sur cette question c'est que la conduite du président de la pétitionnaire, sa connaissance du communiqué de presse, la correspondance volumineuse qui s'enchaîna par la suite, l'assemblée du 16 novembre 1964 à laquelle le président participa à Ottawa, les tentatives de règlement, la relocation au hangar 27 au port, faite par le truchement des Ports nationaux, équivalent à un avis. Ce n'est pas, disent-ils, l'avis formel de 12(b) (a notice in writing signed by the legal adviser of the St. Lawrence Seaway Authority) mais cela équivaudrait à un tel avis.

Si, d'autre part, disent les procureurs des intimées, il faut conclure qu'un tel avis ne vaut pas parce que la pétitionnaire n'a pas été avisée par l'écrit prévu au bail, il faut aussi conclure qu'elle ne l'a pas été parce qu'elle a demandé de ne pas l'être et pour cette raison seule elle serait sans recours.

Il ne m'est pas possible d'accepter cette prétention des intimées à l'effet que la connaissance du communiqué de presse par le président de la pétitionnaire et sa conduite équivalent à l'envoi de l'avis prévu au bail parce que en premier lieu un tel avis écrit n'a jamais, en fait, été envoyé et que la conduite du représentant de la pétitionnaire, que nous avons eu l'avantage d'examiner plus haut, ne peut d'aucune façon être considérée comme équivalant à un tel avis. La preuve, en effet, révèle clairement qu'un avis n'a pas été envoyé dès la fermeture du canal, parce que les parties en cause discutaient d'un règlement et que l'on a toujours cru, jusqu'au refus du Conseil du trésor d'autoriser le paiement d'un montant de $95,000 pour les bâtiments de la pétitionnaire et les améliorations qu'elle avait faites aux lieux loués que tout pourrait se régler sans écarter, comme on le dit dans une des lettres émanant de l'Administration, la possibilité que les dommages subis par la pétitionnaire puissent même être compensés par un paiement *ex gratia*. C'est après ce refus qu'il aurait fallu transmettre l'avis

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écrit de résiliation du bail et l'on peut même se demander encore pourquoi un tel avis n'a pas été envoyé.

Les faits connus du président de la pétitionnaire ne sont pas ni ne peuvent d'ailleurs équivaloir à un avis, tel que le veulent les intimées. Ils indiquent tout au plus qu'il pouvait réaliser qu'on était dans une situation où un avis pouvait être donné et il pouvait espérer obtenir un règlement convenable des dommages que la pétitionnaire subissait sans que l'Administration se prévaille de l'avis de résiliation. Je suis même prêt à admettre que la pétitionnaire, par son président, demanda même qu'on n'utilise pas ce moyen de mettre un terme au bail. Il n'y a, cependant, rien dans un tel geste qui puisse me faire conclure qu'ayant fait cette demande il s'est maintenant placé dans une position où il ne peut réclamer les dommages auxquels il peut avoir droit par suite du bris des obligations du bailleur. Peu importe, en effet, les raisons pour lesquelles l'Administration n'a pas envoyé un tel avis, que ce soit parce que la pétitionnaire lui a demandé de ne pas l'utiliser ou que cela soit par négligence ou parce que les officiers de l'Administration ont pensé que les conséquences d'un tel avis dans les circonstances étaient telles qu'elles risqueraient de compromettre sérieusement la vie même de cette entreprise, il n'en demeure pas moins que parce qu'un tel geste n'a pas été posé, un bail qui aurait pu être résilié ne l'a pas été et que les droits et obligations des parties à ce bail ont, par conséquent, continué à subsister et subsistent encore.

Il me faut donc conclure que la pétitionnaire affectée dans sa jouissance par l'action de son bailleur, a droit aux dommages et à la perte subis par suite du manquement de l'intimée aux obligations du bail. Avant d'examiner les dommages réclamés par la présente action, il serait cependant utile de considérer dès maintenant la question de savoir si les intimées sont liées, tel que le soutient la pétitionnaire, par l'offre qu'elle a faite d'acheter les bâtiments de la pétitionnaire et les améliorations qu'elle a faites aux lieux loués.

Il ne m'apparaît pas ici que la pétitionnaire puisse se réclamer de l'acceptation qu'elle prétend avoir faite de

l'offre de l'Administration. L'acceptation conditionnelle par la pétitionnaire de l'offre de $95,000 de l'Administration ne peut, en effet, dans les circonstances que nous connaissons, être considérée comme une pollicitation acceptée et ne peut, par conséquent, lier l'Administration même si une telle offre n'avait pas été sujette à l'autorisation du Conseil du trésor comme ce fut le cas ici et même dois-je ajouter, s'il n'est pas sûr qu'il fut nécessaire dans le présent cas, d'obtenir l'autorisation du Conseil du trésor pour effectuer le règlement proposé (voir à ce sujet l'article 39 de la *Loi pourvoyant à l'administration financière du gouvernement du Canada,* S.R.C. 1952, chapitre 116, le *Règlement sur le marché de l'État* (C.P. 1964-1467) article 2 où l'on définit le mot «marché» (ou «contract» dans le texte anglais) et où l'on voit que ce mot ne comprend pas une transaction comme celle qui s'était amorcée entre les parties dans la présente cause) bien que d'autre part les articles 30 et 38 de cette loi semblent exiger que tout contrat soit certifié par le contrôleur et qu'il y ait des deniers disponibles.

Il est même douteux que cette Loi et ce règlement s'appliquent à l'Administration puisque l'article 3 du règlement déclare qu'il ne s'applique pas aux corporations nommées aux annexes y mentionnées (dont l'Administration) et que, d'autre part, il n'apparaît pas que le gouverneur en conseil ait établi des règlements sur les conditions auxquelles une corporation de mandataire peut entreprendre des engagements contractuels, tel que le prévoit l'article 83 de la *Loi sur l'administration financière du gouvernement du Canada.*

Au surplus, peu importe, il me semble qu'un tel marché devait ou non être autorisé par le Conseil, cette autorisation avait été stipulée par la partie offrante comme condition de son offre et n'ayant pas été remplie, l'offre, il me semble, tombe et ne peut engager l'Administration.

Cette offre de règlement ne peut même pas être considérée comme une reconnaissance de responsabilité puisqu'en tout temps elle était sujette, tel que le dit Carvell à la page 2 de sa lettre du 15 décembre 1965 (15 janvier 1965) à la signature par la pétitionnaire d'une quittance

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en règlement complet et final de sa réclamation, quittance que la pétitionnaire n'a, en aucun moment, indiqué qu'elle signerait. La lettre de Harris Arbique, l'assistant du ministre des Transports du temps, en date du 13 janvier 1965 (pièce P-1) n'est pas davantage une acceptation de responsabilité de la part de la Couronne car elle ne fait que mentionner la proposition de règlement de l'Administration en répétant encore une fois que le paiement serait en règlement complet et final de tous dommages résultant de la cessation d'occupation des lieux loués.

D'ailleurs, il est maintenant clairement établi et constant que règle générale un ministre de la Couronne ne peut engager la responsabilité contractuelle de la Couronne à moins qu'il soit autorisé à le faire par un statut ou une loi ou par un arrêté ministériel (cf. *Walsh Advertising Company Limited v. The Queen*[4]; *Drew v. The Queen*[5] et *The King v. George McCarthy et al*[6]). Or, il n'y avait, au moment de la lettre d'Arbique, aucune loi ou aucun arrêté ministériel qui permettait au ministre des Transports d'engager la Couronne quant au règlement proposé. Cette offre est donc tout simplement restée à l'étape d'offre ou d'ébauche de règlement.

Il s'ensuit donc que la pétitionnaire ne peut se réclamer de l'offre de l'intimée de lui acheter ses bâtiments et améliorations pour la somme de $95,000. Comme, d'autre part, elle n'a droit en vertu du bail que d'enlever les bâtiments des lieux loués à son expiration, elle ne peut rien réclamer pour ses biens.

Examinons, maintenant, la réclamation en dommages de la pétitionnaire. Bien qu'elle réclame $1,080,427.38, son expert François Valiquette n'établit l'indemnité à laquelle elle aurait droit qu'à la somme de $703,075, dont $110,570 pour les bâtiments, $18,830 pour les améliorations et $573,675 pour les dommages. Les bâtiments comprennent trois grands hangars, un petit hangar et un bureau dont Valiquette évalue la valeur de remplacement à $132,490 et la

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[4] [1962] R C. de l'É. 115 aux pp. 123-124.
[5] [1956-60] R C. de l'É 339.

valeur nette dépréciée à $110,570. Pour les raisons déjà données, il ne devrait pas être nécessaire d'estimer la valeur de ces biens puisque la pétitionnaire ne peut rien réclamer sous cette rubrique. Elle n'aurait, en effet, droit de réclamer sous ce chef que si sur appel l'on déclarait que l'offre de règlement des intimées lie la Couronne en autant que le montant offert corresponde à la valeur de ces biens. C'est à cette fin seulement que j'ai voulu en estimer leur valeur.

Roger Chouinard, l'évaluateur des intimées évalue leur valeur de remplacement à $124,630 et leur valeur dépréciée à $67,860. La différence des chiffres ici provient surtout des pourcentages de dépréciation différents employés et parce que Chouinard a fait son évaluation en 1968 au lieu de 1963. Il déclare d'ailleurs que s'il calculait ses valeurs en 1963, il arriverait à une valeur de remplacement de $110,350 et à une valeur dépréciée de $75,620.

Il me faut ici dire que l'évaluation des deux estimateurs précités ne me convainc guère quant à la valeur des immeubles en cause. Valiquette, celui de la pétitionnaire, n'est même pas allé sur les lieux mais s'en remet à son ingénieur en chef et un inspecteur et Chouinard a fait évaluer les propriétés aux mois de juillet et août 1968. Je crois qu'il est préférable, dans ces circonstances, d'accepter, quant à la valeur des bâtiments et améliorations effectuées sur les lieux loués par la pétitionnaire, le chiffre de $95,000 établi par Jacques St-Laurent, l'agent régional des terres pour la région de l'est, et un employé du ministère des Transports, au mois de décembre 1964, dans son rapport du 14 décembre 1964 (pièce P-17). Ce montant comprend la valeur des bâtiments et des améliorations, soit $74,900 pour les bâtiments et $20,260 pour les améliorations.

Avant de procéder à l'examen des montants réclamés, il me faut disposer ici d'une objection faite par le procureur de la pétitionnaire au témoignage de l'expert des intimées, Chouinard. Tout au long de son rapport et au cours de son témoignage à l'enquête, ce témoin s'est prononcé sur des questions de faits et même sur des questions de droit auxquelles s'est objecté le procureur de la pétitionnaire et la Cour lui a donné raison en déclarant qu'elle verrait à mettre

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de côté toutes les conclusions de faits ou de droit dont la décision appartient à la Cour. Il s'est cependant objecté, comme étant du ouï-dire, à d'autres parties de son expertise ou de son témoignage où il référait à une enquête qu'il avait conduite auprès de certaines personnes du port de Montréal ou du canal pour vérifier le bien-fondé des montants que l'expert de la pétitionnaire réclamait pour elle. S'il me fallait mettre de côté cette preuve, il me serait difficile d'en arriver à une décision sur le bien-fondé des montants réclamés. Il ne me paraît pas, cependant, que la position prise par le procureur de la pétitionnaire dans l'occurrence soit celle qu'il faille adopter en cette matière quant au témoignage de l'expert de l'intimée. Dans une cause d'expropriation de *City of Saint John v. Irving Oil Co. Ltd.*[7], le juge Ritchie déclarait à la page 592:

> Counsel on behalf of the City of Saint John pointed out that if the opinion of a qualified appraiser is to be excluded because it is based upon information acquired from others who have not been called to testify in the course of his investigation, then proceedings to establish the value of land would take on an endless character as each of the appraiser's informants whose views had contributed to the ultimate formation of his opinion would have to be individually called. To characterize the opinion evidence of a qualified appraiser as inadmissible because it is based on something that he has been told is, in my opinion, to treat the matter as if the direct facts of each of the comparable transactions which he has investigated were at issue whereas what is in truth at issue is the value of his opinion.

Il me paraît donc que la preuve apportée par l'expert des intimées ne doit pas être mise de côté bien que les informations qu'il a ainsi obtenues doivent être pesées pour apprécier à sa juste valeur l'opinion experte de ce témoin.

Valiquette établit ce qu'il appelle les dommages à une somme de $573,675. (Ici le savant juge procède à considérer les montants réclamés et continue):

Il ne s'ensuit pas, cependant, que la pétitionnaire n'ait pas subi de dommages par suite du déplacement de ses opérations. Elle en a subis et quelle que soit la difficulté de la tâche qui m'incombe, il me faut maintenant déterminer le quantum de ces dommages.

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[7] [1966] R.C.S. 581

Le déplacement de la pétitionnaire a entraîné pour elle des pertes et des dommages, c'est sûr, mais comme nous l'avons vu, cela a entraîné aussi certains avantages qui se traduiront d'ici peu par un profit net accru. L'augmentation du volume des opérations, en effet, qui, comme nous l'avons vu, s'est effectué dès la première année du déménagement au port, ne pourra qu'augmenter chaque année et profiter à la pétitionnaire. Les chiffres présentés par l'expert de la pétitionnaire, sauf ceux qui ont trait aux bâtiments et améliorations, sont tellement exagérés qu'il ne peut être question de les utiliser aux fins de déterminer les dommages encourus. Il me paraît plus objectif et plus juste de fonder les dommages de la pétitionnaire sur ses profits nets pour les années 1957 à 1964 (soit jusqu'à l'année qui a précédé son déménagement au port) tels qu'ils apparaissent à la page 30 du rapport de Valiquette et des profits réduits de la première année au port en 1966. Il me faudra dans ce cas évaluer à une moyenne d'environ $2,200 les profits nets de la pétitionnaire pour cette période et qui représente la perte qu'elle subit pour une année. D'autre part, il n'est pas possible d'accorder à la pétitionnaire plus que quatre années de perte de profits à compter de l'année 1965 jusqu'à l'année 1969 car en 1964, la pétitionnaire n'avait pas encore été affectée par la fermeture du canal. Je ne puis, d'autre part, accepter que le bail coure jusqu'à l'expiration des cinq ans de son renouvellement à partir de son expiration le 31 mars 1968, car j'ai bien l'impression que sur l'émission de ce jugement, l'on verra à résilier le bail, comme on aurait dû le faire dès après le refus du Conseil du trésor d'approuver le règlement suggéré.

Il me paraît donc qu'une somme de $8,800 ($2,200 × 4) soit $9,000 en chiffre rond représente d'une façon adéquate les pertes de profits subies par la pétitionnaire par suite du transfert de son commerce au port de Montréal. Si l'on ajoute à ce montant la somme de $35,000 pour frais de déménagement, etc., l'on obtient un montant de $44,000 qui correspond aux dommages subis par la pétitionnaire.

La pétitionnaire a de plus demandé comme conclusion subsidiaire la réduction du loyer qu'elle devait payer depuis

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le 27 mai 1964 et durant toute la durée du bail et son renouvellement à la somme de $500 par année. Comme, cependant, cette conclusion est subsidiaire à sa réclamation en dommages et à défaut de son recours en dommages seulement il n'est pas possible de lui accorder la réduction demandée.

La Cour devra, par conséquent, dans le jugement formel, maintenir la pétition de la pétitionnaire pour partie et lui accorder des dommages au montant de $44,000 (soit $35,000 et $9,000) avec frais et dépens. Quant à la demande reconventionnelle de l'Administration pour les montants de loyer que lui doit la pétitionnaire pour l'occupation des lieux à compter du 1er juillet 1964 au 1er janvier 1968 inclusivement, la Cour est prête à lui accorder le loyer réclamé (soit la somme de $30,740.70 sur lequel d'ailleurs les parties, par leurs procureurs respectifs, ont déclaré s'être entendues) à condition, évidemment, que par des amendements appropriés, elle fasse en sorte que cette demande reconventionnelle soit exercée au nom de Sa Majesté la Reine. Dès que cette exigence sera satisfaite, la Cour verra dans le prononcé du jugement à lui accorder sa demande ainsi qu'à déclarer la compensation entre ce montant et le montant dû à la pétitionnaire par l'intimée (soit la somme de $44,000) avec ses frais et dépens sur la demande reconventionnelle, ce qui laissera un montant dû à la pétitionnaire de $13,259.30.

Montreal
1968
Sept. 9-10
Sept. 12

BETWEEN:

THE CANADIAN CONVERTERS' COMPANY LIMITED ..... PLAINTIFF;

AND

EASTPORT TRADING CO. LTD. .....DEFENDANT.

Unfair competition—Selling goods in colourable imitation of competitor's get-up—Whether use of different words exculpatory—"Confusion", meaning—Trade Marks Act, s. 7(b) and s. 6(2), (3) and (4).

Plaintiff, a clothing manufacturer, with the consent of the owner of the registered trade mark "Bond Street" to the use of that mark, sold boys' shirts in Canada from 1947 in transparent bags bearing a distinctive design including the words "Bond Street", and the trade and the buying public had come to know that "get-up" as indicating shirts of plaintiff's manufacture. In 1963 defendant sold to retailers in Canada 1500 dozen imported boys' shirts in a colourable imitation of plaintiff's "get-up" except mainly that the words "Style Manor" were substituted for "Bond Street". The court found that the similarity of the two "get-ups" would create the impression that the shirts so packaged were two different wares of one manufacturer.

Held, such a misleading of the public caused "confusion" between the wares of defendant and those of plaintiff and was prohibited by s. 7(*b*) of the *Trade Marks Act*. While the provisions of s. 6(2), (3) and (4) respecting "confusion" in the use of trade marks and trade names do not apply in terms to the prohibition described by s. 7(*b*) it must be assumed that Parliament intended the same general meaning for the word.

ACTION under *Trade Marks Act*.

Alastair M. Watt, Q.C. and *John A. A. Swift* for plaintiff.

N. A. Levilsky for defendant.

JACKETT P. (*orally*):—What I have to dispose of this afternoon is a claim under section 7(b) of the *Trade Marks Act*. Other claims in the statement of claim were, in effect, abandoned by counsel for the plaintiff during argument.

The provisions of the *Trade Marks Act* relating to the cause of action read as follows:

> 7. No person shall
>
> * * *
>
> (b) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;
>
> * * *

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52. Where it is made to appear to a court of competent jurisdiction that any act has been done contrary to the provisions of this Act, the court may make any such order as the circumstances require including provision for relief by way of injunction and the recovery of damages or profits, and may give directions with respect to the disposition of any offending wares, packages, labels and advertising material and of any dies used in connection therewith.

Jackett P.

This Court has jurisdiction to entertain this action by virtue of section 54 of the same Act, which reads as follows:

54. The Exchequer Court of Canada has jurisdiction to entertain any action or proceeding for the enforcement of any of the provisions of this Act or of any right or remedy conferred or defined thereby.

As the action arises, in part at least, in the Province of Quebec, and has been brought in the Exchequer Court of Canada, it is important to have in mind that it is not an action for passing off under the common law of England, which forms part of the law of certain Provinces, and is not based on the provisions of the Civil Code of Quebec governing *dilictual* liability. It is a purely statutory cause of action. Compare *S. & S. Industries Inc. v. Rowell.*[1]

The plaintiff is a manufacturer in Canada of wearing apparel, including men's and boys 'shirts. Over a period of several years prior to the institution of this action in 1964, the plaintiff sold in Canada a large quantity of boys' shirts to which were attached labels bearing *inter alia* a trade mark "BOND STREET". These shirts were sold in transparent flexible bags, on each of which there was a distinctive design described by the statement of claim, in a manner that is admitted by the statement of defence to be correct, as being "a distinctive design in red, black and white colours" which consists *inter alia* of the following:

(A) The words BOND STREET in red letters edged in white, which letters are in Gothic type. The said words appear on the front of the bag approximately 4 inches from the bag's base and on the back of the bag approximately 8 inches from the bag's base. The said words are also printed in smaller black letters in Gothic type on the bag's top end.

(B) Directly to the left of, but slightly higher than, the said words BOND STREET, where printed in red letters edged in white, that is on the front and back of the bag, there appears, in black, the silhouette of a man in top hat facing to the right, which silhouette is framed by a white oval, the edges of which are scalloped. A larger red oval encircles the said silhouette.

[1] [1966] S.C.R. 419.

(C) The word JUNIORS in black letters, printed in an exaggerated Futura type, centered, and printed directly beneath the words BOND STREET on the front of the bag.

(D) The word GARÇONS in black letters, printed in an exaggerated Futura type, centered, and printed directly beneath the words BOND STREET on the back of the bag.

(E) The words PERFECTLY TAILORED FOR COMFORT & FIT superimposed in Futura type on a red bar extending the width of the front of the bag, and which bar appears directly below the word JUNIORS referred to in sub-paragraph C) above. Superimposed on the left end of the said red bar is a triangular figure of isoscelesean dimensions, in black print, the apex of which points towards the words printed on the said bar.

(F) The words TAILLÉ PARFAITEMENT POUR VOTRE CONFORT superimposed in Futura type on a red bar extending the width of the back of the bag, and which bar appears directly below the word GARÇONS referred to in sub-paragraph D) above. Superimposed on the left end of the said red bar is a triangular figure of isoscelesean dimensions, in black print, the apex of which points towards the words printed on the said bar.

(G) The words GUARANTEED MACHINE WASHABLE superimposed in Futura type on a black bar extending the width of the front of the bag, and which bar appears directly below the red bar referred to in subparagraph E) hereof. Superimposed on the left end of the said black bar is a triangular figure of isoscelesean dimensions in red print, the apex of which points towards the words printed on the said bar.

(H) The words GARANTI LAVABLE À LA MACHINE superimposed in Futura type on a black bar extending the width of the back of the bag, and which bar appears directly below the red bar referred to in subparagraph F) hereof. Superimposed on the left end of the said black bar is a triangular figure of isoscelesean dimensions in red print, the apex of which points towards the words printed on the said bar.

(I) The words SANFORIZED, COMBED, MERCERIZED superimposed in futura type on a red bar extending the width of the front of the bag, and which bar appears directly below the black bar referred to in sub-paragraph G) hereof. Superimposed on the left end of the said red bar is a triangular figure of isoscelesean dimensions in black print, the apex of which points towards the words printed on the said bar.

(J) The words SANFORIZÉ, CARDÉ, MERCERISÉ superimposed in Futura type on a red bar extending the width of the back of the bag, and which bar appears directly below the black bar referred to in sub-paragraph H) hereof. Superimposed on the left end of the said red bar is a triangular figure of isoscelesean dimensions in black print, the apex of which points towards the words printed on the said bar.

(K) Directly below the red bar referred to in sub-paragraph J) hereof, there is printed a chart indicating neck-sizes for ages 5, 6, 8, 10, 12, 14, 15, 16 and 17/18. The said chart, which is bordered in red, has printed thereon in black letters in Futura type and on

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its left side, the words YOUR AGE, YOUR NECK and YOUR PROPER SIZE CHART and on its right side, the words VOTRE ÂGE, VOTRE COU and VOTRE GUIDE DE GRANDEUR.

In 1963 the defendant purchased in Hong Kong, imported into Canada and sold to retailers (some at least of whom ordinarily sold shirts manufactured and marketed by the plaintiff in the manner that I have already described) some 1,500 dozen shirts which were packaged for sale in transparent flexible bags that were patterned almost exactly on the bags used by the plaintiff that I have already described except that

(a) wherever the words "BOND STREET" occurred on the plaintiff's bag, the words "STYLE MANOR" appeared on the defendant's bag in the same colour and the same size and style of print,

(b) while the words "Made in Canada since 1889" appeared on the plaintiff's bag, the words "Made in Hong Kong" appeared on the defendant's bag, and

(c) the printing on the red stripes on the defendant's bag was in white letters instead of black letters.

Counsel for the defendant took the position during argument that the person who designed the defendant's bag must have copied a large part of it from the design of the plaintiff's bag. No other theory explains the facts and I therefore find that the bags in which the defendant's shirts were imported and sold in Canada were what is sometimes referred to as "colourable" imitations of the bags in which the plaintiff had been selling shirts in Canada. (The president of the defendant gave evidence that he left the choice of design—except for the use of the trade mark "STYLE MANOR"—to his Hong Kong supplier, and that he did not discover the similarity between the defendant's bag and the plaintiff's bag until after he started to market the shirts in Canada. Counsel for the defendant concedes that whether or not this is true is irrelevant and I therefore make no finding of fact with regard thereto.)

The plaintiff had no property rights in the trade mark "BOND STREET" in relation to men's or boys' shirts. This mark is registered in the name of a third person who, it would appear, had ceased to use it in relation to such goods some time prior to 1947, at which time the plaintiff

had in its possession a written consent from the registered owner "to the use and registration...in connection with shirts and neckwear only of the word mark 'BOND STREET'". I am satisfied, on the evidence, that the plaintiff did use the mark in the "get-up" that I have already described over such a period of time, and, by selling such a volume of shirts, that the trade and the buying public got to know the "get-up" as indicating shirts of the plaintiff's manufacture. (This is not to say, of course, that it indicated that the plaintiff was the manufacturer of such shirts.)

That being so, there is no doubt in my mind that, had the defendant's shirts been sold in the bags in which they were sold with the words "BOND STREET" where there actually appeared the words "STYLE MANOR", he would clearly have directed public attention to his wares in such a way as to cause or be likely to cause "confusion" in Canada between his wares and the plaintiff's wares and would clearly have infringed the prohibition in section 7(*b*). The other differences between the defendant's bag and the plaintiff's bag are, from this point of view, in my opinion, irrelevant.

The question that causes me difficulty is whether such "confusion" was avoided by the use of the trade mark "STYLE MANOR" instead of the trade mark "BOND STREET" in a prominent place, both on the back and on the front of the defendant's bag.

In my view, when one looks at the exhibits consisting of the two shirts in their bags that have been put in evidence to exemplify the shirts in question of the plaintiff and the defendant, respectively, it is obvious that the impression that would be created on the mind of an ordinary member of the buying public is that, as the whole general "get-up" is obviously identical, they must have come from the same source, but, as different trade marks are used, this is probably one of those cases where a manufacturer uses different trade marks for different wares of his manufacture. In other words, in my view, the defendant has so directed public attention to its wares as to make the public think that its wares and the plaintiff's wares came from the same source, but not in such a way as to cause a member of the public to select one of the defendant's shirts thinking that

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it was one of the shirts that the purchaser had previously got to know as a "BOND STREET" shirt. The question is, therefore, whether such a misleading of the public causes "confusion" between the defendant's wares and "the wares...of another" within the meaning of the words in section 7(*b*).

Had section 6(2), (3) and (4) of the *Trade Marks Act* not been framed in a restricted way, they might have supplied a solution to the problem. Those subsections read as follows:

> 6. (2) The use of a trade mark causes confusion with another trade mark if the use of both trade marks in the same area would be likely to lead to the inference that the wares or services associated with such trade marks are manufactured, sold, leased, hired or performed by the same person, whether or not such wares or services are of the same general class.
>
> (3) The use of a trade mark causes confusion with a trade name if the use of both the trade mark and trade name in the same area would be likely to lead to the inference that the wares or services associated with the trade mark and those associated with the business carried on under such trade name are manufactured, sold, leased, hired or performed by the same person, whether or not such wares or services are of the same general class.
>
> (4) The use of a trade name causes confusion with a trade mark if the use of both the trade name and the trade mark in the same area would be likely to lead to the inference that the wares or services associated with the business carried on under such trade name and those associated with such trade mark are manufactured, sold, leased, hired or performed by the same person, whether or not such wares or services are of the same general class.

Those provisions do not in terms apply so as to require their application to the facts of a case where the directing of "public attention" upon which a claim under section 7(*b*) is based has been effected by a means other than trade marks or trade names. I am, therefore, without any assistance by way of a statutory rule that applies to this case.

Nevertheless, it does seem to me that I can properly consider the effect of section 6, when it does apply, on the meaning of the word "confusion" in section 7(*b*), in considering what that word means when the rules in section 6 do not apply. Parliament must have intended the same general meaning for the words "confusion...between ...wares...and...wares" where the section 6 rules do not apply as was intended where they do apply. I am,

therefore, of opinion that "confusion" would be created between the wares of one person and the wares of another within section 7(*b*) if something were done to lead to the inference that both classes of wares were manufactured or sold by the same person whether that was accomplished by a deceptively similar trade mark or trade name or by a deceptively similar "get-up".

On that view of the matter, I conclude that the defendant has been guilty of a breach of section 7(*b*) and that the plaintiff should therefore have judgment for appropriate relief.

I shall hear what counsel have to say as to the form that my pronouncement should take having regard to my conclusion. The pronouncement that I have in mind making, subject to consideration of counsels' submissions, would read as follows:

1. It is declared that the defendant has directed attention to its wares in such a way as to be likely to cause confusion in Canada, at the time that it commenced so to direct attention to them, between its wares and wares of the plaintiff, by selling boys' shirts in the "get-up" described in paragraph 6 of the statement of claim.

2. It is declared that the plaintiff is entitled to be paid by the defendant an amount equal to

(a) the amount of the damages sustained by the plaintiff as a result of such sales, or

(b) the amount of the profits derived by the defendant from such sales.

3. It is ordered that, for the purpose of determining the amount that the plaintiff is so entitled to be paid by the defendant (if the parties cannot agree on it), there be a reference to the Associate Registrar (or a deputy registrar nominated by the Associate Registrar, or, if none such is available, an officer of the Court agreed upon by the parties or appointed by the Court) of the following questions, *viz*,

(a) What sales have been made by the defendant of shirts in the "get-up" described in paragraph 6 of the statement of claim? and

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(b) According to the election of the plaintiff (which election must be made in writing and filed in the Court and served upon the defendant before the plaintiff may take any step in connection with the reference), what is the amount of the aforesaid damages sustained by the plaintiff or the amount of the aforesaid profits derived by the defendant?

4. It is ordered that the plaintiff recover from the defendant its costs herein to be taxed except the costs of the reference, which are left to be dealt with on the motion for judgment upon the report of the referee under Rule 186 of the Rules of the Court.

BETWEEN:

Vancouver 1968

Oct. 9-10

Ottawa Dec. 16

THE CARLING BREWERIES (B.C.) LIMITED ..... PLAINTIFF;

AND

TARTAN BREWING LIMITED ..... DEFENDANT.

Trade marks—Statutory passing-off action—Brewery using word "Pil" to describe Pilsener-type beer—Competitor using "Pil'Can"—Intention —Trade Marks Act, s. 7(b).

In 1963 and 1964 plaintiff brewing company in marketing its Pilsener-type beer in British Columbia began to use the unregistered trade mark "Pil" on bottle caps, in newspaper advertising, and on cartons. In mid-1966 defendant brewing company in marketing its Pilsener-type beer in British Columbia began to use the term "Pil'Can", later "Pilcan", on its beer cans and cartons. Defendant sold other brands of beer under names identical with or similar to famous United States brands. Plaintiff brought action under s. 7(b) of the *Trade Marks Act*:—

> 7. No person shall
>
> (*b*) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;

Held, plaintiff was entitled to an injunction and to damages or an accounting of profits.

Held also, defendant's intention could be collected from the whole of its conduct including its use of the names of famous U.S. brands of beer. *Slazenger & Sons v. Feltham & Co.* (1889) 6 R.P.C. 531 at pp. 537-38; *Reddaway v. Banham* (1896) 13 R.P.C. 218 at pp. 227-28, referred to

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ACTION under s. 7(*b*) of the *Trade Marks Act.*

Christopher Robinson, Q.C. and *James D. Kokonis* for plaintiff.

W. J. Wallace, Q.C. and *A. G. MacKinnon* for defendant.

GIBSON J.:—The trial of this action resolved itself into a claim under section 7(*b*) of the *Trade Marks Act,* a purely statutory action, in some respects, like a "passing-off" action. This subsection reads:

> 7. No person shall
>
> . . .
>
> (*b*) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;

In its statement of claim, the plaintiff pleaded this cause of action by alleging that the defendant:

> 9. . . .
>
> (*b*) directed public attention to its wares in such a way as to cause or be likely to cause confusion at the time it commenced so to do between its wares and the wares of the plaintiff;

The essential time to consider in the determination of whether or not such a claim is proven under section 7(*b*) of this Act, is "the time (the defendant) commenced so to direct attention (to his wares)".

The meaning of one of the key words *viz.,* the word "confusion" in that subsection is also of the essence in considering the elements of such a claim.

There is no statutory definition of "confusion" in the *Trade Marks Act.* There is however, a statutory definition of "confusing" in s. 2(*b*) of the Act. It reads:

> (*b*) "confusing" when applied as an adjective to a trade mark or trade name, means a trade mark or trade name the use of which would cause confusion in the manner and circumstances described in section 6;

"Confusing" is applied as an adjective, for example, in section 20 of the Act, where it refers to "confusing trade mark or trade name", and therefore for the purposes of that section, it is mandatory in a determination of whether

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or not the use of a trade mark or a trade name would cause confusion, to consider the "manner" and "circumstances" described in section 6 of this Act.

Even though it is not mandatory to consider the "manner" and "circumstances" described in section 6 of this Act in the determination of any claim under section 7(*b*) of this Act, for the reasons stated, and also moreover because in this case it is not just the use of a trade mark that is involved, nevertheless, as Jackett P. pointed out in *Canadian Converters' Co. v. Eastport Trading Co.*[1] in considering the meaning of "confusion" in section 7(b) of this Act, section 6 may properly be used as some guideline. The words of Jackett P. are:

> ...Parliament must have intended the same general meaning for the words "confusion ... between ... wares ... and ... wares" where the section 6 rules do not apply as was intended where they do apply. I am, therefore, of opinion that "confusion" would be created between the wares of one person and the wares of another within section 7(*b*) if something were done to lead to the inference that both classes of wares were manufactured or sold by the same person whether that was accomplished by a deceptively similar trade mark or trade name or by a deceptively similar "get-up".

The parties in this action are both manufacturers and sellers of beer in British Columbia. The particular kind of beer ("wares") which are in issue is a type called in the trade Pilsener beer.

According to the evidence the origin of Pilsener beer was in the Town of Pilsen, now in Czechoslovakia, about 125 years ago, when a group of home-brewers who made this kind of beer, met and decided to build a proper brewery; and the product, a light lager with hop emphasis, was named at that time the English language equivalent of Pilsener.

From 1962 until mid-1966, both the plaintiff and the defendant, and also Labatt's Breweries Ltd., and Interior Breweries Ltd., had been selling Pilsener beer in British Columbia.

But, in mid-1966, the defendant commenced to do certain things and the plaintiff claims that it is what the defendant commenced to do in directing public attention to its Pilsener beer in such a way at that time that would cause or be likely to cause confusion in British Columbia

[1] [1969] 1 Ex. C.R. 493.

between the plaintiff's Pilsener beer and the defendant's Pilsener beer within the meaning of section 7(*b*) of the *Trade Marks Act*.

The plaintiff prior to mid-1966, namely about 1963, devised and embarked upon a market programme for the selling of its Pilsener beer and to assist in this undertaking, employed advertising agents, and expended substantial sums and effort. In implementing its programme, it adopted and used the unregistered trade mark "Pil" on the bottle caps of the Pilsener beer it sold in British Columbia, and in the advertising of it in newspapers. Then in 1964 it used the trade mark "Pil" on the cartons in which it sold its Pilsener beer. And from that time on, all its Pilsener beer was sold in that way in British Columbia.

By mid-1966 over five million dozens of the plaintiff's Pilsener beer with the "Pil" caps had been sold in that way, and over four and a half million cases bearing the endorsement "Say 'Pil' please" had been sold, for a total sales volume of nine million dollars ($9,000,000). In addition, the plaintiff had spent about $120,000 to $150,000 on advertising in newspapers in British Columbia promoting in various ways the trade mark "Pil" for its Pilsener beer. In 1963 for example, the plaintiff caused to be published 86 different newspaper advertisements for such purpose throughout British Columbia. In 1964 there were 60 different days that such type of advertisements appeared in the Prince George, B.C. paper, the city where the defendant's manufacturing plant and head office is and was located. In 1965, such "Pil" advertisements appeared in 44 different newspapers in British Columbia on over 150 different occasions.

In addition, up until mid-1966, some 70% of the plaintiff's beer so designated and advertised to an amount of about three million cases had been sold in liquor stores in British Columbia. (In this connection, beer sold in liquor stores in British Columbia is on display to the customer in stacked cartons, and a customer in such stores orders or calls for his beer verbally to the sales clerks.)

The evidence also is that during the two and one half year period up to mid-1966, (or indeed, at any time prior thereto) no other person in British Columbia including the

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defendant, (who for years had been selling Pilsener beer) had sold Pilsener beer in association with the word "Pil".

Then in mid-1966, the defendant commenced to do certain things. It sold in the market in British Columbia its Pilsener beer in a can marked "Pil'Can" (which was later changed to "Pilcan") contained in a carton similarly marked. (The evidence is that the defendant at this time was the first person in British Columbia to sell any beer in cans.) And it marketed its Pilsener beer using this trade mark and "get-up" on its cans and cartons.

Mr. George Benjamin Ginter, President of the defendant company, at this trial said that when that company adopted and used the trade name "Pil'Can" on its can and cartons in the way it did, and the particular "get-up" on each marketing the same, that nothing entered his mind or the minds of his associates employed by the defendant company, about the "get-up" of the plaintiff Carling's "Pil" product or the manner and circumstances of the latter's marketing efforts in promoting its wares bearing this trade mark, although on cross-examination he admitted he knew that the plaintiff Carling had been using "Pil" on its advertising and cartons in promoting the sales and the selling of its Pilsener beer.

The defendant's master brewer Eugene K. Zarek also admitted this.

At mid-1966 also, the evidence is, that the defendant was manufacturing and selling three other beers, namely (1) "High Life", which Mr. Zarek admitted that he and the defendant's officials knew was also the name of a well known and famous United States beer, "Miller High Life", (2) "Paaps" in respect to which there was a somewhat similar admission to the effect that it resembled the well known and famous "Pabst" beer made in Milwaukee, and (3) "Budd" in respect to which there was a similar admission, that it was the name of the well known and famous "Budweiser", sometimes called "Budd" United States beer.

Ginter also said in evidence that the reason the "Pil'Can" mark and "get-up" were chosen and adopted in mid-1966 in marketing its Pilsener beer was because the mark was short and it and the "get-up" would identify the can as the first canned beer sold in British Columbia.

The respective cans, cartons, and caps of the plaintiff's and defendant's were filed as exhibits at this trial and they

illustrate the "get-up", of the wares of each sold by them in the British Columbia market. In addition, tear sheets of the newspaper advertisements of the plaintiff referred to above, and a memorandum showing the times and names of the newspapers in which these advertisements appeared were filed as exhibits. These illustrate the method and effort of the plaintiff during the relevant period to direct public attention to its Pilsener beer.

On this evidence, the issue to be decided is whether or not in mid-1966, the defendant did "direct public attention to (the defendant's) wares... *in such a way* as to cause or be likely to cause *confusion* in (British Columbia)...between (the defendant's) wares and the wares... of (the plaintiff)".

The issue is not for example, whether the plaintiff is solely entitled to use the trade mark "Pil" on beer (wares); or whether "Pil" as a slang word for Pilsener beer has lost its primary meaning and taken on a secondary meaning; or whether "Pil" is distinctive only of the beer (wares) of the plaintiff, and no others, including the defendant.

In reaching a conclusion in this case, the evidence of what the defendant was doing generally in mid-1966, at which time the defendant commenced to do the things which form the basis of this action, is of substantial weight. In mid-1966, the defendant was manufacturing and selling four brands of beer under the respective names of:

—"Tartan Pilsener"
—"High Life"
—"Paabs"
—"Budd".

Clearly the adoption of the last three names in the way such was done, was calculated to direct public attention in such a way as to cause or be likely to cause confusion between these brands of beer of the defendant's and the respective famous brand of beers of the United States brewers, which latter brands would be known to the buying public in British Columbia.

What then was the intention in mid-1966 in adopting the mark of "Pil'Can" in the way it did, and the general "get-up" of "Pil'Can" on its cans and cartons in the merchandising and selling of its Pilsener beer in cans in British Columbia in the way it did?

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The answer to this question in my view, is perfectly clear. The intention can be determined from the whole of this conduct of the defendant at this time. The whole of this conduct of the defendant constitutes the most cogent evidence of design to confuse.

In this connection, the words of Lord Justice Lindley in *Slazenger & Sons v. Feltham & Co.*[2] are apt, even though they were used in connection with a passing-off case, namely: "Why should we be astute to say that he cannot succeed in doing that which he is straining every nerve to do?" in the passage at pages 537-38:

> Lindley L.J.—This case has been argued as if it involved some question of law about which there could be two opinions; but it appears to be that the case turns on the facts, not on the law. The real question is, whether the Defendants are endeavouring, with any probability of success, to pass off their goods as those of the Plaintiffs. That depends upon the evidence, and the evidence is this. that, whereas the Plaintiffs had got a trade mark, one part of which consists of the word "Demon", and whereas the Plaintiffs put that trade mark on their bats and put the word "Demon" at the top of the rim, the Defendants look through the dictionary, see how close they can get to "Demon," pick out "Demotic", and put "Demotic" in exactly the same spot where the Plaintiffs put "Demon." They put their own name on the bats, no doubt, and do not use the registered trade mark. Well, what is that for? One must exercise one's common sense, and, if you are driven to the conclusion that what is intended to be done is to deceive if possible, I do not think it is stretching the imagination very much to credit the man with occasional success or possible success. Why should we be astute to say that he cannot succeed in doing that which he is straining every nerve to do?

The conclusion is, therefore, that it was the intention of the defendant to and it did, in mid-1966, in relation to its activities concerning "Pil'Can" and the "get-up" of the packaging of its canned Pilsener beer direct public attention to its wares in issue in this action, in such a way as to cause or likely to cause confusion in British Columbia within the meaning of section 7(*b*) of the *Trade Marks Act* between the defendant's (Tartan) "Pilcan" Pilsener beer and the plaintiff's (Carling) "Pil" Pilsener beer.

Quite aside from this evidence of design to confuse which was adduced, from which I have inferred the said intention of the defendant at this material time in this

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[2] (1889) 6 R.P.C. 531 at 537-38.

case and have concluded that a breach of section 7(*b*) has been proven, certain of the other evidence adduced also establishes a breach of section 7(*b*) of the *Trade Marks Act* by the defendant.

This relevant other evidence establishes that in mid-1966 the defendant through its officers knew of the manner and circumstances of the use of the plaintiff's trade mark "Pil" and of the "get-up" of the crown on its bottles, and on the cartons containing the bottles, in the promotion of the sale and the sale of its Pilsener beer in British Columbia; they knew of the plaintiff's extensive and successful advertising campaign aimed at directing public attention to its Pilsener beer; and they knew that the plaintiff had been so successful in its effort to direct public attention to its Pilsener beer that to the public in British Columbia in mid-1966 "Pil" meant Carling's Pilsener; and notwithstanding their evidence to the contrary which I don't accept, they sought to take advantage of this, and deliberately designed the defendant's label on its cans and the name on its cartons and containers, and the general "get-up" of both employing the word "Pil'Can" in such a way, and also they promoted the sales to the public of the defendant's canned Pilsener beer in such a way, so as to direct public attention to the defendant's wares as to cause or to likely cause confusion in the minds of the public in British Columbia between the defendant's Pilsener beer and the plaintiff's Pilsener beer; and further that in doing so, they had the intention of leading the public in British Columbia to make the inference that the defendant's product was the plaintiff's Pilsener beer in cans instead of in bottles. In fact, no effort at all was made by the defendant to distinguish features of its wares from those of the plaintiff's.

The words of Lord Herschell in *Reddaway v. Banham*[3] are also apt in describing what is at issue in this case:

> I cannot help saying that if the Defendants are entitled to lead purchasers to believe that they are getting the Plaintiffs' manufacture when they are not, and thus to cheat the Plaintiffs of some of their legitimate trade, I should regret to find that the law was powerless to enforce the most elementary principles of commercial morality I do not think your Lordships are driven to any such conclusion

[3] (1896) 13 R.P.C. 218 at 227-28.

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In the result therefore, the plaintiff is entitled to judgment against the defendant for (*a*) an injunction restraining the defendant, its officers, servants, agents and workmen, from using the word "Pil" in British Columbia in a manner which is calculated to cause confusion between the wares of the plaintiff and the wares of the defendant, and/or from using the word "Pil" in British Columbia in connection with the sale of Pilsener beer in a way that is calculated to be an invitation to order and/or identify its wares by the word "Pil" and/or "Pil'Can"; (*b*) damages or an accounting of profits, as the plaintiff may elect; and the plaintiff is also entitled to costs against the defendant.

Ottawa 1968

Oct. 21-22

Dec. 27

BETWEEN:

M.F.F. EQUITIES LIMITED .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Sales tax—Exemption for "fish and edible products thereof"—Margarine composed in part of processed fish oil—Excise Tax Act, R.S.C. 1952, c. 100, s. 32(1).

Suppliant sold margarine composed 80% of oil, 48% to 90% of which was fish oil which had been subjected to extensive processing to make it edible. Suppliant claimed the margarine was exempt from sales tax as being within the words "fish and edible products thereof" in Schedule III of s. 32(1) of the *Excise Tax Act*.

Held, the words "fish and edible products thereof", construed according to the common understanding of such words used in relation to articles of commerce, which is the test to apply, do not encompass margarine even though fish oil is a principal ingredient thereof. Margarine is neither marketed, purchased nor thought of by the consumer as a product of fish.

Townsend v. Northern Crown Bank, 49 S.C.R. 394, considered.

PETITION OF RIGHT.

Gordon F. Henderson, Q.C. and *John D. Richard* for suppliant.

D. H. Aylen and *John E. Smith* for respondent.

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CATTANACH J.:—The suppliant by its petition of right seeks to recover the sum of $355,412.48 paid by it to Her Majesty under protest and without admission of liability pursuant to demands made by the officers of the Department of National Revenue as tax in respect of the sale of margarine between the period from April 7, 1963, to February 8, 1964.

The fundamental basis of the suppliant's claim for relief is that the goods in question were exempt from sales tax and accordingly the Crown is liable to return to the suppliant the sum of money which was so paid by the suppliant under protest and for the return of which a demand was made in writing addressed to the Deputy Minister of National Revenue, Customs and Excise, which demand has not been complied with.

Section 30 of the *Excise Tax Act*[1] and amendments provides that there shall be imposed, levied and collected a consumption or sales tax on the sale price of all goods produced or manufactured in Canada.

However certain articles are exempted by section 32(1) of the Act which reads as follows:

> 32. (1) The tax imposed by section 30 does not apply to the sale or importation of the articles mentioned in Schedule III.
>
> . . .

Schedule III includes a large number of articles which are listed and classified under parts.

Part V of Schedule III is entitled "Foodstuffs" and the material portion of item 7 thereof reads as follows, "Fish and edible products thereof; . . .".

By order of Thurlow J. dated October 3, 1968, on motion made by counsel for the respondent in the presence of counsel for the suppliant, an issue was defined by agreement of the parties for the purposes of Rule 164B(1) (*a*) in the following terms:

> Whether the goods manufactured by the Suppliant and sold by the Suppliant during the period April 7, 1963 to February 8, 1964 are exempt from sales tax by virtue of the provisions of Section 32(1) of the *Excise Tax Act* R.S.C. 1952 Chapter 100 and Schedule III thereof, in particular under the heading "foodstuffs" and the item reading as follows. "Fish and Edible products thereof" and/or the item reading as follows· "Materials to be used exclusively in the manufacture or production of the foregoing foodstuffs".

[1] R.S.C. 1952, c. 100

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In addition the parties agreed upon a statement of facts which reads as follows:

1. The parties hereto, for the purpose only of this cause, agree to and admit the facts hereafter stated but it is further agreed that the parties shall be at liberty to introduce in the usual manner at the trial of this action evidence of additional facts not inconsistent with any of the facts hereafter stated.

2. The Suppliant is the manufacturer or producer of the goods in issue.

3. The Suppliant has been granted a Sales Tax license under the provisions of Part VI of the *Excise Tax Act*.

4. Pursuant to general demands which did not specify any particular amount of tax, made by officers of the Department of National Revenue, Customs and Excise Division, the Suppliant paid to Her Majesty the Queen, under protest and without admission of liability the sum of $355,412 48 in respect of the sale of goods in issue during the period from April 7, 1963 to February 8, 1964 this being the amount of tax payable as calculated by the Suppliant if the goods in issue are taxable.

5 The Suppliant has requested in writing to the Deputy Minister of National Revenue, Customs and Excise, that these monies be returned but to date the said monies have not been returned to the Suppliant.

6. If the goods in issue or any part thereof are exempt from sales tax as set out in the statement of the issue herein, the Crown is liable to return to the Suppliant the sum of money so held or that portion of the money so held which is applicable to those goods which are exempt

7. The goods in issue are foodstuffs commonly known as margarine. Margarine is a fatty food resembling butter. It is composed of oil and other ingredients. The proportion of oil and other ingredients as measured by weight are as follows: oil—80%; other ingredients—20%.

8. The oil which is used is a mixture of herring oil and vegetable oil, the proportion of which varies depending on the particular formula used by the Suppliant.

9. During the period of April 1963 the Suppliant also used some whale oil.

10. The other ingredients are milk, salt, flavouring, vitamins and small quantities of colour, emulsifier and antioxident.

11. The quality and quantity of each ingredient is carefully controlled and the manufacture of margarine from its various ingredients is a complex process requiring extensive and expensive processing apparatus. The oil used must first be made suitable for use in food. The extent of the treatment required for this purpose depends on the nature of the oil but commonly involves refining, bleaching and deodorizing and hydrogenation. Fish and whale oil are, subject to existing market conditions, ordinarily less expensive to buy than vegetable oil. The selection of vegetable oil on the one hand or marine oil on the other hand is governed mainly by the cost of using one as opposed to the other

12. Prior to May 1963 the Suppliant purchased oils in a refined state from refiners of oil but in May 1963 opened its own refinery and has since purchased crude vegetable oil through brokers from crushers of oil and has since purchased crude fish oil through brokers from fish reduction plants. The crude oil is then refined in the Suppliant's own refinery.

13. During the period in issue the Suppliant used three formulations in the manufacture or production of the goods in issue as follows: No. 35; No. 42; No. 63.

14. The contents of each formula are as follows:

(a) *No. 35*

(1) Up to May 22, 1963:

Oil 80% } Herring oil 48%
Other 20% } Vegetable oil 52%

(2) From May 22, 1963:

Oil 80% } Herring oil 50%
Other 20% } Vegetable oil 50%

(b) *No. 42*

Oil 80% } Herring oil 65%
Other 20% } Vegetable oil 35%

(c) *No. 63*

Oil 80% } Herring oil 90%
Other 20% } Vegetable oil 10%

15. These percentages are based upon proportions of ingredients as measured by weight. Batches of ingredients are measured in 4,000 lb. portions. Of the 4,000 lb. batch, 3,200 lbs. are oil.

16 The goods in issue were sold by the Suppliant under brand names. The formula used in each brand name during the period in issue is as follows:

BRAND NAME	PERIOD 1 *April 7, 1963 to April 25, 1963*	PERIOD 2 *April 25, 1963 to December 2, 1963*	PERIOD 3 *December 2, 1963 to February 8, 1964*
I.G A. Regular	63	63	35
I.G.A. Quick Bag	63	63	35
Monarch Quarters	42	35	—
Moms Regular	63	63	35
Moms Quick Bag	63	63	35
Moms Squares	63	63	35
Golden Girl	42	35	35
Golden Girl Cartons	42	35	35
Golden Girl Quick Bag	42	35	35
Silverdale Squares	63	63	35
Buttercup	63	63	35
Top Value Regular	63	63	35
Top Value Quick Bag	63	63	35
Top Value Squares	—	—	35
Monarch Regular	42	35	—
Jaymax	63	63	35
Moms Family Pack	63	63	35
Discount Margarine	63	63	35
Golden Gal Squares	63	63	35
Monarch Squares	—	35	—
Blue Band	63	63	35

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17. The Suppliant did not record the composition of margarine sold and now in issue. However, in general the Suppliant sold during the material period margarine made according to the formula in use in manufacture approximately one month prior to the sale of margarine by the Suppliant.

18. The alleged taxable sales of the Suppliant and the Sales tax paid under protest by the Suppliant to the Respondent during the period in issue in respect of each brand name are set out in detail in an exhibit annexed hereto and identified as Exhibit 1.

19. Margarine like that in issue is not ordinarily advertised, displayed or sold as a fish product but always shows on the label that it contains fish oil or marine oil and may usually be found in the dairy section of the food store.

Exhibit 1 attached to the agreed statement of facts and referred to in paragraph 18 thereof is a detailed list of the sales made by the suppliant during the period in issue, the sales tax paid thereon under protest by the suppliant in respect of each brand name used by the suppliant for its products. The formulae used in each such brand name are set forth by an identifying number in paragraph 16 of the agreed statement of facts and the content of each such numbered formula is set out in paragraph 14 of the agreed statement of facts.

During the trial it was stated that the amount of $355,-412.48 is the accurate computation of the sales tax paid by the suppliant rather than the amount of $361,114.46 as alleged in the petition of right.

Margarine is a fatty food resembling butter in appearance, character and composition and is used as a substitute for or an alternative to butter. The difference is that, in margarine the fat is not, or is only to a minor extent, derived from milk fat.

The invention of margarine was the result of the search for a substitute for butter, which in the middle of the nineteenth century was produced in insufficient quantity to meet the demands consequent upon the steadily growing migration of population from country to town with change of occupation from agriculture to industry, and a general recession in farming in Europe. Butter production in overseas countries, such as Canada, United States, New Zealand and Australia, was still in its infancy and could not do much to relieve the shortage in Europe where butter prices soared.

Napoleon III offered a prize for a suitable substitute for butter which should be cheaper and keep better than

butter. A French chemist, Mége-Mouriés, who was already engaged in this and other problems of national economy won the prize in 1896 and was granted a patent for his process and a concession to erect a plant for the manufacture of his product.

The principal ingredient of Mouriés' product was animal fat. It was his belief that the soft part of his product consisted of margarine and olein, the glycerides of margaric and oleic acids, respectively, and the hard parts largely of the glycerides of stearic acid. Hence this "new butter fat" was called oleomargarine.

As the demand increased new and more efficient processes were introduced. The supply of beef fats could not keep pace with the expansion of the industry. The developing refining industry produced and made available other fats and oils derived from vegetables such as coconut oil, palm oil, soyabean oil, sunflower oil, corn oil, rapeseed oil, peanut oil and as time progressed a host of others.

Mouriés first described his product as "a variety of true butter taken at its source", "artificial butter", "butterine" and finally oleomargarine, but the name margarine has now become accepted and is generally used to designate this butter substitute regardless of the type of fats or oils going into its composition.

In the manufacture of margarine in Canada the proportions of edible oils and other ingredients measured by weight are edible oils 80%, other ingredients, 20%. This is confirmed in paragraphs 13 and 14 of the agreed statement of facts wherein the three formulae (No. 35, 42 and 63) for the production of the goods here in issue are described as containing fat or oil to the extent of 80% and other ingredients to the extent of 20%. The other ingredients consist of 16% water and the remaining 4% is comprised of solids being milk solids, a preservative and emulsifier.

Animal fats are used in the manufacture of margarine in Canada to a very limited extent for economic and practical reasons. First the cost of animal fats is higher than other available oils and secondly the product so manufactured is hard and not considered as desirable as those manufactured with other oils.

For all practical purposes margarine produced in Canada is either vegetable oil margarine or fish oil margarine or a combination of vegetable and fish oil margarine.

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The use of fish oil in margarine manufactured in Canada has increased. However, early attempts to use fish oils met with disappointment because the average consumer exhibited a distinct distrust of fish oils and a distinct preference for all vegetable fatty products.

The fish oils used in the manufacture of margarine in Canada are derived from the herring, menhaden, whale and seal. The term "marine oil" is used to describe the oils so derived, presumably because whales and seals are not truly fish but marine creatures but in any event the terms "marine oil" and "fish oil" are used interchangeably in the industry.

The oil derived from herring is used more extensively in Canada in the production of margarine, most likely because herring is more plentiful and the oil from this fish is therefore more readily available.

A margarine made from fish oil is almost always less costly than a margarine made from vegetable oil, for the reason that fish oil is almost always less costly than vegetable oil.

As a practical matter the oil used in the manufacture of margarine is never exclusively fish oil. Invariably the fish oil used is combined with vegetable oil. Most, if not all, provincial jurisdictions have enacted legislation requiring that margarine containing any fish oil shall not be sold as being a vegetable oil margarine and that the contents shall be displayed on the label.

It is my understanding that any margarine 40% or over of the total oil content of which is fish oil is referred to in the trade as a fish or marine oil margarine.

In the formulae for the production of the goods here in issue it will be observed from paragraph 14 of the agreed statement of facts that in formula No. 35, 48% of the 80% oil content was herring oil, which after May 22, 1963, was increased to 50%, in formula No. 42 the herring oil content was 65% of the total content of 80% and in formula No. 63 the herring oil content was 90% of the 80% oil content of the product.

Therefore all the goods here in issue would be described in the trade as a fish oil margarine.

Prior to May 1963 the suppliant purchased the fish oil it used in its margarine from refiners of oil, but in May 1963

it opened and operated its own refinery. It then purchased the fish oil through brokers in a crude state from fish reduction plants and subjected the crude fish oil to refining in its own refinery.

Crude fish oil can be ingested by humans but is unpalatable. There is no doubt in my mind that crude fish oil is not edible. While it has the initial advantage of being cheap, it requires extensive processing before it can be used in the edible product, margarine.

The processes to which the crude fish oil is subjected are,

(1) refining,
(2) bleaching,
(3) hydrogenation and
(4) deodorization.

The desirable characteristics of margarine, which stem from the selection and processing oil ingredients used, are,

1. good resistance to oxidative deterioration, that is resistance to the development of a rancid flavour;
2. good physical stability in its resistance to heat;
3. a pleasant eating quality and feeling in the mouth; and
4. an adequate spreadability.

These characteristics are obtained by the processes to which the crude fish oil is subjected.

The refining process essentially removes from the crude fish oil all the free acids, the non-glyceride oleoginous material and the carbohydrate matter.

The bleaching process is the method by which colour bodies are absorbed and the colour of oil is lightened to the desired degree.

The refined and bleached oil is deodorized. This term is self-explanatory and is designed to make the oil fully acceptable for use in foods. It is my recollection of the evidence that the deodorization process is the last following hydrogenation which I understood to be the most important process of the four mentioned.

Before crude fish oil can be used for margarine it must be hydrogenated. This is done to control the extent of "unsaturation" in the oil, and thus its hardness and to make it more "saturated" by the chemical addition of

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hydrogen. If this were not done the rate of oxidation would be much greater and the end product would become rancid very rapidly. In short the margarine would spoil quickly.

Thus hydrogenation serves a two-fold purpose, (1) to provide a matrix of solid fat for the support of liquid fat and (2) to increase the resistance to oxidative rancidity.

Thorough hydrogenation is required to eliminate excessive unsaturation and the fishiness of a fish oil must be destroyed before an oil originating from a fish can be used in margarine.

Evidence was introduced on behalf of Her Majesty to show that margarine is invariably displayed to the public in the dairy cases or sections of retail outlets alongside butter, cheese and like acknowledged dairy products. Fresh and frozen fish are displayed for sale in the meat section and canned fish is included in the grocery section. Efforts made by retailers to tie margarine in with shortening and lard proved unsuccessful because the public expects to find margarine in the dairy section of supermarkets. However it was elicited in cross-examination that margarine requires refrigeration and that the only refrigerated space normally available is the dairy cases. The purpose of the introduction of such evidence is undoubtedly to show that margarine is not marketed as a fish product.

As I understood the argument of counsel for the suppliant it basically amounted to this. He puts his claim exclusively on the item in Schedule III of the *Excise Tax Act* reading, "Fish and edible products thereof;". The words to be construed are "edible products thereof;". This gives rise to two conditions, (1) the product, margarine, is edible, with respect to which there is no controversy and (2) that the origin or source of the product, margarine, is fish. He argues that, having regard to the ordinary meaning of the words, it is clear that if the source of the product is fish, the intermediate processes are immaterial because the origin of the end product is fish and the fish oil content characterizes that product.

I fully agree with the submission of counsel for the suppliant that the words "Fish and edible products thereof;" must be given their ordinary meaning. The words of an Act of Parliament which are not applied to any particular science or art, are to be construed as they are understood in the common language.

However, I do not agree with his submission that the intermediate processes to which the original source is subjected are immaterial. Neither do I think that the decisions of the Supreme Court in *Townsend v. Northern Crown Bank*[2] and *Universal Fur Dressers and Dyers Ltd. v. The Queen*[3], upon which he strongly relied as being in support of his submission that the processes to which the source of the end product are subjected are immaterial, are authorities for the proposition advanced by him.

In *Townsend v. Northern Crown Bank (supra)* the question that the Supreme Court considered was whether sawn lumber is a "product of the forest" within the meaning of those words in the *Bank Act*. Duff, J. (as he then was) said at page 397:

> . . . Is lumber then a "product of the forest" for the purposes of this section? According to the narrow construction which the appellant asks us to give effect to when pressed to its logical conclusion, timber ceases to be a product of the forest as soon as it has been subjected to any process of manufacture. That is almost a *reductio ad absurdum*, and Mr. Laidlaw, of course, did not assume any such untenable position, rather he tried to escape from it. He did not, as I understood him on the oral argument before us, dispute that what are commonly known as saw-logs would be "products of the forest," within the meaning of the "Bank Act." But why draw the line at the saw logs? Logs are frequently reduced to lumber at the very place, or at all events, within a short distance of the very place where they are felled, by means of portable sawmills. The appellant's answer, of course, to this mode of argument is that the line must be drawn somewhere and that if you admit dressed lumber as a "product of the forest" you cannot logically stop short of admitting the articles into which the lumber is further manufactured.
>
> I concur with much that is said as to the difficulty of drawing an abstract line. This is only one example of the class of cases in which the court being loath and refusing to attempt to draw an abstract line, finds itself compelled to decide whether a particular concrete case falls on one side or on the other side of the line which theoretically must be found somewhere within given limits. In this particular case I prefer to say that according to the common understanding the articles in question would fairly be comprised within the description "products of the forest," and I think they are within the contemplation of the enactment we have to interpret.

It is apparent from the language above quoted that there is some point in the various processing stages beyond which the original source ceases to be used as descriptive of the end product in ordinary parlance.

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[2] 49 S.C.R. 394.

[3] [1956] S.C.R. 632.

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M.F.F. EQUITIES LTD. v. THE QUEEN

Cattanach J.

In *Universal Fur Dressers and Dyers Ltd. v. The Queen (supra)* the question was whether the raw skins of shearlings of the merino type which had been processed into "mouton" was a fur and therefore subject to the excise tax on furs. Cartwright J. (as he then was) stated that the merino sheep is a wool-bearing animal and not a fur-bearing one, that its skin with the wool attached is not a fur and could not be transmuted into fur no matter what processes it was subjected to.

I fail to see how that decision has any application to the problem that I have to resolve.

In my view, in order to determine whether a particular product falls within an expression such as "Fish and edible products thereof;" resort must be had to the common understanding of such words when used in relation to articles of commerce. The question here is, therefore, whether, in the ordinary use of words, margarine may be fairly regarded as falling within the words, "Fish and edible products thereof;" or more specifically, applying such a test: is margarine a product of fish?

I do not think that, in common parlance, the words "product of fish" can be considered as comprehending margarine, even though it contains fish oil as one of its principal ingredients. Margarine is itself a well known article of commerce and is neither marketed, purchased, nor thought of by the consumer as a product of fish.

It seems to me that the fish from which oil has been extracted and which is used in the manufacture of margarine, which is by no means the sole ingredient of the end product, has become so obscured by the processes to which it and the oil thereof has been subjected and by the oil being intermingled with substantial amounts of other ingredients from other sources, the whole of which is again the subject of an extensive manufacturing process, that the resultant margarine cannot be considered as a product of fish, even though the fish oil content may make the margarine a fish oil margarine and the labels thereon disclose the fish oil content.

Therefore, the suppliant is not entitled to any portion of the relief sought by its petition of right and Her Majesty is entitled to costs.

BETWEEN:

SHULAMIT ELFRIEDE VASKEVITCH ... APPELLANT;

AND

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

Toronto 1968 Sept. 17-18

Ottawa 1969 Jan. 3

Estate tax—Insurance purchased by wife on husband's life—Insurance moneys paid to wife—Whether chargeable—Estate Tax Act, 1958, c. 29, s 3(1)(j)—"Concert", "arrangement", meaning.

Mrs *V*, whose husband was about to make a flight to the Orient, accompanied him to the Toronto airport where Mr. *V* having mentioned insurance Mrs *V* of her own volition completed two applications for flight insurance on his life, inserting his name in the places provided for the name of applicant or insured, naming herself as beneficiary and paying the premiums of $8 00 from her own funds. Mr. *V* personally signed both applications as the insurers required. Mr. *V* was killed on the flight and the proceeds of the two policies, $95,000, were paid to his wife.

Held, the insurance proceeds were not chargeable to estate tax by s. 3(1)(*j*) of the *Estate Tax Act* as the policies were not purchased or provided by the husband either by himself alone or in concert or by arrangement with his wife. The fact that the insurers intended to contract with the husband did not determine the ownership of the policies as between husband and wife, and there was no presumption of a loan of the amount of the premiums by the wife to the husband. To act "in concert or by arrangement with another person" within the meaning of s. 3(1)(*j*) presupposes some form of active participation rather than passive consent to a decision taken by another person.

Lethbridge v. Attorney General [1907] A.C. 19, referred to.

APPEAL from estate tax assessment.

Wolfe D. Goodman for appellant.

N. A. Chalmers for respondent.

CATTANACH J.:—This is an appeal from an assessment dated March 22, 1967 under the *Estate Tax Act,* chapter 29, Statutes of Canada, 1958 whereby the Minister assessed the appellant as executrix of the estate of her late husband, Theodore Vaskevitch, by adding to the aggregate net value of that estate the sum of $95,000 being the proceeds of two policies of accident insurance.

The facts giving rise to the assessment are relatively simple and straight forward and are, in the main, agreed upon between the parties with the exception of one major particular upon which I shall comment in detail later.

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On Friday, February 25, 1966, Theodore Vaskevitch, the husband of the appellant, departed from Malton Airport at Toronto, Ontario by Canadian Pacific Airlines for the Orient.

Mr. Vaskevitch was an engineer engaged in the manufacture of electronics on his own account and in the course of his business he frequently flew to Europe and to Japan and Hong Kong.

Immediately prior to his departure, two policies of flight insurance were obtained, one being policy No. DC-11091668 issued by Fidelity and Casualty Company of New York in the principal sum of $75,000 (hereinafter called the Fidelity policy) and the second being policy No. T18BAC-29826-A issued by Mutual of Omaha Insurance Company in the principal sum of $20,000 (hereinafter called the Omaha policy). The term of the Fidelity policy was for the duration of Mr. Vaskevitch's flight to the Orient and for the duration of his return flight, whereas the term of the Omaha policy was for a period of 14 days from February 25, 1966.

In each case the principal sum was payable in the event of the death of Theodore Vaskevitch and in the event of the loss of hands, eyes or feet and a lesser sum in respect of the loss of a single eye, hand or foot.

The appellant was named the beneficiary in both policies.

It was agreed by both parties that these policies were policies of accident insurance.

The aircraft in which Mr. Vaskevitch was a passenger crashed at Mount Fuji, Japan on March 5, 1966, killing him and many other passengers and members of the crew.

The principal sums payable under the policies of insurance were promptly paid to the appellant by the insurers, but the appellant, in completing an estate tax return, did not include those amounts in her declared total value of the estate of the deceased.

The Minister, by his notice of assessment, dated March 22, 1967, did so.

The appellant filed a notice of objection.

The Minister confirmed the assessment on the ground that the proceeds of the two policies above mentioned was

property passing on the death of the late Theodore Vaskevitch and the value of such property was properly included in computing the aggregate net value of the property so passing, pursuant to the provisions of section 3(1)(*j*) of the *Estate Tax Act*.

The said section 3(1)(*j*) reads as follows:

> 3. (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,
>
> . . .
>
> (*j*) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest therein arising or accruing by survivorship or otherwise on the death of the deceased;
>
> . . .

Under section 3(1)(*j*) there are three conditions which must be present to give rise to estate tax being exigible on this part of the deceased's estate:

(1) there must be an annuity or other interest,

(2) it must have been purchased or provided by the deceased either by himself alone or in concert or by arrangement with any other person, and

(3) a beneficial interest therein must accrue or arise by survivorship or otherwise on the death of the deceased.

There is no doubt in my mind and it was accepted by both parties that an accident policy is an "other interest" in property and the subject of duty, but the two other conditions above mentioned must also be present if the proceeds of these two particular accident insurance policies are to be taxable as part of the aggregate net value of the appellant's husband's estate.

Counsel for the appellant submitted that,

(1) the policies, here involved, were not purchased by the deceased alone or in concert or by arrangement with the appellant and that even if such had been the case, which he vigorously denied, then,

(2) there was no beneficial interest therein arising or accruing by survivorship or otherwise on the death of the deceased.

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It is with respect to the facts upon which the appellant bases the first of the two above contentions that a controversy arises between the parties.

Therefore it is incumbent upon me to examine the evidence adduced in this regard with care.

On all previous business flights taken by the deceased the appellant had made all of her husband's arrangements such as the flight booking, hotel reservations and the withdrawal of money for expenses. However the appellant was opposed to her husband going to the Orient. She had a prejudice against the country to which her husband was going. She thought it to be uncivilized, subject to earthquakes, tidal waves and like disasters. Furthermore, she had a premonition that her husband would not return from this particular trip. Her husband did not share the appellant's apprehensions and apparently felt that this trip was necessary for his business interests. To alleviate domestic friction he made the necessary arrangements himself which was contrary to their usual custom. It had also been the custom of the appellant and the deceased to take out flight insurance in the amount of $75,000. The appellant knew that her husband was going to take this trip, but he had kept his departure date secret from her in the interest of harmony and to postpone his wife's inevitable protestations until the last possible moment.

On Wednesday, February 23, 1966, the appellant had received a cheque from the German Government in the amount of 5000 marks in restitution of war damage suffered by her. During the morning of Thursday, February 24, 1966, the appellant cashed this cheque, rather than depositing it, the cheque having been drawn on a bank other than her own, and she received therefor approximately $1300 in Canadian funds.

That evening the husband revealed his plan to leave for the Orient by air the next morning. He had exhausted his Canadian funds. Therefore the appellant gave him an uncertain amount of Canadian money from the proceeds of the cheque she had cashed that morning so that upon her husband's return he would have Canadian funds in case she was prevented from meeting him at the Toronto airport because of the winter weather. While she did not know the precise amount she gave her husband, nevertheless, she did know that the smallest denomination of the

bills she gave him was $20. This was confirmed by the contents of the deceased's wallet which was returned to the appellant after his death in the crash and which contained no Canadian currency in smaller denominations than $20.

The appellant, as was her custom, drove her husband to the airport, all the while continuing her objections to him going on the trip.

After her husband had checked in for his flight at the Canadian Pacific Airlines counter and he and the appellant were on their way to the departure gate they stopped at the insurance counter.

Her husband, to placate the appellant and to allay her fears of disaster, suggested that he should take out a flight insurance policy for $300,000, an amount greatly in excess of the amount of $75,000 normally taken out.

The appellant rejected her husband's suggestion that he should take out a policy in such a large amount on the ground that, as she put it, "it would put a jinx on the flight and I was against that". She then said to her husband, "I don't want such a large policy. I will take out $75 myself". (By $75 she meant $75,000). This culmination of the dispute between the appellant and her husband took place as they made their way from the airline counter to the insurance counter.

As they approached the counter the appellant preceded her husband and announced, "I will take out $75,000". Her husband said that she should do as she pleased.

At the insurance counter there was another customer being served by the attendant. While waiting the appellant in her own handwriting filled in a portion of the Fidelity policy for $75,000. The document which I admitted in evidence is a photostatic copy of the original. The original was surrendered to The Fidelity and Casualty Company of New York at the time that the claim for payment was made and it was retained by that company for eighteen months and then destroyed. The copy in evidence was made by the solicitor for the appellant immediately prior to sending it to the company with his request for payment. In my opinion this is a clear case in which secondary evidence is properly admitted.

The appellant printed the first two lines in the spaces provided in a box at the top of the document. On the

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left-hand side of the first line she printed her husband's name as the "name of the applicant" and on the right-hand side of the same line her own name as the "name of the beneficiary". The second line sets out their addresses which are the same and which were printed by the appellant. The information in the two bottom lines in the box was completed by the attendant at the insurance counter, except at the extreme right the deceased signed his name in the space entitled, "Personal signature of the Applicant". It is specifically stated at the end of the policy that the policy "shall not be binding on the Insurer unless the application is signed personally by the Applicant". On a previous policy for a prior trip, the deceased and the appellant had noticed that the deceased had failed to sign thereby avoiding liability on the part of the Insurer. On this occasion they were careful not to repeat the former omission. Furthermore, they were informed at this time by the attendant that it was mandatory for the traveller to personally sign the application and the policy was placed before the deceased for that purpose. In the spaces filled in by the attendant it is indicated that the policy was taken out at 9 o'clock a.m. and that the premium was $2.50.

A second policy was also taken out at this time which was the Mutual of Omaha policy for the principal sum of $20,000. The appellant testified that this was done because of her aversion to the country her husband would visit. She was anxious to provide hospital expenses and the like against the event of injury befalling her husband in the "uncivilized" lands he would visit.

As in the former policy the appellant also printed and wrote the information required in a box entitled "Schedule" at the beginning of the document. However in this policy her husband is described as the "insured" rather than as the "applicant" as in the Fidelity policy. The attendant filled in the balance of the information which indicated, among other things, that the premium was $5.50 and that the policy was effective from 9:55 o'clock a.m. of that day. Again the deceased personally signed the policy as the "insured" at the request of the attendant. In this instance the original policy was introduced in evidence. Apparently Mutual of Omaha Insurance Company did not require the production of the original policy and its

surrender as a condition precedent to payment thereof as was the case with Fidelity, although both policies were sold over the same counter by the same attendant.

The premiums for both policies totalled $8.00.

The appellant tendered the payment of that amount by producing a $10 bill from her purse, being part of the funds she had received upon cashing the cheque payable to her which she had received two days previously from the German government as restitution of war damages which she had incurred. The proffered $10 bill was accepted by the attendant who gave the appellant a $2 bill as change and the two policies were delivered to her which she kept and stored in a drawer at her home.

The appellant did not ask for nor obtain a receipt for the $8 she paid the attendant, nor did she have her husband execute a form of assignment. The attendant who sold these policies was called as a witness. She testified that the form of assignment was conclusive evidence that the assignee was the owner of the policy and that both forms, the receipt form and the form of assignment were available at the desk for persons who requested them, but that, as a matter of practice, she did not advise customers that such forms were available. It is only to the statement by the attendant that she neither advised Mr. and Mrs. Vaskevitch that such forms were available nor proffered them to them that I attach particular significance.

In my opinion it is quite understandable that the appellant would not request a receipt for the premiums paid unless prompted to do so. She had possession of the effective policies and a receipt would not be necessary to her. As to the form of assignment, it should be borne in mind that these policies are usually purchased in a hurry with an aircraft standing by to take off. I think it is understandable that the appellant, in the time available to her, would not think of requesting a form of assignment to be completed by her husband and the attendant did not offer her such a form. I do not think it would have occurred to the attendant to do so because (1) she would not have been aware of the circumstances leading to the purchase of the policies and (2) as she testified, she never proffered this form of assignment unless requested to do so by the customer as she was not requested to do by the appellant or the deceased in this instance.

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There were no forms available to cover the circumstance where a person other than the traveller took out the policy. There are discrepancies in the appellant's testimony to which counsel for the Minister referred as illustrative of the unreliability of her evidence as a whole.

He specifically pointed out that on the Fidelity policy the time of purchase inserted by the attendant as 9 a.m. and the Mutual of Omaha policy indicated it was effective from 9:55 a.m., which time was also inserted by the attendant. The appellant insisted that the second policy was bought immediately following the first and that in her recollection 9 o'clock a.m. would be approximately the correct time. She could offer no explanation for the apparent difference of fifty-five minutes between the purchase of the two policies. Furthermore, the appellant testified that the aircraft on which her husband travelled took off at 9:30 or 9:35 a.m., so it would have been impossible for her husband to have signed the second policy at 9:55 a.m. She made this statement in her examination in chief. The matter arose again in cross-examination. Again she could offer no explanation for the difference in time. She volunteered the information that she wished to establish the precise time of take-off so she called Canadian Pacific Airlines and was informed that it was between 9:30 and 9:35 a.m. that the aircraft took off, although she could not recall which of the two times she was told.

I cannot be certain how far the appellant's first evidence as to the departure time of the aircraft was influenced by the information she received pursuant to her telephone call to the airline. However she did drive her husband to the airport and she would have known the departure time and would have estimated the time required to get there with some accuracy.

To the best of the appellant's recollection the attendant at the insurance counter was wearing a uniform consisting of a skirt and jacket. The appellant said in response to a question put to her in cross-examination she thought the jacket was red in colour and that the attendant was blonde, although in both instances she prefaced her answers by stating that she could not recall with certainty. Her answers in these respects were only guesses on her part as she indicated they could only be.

As I have intimated before, the attendant was called as a witness. She testified that she wore a uniform consisting of a skirt and jacket, but that the jacket was blue. I observed that the attendant's hair was raven black and she said that she had never been a blonde.

The attendant did not recall the sale of these two particular policies, but she was adamant in her insistance that she would have inserted the correct time in the second policy because it was her invariable practice to do so.

I accept the appellant's testimony as to the time of purchase of the policies and there are good and valid reasons for doing so. This was an event of paramount importance in the appellant's life whereas to the attendant it was merely a routine sale of two of many policies. Neither do I think that the attendant was infallible in inserting the times in the policies. A few minutes either way would be of no great significance to her. I am therefore certain that the attendant made a mistake and inserted the wrong time in the second policy purchased.

Neither do I think that the appellant's vague and incorrect recollections of the colour of the attendant's garb and hair is of particular significance. The appellant's mind was directed to other matters of far more importance to her with respect to which I accept her testimony.

I think it is clear that it was the intention of the insurer, under both contracts of insurance herein, to enter into agreements only with the actual traveller, in this instance Mr. Vaskevitch. There is no ambiguity in the language of the policies as to the parties thereto. In the Fidelity policy Mr. Vaskevitch is described as the applicant and he personally signed the application in that capacity. Similarly in the Mutual of Omaha policy he is described as the insured and he signed the application as such. It would appear that the insurer was willing to contract only with the actual traveller as is indicated by the form of the application and by the fact that it was a condition to the validity of the policies that the traveller should personally sign the applications.

Therefore as between the insurers and Mr. Vaskevitch there is no doubt that the insurer considers him to be the other contracting party, but this circumstance does not resolve the question of the ownership of the policies as between the appellant and her husband.

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As I have accepted the appellant's testimony it follows that she purchased both these accident policies on her husband's life for which she paid the premiums with her own money. Because those money were paid to a third party there can be no presumption of a loan to her husband and furthermore the evidence, in my view, effectively rebuts any presumption of a loan or gift to her husband if such should exist.

Section 3(1)(*j*) of the *Estate Tax Act* is enacted in language identical to that used in section 2(1)(*d*) of the *Finance Act* of the United Kingdom. Therefore the English decisions on that section are applicable and helpful.

Lord *Lorebum, L.C. said in Lethbridge v. Attorney General*[2] at page 23, that the general purpose of the section is "to prevent a man escaping estate duty by subtracting from his means, during life, money or money's worth which when he dies are to reappear in the form of a beneficial interest accruing or arising on his death".

The facts as I have found them to be in the present case show that Theodore Vaskevitch did not "subtract from his means" for the purpose of paying the premiums in question. This was done by the appellant alone out of her own free property.

Accordingly it follows that the deceased, Theodore Vaskevitch, did not "purchase or provide" the two accident policies "by himself alone" within the meaning of the above quoted words as they appear in section 3(1)(*j*).

However the question remains whether he "purchased or provided" those policies "in concert or by arrangement with any other person" that is in the present instance, his wife, the appellant.

While it is true that the deceased initiated the discussion with his wife concerning the purchase of an accident policy for the substantial amount of $300,000 that suggestion was rejected by the appellant and from that point forward, as I view the evidence, all decisions and steps taken were those of the appellant to which the deceased merely consented and acquiesced. To act "in concert" or "by arrangement with another person", in my opinion, presupposes

[2] [1907] A.C. 19.

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some form of active participation rather than passive consent to a decision taken by another person. It follows that the deceased did not purchase or provide the policies in question "either by himself alone or in concert or by arrangement with any other person" which is a condition of the proceeds of these two particular accident insurance policies being properly included as part of the aggregate net value of the appellant's husband's estate.

Because of the conclusion I have reached it is not necessary for me to consider the second submission on behalf of the appellant that there was no beneficial interest in the two accident insurance policies arising or accruing by survivorship or otherwise on the death of the deceased.

Accordingly the appeal is allowed with costs.

BETWEEN:

LIBBEY-OWENS-FORD GLASS COMPANY ..... PLAINTIFF;

AND

FORD MOTOR COMPANY OF CANADA, LIMITED ..... DEFENDANT.

Ottawa 1968

Nov 18, 22, 26-27

1969

Jan. 7

(No. 2)

Patents—Infringement—Patent for apparatus and method—Defence that invention acquired before patent issued—Whether intangible subject-matter excluded from defence—Patent Act, R.S.C. 1952, c 203, secs. 2(d), 58.

In 1962 plaintiff obtained a patent with respect to an apparatus and method for pressing glass and plastic assemblies and brought action for infringement against defendant, which in 1961 had acquired and commenced operating machines for pressing glass windshields. Amongst other defences defendant relied on s. 58 of the *Patent Act*.

Held, the immunity conferred by s. 58 on a person who acquires an invention before a patent therefor is issued to someone else is not confined to tangible subject-matter only, *viz* in this case the apparatus, but extends to intangible subject-matter also, *viz* in this case the method.

Schweyer Electric & Mfg. Co. v. N.Y. Central Railroad Co. [1934] Ex. C.R. 31; *McClurg v. Kingsland* (1843) 42 U.S. 202; *Andrews v. Hovey* (1887) 123 U.S. 267, (1888) 124 U.S. 694; *Barton v. Nevada Consolidated Copper Co.* (1934) 71 F (2d) 381; *Victor Sporting Goods Co. v. Harold A. Wilson Co.* (1904) 7 O.L.R. 570, considered.

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LIBBEY-OWENS-FORD GLASS CO. v. FORD MOTOR CO. OF CANADA LTD.

TRIAL OF ISSUE.

Gordon F. Henderson, Q.C. and *C. R. Carson* for plaintiff.

Donald F. Sim, Q.C. and *Roger T. Hughes* for defendant.

THURLOW J.:—In this action, following the decision of the court on the special case by which it was sought to raise certain points of law, an order was made setting down for trial the question whether assuming the validity of Canadian patent number 653,277 the defendant is liable for infringement of that patent and this issue has since come on for trial accordingly.

The patent in question was issued on December 4, 1962 on an application filed on May 4, 1955. The specification, which consists of some forty typewritten pages and a set of fourteen drawings, is concerned with what is therein claimed to be "an improved method and apparatus for pressing assemblies of curved glass sheets and plastic interlayers preparatory to the final compositing operation". More particularly as disclosed by the specification and evidence the purpose of the first of two consecutive pressing operations to be carried out by the method and apparatus is to expel entrapped air from such assemblies—chiefly laminated automobile windshields—while that of the second, which follows heating of the assembly, is to secure close contact of the surfaces to one another and to seal the edges so that oil under pressure, which is used in a subsequent processing step, will not penetrate between the layers.

The specification describes the characteristics and functioning of an apparatus designed to carry out these purposes. In general the characteristic elements of the apparatus described (so far as the present controversy is concerned with them) consist of a conveyor belt which moves the glass "sandwich" along a course which is so set as to bring the leading edge of the sandwich directly to the nip of a pair of power driven rollers in a plane which coincides with the common tangential plane of the rollers as they are at that moment positioned. The rollers are mounted on a frame which is capable of moving or rocking in an arc and thus of moving or rocking the rollers in an

arc as well, and there is a device which, on being engaged by the glass on its way between the rollers, automatically sets this frame in motion in its arc thereby causing the sandwich to be lifted from the conveyor and moved forward in that arc (while it is being passed between the rollers, and is at the same time being supported by other devices known as outrigger rolls and rocked with reference to the rollers as well to keep the plane of the portion in the nip at any particular time coincident with the common tangential plane of the rollers), to a point at the other end of the arc of the frame where on leaving the rollers the sandwich is again deposited on a conveyor precisely oriented for its reception and removal to its next processing step.

The specification concludes with twenty-three claims, fourteen of which are apparatus claims and nine of which are method claims. For the present purpose these are all assumed to be valid.

Since the end of March 1961 the defendant has had in its possession and since June of that year it has operated as part of its equipment for manufacturing curved glass windshields for cars, two pressing machines—one used to remove air from windshield assemblies and the other to secure close contact between the laminae and to seal the edges. Both of these machines—which were substantially alike—had rollers capable of being rocked with their supporting frame and devices for automatically rocking, lifting and supporting windshields passing between the rollers and for depositing them on exit from the rollers essentially similar in most respects to those of the apparatus described in the specification.

Since their acquisition both of the defendant's machines have been used in conjunction with conveyor devices so designed, positioned and adjusted as to receive the windshields from the pressing rolls and carry them away to their subsequent processing stage. In the case of the defendant's tacker unit there was also a feed conveyor in operation from the time of the acquisition of the machine to September 1964 when it was removed and replaced by a device known as a load stand. The defendant's de-air unit, throughout the period mentioned, and the tacker unit since September 1964 have been used in conjunction with load stands.

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Thurlow J.

The feed conveyor was designed and positioned and with necessary adjustments to its height and grade made from time to time to suit the requirements for the curvature of the particular style of windshield to be processed was used to carry the windshields from the tacker oven conveyor, on which they had been passed through the tacker oven for heating to the appropriate temperature, directly to the rollers of the tacker pressing machine. At that point the progress of the windshield would have been stopped had not a man been present to push or otherwise assist the leading edge of the windshield far enough into the nip of the rollers to engage the central lower rollers, which were power driven and the rollers above them so as to cause them to draw the windshield into and through their nip. How far into the nip between the rollers it would be necessary to push or assist the windshield would, I fancy, depend to some extent on the shape of the windshield since engaging the outer rollers would provide no assistance in drawing the windshield further into the nip until a sufficient portion of the leading edge engaged the power driven lower rollers in the middle.

The load stands were also devices used, in the case of both of defendant's machines, in the course of introducing the windshields into the nip of the rollers. Each of them consisted of a mere upright stand on top of which was mounted a rubber roll. This roll was free to turn but was not power driven. On it an operator could rest a windshield and move it forward towards the nip of the machine's rollers so that its leading edge could become engaged between them in the right plane therefor—i.e., the common tangential plane of the rollers—while its remaining portion was supported by the load stand and continued to be supported thereby until it was lifted therefrom in the course of the rocking action of the rollers and their supporting frame. The positions of these load stands on the floor in front of the tacking machines as well as their heights were adjusted as required from time to time to meet the requirements for easy handling and to secure the proper angle of entry for different types of windshields. The height to which the load stand would be adjusted might also depend to some extent on the height or stature of the operator. While the top of its roller could be higher at times than the nip of the machine's rollers it was more

often lower. It was, however, never directly below them but at a distance of some two feet or thereabouts therefrom. In general it was adjusted to about knee height.

At the hearing the controversy developed around three questions.

1. Whether and in what respects infringement by the defendant of all or any of the patent claims relied on by the plaintiff should be taken as admitted.
2. Whether, and how far, if not admitted, infringement has been established.
3. Whether, and how far section 58 of the *Patent Act* affords a defence.

The first of these questions arises from correspondence between solicitors during the course of the litigation and depends on the effect of certain admissions therein contained. This, as I see it must be determined having regard to the state of the pleadings and to what transpired in the course of the trial. In my opinion the result is not affected either on the one hand by the plaintiff having refrained, as counsel suggested it had, as a result of the letters, from taking preparatory measures with a view to proving infringement at the trial, nor on the other hand by the defendant having permitted, shortly before the trial, whether pursuant to an order of the court or otherwise, a further inspection of its premises by the defendant or a further examination for discovery. In short neither the interpretation nor the effect of the alleged admissions is in my view affected by the reasons which led to their being made or by what transpired afterwards between counsel.

The action was brought in respect of alleged infringement by the defendant of nine patents said to belong to the plaintiff. The allegations of infringement of all nine patents is made in paragraph 4 of the statement of claim which states that:

> 4 The Defendant has infringed the rights of the Plaintiff under the said Letters Patent as set out in the Particulars of Breaches served herewith and threatens to continue the said infringement

So far as material the particulars of breaches allege that:

> 1 The defendant has made, constructed, used and vended to others items containing glass in infringement . .

of the nine letters patent referred to in the statement of claim including letters patent number 653,277.

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2 The Plaintiff relies on . . . (various claims in the other 8 patents) and claims 1 to 9 inclusive and 11 to 20 inclusive of Canadian Letters Patent 653,277

3. The precise number and dates of all of the Defendant's infringements are at present unknown to the Plaintiff, but the Plaintiff will claim to recover full compensation in respect of such infringements.

In its defence the defendant denied these allegations and went on to allege invalidity of the patent, licence by the plaintiff to the defendant under the patent and a defence under setion 58 of the *Patent Act*.

The statement of claim was dated January 28, 1965, and the correspondence in question, so far as it is in evidence, commenced on May 8, 1967. It consists of six letters, the first three of which were offered by the plaintiff and the other three by the defendant. The first two of these are letters purporting to be written by the defendant's solicitor in the course of negotiations for an inspection of the defendant's premises under conditions that would be acceptable to both parties. While both hold out the possibility of some admissions being made in certain events neither, as I read it, makes any admission and it is unnecessary to set them out. The third letter, also written by the solicitor for the defendant to the solicitor for the plaintiff was dated November 13, 1967, and read as follows:

Subject: L-O-F vs. Ford Canada
Actions Nos. 1 and 2
"Inspection"

This will confirm the arrangements we have made with respect to the inspection of the Ford plant.

(1) The inspection is now scheduled to take place at 12 30 p.m. on Tuesday, November 28th, 1967.

(2) The parties making the inspection will be yourself, Mr. Henderson, Mr Nobbe and one technical representative of L-O-F.

(3) You and each of the persons making the inspection have agreed that information obtained during the inspection will be used only for the purposes of the two pending actions and will not be used for any commercial or other purpose

(4) The inspection is to be of the vinyl stretching operations carried on by Ford and of the prepressing and tacking operations.

(5) The inspection shall be without prejudice to your right to apply to the Court for further or other inspections.

(6) L-O-F agrees to consent to and cooperate with Ford in obtaining an order directing a preliminary trial between the parties relating to the plea of license under patents Nos. 486,072, 486,073, 488,745, 488,746, 513,738, 549,068, 726,061 and 727,546 and the plea based upon Section 58 in respect of patent No. 653,277.

(7) Ford agrees that proceedings in the remaining portions of the actions may proceed in the normal course and undertakes not to seek any stay or delay thereof on the grounds of the separate and preliminary trial above referred to.

(8) Ford admits that it has infringed Canadian Patents Nos. 470,044, 488,745, 613,040 and 653,277 subject to and reserving all arguments as to validity, license and Section 58 in respect thereof.

Would you kindly indicate your acceptance of this and provide us with evidence that the parties making the inspection apart from yourself and Mr. Henderson are aware of and consider themselves bound by the provisions of (3) above.

It is common ground that the inspection referred to took place in about the month of December 1967 and no breach of any of the undertakings required of the plaintiff has been suggested.

The remaining three letters were written following the decision already referred to on the special case submitted to the court by the parties on the effect of section 58. The first of these was written by the defendant's solicitor on August 8, 1968. It read as follows:

Subject: L-O-F vs. Ford Canada
Action No. 1—Makovic
Canadian Patent 653,277
Preliminary Trial

(1) Following the examination for discovery of Mr. Thompson, I compiled a list of the information which we undertook to develop and supply you. Enclosed herewith is a schedule setting out this material. It may be some time before the transcript is available and so that no time will be lost in getting this material to you, I would appreciate it if you would check this list against your own notes and let me know whether I have overlooked anything.

(2) I would appreciate it if you would advise me, for the purposes of the trial, which of the documents adduced as exhibits to Mr. Thompson's examination for discovery, you are prepared to admit.

(3) To assist you in preparing for trial, the defendant admits that it has infringed claims 1 and 20 of the patent in the use of the tacking equipment described by Mr Thompson in the examination for discovery from the date of the patent to the date of issue of the Statement of Claim herein, subject to and reserving all arguments as to validity and Section 58 in respect thereof. The defendant does not admit infringement of any of the other claims of the patent at any time. If you decide to limit the claims in suit in view of the examination for discovery of Mr. Thompson, I would be glad to hear from you at your earliest possible convenience.

The remaining two letters were written thereafter by solicitors of the plaintiff to solicitors of the defendant. In the first of these, written on August 13, 1968, no comment was made with respect to the admission set out in the

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defendant's letter but in the second, dated October 15, 1968, the defendant's solicitor stated his views that by the earlier letters infringement of all the claims in suit had been admitted.

At the trial, however, the plaintiff did not rely entirely on the first three letters as constituting an admission of infringement of all the claims relied on but led, as well, evidence of what had been observed at two inspections of the defendant's plant as to the characteristics of the apparatus and system for de-airing and tacking windshield assemblies then in operation as well as a considerable body of evidence given by a representative of the defendant on two examinations for discovery relating to the installation of the system, subsequent alterations thereto and its operation in the defendant's plant. Further evidence on the same subject was also adduced by the defendant who offered a number of documents pertaining to the acquisition, installation and operation of the system and oral evidence of the same person who had been examined for discovery. This witness was cross-examined at length on the same subjects by counsel for the plaintiff.

I see no difficulty in reaching the conclusion that the defendant's letter of November 13, 1967, constitutes an admission, for the purposes of this action, that the defendant has infringed the four patents listed in paragraph 8 and in my opinion this admission is of the same force and effect as if it had been made formally pursuant to a notice to admit facts. But it can have no effect beyond precisely what it says when read in answer to what had been alleged in the statement of claim and particulars of breaches. It admits infringement of the patent but like the statement of claim and particulars of breaches it appears to me to say nothing of any particular respect in which the patent has been infringed or when or by what particular makings, constructions, uses or sales of items containing glass by the defendant the patent was infringed. It thus leaves completely unidentified what it is that is being admitted to constitute infringement of the patent. As I read it the admission is equally consistent with a single act of infringement or with multiple acts of infringement and either in ways which the plaintiff had in mind in making its complaint, but did not state, or in ways not contemplated or known by the plaintiff. Of all this, however, the

plaintiff, as I view it, has no reason to complain since it flows from the plaintiff's own omission to state in its pleadings precisely what the defendant did which constituted infringement of its rights. Nor does the admission specify which of the claims relied on is admitted to have been infringed. It simply admits infringement of the patent and this appears to me to be equally consistent with the plaintiff having infringed one or more but not necessarily all of the claims cited in the particulars of breaches.

In the circumstances the admission appears to me to be as vague as the statement of claim and particulars of breaches for the purpose of ascertaining what it was that the plaintiff complained of or that the defendant did which constituted infringement of the patent in suit or when the defendant did it and to my mind it could never have served as a foundation for awarding the relief which the plaintiff claims, for, without agreement on the point or a trial for the purpose of determining it, there would have been nothing before the court upon which it could have been adjudged what it was that constituted the defendant's tort or by which the tort could have been defined for the purpose of a reference to assess damages or to determine profits or for the purpose of enjoining the defendant from continuing it. It appears to me therefore that the questions of what claims were infringed, when they were infringed and what conduct of the defendant infringed them can be determined only by reference to such evidence thereon as has been offered and as I see it the admission is of no assistance or effect whatever in reaching conclusions thereon.[1]

That evidence, however, includes the defendant's letter of August 8, 1968, which was not offered by the plaintiff but was put in evidence by the defendant. The admission therein contained comes to much closer grips with the matter. While the letter appears to me to be open to more

[1] *Vide Ash v. Hutchinson & Co. (Publishers)* [1936] 1 Ch. 489 where Greene, L.J., said at page 503:

> A Plaintiff who relies for the proof of a substantial part of his case upon admissions in the defence must, in my judgment, show that the matters in question are clearly pleaded and as clearly admitted; he is not entitled to ask the Court to read meanings into his pleading which upon a fair construction do not clearly appear in order to fix the defendants with an admission.

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than one interpretation in the light of the facts established in evidence to my mind this letter is *prima facie* sufficient to lead to a conclusion in favour of the plaintiff that the use of the defendant's tacker unit throughout the period referred to therein infringed both claim 1 and claim 20 of the patent and there the matter must rest save insofar as the other evidence may show this conclusion to be erroneous. *Vide Sinclair v. Blue Top Brewers Co. Ltd.*[2] In examining the evidence therefore I propose to approach the matter as being one in which infringement of both claim 1 and claim 20 of the patent throughout the period referred to in the letter by the use of the defendant's tacker apparatus has been established save insofar as the other evidence established the contrary but with respect to the rest of the matter as one in which, the onus being on the plaintiff, infringement is to be found only to the extent that it has been proved.

This brings me to the second of the areas of controversy that is to say how far infringement has been established. As will appear, despite his letter of August 8, 1968, counsel for the defendant took the position that none of the claims relied on had been infringed. I turn therefore to the claims on which the plaintiff relies and the several points raised in respect of each of them.

Claim 1 reads as follows, the portions which I have put in italics being those on which submissions were made:

> 1. In apparatus for pressing together the sheets of a curved glass-plastic sandwich, *means for conveying the sandwich in a defined path* transversely to an axis of curvature thereof, a pair of *pressing rolls disposed transversely of said path* and providing a confined passage therebetween to receive said sandwich means for mounting said rolls as a unit for rocking movement of said unit from a first position for receiving the forward end of said sandwich in said confined passage along a tangential plane common to both of said rolls to a second position for releasing the rearward end of said sandwich from said passage, and *means for rotating said rolls in opposite directions for moving said sandwich therebetween* during the rocking thereof from said first to said second position.

The first two submissions made by counsel for the defendant on this claim were that the load stands used in the defendant's operation were not "means for conveying the sandwich in a defined path" within the meaning of the claim since (1) a load stand was not a means for convey-

[2] [1947] 4 D.L.R. 561 per Kellock J. at pp. 561-2.

ing; and (2) there was no defined path in which the windshield was moved along the top of the load stand to the nip of the rollers. Counsel for the respondent, however, urged that a load stand was a "means for conveying" the windshield since it was equipped with a roller on which the windshield could be and was supported and moved and its position and height were adjusted to make it suitable for such use for the particular type of windshield to be pressed. He also submitted that the expression "defined path" in the claim referred to the course of the windshield from the time its leading edge was in the common tangential plane of the rollers—a distance that might be as little as one-quarter of an inch from their nip—to the moment, very shortly thereafter, when, by reason of the action of the rocking frame, the windshield was lifted up and rocked forward while between the rollers, and that the load stand was a means for conveying the windshield in this defined path within the meaning of the claim.

While I am inclined to the view that the "defined path" referred to in claim 1 means the course of the windshield during the period as submitted by Mr. Henderson (since the course of the windshield prior to that is of no importance to the pressing procedure and is of critical importance to it from the moment mentioned) I am unable to agree that the defendant's load stands are means for conveying the windshield in that defined path. I do not think, for example, that a man who manually inserts a windshield into the nip in the correct plane can be considered to be a means within the meaning of the claim and as I see it in the defendant's operation it is the operator who conveys the windshield in the defined path. The load stand is no doubt a means which he uses to assist him in doing so but it does not do the conveying and without the act of the man in putting the leading edge of the windshield in the defined plane, his keeping it there and his moving it in that plane the windshield would never reach or become engaged in the nip of the rollers since without the control exercised by the operator it would not only never reach the commencement of the defined path but would leave it and fall down if the operator failed to support it at any time prior to its becoming firmly engaged in the nip. This interpretation of the expression is I think confirmed by reading the claim in conjunction with the rest of the specification. In it

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one finds no reference to a defined path. On the other hand one does find numerous references to the conveyor but none appears to me to contemplate a device which by itself will neither move nor provide complete support for the windshield in its course from the moment its leading edge is in the common tangential plane of the rollers until it is firmly engaged in the nip. In my view therefore the defendant's pressing machines when used in conjunction with load stands are not apparatus that fall within the terms of claim 1.

Counsel for the defendant also submitted that the use of the defendant's tacker unit in conjunction with a feed conveyor was not within the claim. As I understand it the feed conveyor had two parallel downwardly inclined conveyor belts on which the windshield was carried until its leading edge came in contact with the large power driven lower rollers of the pressing assembly. At that moment or shortly thereafter a set of castors arranged between the two conveyor belts was automatically raised to lift the windshield from the belts and support it during its movement between the rollers until it was lifted therefrom by the rocking action. The evidence was that with this apparatus the windshield would not enter the nip of the rollers automatically and that it was necessary to have an operator present to guide the windshield while on the conveyor belts and to rock its leading edge upward into the nip when it reached the rollers. In counsel's submission the path of the windshield was a defined path while it rested on the conveyor belts but that such defined path stopped or ceased to be a defined path (at the critical moment) when it became necessary for the operator to rock its leading edge into the nip by pressing down on the rear end.

I have already indicated my view that the only material defined path is that of the windshield from the time its leading edge is in the common tangential plane of the rollers which in the defendant's load conveyor arrangement would, as I understand it, commence when the leading edge of the windshield comes in contact with the power driven lower rollers of the pressing device. From that moment onward the windshield is supported in that path first by the conveyor belts and then by the castors and with the assistance of the operator, in addition to the force exerted by the belts and that of gravity, it is moved in that

path—(not of the leading edge but of the windshield itself) until, its leading edge and leading portion having become engaged between the rollers, it is raised from the castors by the rocking action. While the force exerted by the belts coupled with the gravitational tendency of the windshield to move along the path and the contact of the leading edge of the windshield with the power driven rollers was apparently insufficient to cause the windshield to continue along its path without the assistance of an operator I am not persuaded that this was not an inefficient example of the plaintiff's combination or that it was not within the claim. The use of this apparatus was admitted, by the defendant's letter of August 8, 1968, to infringe claim 1 and the evidence does not satisfy me that it did not do so.

The third point raised on claim 1 was that the pressing rolls in the defendant's apparatus were not disposed transversely of the defined path because while the rolls were disposed at an angle of 90° to the path, if indeed there was such a path, they did not cross it since it ended at the rolls. In the view I have taken that the defined path continues to the point at which the devices for moving the supporting frame have been engaged and the windshield is lifted from the conveyor the rolls are not disposed merely at the end of the path but are disposed across it. The point is therefore not sustainable.

The remaining point taken arises from a difference in the rolling mechanism of the defendant's machines from that described in the specification. In that described in the specification both upper and lower rollers are power driven. In the defendant's machines only the four central lower rollers are power driven and these exert rotating force on the rollers directly above them, with which they are in contact when no windshield is between them, and on the windshield when there is one between them so as to cause the upper rollers to turn in the opposite direction. The rotation of the outer rollers, both upper and lower, in the defendant's machine is produced by the movement of the windshield between them.

The point raised was that in the defendant's machines the rolls are not rotated "in opposite directions" for moving said sandwich therebetween within the meaning of claim 1, that the words of the claim are peculiar to the

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construction described in the specification and are confined to pressing rollers in which both upper and lower rollers are power driven. In my view, there is neither ambiguity nor lack of clarity in the expression "means for rotating said rollers in opposite directions for moving said sandwich therebetween" nor justification for limiting the expression so used to means of the kind described in the specification. As defendant's machines are equipped with means for turning the lower four central rollers which are larger than the others and which are in contact with the rollers immediately above them, there is a means for rotating those particular rollers in opposite directions when there is nothing between them and there is also a means for rotating them in opposite directions for moving the sandwich therebetween as well as between the outer upper and lower rollers.

The defendant's submission on this point accordingly fails.

In addition to submitting that the defendant's machines were within the text of this and the other apparatus claims counsel for the plaintiff contended that the machines were infringements of the substance or what has been referred to as the "pith and marrow" of the invention. He submitted that the invention was one of a process whereby a curved laminated glass windshield enters a pressing roll in a predetermined relationship, is rocked, while being pressed and while maintaining a particular position in the nip of the rollers, to a second position and is there unloaded in a defined relationship and that in terms of the apparatus all three pieces—i.e., the loading device, the rocking and pressing assembly and the receiving device—interrelate to enable the functions to be performed. He went on to submit that the substance of the invention relates to the proper entry of the windshield between the rolls the pressing of the windshield while being rocked and the proper discharge and that the use by the defendants of its load stands served the first of these functions and the pressing assembly and discharge conveyor served the others.

Of these submissions it is to be observed first that if the scope of the invention described by claim 1 is as broad as stated the insertion of a windshield between the rollers of the defendant's machine in the proper relationship by a

man using no device whatever therefor would meet the substance. I do not therefore think the substance can be as broad as suggested. Secondly, the argument really adds nothing to that already considered in relation to the wording of the claim itself since it too depends on a determination that a load stand is a means for achieving proper entry of the windshield into the nip of the rollers, which in my view, as already expressed, it is not. As I see it, it is no more such a means than are the gloves worn by the operator who without them would probably find it more difficult to position the windshield properly because of its being too hot for him to handle without them. Moreover, while evidence of what was known by persons skilled in the art prior to the date of the specification, from which one might form some view of the extent of the invention disclosed thereby, is very scanty, consisting as it does of a few not very informative recitals in the specification itself and a copy of an earlier specification, known as the Boicey patent (Exhibit Z), it seems clear from such evidence that the pressing of curved glass sandwiches by passing them between rollers was already well known as was also the necessity, which I should also have thought to be obvious to anyone whether skilled in the art or not, to have the edge of the sandwich oriented to enter the nip of the rollers in the common tangential plane of the rollers and for that reason to bring the sandwich to the nip of the rollers in the correct orientation, whether that was to be achieved by hand or by mechanical means. Having read and re-read all of the passages in the specification to which my attention was drawn as well as the other portions thereof which appeared to me to bear on the question I have not been able to discern therein or in any of the material before me any basis for concluding that any of the four elements or means referred to in the claim, whether by themselves or in any cooperatively acting group short of all the elements or means referred to in the claim and whether in an apparatus of the kind referred to in the claim or elsewhere could constitute an invention. There is nothing new about the product or result of using the apparatus and even to one inexperienced in the field there is nothing about any of the several elements claimed that strikes one as being capable of being regarded as novel, either in itself or in its employment in or in conjunction with a rolling or pressing

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apparatus. In my view, therefore, the essence of the invention patented by claim 1 must lie, if anywhere, in the combination and arrangement in apparatus for pressing curved glass sandwiches of the several elements consisting of devices to produce proper entry between rollers, to rock the windshield while being rolled and to discharge it properly. This substance, as I see it, is not present in an apparatus in which one of the devices essential to the combination is not present.

I find therefore that claim 1 is not infringed by the defendant's use of its pressing machines in conjunction with load stands but that it was infringed by the use of the tacker unit prior to September 1964 in conjunction with a feed conveyor.

With respect to claim 2 counsel for the defendant raised no additional points but took the position that whether or not it was infringed would turn on whether or not claim 1 was infringed. Claim 2 reads:

> 2 In apparatus of the character defined in claim 1, means for resiliently pressing said rolls together along said confined passage.

For the reasons given with respect to claim 1, I am of the opinion that the claim has not been infringed by the use of the defendant's machines in conjunction with load stands but has been infringed by the use of the defendant's tacker unit in conjunction with a feed conveyor.

Claim 3 reads:

> 3. In apparatus for pressing together the sheets of a curved glass-plastic sandwich, *conveyor means for moving said sandwich in a defined path* transversely to an axis of curvature thereof, a pair of rolls disposed *transversely of said path* to provide a confined passage therebetween which is located *above said conveyor means* and generally parallel to said axis of curvature of the sandwich, *means for rotating said rolls in opposite directions to provide driving movement through* said confined passage, *and means for rocking said rolls, as a unit, to receive the forward end of said sandwich from the conveyor means* at one side of said rolls then tilt said sandwich and *finally release the rearward end of said sandwich onto the conveyor means at the other side of said rolls* after said sandwich has been moved through said confined passage.

Arguments were raised on the several portions of the claim which have been italicized. It was not suggested, however, that the expression "conveyor means" for moving said sandwich in a defined path in this claim meant anything different from the corresponding expression in claim 1 and

the arguments with respect to this and the expression "transversely of said path" and "means for rotating said rolls in opposite directions to provide driving movement through" were the same as those made with respect to the corresponding expressions in claim 1. My opinion thereon is, accordingly, the same as well.

The point made with respect to the wording "above said conveyor means" was that even if the defendant's load stands and feed conveyor could be considered conveyor means within the meaning of the claim in neither case were the rolls disposed above them. In the device described in the specification the rolls are shown above the conveyor belt but at that point it has been diverted downwards since that portion of it is no longer engaged in supporting the windshield. Mr. Henderson pointed out that the wording does not say "directly" above and that in the apparatus described in the specification there is no function to be performed by having the rollers directly above the conveyor. In his submission all that was required was that the rollers be higher than the conveyor and this requirement was fulfilled when the defendant's load stands and load conveyor were being used at a lower level than the initial position of the rollers.

In my view what was contemplated in the specification was a device which would receive the windshield into the rollers with its curved ends pointing upwards—rather than downwards—and then rock the windshield by raising it off the conveyor means and this I think accounts for the use of the language "above said conveyor means" in the claim. Interpreted in this sense the language only requires the conveyor to be lower than the nip of the rollers at the point where it delivers the windshield into the nip of the rollers. I would not therefore sustain the defendant's position on this point.

Next it was argued that the expression "means for rocking said rolls, as a unit, to receive the forward end of said sandwich from the conveyor means" meant that the conveyor means must itself lead the sandwich into the nip of the rolls and that this was not present in the defendant's apparatus. There is, as I see it, no requirement in the wording of the claim that the mechanism be so arranged that the rolls will, without human assistance, engage the

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sandwich while it rests on the conveyor and apart from the submissions already considered with respect to the defendant's load stands and feed conveyor being means for conveying of the kind referred to in the claim there is in my view no substance in the point taken. The load stands in my opinion were not such means, the feed conveyor was.

Finally it was submitted that the words "finally release the rearward end of said sandwich onto the conveyor means at the other side of said rolls" meant the conveyor means referred to earlier in the claim (since the conveyor means described in the specification continued to the second position and received the sandwich from the rolls) and that since the same conveyor means did not receive the windshield from the rollers in the defendant's apparatus the claim did not cover it. I think the meaning of the words are sufficiently clear without reference to the description in the specification and as I read it the claim is not confined to devices embodying a single conveyor system for both delivering the sandwich to and receiving it from the rolls. The defendant's point is therefore not sustainable.

It follows from the foregoing that claim 3 is not infringed by the use of the defendant's apparatus in conjunction with load stands but was infringed by the use of the defendant's tacker unit in conjunction with a feed conveyor.

No additional submissions were made with respect to claims 4, 5, 6, 7, 8 or 9, which are all dependent on the apparatus falling within claim 3, and accordingly the same conclusion applies in respect to each of these claims.

The next claim relied on by the plaintiff is claim 11 which reads as follows:

> 11. A method of pressing together the sheets of a curved glass-plastic sandwich, comprising the steps of moving said sandwich along *one predetermined path,* receiving said sandwich from said path in a confined passage between rotary pressing elements, *lifting said sandwich from said path,* passing said sandwich between said pressing elements, and releasing said sandwich onto another predetermined path.

The sole point taken by the defendant on this claim turned on the meaning of the expressions which I have italicized and the argument was that in the defendant's apparatus there was no predetermined path along which the sand-

which was moved or from which the sandwich was lifted, that the words of the claim contemplated a path provided by a mechanism, which is not present in the defendant's apparatus and that even if the path referred to means only the last quarter inch of travel prior to the engagement of the leading edge of the windshield between the nip of the rollers, in the defendant's operation there is no predetermined path at all prior to the actual engagement of the windshield in the rollers. The plaintiff's submission, as I have noted it, was that the path referred to is that defined by the relationship of the angularly disposed rollers and the position of the top of the defendant's load stand and proceeds to the point where the activating means takes over so that there is a rocking and a lifting of the windshield". If I understand this correctly it implies that the predetermined path really only begins when the leading edge of the windshield is being engaged by the rollers. This interpretation appears to me to be in conflict with the subsequent expression "releasing said sandwich onto another predetermined path", which appears to me to contemplate the path to be followed by the windshield after it has been released and I think that something of the same nature is what was contemplated by the use of the expression "along one predetermined path" earlier in the claim. That, however, as I see it, is the situation in the defendant's operation for at least some short distance prior to engagement of the windshield in the nip of the rollers even when a load stand is being used and as the wording of the claim imposes no limitation with respect to the length of the path or as to the means by which the movement along it is to be achieved I do not think the defendant's point is maintainable. I find therefore that this claim is infringed by the use of the defendant's apparatus whether in conjunction with a load stand or a feed conveyor.

Claims 12 and 13 are dependent on claim 11 and the same conclusion follows as to infringement of each of them.

A different problem was raised on the wording in claim 14 which reads:

> 14. A method of pressing together the sheets of a curved glass-plastic sandwich *during continuous movement thereof along a substantially straight path* transverse to an axis of curvature of said sandwich, comprising the steps of receiving the forward end of said sandwich in a confined passage between rotary elements

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when said sandwich is located in a first position along said path, *rocking said sandwich on said rotary elements about an axis parallel to the axis of curvature of said sandwich from said first to a second position along said path while pressingly passing said sandwich between said rotary elements,* and releasing the rearward end of said sandwich from said confined passage when said sandwich is located in said second position.

Here the question arising on the first italicized passage is really whether the reader is to view the path from above, in which case in both the defendant's machines and that described in the specification the path of the windshield would appear straight or substantially so, or from the side, front or rear in which case, in both the defendant's apparatus and that described in the specification, the path would become higher and then lower as the rocking progressed but in the defendant's machines would also be affected vertically by reason of the axis on which the rocking frame rocks being angled 10° from horizontal. In my view the path referred to in the claim means a path viewed from above and I see no reason for regarding the path as being otherwise than straight for the purposes of the claim merely by reason of there being undulation or lack of evenness in the course of the path. In short as I see it a path can be straight even though it may be hilly and uneven. The defendant's point is therefore in my view without substance.

The second point taken, as I understand it, was that as the axis on which the frame which supports the rollers in the defendant's machines is set at an angle of about 10° from horizontal the step of "rocking said sandwich on said rotary elements about an axis parallel to the axis of curvature of said sandwich from said first to a second position along said path while pressingly passing said sandwich between said rotary elements" was not present in the defendant's machines. This submission is based on an interpretation of the wording as meaning that the rocking axis referred to is to be parallel to the horizontal transverse plane of the path referred to earlier in the claim. I do not so read it however. In my opinion the rotary elements referred to are the rollers and it is their axis which is to be parallel to that of the curvature of the sandwich from the first to the second position along the path while the pressing is being done. This as I understand it is the situation

in the defendant's machines. In my view, therefore, the elements of this claim are all present in the use of the defendant's machines whether used with a feed conveyor or with load stands and such use constitutes infringement of the claim.

Neither claim 15 nor claim 16, both of which are dependent on claim 14, adds any element not present in the defendant's apparatus and in my opinion these claims are similarly infringed as well.

Claim 17 reads as follows and here again I have italicized the wording on which argument arose:

> 17. A method of pressing curved glass-plastic sandwiches which includes the steps of *moving the sandwich forwardly with its leading area carried in a general plane of angularity coincident with a tangential plane common to opposed rotating pressure elements,* passing the sandwich between the pressure elements while rocking the same about a common axis and then removing the sandwich from between the pressure elements when the tangential plane common thereto coincides with the plane of the following area of the sandwich along which said following area moves from between the pressure elements.

The point raised was that the action of an operator of the defendant's machines cannot be said to be a "carrying" of the leading area in the required plane within the meaning of the claim and that in any event the claim requires more than the precise instant of coincidence which occurs at the time the leading edge goes into the nip. I incline to the view that some period of "carrying" however short prior to actual engagement by the rollers is contemplated by the claim but I see nothing in its language to restrict the means of moving the sandwich or carrying its leading edge in the required plane to mechanical devices therefor. As worded the claim appears to me to contemplate the defined method of pressing, however accomplished. In my opinion therefore this claim is infringed as well by the use of the defendant's machines whether in conjunction with load stands or a feed conveyor.

A similar point was made on the wording of claim 18 which, however, by its terms is limited to a method of pressing for the purpose of exhausting entrapped air from the sandwich. The submission fails for the same reason and in my opinion this claim is infringed by the defendant's use of its de-airing apparatus.

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Claim 19 reads as follows:

19. In apparatus for pressing together the sheets of a curved glass-plastic sandwich, *conveyor means for moving a curved leading end of said sandwich in a path substantially transversely of an axis of curvature thereof,* a pair of pressing rolls disposed *transversely of said path* to provide a confined passage therebetween along a plane tangentially common to both of said rolls, and *means mounting said rolls to dispose said confined passage angularly with respect to the path of said curved leading end of the sandwich for receiving the same in said confined passage along said plane tangentially common to both of said rolls.*

Submissions were made with respect to the first two portions of this claim which I have italicized, similar to those made on the similar expressions in claim 1 and my opinion on them is the same. A third point made was that the expression *"means mounting said rolls to dispose said confined passage angularly with respect to the path of said curved leading end of the sandwich for receiving the same in said confined passage along said plane tangentially common to both of said rolls"* calls for such an orientation of the path with respect to the rolls that the leading edge is received automatically into the nip and that this is not present where an operator is required to put the leading edge into the nip. In my opinion on the wording of this claim when the required conveyor means is present it does not matter that the entry of the leading edge into the nip is not accomplished automatically and without human assistance. My finding is accordingly the same on this claim as on claim 1, that is to say that it is infringed by the use of the defendant's tacker unit in conjunction with a feed conveyor but is not infringed by the use of either the tacker unit or the de-air unit in conjunction with a load stand.

The remaining claim relied on was claim 20 which reads:

20. In a method of pressing together the sheets of a curved glass-plastic sandwich, the steps of *moving a curved leading end of said sandwich in a defined path* substantially transverse to an axis of curvature thereof, and moving a pair of pressing rolls into position to receive said curved leading end of the sandwich in a confined passage between said rolls along a plane tangentially common to both of said rolls.

Here again the argument developed over what was embraced within the wording "moving a curved leading end of said sandwich in a defined path" and it was submitted that this wording could not apply in the defendant's

operation since there was no defined path in which the leading edge was moved even in the last quarter of an inch of its travel to the nip of the rollers. In my opinion, the defined path referred to in the claim is the path of the sandwich itself from the time its leading edge is in the common tangential plane of the rollers until the sandwich is lifted from such path by the rocking action of the device on which the rollers are mounted and the claim as worded is not restricted to situations in which the support and movement of the sandwich in such path is provided by mechanical means. It follows as I see it that this claim is infringed by the defendant's operation of its machines whether in conjunction with a feed conveyor or with load stands.

In summary I find that, except during the period in September 1963 when the rocking mechanisms of both machines were not operated but maintained in a fixed position while the machines were in operation,

(1) the use of the defendant's tacker unit in conjunction with a load conveyor from the date of the patent to September 1964 infringed all the claims relied on except claim 18;

(2) the use of the defendant's tacker apparatus since September 1964 in conjunction with a load stand infringed claims 11, 12, 13, 14, 15, 16, 17 and 20 but not any of the other claims relied on.

(3) the use of the defendant's de-air apparatus since the grant of the patent in conjunction with a load stand infringed claims 11, 12, 13, 14, 15, 16, 17, 18 and 20 of the patent but not any of the other claims in suit. With respect to the operation of the tacker apparatus from September 1964 to the commencement of the action the second of the above findings is in conflict with the *prima facie* meaning of the admission of the defendant's letter of August 8, 1968, that claim 1 was also infringed thereby but on reading the letter in the light of the finding I do not think it is necessarily inconsistent therewith. However, even if it is, the finding, as I view the matter, must prevail.

I turn now to the third area of controversy, the defence based on section 58. Here the defence is that the defendant

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acquired both its tacker and its de-air apparatus and had them in operation to press curved glass windshields before the patent issued and that in consequence it is entitled to have and use them without being accountable to the plaintiff therefor whether so doing infringes the patent or not. Apart from contending that the use of these machines to press curved glass windshields prior to the issue of the patent was not established the plaintiff's main contention was that section 58 provides immunity only in respect of tangible subject matter of a patent but affords none in respect of the use of a patented process and so could not justify the defendant's use of the machines to press curved glass windshields by the patented methods. If so it is apparent that there is little scope for the operation of section 58 whenever a patent in respect of a newly invented machine includes claims directed to the methods by which it is to be used to achieve its purposes.

The section reads:

> 58. Every person who, before the issuing of a patent has purchased, constructed or acquired any invention for which a patent is afterwards obtained under this Act, has the right of using and vending to others the specific article, machine, manufacture or composition of matter patented and so purchased, constructed or acquired before the issue of the patent therefor, without being liable to the patentee or his legal representatives for so doing; but the patent shall not, as regards other persons, be held invalid by reason of such purchase, construction or acquisition or use of the invention by the person first mentioned, or by those to whom he has sold it, unless it was purchased, constructed, acquired or used for a longer period than two years before the application for a patent therefor, in consequence whereof the invention became public and available to public use.

The only other section of the Act which appears to me to have any important bearing on the question is section 2(*d*) which is as follows:

> 2. In this Act, and in any rule, regulation or order made under it,
>
> . . .
>
> (*d*) "invention" means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter;

This definition has been unchanged in the English language editions of the Patent Acts of this country since

1923[3] when the word "process" was inserted in two places in each case between the words "art" and "machine". Prior to that the definition had been unchanged since the coming into force of chapter 61 of the Revised Statutes of Canada 1886.

Section 58, the forerunner of which was enacted in 1869[4], has had no change material to the present problem since enacted as section 48 of chapter 26 of the Statutes of Canada 1872. Since then, however, substantial changes have been made from time to time in other provisions of the patent law particularly in those relating to entitlement to patent protection.

There is no Canadian case in which the precise point raised by the plaintiff has been determined but the problem has been considered in the United States, where a similar statutory provision was in effect from 1838-1870 and there are various comments to be found in text books on the subject. The argument covered these and raised points as well on the historical development of the Canadian section and on its particular wording.

In the view I take the proper approach to the interpretation of section 58 is to first read its wording, coupled with that of section 2(*d*), in an effort to ascertain its meaning therefrom without reference to preconceived notions generated by knowledge of how the comparable but different sections of earlier Acts read and without reference to expressions of opinion by text writers or by the courts of other countries thereon. *Vide S. & S. Industries Inc. v. Rowell* [1966] S.C.R. 419 per Martland J. at page 425; *Bank of England v. Vagliano Brothers* [1891] A.C. 107 per Lord Herschell at page 144; and *Wilkinson Sword (Canada) Ltd. v. Juda* [1968] 2 Ex. C.R. 137 per Jackett, P. at page 161.

So reading section 58 the first observation to be made, as I see it, is that the first part of the section applies to "every person who has purchased, constructed or acquired any invention for which a patent is afterwards obtained".

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[3] Statutes of Canada 1923, c. 23.

[4] A provision dealing with the same subject had been in the patent law of the Province of Canada from 1849. *Vide* Statutes of Canada 1849, c. 24, s. 12; Statutes of Canada 1851, c. 79, s. 1; Consolidated Statutes of Canada 1859, c 34, s 22.

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In this context the word "invention" appears to me to be broad enough to embrace any patentable subject matter, whether tangible or intangible, that would fall within what the word "invention" is defined by section 2(d) to mean, that is to say, "any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter". The verbs "purchase" and "construct" would not go well with the objects "art" or "process" nor would the verb "construct" go well with the object "manufacture" but it appears to me that the verb "acquire" is broad and versatile enough to comprehend any process of acquisition whether it be by purchase, gift, invention or discovery and, in its sense of gaining for oneself by one's own efforts, to be capable of applying as well to the acquisition of an art or process by invention or discovery or by learning, however obtained, or by the practice of it, as to any of the tangible items comprehended by the expressions "machine, manufacture or composition of matter".

To my mind as well the acquisition which this portion of the section appears to be directed to is that of the subject matter of the invention itself rather than that of the right which accrues to the first inventor to obtain patent protection therefor or that of such rights as the inventor of a patentable but unpatented invention can confer on another. In short it appears to me to embrace everyone who has somehow come by the subject matter of an invention before a patent therefor was obtained. There are no doubt cases wherein a person is disqualified by his own dishonest conduct from asserting a right under the section but these, as I see it, depend on principles of equity rather than on principles of statutory interpretation.

Next, the word "invention" appears later in the section in a context in which it is associated with the words "purchase, construction or acquisition", which are related by the word "such" to the earlier words "purchased, constructed or acquired", and is associated as well with the word "use". Here again the word "invention" appears to me to have the same connotation as it has in the opening words of the section. This latter portion of section 58 is directed to protecting the inventor against effects which such purchase, construction, acquisition or use might

otherwise have on his right to a patent and to my mind the significant feature of it is that the protection so provided is not confined to patentable subject matter of any particular nature or kind but applies to any kind of patentable subject matter whether tangible or intangible.

Turning now to the right conferred by section 58 on the person who qualifies for it it will be observed that it is a right to use and vend to others "the specific article, machine, manufacture or composition of matter patented and so purchased, constructed or acquired before the issue of the patent therefor". Here the word "so" relates the purchase, construction or acquisition referred to to that mentioned earlier in the section as qualifying the person to whom the section applies but at this point instead of the word "invention" the expression "article, machine, manufacture or composition of matter" appears coupled with the additional qualifying words "specific" and "patented". In this context the words "machine, manufacture or composition of matter" have, I think, the same meaning as they have in section 2(d) where they appear to me to be at least comprehensive enough to embrace (whether they embrace more or not) every kind or type of physical or tangible subject matter patentable as an invention. If, therefore, the word "article" is to be taken, as I think it must, as indicating something in addition to or apart from what is embraced by these expressions it seems to me that it must have been intended either to refer to and comprehend intangible subject matter embraced within the meaning of "art" and "process" in the definition of invention or to refer to what is connoted by the reference therein to an "improvement". In the definition, however, the improvements referred to are those in any art, process, machine, manufacture or composition of matter and thus if the word "article" refers to such improvements it refers to improvements in arts and processes as well as in machines, etc., and thus to intangible as well as to tangible patentable subject matter.

In its ordinary usage the word "article" has a number of different meanings depending on the context in which the word is used. Some of these meanings vary quite widely but in most cases they refer to intangibles. It is noticeable as well that it is the meanings of the word in reference to

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intangibles that are given first in the Shorter Oxford Dictionary, and that this applies as well to the Little Oxford Dictionary which gives but the commonest meanings of a selection of the more common English words. The meaning given for "article" in the Little Oxford Dictionary is:

> Article, *n.* clause of agreement, treaty, etc.; short literary composition; any particular thing. *v.t* bind by articles of apprenticeship; set forth in articles

In my opinion, as used in the context of section 58, that is to say, a context referring to the subject matter of patentable inventions the meaning of "article" can be very broad and can be read as referring to the *res* or subject matter *patented and so purchased, constructed, or acquired* etc., regardless of whether such *res* or subject matter is tangible or intangible. In its context in section 58 the word appears to me to be the equivalent of such words as "item" or "particular" and if it is to have meaning beyond what falls within the meaning of the words "machine, manufacture or composition of matter" in the definition of invention in section 2(d), as I think it must, it seems to me that the word must refer to or at least include reference to what is embraced within the meaning of the words "art" and "process" in the definition in section 2(d). As I see it there are considerable areas of overlapping of the meanings of the several words used, both in the definition of invention in section 2(d) and in section 58, but if, as I think, the words "machine, manufacture or composition of matter" have the same meaning in both and if, as I also think, the word "invention" as used in section 58 comprehends the whole scope of patentable subject matter as defined in section 2(d) it seems to me that the selection and use of so broad and versatile a word as "article" indicates that whatever overlapping its meaning may have with that of the other expressions used its meaning should be interpreted broadly enough to refer to anything patentable that is embraced within the meaning of the words "art" and "process" but happens to fall outside the meaning of the three other expressions used in the definition of invention.

On this analysis of section 58 I am accordingly inclined to the opinion that the words "article, machine, manufacture or composition of matter patented" are broad enough by themselves to embrace anything whether tangible or intangible which is patentable as an invention and that the

scope of what the person referred to in section 58 may use and sell is limited only by the adjective "specific" and the subsequent expression "so purchased, constructed or acquired before the issue of the patent therefor." The effect of these words, as I see it, in respect to an "article" whether tangible or intangible, is to limit the use that may be made of the patented subject matter to use of the specific item of patented subject matter acquired before the patent issued.

While the section is worded somewhat clumsily, its meaning in this view would come to this:

> "Every person, who, before the issuing of a patent has purchased, constructed or acquired *any invention* (i.e, *any* new or useful art, process, machine, manufacture or composition of matter) for which a patent is afterwards obtained, under this Act, has the right of using and vending to others the specific *thing* patented and so purchased, constructed or acquired before the issue of the patent therefor . . ."

This interpretation is, I think, supported by the consideration that the word "invention" would not fit well with the adjective "specific" in place of the several expressions used in section 58 since the effect could be to authorize use of the patented invention in more ways than had been practised before the issue of the patent. The interpretation is also supported by the consideration that there seems no reason in principle why, when the section is applicable to every person who has acquired any "invention" prior to the issue of a patent therefor, the words "article, machine", etc., should not be regarded as intended to refer to anything falling within the scope of patentable subject matter. Otherwise, it seems odd that the draftsman should not have used the words "article, machine" etc., in the place where the word "invention" first appears in the section,[5] as well as in the second place where the word "invention" appears.

Next there is the consideration that the reason for having such a provision in the law seems to apply with as much force in the case of a process or method invention as in that of any other kind of invention. The grant of an exclusive right to an invention for a limited period rewards a person, who has made the invention and has disclosed it

[5] This was the way section 7 of the United States Act of 1839 on which *McClurg v. Kingsland* (1843) 42 U.S. 202, turned, was worded.

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to the public in the prescribed manner, for the benefit which thereby accrues to other members of the public. However, a member of the public who makes or acquires the invention, or some part of it, by himself before it becomes available to the public has, to that extent, no benefit to derive from the publication, yet, without a provision such as section 58, he would be restrained from practising what he had learned and done by himself before the publication by the person to be rewarded for the information.[6] MacLean P. expressed the purpose of the section thus in *Schweyer Electric & Mfg. Co. v. N.Y. Central Railroad Co.*[7]:

> The section is confusing and its meaning should be clarified. This statutory provision appeared in Chap. 34 of the Statutes of Canada for 1859, and also in Chap. 24 of the Statutes of Canada for 1848-9; which statutes related to patents, and the meaning and purpose of the provision was, I think, more clearly expressed in those statutes than in sec. 50 of the Patent Act. It seems to me that section means and was intended to mean, that if a person has acquired in some way or other, something which was the subject of an application for a patent by another who is presumably the first inventor, but for which a patent had not yet issued, he, the former, shall have a continuing right to use and vend the same notwithstanding the issue of the patent to the other person. That is the only interpretation I can put upon the section.

This consideration as well therefore inclines me to the view that the expressions used in section 58 apply to the whole scope of patentable subject matter both tangible and intangible.

This view, moreover, coincides with that taken by the Supreme Court of the United States on the purpose of a corresponding provision of the United States patent law of 1839 in *McClurg v. Kingsland*[8] which, despite criticism

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[6] Mr. J. G. Fogo in his article on section 58 in 38 C.P.R. 147 cites at page 149 as an interesting hypothesis to explain why rights are accorded a prior user the following presentation given by George Benjamin in the Journal of the Patent Office Society:

> The right to use *any* article, process or composition of matter is a natural right in all persons independent of patent protection. The State, by legislation, gives to the patentee an added right in exchange for teaching the nation—an exclusive right—the right to exclude others from manufacture, sale and use of the invention. The words "exclusive" and "exclude" stem from the Latin "excludere"—to lock out. But you can lock out only those who are not already inside when the fence is erected. Thus those already practising the invention at the critical date are not excluded.

[7] [1934] Ex. C.R. 31 at 65.

[8] (1843) 42 U.S. 202.

that had been expressed in the meantime was reaffirmed by the same court in *Andrews v. Hovey*[9]. In the *McClurg* case the court said at page 208:

> The remaining exception is to the charge of the court below, on the effect of the 7th section of the act of 1839, which is in these words: "That every person or corporation who has, or shall have purchased or constructed any newly-invented machine, manufacture, or composition of matter, prior to the application by the inventor or discoverer of a patent, shall be held to possess the right to use and vend to others to be used, the specific machine, manufacture, or composition of matter, so made or purchased, without liability therefore to the inventor, or any other person interested in such invention; and no patent shall be held invalid by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent." Pamphlet Laws, 1839, 74, 75.
>
> The object of this provision is evidently twofold; first, to protect the person who has used the thing patented, by having purchased, constructed, or made the machine, etc., to which the invention is applied, from any liability to the patentee or his assignee. Second, to protect the rights, granted to the patentee, against any infringement by any other persons. This relieved him from the effects of former laws and their constructions by this court, unless in case of an abandonment of the invention, or a continued prior use for more than two years before the application for a patent, while it puts the person who has had such prior use on the same footing as if he had a special license from the inventor to use his invention; which, if given before the application for a patent, would justify the continued use after it issued without liability.

The *McClurg* case was decided in 1843. In *Andrews v. Hovey*, decided in 1888, the court reviewed it and other cases which had been decided in the meantime and said of the *McClurg* case at page 703:

> The first case in which the 7th section of the Act of 1839 appears to have come under consideration in this court was that of *McClurg v. Kingsland, 42 U.S.* 1 How. 202, decided in 1843. But that was a case which involved only the first clause of the section. The patent was for an improvement in the mode of casting chilled rollers. It was, therefore, a patent for an improvement in a process. The patentee invented it while he was a workman in the employ of the defendants. They put it into use in their business. He left their employment, and then applied for and obtained his patent. His assignees sued the defendants in an action at law for continuing to use the improvement. There was a verdict for the defendants, upon the ground that, by reason of their unmolested, notorious use of the invention before the application for the patent, they had a right to continue to use it, under the provisions of the first clause of the 7th section. The judgment for the defendants was affirmed by this court upon that ground. It held that the defendants were on the same footing as if they had

[9] (1887) 123 U.S. 267; (1888) 124 U.S. 694.

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had from the inventor a special license to use his invention, given before he applied for his patent, and that the first clause of the 7th section extended to the invention or thing patented in that case, although it consisted of a new mode of operating an old machine, as contradistinguished from a patent for a machine. The court distinctly held that the words "newly invented machine, manufacture, or composition of matter," and the words "such invention," in the first clause of the 7th section, meant the invention patented; and that the words "the specific machine, manufacture, or composition of matter" meant the thing invented, the right to which was secured by the patent.

Moreover, in *Barton v. Nevada Consolidated Copper Co.*[10] decided in 1934 a United States Circuit Court of Appeals further held that the expression *machine or other patented article* in a corresponding provision of the 1870 United States statute "should be construed to have the same comprehensive meaning as the Supreme Court attributed to the words 'machine, manufacture, or composition of matter' in the earlier act in *McClurg v. Kingsland*, that is 'invention' or 'thing patented'" and that a patent on a process was as much within the reason of the statute as a patent on a machine.

These considerations lead me to hold that the immunity given by section 58 is not confined to tangible patented subject matter but applies to intangible subject matter as well including patented processes. To my mind, moreover, the contrary conclusion would lead to capricious results which I do not think should be taken to have been contemplated. It would, for example, protect a person's use of an infringing apparatus only insofar as the use of that apparatus was not by a patented method which might well be the only way to use it satisfactorily and the way it was designed to be used. It would also provide no protection against the use of apparatus by a person in the way in which it was designed to be used and had been used even though the apparatus itself bore no resemblance to anything patented as an apparatus and was not within any apparatus claim and even though the patentee had no patented apparatus.

In the course of considering the matter I have also examined the historical development of section 58 but I have not derived assistance from it. In this connection counsel for the plaintiff stressed the fact that in the 1869

[10] (1934) 71 F (2d) 381.

statute[11] the word *art* appeared in section 48 in place of the word *article* and was changed to *article* in 1872[12] and he urged that this supported his position that arts and processes were not intended to be within the enumeration in that section. There is, however, no presumption that a change in the law is intended by such a change in the language of a statute, which may be intended merely to clarify the law as already expressed, but in any event, no inference to be drawn from such a change of wording can, as I see it, prevail over the necessity to interpret the words used in the section as amended and to give effect to the legislative intent appearing therefrom.

It may also be worthy of note that in the French language edition of the statutes the word *procédé* (which it seems to me would have meant a process) appeared in what is now section 58 in the place of the English word *manufacture* from the time of the enactment of Statutes of Canada 1872, c. 26 to and including R.S.C. 1927, c. 150, s. 50[13] (that is to say even after the word "process" had appeared in the definition of invention) but that the word was changed to *l'objet manufacturé* (though the English wording did not change) in section 56 of Statutes of Canada 1935, c. 32, which now appears as section 58 of R.S.C. 1952, c. 203. As the 1935 statute was a statutory revision of the patent law rather than a mere consolidation it would seem to follow that the word "manufacture" in the English text can no longer be interpreted as referring to a process. The translation of the English word *article*, however, to *l'article* has not been changed since it appeared in the French language edition of Statutes of Canada 1872, c. 26, s. 48.

A further submission put forward by counsel for the plaintiff was that section 58 applies only when the acquisition of the invention prior to the issue of the patent has been with the consent of the patentee but this to my mind

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[11] Statutes of Canada, 1869, c. 11.
[12] Statutes of Canada, 1872, c 26, s. 48.
[13] *Vide* S. of C. 1872, c. 26, s. 48.
R S C. 1880, c. 61, s. 46.
R.S C. 1906, c. 69, s. 54.
S of C. 1923, c. 23, s. 50.
R S.C. 1927, c. 150, s. 50.
S of C. 1935, c. 32, s. 56.
R S.C. 1952, c. 203, s. 58.

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is not sustainable. There appears to me to be nothing in the wording of section 58 to support it and the judgment of the Ontario Court of Appeal in *Victor Sporting Goods Co. v. Harold A. Wilson Company*[14] which applied the reasoning of the Supreme Court of the United States in *Andrews v. Hovey*, is against it.

Turning now to the facts in the present case on the evidence I see no reason to doubt that the defendant's tacker and de-air machines had been purchased and installed by the end of March 1961 and, notwithstanding Mr. Henderson's submissions to the contrary, I find that these machines were in fact used to press curved glass windshields from June 1, 1961, onward and were being used for that purpose on a considerable scale at the time of the grant of the patent. As there has been no change in the defendant's de-air apparatus or in the method of its operation since that time it appears to me to follow from what I have held with respect to section 58 that that section would afford a defence to the plaintiff's claim both in respect of the apparatus itself, even if contrary to what I have found it does infringe the apparatus claims of the patent, and in respect of the method used as well. The same conclusions also appear to me to follow with respect to the defendant's tacker apparatus and its operation in conjunction with a feed conveyor from the time of the issue of the patent until the removal of the feed conveyor in September 1964 and its replacement by a load stand. If, contrary to what I have held, the operation of the combination consisting of the tacker presser and load stand infringes the apparatus claims I do not think section 58 would afford a defence to the plaintiff's claim insofar as it was based on infringement of the apparatus claims since it is not established that this particular combination, including a load stand, making up the tacker apparatus was acquired prior to the issue of the patent but in view of my conclusion on the question of infringement of these claims there is no necessity for the defendant to resort to section 58 for its defence to that particular aspect of the plaintiff's claim. The infringement of the method claims, however, does not depend on the precise combination of apparatus used and even though

[14] (1904) 7 O.L.R. 570.

the tacker combination differed after the introduction of the load stand from what it had been before that the elements of the methods used, whose presence brought its operation within the method claims of the patent, as I see it, were the same both before and after the removal of the feed conveyor and the substitution of the load stand. To this aspect of the plaintiff's claim in respect of the operation of the tacker apparatus after the introduction of the load stand, therefore, section 58, in my opinion, affords a defence.

In the result, therefore, assuming the validity of Canadian Patent number 653,277, as prescribed by the order by which the issue was set down for trial, I find that the defendant is not liable for infringement thereof.

The defendant is entitled to the costs of the issue.

BETWEEN:

THE INTERNATIONAL NICKEL COMPANY OF CANADA, LIMITED ..... APPELLANT;

AND

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

Toronto
1969
Jan. 22-24, 27-30
Ottawa
Feb. 12

Income tax—Deductions—Mining—"Development expenses"—Construction—Question of fact—Expert evidence, whether admissible—Cost of constructing townsite for mining employees—Income Tax Act, s. 83A(3)(c)(ii).

Income tax—Deduction for provincial mining tax—Computation of—Whether allowed in respect of exempt income—Income Tax Act, s. 11(1)(p)—Income Tax Regulations, 701.

Appellant discovered an ore body at Thompson, Manitoba in 1956 following years of prospecting and exploring, and in following years built for its employees on municipally-owned land a townsite consisting of roads, sewers, schools, fire stations and municipal buildings which it turned over to the local municipalities in accordance with its contract with the Province. During the years 1958 to 1961 appellant did some surface drilling and underground development and began the production stage. None of its employees living at the townsite in those years was engaged in the development stage of mining. In computing its

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income for those years appellant sought to deduct the amount expended on construction of the townsite in those years, contending that they were "development expenses incurred . . . in searching for minerals" within the meaning of s. 83A(3)(c)(ii) of the *Income Tax Act*. The Minister disallowed the deduction.

In 1961 appellant had income from its mining operations in Manitoba and elsewhere but all of its income from mining operations in Manitoba was exempt from income tax by s. 83A(5) of the *Income Tax Act* but was subject to a provincial mining tax in Manitoba of $130,135. Appellant sought to deduct the amount of the provincial mining tax in computing its federal income tax for 1961, relying on s. 11(1)(*p*) and *Income Tax Regulation* 701. The Minister disallowed the deduction.

Held, appellant was entitled to neither deduction claimed.

1. The words "development expenses" in s. 83A(3) are confined to expenses incurred at the development stage of mining as understood by people in the mining business, *viz* expenses incurred in the opening up of an ore body by shafts, drives and subsidiary openings for the various purposes of subsequent mining. The meaning of the words "development expenses" in s. 83A(3) is a question of fact, upon which expert evidence as well as dictionary definitions is admissible. *Mount Isa Mines Ltd v. Fed. Com'r of Taxation* (1954) 92 C.L.R. 483; *Johnson's Asbestos Corp. v. M.N.R.* [1966] Ex. C.R. 212, considered.
2. On the proper construction of *Income Tax Regulation* 701 the deduction to which appellant was entitled in respect of mining taxes paid Manitoba must be calculated by reference to its income derived from mining operations in Manitoba which is subject to federal income tax, in this case nil. *Quemont Mining Corp. et al v. M.N.R.* [1967] 2 Ex. C.R. 169, distinguished.

INCOME TAX APPEAL.

C. F. H. Carson, Q.C., Stuart D. Thom, Q.C. and *John M. Fuke*, for appellant.

D. G. H. Bowman and *G. V. Anderson* for respondent.

GIBSON J.:—There are two issues for decision on this appeal by The International Nickel Company of Canada, Limited from assessments for income tax for the taxation years 1958, 1959, 1960 and 1961 respectively.

On the first issue, the company contends that its $6,920,-825.74 expenditures of a capital nature which it incurred in establishing and building the Townsite of Thompson at its Thompson mine in northern Manitoba were "development expenses" incurred by it in "searching for minerals in Canada" in those taxation years within the meaning of section 83A(3) of the *Income Tax Act* and as such were

deductible in the respective years in which they were incurred for the purpose of computing the income of the company for those taxation years.

On the second issue, the company contends that it can deduct the sum of $130,135.80, paid in 1961 to the Province of Manitoba under *The Mining Royalty and Tax Act*, R.S.M. 1954, c. 169, from its income which was subject to tax in that year, which income came from sources in the Province of Ontario and elsewhere. (During 1961 and for a 36-month period from June 15, 1961, the appellant's income in the Province of Manitoba which was derived solely from the operation of the Thompson mine at Thompson Manitoba was exempt under section 83(5) of the *Income Tax Act*.) For this contention the company relies on section 11(1)(*p*) of the *Income Tax Act* and submits that on a true interpretation of section 701 of the Regulations to the *Income Tax Act* in relation to the facts of this case, the company is entitled to this type of deduction.

The evidence discloses that the appellant commenced prospecting operations in the Province of Manitoba in 1946 and following a programme of prospecting and exploration, made the initial discovery of a major ore body in the so-called Thompson area in early 1956. The Thompson area is approximately 400 air miles north of the city of Winnipeg and is in about the centre of the Province of Manitoba. There were no inhabitants in this area before the appellant established the Townsite.

By October 1956 as a result of a programme of surface diamond drilling, the company had ascertained that there was an important ore body extending about 3½ miles in this area, that there were 15 million tons of indicated ore, and that if a mine were established it could support a mining, milling and smelting operation of 50 million pounds of nickel per year.

The appellant at that time decided to proceed to establish a mine in the Thompson area and entered into negotiations and finally into an agreement with the Province of Manitoba, which agreement is dated December 3, 1956, concerning a number of matters, one of which was the construction and establishment of the subject Townsite. During the course of these negotiations, the appellant

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indicated to the Province of Manitoba officials that it contemplated an outlay of about $144,000,000 on this mining project.

Between 1957 and 1961, the date upon which the first nickel was produced at the Thompson mine, $15,000,000 was spent in a continued programme of surface drilling and underground development. A development shaft and a production shaft were sunk commencing in early 1957. And by the end of 1960 the appellant had proven ore reserves of 25 million tons.

The development work of diamond drilling, construction of shafts, haulageways, drifts, cross-cuts and raises during all relevant periods was done for the appellant by independent contractors, and in the main by a company by the name of Patrick Harrison Limited.

The appellant, in 1956, estimated that it would have about 2,400 employees in the production (or extraction) milling, smelting and refining operations at its Thompson mine. It was then estimated that the townsite population would be 8,000 persons; it is more than that in fact, now.

At all relevant times, about a little over one-half the appellant's employees at the Thompson Townsite were (and are now) engaged in mining and a little less than one-half were engaged in milling, smelting and refining operations. The balance making up 100% of the employees there, were (and are now) administrative and supervisory personnel. Exhibit R-1 shows the breakdown of all such employees.

The appellant, pursuant to the said agreement of December 3, 1956, was required by the Province of Manitoba to build this Thompson Townsite at its own expense.

All the roads, sewers, schools, fire stations, municipal buildings and other structures below referred to were built at the Thompson Townsite by the appellant on lands owned by the local Government District or the Official Trustee of the School District of Mystery Lake, which local Government District and School District were set up pursuant to enabling Province of Manitoba legislation. (See Exhibit A-1). None were constructed on lands owned by the appellant. The appellant was not permitted by

Province of Manitoba legislation to build a townsite and own it, as is often done in other cases when mines are established in remote areas such as Thompson, and where there are no living accommodations and other buildings providing necessary living amenities, such as schools, a hospital etc. By this agreement of December 3, 1956, as stated, the appellant had to build all these buildings and things and hand them over to the said local Government District and School Authorities of the Province of Manitoba. As a consequence, the appellant at no time could or can now or in the future, make any deduction from its taxable income in any taxation year for capital cost allowance under the *Income Tax Act* in respect to the capital cost of these buildings or things at Thompson Townsite not owned by it, but built and paid for by it.

The employees of the appellant who lived in the Townsite from the commencement of the production or extraction stage of the mining operations were engaged in production (or extracting) operations of the appellant which includes bringing ore to the mill, and also in milling, smelting and refining operations of the appellant and the administrative work relating to the same. None were engaged in prospecting, exploration or development work. The Townsite was not built and developed for the purposes of the personnel who did the said underground development work for the appellant at the Thompson mine. As stated, the said underground development work was done by independent contractors, and none of their personnel lived in the Townsite.

A summary in a convenient form for quick reference of much of what has been stated above, may be found in the document filed as Exhibit A-4 at this trial. It is entitled a "Brief History of Manitoba Exploration and Development of Thompson Mine, Surface Plants and Townsite".

As to the first issue, the deductibility of the Thompson Townsite expenditures, the parties agree:

1. That the appellant entered into an agreement dated as of December 3, 1956, with Her Majesty The Queen in right of the Province of Manitoba. Under that agreement the appellant made or

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incurred the following outlays or expenses during the taxation years involved in this appeal in respect of the townsite for which provision was made in the said agreement:

	1958	*1959*	*1960*	*1961*
Roads, lanes and sidewalks	$ 222,287.81	$ 501,441	$ 588,902	$ 246,979
Administration building (includes assembly hall, townsite office and fire station)	—	317,930	47,526	21,459
Schools	—	269,241	173,607	912,770
Sewers and water mains				
Sewer lines—storm	616,766.46	569,408	266,802	906
Sewer lines—sanitary	211,756 82	243,922	194,812	14,084
Water lines	395,253.65	504,981	315,556	5,190 R
Sewage lift station	—	63,634	—	—
Clearing and Grubbing	—	96,670	3,935	15,923
Parking lot	—	11,150	9,313	—
(R—denotes red figure)	$1,446,064.74	$2,578,377	$1,600,453	$1,206,931

2. That the aforesaid amounts were outlays of capital or payments on account of capital.

3. That the principal business of the appellant was mining within the meaning of section 83A(3)(*b*) of the *Income Tax Act*.

As to this first issue, the question for decision is whether the aforesaid amounts were "development expenses" incurred by the appellant in searching for minerals in Canada within the meaning of sub-paragraph (ii) of paragraph (*c*) of subsection (3) of section 83A of the *Income Tax Act* in the pertinent taxation years.

The relevant part of section 83A(3)(*c*)(ii) of the Act reads:

> 83A (3) . . . A corporation whose principal business is
>
> . . .
>
> (*b*) mining or exploring for minerals,
>
> may deduct, in computing its income under this Part for a taxation year, . . .
>
> (*c*) the aggregate of such of
>
> . . .
>
> (ii) the prospecting, exploration and development expenses incurred by it in searching for minerals in Canada,
>
> as were incurred after the calendar year 1952 and before April 11, 1962, to the extent that they were not deductible in computing income for a previous taxation year,

By this provision of the Act, the deduction in computing its income for a taxation year allowed to a mining corporation whose principal business is mining such as the subject corporation, is confined to expenses incurred by it in implementing the first three of the four stages of mining namely, the prospecting, exploration and development stages and there may not be included in such deduction expenses incurred in implementing the fourth stage of mining which is the production (or the extraction) stage; and for "prospecting", "exploration" or "development" expenses incurred to qualify as a deduction under this provision, such expenses must be incurred in "searching for minerals in Canada". No deduction is allowed for production (or extraction) expenses incurred by such a corporation even though incurred "in searching for minerals in Canada".

This is of significance as will appear later in these reasons, because in this case, it was contended by the appellant and disputed by the respondent, firstly, that the "searching for minerals" at the subject Thompson mine commenced with the prospecting and will continue during the whole life of the mine, that is, until the last ore is extracted; and secondly, that "development expenses" within the meaning and for the purpose of section 83A(3) of the *Income Tax Act* do not have to have a direct and specific searching aspect to them to qualify as deductible expenses, but instead a broader meaning should be given to the category of expenses which qualify as such "development expenses" in searching for minerals in Canada once it is established that the principal business of a mining corporation is mining, and that, at a particular mine site where "development expenses" are incurred by it, searching for minerals is an essential aspect of such mining.

In summary, the appellant's submission on this first issue was that on the evidence and on a true construction of the relevant provisions of the *Income Tax Act*:

1. That Parliament has directed that a corporation whose principal business is mining may deduct certain expenses not otherwise deductible in computing its income, incurred by it in searching for minerals. These expenses identified as those of prospecting, exploring and developing, are not otherwise deductible because they are capital in nature under income

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tax law and do not fit into any category of deductible capital outlay under Part XI of the Regulations, but are closely related to earning the corporation's income.

2. That there are two questions to be answered. *The first* is whether the cost to the appellant of building the Thompson Townsite was a development expense in relation to its mining business, and *the second* was whether such expense had been incurred in searching for minerals.

3. That on the first question, evidence was adduced by it which adequately supports the proposition that townsite costs are development expenses in the mining business.

4. That all the prospecting and exploring and all the underground tunnelling and drilling is pointless and a waste of time and money, without miners to extract the minerals that have been discovered. That when these minerals are located in remote and forbidding areas it requires more than the mere offer to pay wages to attract the miners and supporting personnel to the area to operate the mine on an economic basis. That this situation is characteristic of mining in Canada. That in some instances mining companies have built the facilities necessary for the operation of their mines. That in the present case the appellant was not able to follow this practice because of the policy of the Government of Manitoba against company towns, and as a result, does not own or control the townsite.

5. That development expenditures need not be directly related to searching in order to be deductible under section 83A(3) of the Act. That the phrase "incurred... in searching for minerals" does not govern development expenses as though the question were "are these development expenses on the townsite incurred in searching for minerals?". That if that were so, then the phrase "incurred in searching for minerals" would also govern prospecting and exploring and subparagraph (ii) would read "The

prospecting expenses incurred in searching for minerals, the exploration expenses incurred in searching for minerals and the development expenses incurred in searching for minerals".

6. That the search for minerals is the common feature of every aspect of a mining company's operations. That it is by no means necessary or correct to limit searching to the type of operation that is described as prospecting or exploring.

7. That "*prospecting*" is a preliminary operation more in the nature of searching for anomalies indicating mineral deposits rather than specifically searching for minerals.

8. That "*exploration*" is the more detailed, but still general, investigation of a possible ore body in which its extent and mineral content is more definitely determined.

9. That considering the enormous areas of land that must be examined and the fact that ore bodies seldom offer conspicuous surface indications of their existence, prospecting and exploring, although searching, are only the beginning of the search. That the evidence shows that detailed searching for minerals not only continues into the actual mining operation, but is in the present case, an essential aspect of the ultimate mining operation.

10. That prospecting and exploration are the first steps taken towards searching in the field of mining. They are initially general and diffused operations. If a mineral deposit is located, the search becomes more and more concentrated and intensive and leads to the development operations required to gain access to the minerals which are believed to exist below the ground and culminates in the mining operation itself.

11. That the statute refers to searching "for minerals" and not "for mineral deposits". Prospecting and exploration are generally understood terms and when such activities are being conducted the search is not for minerals directly but for mineralized zones

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or areas. The mineral itself is the ultimate object of the search and this stage of the search is conducted in the course of the mining operations.

12. That sub-paragraph (ii) of subsection (3) of section 83A of the Act is worded as it is, not to define or limit "searching", but to include in the deductible expenses of the business of mining certain stipulated amounts otherwise not deductible that may be incurred at any stage of the mining operation.

13. That said sub-paragraph (ii) must be set in the context of the whole section and as part of the scheme of taxing the income of mining companies.

14. That because the word "searching" follows closely after "prospecting and exploring" it is rather natural but by no means necessary to limit searching to the sort of operations that are described as prospecting or exploring. The evidence indicates, as stated, that prospecting and exploring are preliminary operations more in the nature of searching for anomalies or mineral deposits rather than specifically for minerals.

15. That searching is a prevailing aspect of a mining company's business at all stages and that Parliament meant that all expenses incurred in that connection should be deductible.

16. That the statute has also been interpreted and applied by the Department of National Revenue on that basis, as is evidenced by the fact that many of the expenditures on the permanent underground structure were not directed to looking for minerals—e.g. sinking the production shaft and driving the main haulageways (see Exhibit A-19), but still the practice of the Department has been to allow these expenses without question.

17. That had the Department restricted the deductibility of underground development expenses to those having a direct and specific searching aspect, the purpose of section 83A(3) of the Act would have been frustrated. It is evident that the departmental practice was to allow these expenses as coming within section 83A. That was done because it was recognized that the searching for minerals was the

essential aspect of mining and that development expenses in the broad sense were incurred in this search.

Contrarywise and in summary, the respondent's submission on this first issue was:

1. That the cost of installing the services and constructing the buildings of the Thompson Townsite is not a "development expense incurred in searching for minerals in Canada" within the meaning of section 83A(3) of the *Income Tax Act*.

(a) The said cost is not a "development expense" within the meaning of section 83A(3) of the Act at all, or in the sense in which that expression is used in the mining industry. Development as that term is used in the mining industry connotes the operation following exploration and preceding production, of physically reaching and opening up the ore body in preparation for extraction. It includes the sinking of development shafts, crosscutting, drifting and raising. It does not include construction of a townsite for the accommodation of persons who will be engaged in extraction, milling, smelting and refining operations.

See Johnson's Asbestos Corporation v. M.N.R.[1]

(b) The said cost is, in any event, not a development expense "*incurred in searching for minerals*".

(i) The words "in searching for minerals" connote a direct and immediate relationship between the "development" and the searching contemplated by section 83A(3) of the Act. In other words, the section permits a deduction not of "development expenses" but of development expenses as qualified by the words "in searching for minerals". This may be expressed in one of two ways:

(A) that the development contemplated by section 83A(3) of the Act must in itself involve searching, or

[1] [1966] Ex. C R 212.

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(B) that the "searching" referred to in section 83A(3) of the Act must be a part of the development operation.

The appellant's theory appears to be that the court may treat the two parts of section 83A(3) of the Act as isolated and contends in effect that the townsite expenses are development expenses (even though the construction of the townsite in itself involved no searching for minerals, nor was it related to any activity that could be described as "development in searching for minerals") and seeks to satisfy the test imposed by the limiting words "in searching" by alleging that the extraction operation in which *some* of the employees were to engage in "searching for minerals". Even if this latter contention advanced on behalf of the appellant (i.e. that persons engaged in extraction are "searching for minerals") had merit—the "searching" upon which the appellant bases its case is—even if the term searching were appropriate—an incidental and minor part of an efficient extraction operation.

(ii) The "searching" contemplated by section 83A(3) of the Act is a searching which forms part of the development operation. It is a searching that takes place in the stage preceding extraction (production).

(c) Even if the appellant were right in contending that:

(i) the cost of carrying out its obligations under the agreement with Manitoba was "a development expense" (even though it involved no searching), and

(ii) the underground extraction operations of extracting ore were "searching for minerals" (even though that "searching", so-called, formed no part of development)

the claim to deduct the townsite expenses should still be denied because the section must be read together rather than bisected and its component parts treated in isolation one from the other.

(d) The allegation that the persons engaged in mining operations underground were engaged in "searching" is in any event wrong. Their essential activity was the extraction of proven ore for the most part as well as, to some degree, of "well indicated" ore. The efficient extraction of ore may include following down stringers or other irregularities running from the main ore body. This is an incidental part of extraction and cannot be described as "searching". Even if it could, it would hardly justify the conclusion that the entire underground operation at Thompson took its character from this activity.

(e) Alternatively, the cost of constructing the buildings and installing the other services which the appellant was obliged to pay for is in no sense a "development expense incurred in searching for minerals". It was the price paid or consideration given for the extensive and important rights and concessions granted to the appellant by Manitoba under the agreement of December 3, 1956.

See *Farmers Mutual Petroleums Ltd. v. M.N.R.*[2]

(f) If the appellant's contention is correct that the townsite costs are "development expenses incurred by it in searching for minerals" within the meaning of section 83A(3) of the Act, the same reasoning would apply to the cost of similar assets in a company town owned by a mining company. The result of this would be that a mining company could treat all of its capital outlays for plant buildings or company towns owned by it as development expenses incurred in searching for minerals and deductible under section 83A of the Act. On the appellant's reasoning there is no difference in principle between the cost of the townsite at Thompson which it did not own and the cost of a company town owned by it. Both, according to the appellant's theory, would be development expenses incurred in searching for

[2] [1966] Ex. C.R. 1126.

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minerals. The result of the appellant's reasoning would be that the cost of a company town owned by a mining company could not be deducted under the capital cost allowance provisions of section 11(1)(*a*) of the Act, but only as a development expense incurred in searching for minerals in Canada under section 83A since under section 1102(1)(*a*) of the Regulations to the *Income Tax Act*

> The classes of property described in this Part and in Schedule "B" shall be deemed not to include property
> (*a*) the cost of which is deductible in computing the taxpayer's income

Thus on the appellant's contention, a mining company that put up a townsite which it owned could deduct the entire cost in one year under section 83A of the Act. It would in fact be obliged to use section 83A and if it sold any of the buildings, it would not be subject to the recapture provisions of section 20 of the *Income Tax Act*. It could, for example, having deducted the full cost under section 83A of the Act sell the townsite to a subsidiary which could then begin to deduct capital cost allowance on it.

(g) Section 83A of the Act is not intended to allow mining companies to write off all capital expenditures which they incur. Section 11(1)(*b*) and Part XII of the Regulations (depletion allowance) to the *Income Tax Act*, section 83A of the Act (prospecting, exploration and development expenses incurred in searching for minerals) and section 83 (three year exemption) of the *Income Tax Act* provide a variety of exceptional and specific concessions and privileges to mining companies that are not granted to other industries. Had Parliament intended to allow mining companies to deduct capital expenditures of the type in issue in this case made under agreements such as the agreement of December 3, 1956, with Manitoba it is submitted that it would have said so. To extend section 83A(3)(*c*)(ii) of the Act to allow the

deduction of the cost of putting in municipal services under an agreement with the province would be to construe that section as if it read:

> all capital expenditures incurred by a corporation whose principal business is mining or exploring for minerals which were incurred prior to the date on which the mine came into production.

If the appellant's contention is right that the expenditures involved in this case are "development expenses incurred by it in searching for minerals" it is difficult to conceive of any capital expenditures incurred before the mine comes into production that would not be. Section 83A of the Act confers a restrictive right to a deduction of a specific type of expenditure. Its obvious purpose is to allow the deduction of those expenses of searching for minerals in Canada that form part of the three successive stages of prospecting, exploration or development. Section 83A of the Act contemplates no deduction of the cost of a townsite which was ultimately to accommodate persons engaged in extraction, milling, smelting and refining.

So much for the submissions of the parties.

The question on this first issue in this case is, are the expenditures on the Thompson Townsite by the appellant of the kind that Parliament meant to allow to be deducted as "development expenses" in computing the appellant's income for the taxation years in question under the provisions of section 83A(3) of the *Income Tax Act*.

Interpreting what Parliament meant to include in "development expenses" under that section of the Act in a case such as this, may be:

(a) a question of law under the principle that the construction of all written documents, including statutes, belongs to the court alone (Taylor on Evidence, paragraph 43, page 47, and *Camden v. Inland Revenue Commissioners*[3], *Loblaw Groceterias Co. v. Toronto*[4], *Rogers-Majestic Corp. v.*

[3] [1914] 1 K.B. 641.

[4] [1936] S.C.R. 249.

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Toronto[5], *The Firestone Tire and Rubber Co. of Canada v. Hamilton*[6], and *Edwards v. Bairstow*[7], or

(b) a question of fact to be determined on the evidence under the exception to that principle illustrated by *A. G. for the Isle of Man v. Moore*[8] (see per Lord Wright at page 267) and applied by the Supreme Court of Canada in *Western Minerals Ltd. et al v. Gaumont*[9]. (Cf. *Crow's Nest Pass Coal Co. (Ltd.) v. The Queen*[10] per Locke J., at page 752 delivering the judgment of the court).

This is a difficult matter to decide in this case.

But even if interpreting Parliament's meaning of "development expenses" under that section of the Act should be considered a question of law only, in any event, (and is always the case in matters such as this) the question of whether the appellant's expenditures on the Thompson Townsite are of such a nature or kind as to fall within such meaning of "development expenses" is a question of fact.

As a result, in a case such as this, it is difficult to separate questions of law and fact because evidence which will enable the court to put itself in a position to construe the words "development expenses" in the section of the Act (if construction is a question of fact to be determined on the evidence) is the same or practically the same as that which the court will use to determine whether the words "development expenses" in the section of the Act cover the subject expenditures of the appellant on the Thompson Townsite. But, that is no reason for not differentiating between these two separate matters.

After careful consideration, I am of the opinion that both matters are questions of fact in this case, to be determined on the evidence.

On the issue of what are such "development expenses", the appellant's witness Harold M. Wright gave evidence. Mr. Wright is a metallurgical engineer by profession, is a registered professional engineer in the Province of British

[5] [1943] S.C.R. 440.
[6] [1955] S.C.R. 604.
[7] [1956] A.C. 14.
[8] [1938] 3 All E.R. 263.
[9] [1953] 1 S.C.R. 345.
[10] [1961] S.C.R. 750.

Columbia, a member of the Canadian Institute of Mining and Metallurgy, the Institution of Mining and Metallurgy in London England and the Australasian Institute of Mining and Metallurgy of Melbourne Australia.

He has had extensive practical experience throughout Canada, the United States and South America and is President of Wright Engineers Limited, Vancouver, B.C., consulting and design engineers which company has 263 employees. Mr. Wright gave evidence that his company's work frequently involves "designing the complete package . . . for a new mining project". He said that when:

> . . . A mining company finds a new mine and asks initially that a Feasibility Study or a Production Plan Report be prepared. This is sometimes referred to as an Economic and Production Analysis in which capital costs and operating costs at an agreed rate of production are developed An economic analysis based on the study provides the directors of the company with information required to make a decision as to the feasibility of the project. If the reports are favourable they are then used for banking purposes to raise the required money or for backing up a security offering to the public. These studies have to be very complete and in addition to including the cost for putting the mine in operation to produce so many tons a day, they include the costs for the concentrator, and the service facilities such as water, power, telephone, repair shops and assay office In remote or very isolated areas the company will have to arrange for housing for married and single people and for such facilities as schools, hospitals, churches, supermarkets and recreational facilities, and the studies will include the costs for these services.

He also said that he considered

> . . . the building of a townsite to be a necessary development expense in order to bring a mine into production in an isolated area such as Thompson, Manitoba.

Speaking generally, he also said that:

> In order to attract and retain the services of stable and qualified workers in isolated areas, the mining company must assume responsibility for the establishment of a townsite at the mine site which has not only good housing, but also good schools, medical services and recreational facilities. The townsite must be such that not only the workers will be happy living there but also their wives and children
>
> In order to establish such a townsite, the mining company must spend large sums of money initially to develop it by installing the necessary sewers, water works, power, etc. In addition, the company may assist employees to purchase houses, usually with some repurchase arrangement in the event that an employee leaves. It must be remembered that young married couples have little capital of their own. Also, providing the initial municipal services will keep the municipal taxes low.

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As to what, in his opinion, "development" meant, he stated as follows:

> From my experience in the mining industry I have become familiar with the terminology employed in describing or referring to its operations and the meanings given to words and phrases used in the industry. A reference to "development" in connection with a mine extends to various operations which must be undertaken in preparation for the removal of ore from the mine. Without attempting an exhaustive statement, development includes the construction of the mine shaft and haulageways, the delineation of the ore body in preparation for extraction operations, and the provision of living facilities and amenities for the work force that will be engaged in the mining and subsequent operations.

His conclusion in respect to the subject matter, he stated in these terms:

> I have been informed with regard to the part played by Inco in Building and developing the townsite at Thompson, Manitoba, and the costs incurred by it in that connection.
>
> It is my opinion, based on my experience aforesaid, that the costs incurred by Inco in connection with the townsite at Thompson, Manitoba, can be properly described as development expenses and would be so considered in the ordinary understanding of those engaged in the mining industry.

On cross-examination, he said that he would include in some cases as such "development expenses", the cost of a mill, a smelter and a refinery, and even the head office of a mining company distant many miles from the mine.

On the issue of what are the subject "development expenses", the respondent called Herbert H. Cox, a consulting mining engineer who has had extensive practical mining experience in Canada and who is now a consultant.

He disagreed with the view expressed by Mr. Wright in these words:

> The view expressed by Mr. Wright as to the meaning of the word "development" in the mining industry in my opinion is inconsistent with the meaning and use of that word in the mining industry. In my experience I have never before heard the word used in the mining industry to include such matters and the meaning which he gives to it is not that given in any dictionary or other publication in the mining field which I have examined. Excerpts from dictionaries and glossaries of mining terms containing definitions of "development" . . . (are exhibited). (Witness produced excerpts which were filed.) In my opinion these definitions correctly set out the meaning of the word development as that term is currently used in the mining industry.
>
> (Words in brackets are mine).

The following dictionary definitions and definitions from mining publications on this matter were introduced and referred to in evidence (most of them by the witness Cox, but some are part of the respondent's evidence).

Mining includes surface operations, as quarrying in open cuts and the working of placers, as well as underground work. In a given mineral deposit, mining operations may be divided into 4 stages:

Prospecting, or the search for minerals.

Exploration, or the work of exploring a mineral deposit when found. It is undertaken to gain knowledge of the size, shape, position, characteristics, and value of the deposit.

Development, or the driving of openings to and in a proved deposit, for mining and handling the product economically.

Exploitation (mining), or the work of extracting the mineral.

These terms are used loosely. It is often difficult to distinguish between prospecting and exploration, or between exploration and development, as the different kinds of work insensibly shade into one another; an arbitrary differentiation between them is usually established at a given property. Confusion also arises when the terms are extended to describe operations on a property containing several orebodies. In such cases, prospecting for new orebodies is a part of exploration. In certain mineral deposits, prospecting and exploration are done in one operation by boring; as in the disseminated lead ores of S.E. Mo, and in those Mesabi iron ores and gold placers that are mined by open-cut methods. (Mining Engineers' Handbook, Vol. 1, Third Edition, 1941, Robert Peele and John A. Church, published by John Wiley & Sons, Inc., New York).

Mine. . . . 3. The terms "mine" and "coal mine" are intended to signify any and all parts of the property of a mining plant, either on the surface or underground, that contribute directly or indirectly to the mining or handling of coal.

(Glossary of Geology and Related Sciences, Second Edition, J. Marvin Weller, published by American Geological Institute, Washington).

DEVELOPMENT. Opening up of an ore body by shafts, drives and subsidiary openings in readiness for valuation of deposit, estimate of its tonnage, and in due course extraction. (Dictionary of Mineral Technology, 1963, E. J. Pryor, published by Mining Publications Ltd., Salisbury House, London, England).

development. a. To open up a coal seam or ore body as by sinking shafts and driving drifts, as well as installing the requisite equipment. *Nelson.* b. Work of driving openings to and in a proved ore body to prepare it for mining and transporting the ore. *Lewis, p. 20.* c. The amount of ore in a mine developed or exposed on at least three sides. *C.T.D.* d. S. Afr. The Work done in a mine to open up the paying ground or reef and, in particular, to form drives or haulages around blocks of ore which are then included under developed ore reserves. *Beerman.* e. A geologic term, applied to those progressive changes in fossil genera and species that have followed one another during the deposition of the strata of the earth. *Fay.*

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(A Dictionary of Mining, Mineral, and Related Terms, Paul W. Thrush, published by U.S. Department of the Interior, Bureau of Mines).

Development. 1. A geological term, applied to those progressive changes in fossil genera, and species, which have followed one another during the deposition of the strata of the earth. (Roberts)

2. Work done in a mine to open up ore bodies, as sinking shafts and driving levels, etc. (Skinner). Sometimes used synonymously with "annual assessment" work.

(A Glossary of the Mining and Mineral Industry, 1947, Albert H. Fay, Bulletin 95, Department of the Interior, Bureau of Mines, Washington).

Development (min.). To open up a coal seam or orebody as by sinking shafts and driving drifts, as well as installing the requisite equipment.

(Dictionary of Mining, 1964, A. Nelson, published by George Newnes Ltd., Tower House, London, England).

Development is the work of driving openings to and in a proved ore body to prepare it for mining and transporting the ore.
(Elements of Mining, Third Edition, 1964, Robert S. Lewis, Revision by George B. Clark, published by John Wiley & Sons Inc., New York).

DEVELOPMENT—Is the underground work carried out for the purpose of reaching and opening up a mineral deposit. It includes shaft sinking, cross-cutting, drifting and raising.

(Mining Explained, 1968, Northern Miner Press Limited, published by Northern Miner Press Limited, Toronto).

The study of the Carter Royal Commission on Taxation in respect to "Taxation of the Mining Industry in Canada" was also referred to. This Study, in part, in reference to "development" reads as follows:

> The decision to develop a property marks the beginning of the third stage in the progress towards a producing mine. Information gathered in the prospecting and property examination stages will have been analysed and estimates made of the grade, size and characteristics of the orebody and of the costs of transportation and treatment. The development stage may be defined as the preparation of an area believed to contain ore for extraction of the ore in commercial quantities. Activities include clearing and stripping the property, removal of overburden, constructing roads and railways, housing, warehouses and power connections (possibly involving the construction of power facilities), shaft-sinking and underground development (or open-pit preparation) prior to extracting the ore, and installing a headframe and underground machinery. If the ore is to be treated at the mine site, activities also include preparation of an area for, and construction of, a mill and possibly a smelter. During this stage ore will be extracted in the course of underground work. While preliminary underground work is usually carried on as much as possible outside the mineralized area, conditions sometimes suggest that it be carried on in the orebody so that large amounts of ore may be extracted in this period.

The High Court of Australia in *Mount Isa Mines Ltd. v. Federal Commissioner of Taxation*[11] in interpreting what "expenditure on necessary plant and development of the mining property" should be included as "development expenses" under section 122 of the *Income Tax Assessment Act of Australia 1936-1949* held that all expenditures, other than expenditures on plant of a capital nature directly attributable to the establishment of the mine and the working of it or to its expansion or extension from time to time, should, for the purposes of section 122, be regarded as expenditures on the "development" of the mining property. The facts of that case were that when the first exploration shafts had been sunk in the subject mine, there was only a small townsite some distance from the mining property and the existing living facilities were totally inadequate for the reasonable accommodation and living amenities of the men employed by the mine. As a result, the mining company constructed houses for them, provided for a water supply, electrical power, sanitary services, medical, hospital and educational facilities and other attendant amenities. The trial judge, Mr. Justice Taylor, held that in the circumstances of that case, such expenditures were a necessary part of the establishment and conduct of the mining undertaking, accordingly were entitled to be charged as expenditures incurred in the "development" of the mining property for the purpose of section 122 of the Australian Act. Mr. Justice Taylor said at pages 489-90 that that section:

> . . permits a person who is carrying on mining operations for the purpose of gaining or producing assessable income to treat a wide class of expenditure of a capital nature as deductible for the purposes of the Act over a period calculated by reference to the estimated life of the mine, and it is inconceivable that the legislature intended to permit such a deduction in the case of capital expenditure incurred on development, in the sense of work preparatory to the commencement of or ancillary to actual mining operations, and yet deny such a deduction in respect of expenditure of a capital nature necessarily incurred contemporaneously with and directly in association with mining operations. This consideration alone would, I think, dispose of any suggestion that the word "development" should be understood in any restricted sense but there is a further contrary intention to be found in the section. The deduction which is permitted in respect of plant is a deduction in relation to expenditure

[11] (1954) 92 C.L.R. 483.

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of a capital nature incurred on *necessary* plant. That is, on the language of the section, plant which is necessary for the carrying on of the mining operations for the purpose of gaining or producing assessable income. In the case of plant the allowable deduction is not subject to any restriction other than that to be found in the wide words of the section. Accordingly, expenditure on plant is within the scope of the section whether it is necessary for the day-to-day working of the mine or for developmental work in the narrowest sense and I should think this circumstance throws some little light on the meaning of the word "development" as used in the section. The deduction in each case is clearly intended to serve the same purpose and it would be out of keeping with the general sense of the section to give a restricted meaning to the latter word and thereby limit the range of expenditure on development in respect of which a deduction might be claimed. Perhaps, the import of the section is best understood by regarding the use of the word "development" as intended to amplify the section and to cover capital works not covered by the word "plant". At all events I am satisfied that all other expenditure of a capital nature directly attributable to the establishment of the mine and to the working of it or to its expansion or extension from time to time should, for the purposes of the section, be regarded as expenditure on the development of the mining property.

Jackett P. in *Johnson's Asbestos Corp. v. M.N.R.*[12] said this at page 217 about the meaning of "development expenses" in section 83A(3) of the Act after hearing evidence in respect thereto:

> "Development" of a mine, in general terms, means to uncover the body or area which is to be the subject matter of the extraction process. Development is the preparation of the deposit or mining site for actual mining. In the case of asbestos, it involves the removal of the overburden and of waste rock. It is of particular importance, in considering the words of sub-paragraph (ii) of paragraph (*c*) of subsection (3) of section 83A to realize that this process also serves, in the case of asbestos, by exposing more fibre-bearing rock, to give more information as to the extent of the fibre-bearing rock. In other words, as the words of sub-paragraph (ii) imply, in the case of asbestos at least, you may be continuing the search for the asbestos right up to the actual extraction process.

As to this first issue, in my view there are two questions to be answered namely, (1) whether the expenditures made by the appellant in building the Thompson Townsite in the relevant years were "development expenses", and (2) whether such expenditures were incurred in "searching for minerals" in Canada in such years, within the meaning of section 83A(3) of the *Income Tax Act* during the relevant taxation years.

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[12] [1966] Ex. C.R. 212.

On the evidence adduced in respect to the subject Thompson mine, I am of opinion that the "searching for minerals" commenced with the prospecting stage and will continue until the mine is completely exhausted.

On the evidence also, it was established that over 50% of the employees of the appellant who lived in the Thompson Townsite during these relevant taxation years were miners and they were engaged in extracting minerals in the production stage of mining the Thompson mine and at that stage of mining, were engaged for a relatively small percentage of their time in "searching for minerals". This is abundantly clear from the evidence of the appelant's mine geologist Mr. Grant B. Hambly and the plans and photographs of the mine which were put in. At no time were any of these miners engaged in any work in the development stage of mining this Thompson mine, and as a consequence none were "searching for minerals" at such development stage. The rest of the employees of the appellant who lived in the Thompson Townsite during the relevant taxation years were engaged in the milling, smelting and refining operations of the production stage of mining this Thompson mine or were supervisory or official personnel.

On the evidence also, a relative allocation of expenses incurred by the appellant to each of the four stages of mining was established. It is sufficient to record such in the manner following:

> *Expenses Incurred by the Appellant "corporation whose principal business is ... mining ... in searching for minerals in Canada" During the Four Stages of Mining Namely, Prospecting, Exploration, Development and Production (Extraction) at Thompson Mine Manitoba.*

1. At prospecting stage-(not in issue).
2. At exploration stage-(not in issue).
3. At development stage-
   (a) the cost of underground installation expenses such as development shafts, haulageways etc.-(Not in issue), done in the main by independent contractors,

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(b) the cost of the very little "searching for minerals" done. (There was probably no "searching for minerals" done during most of the time taken up with development work, because development work, in the main, only indirectly related to "searching for minerals".)

4. At production (or extraction) stage-

(a) the cost of some "searching for minerals" done by miners of the appellant, but this was relatively small in relation to the cost of mining or extracting the ore body,

(b) the cost of constructing the mill, the smelter and the refinery and 18 houses in the Townsite owned by the appellant for its supervisory and official personnel,

(c) the cost of miners' wages.

Having made such allocation of expenses to the four stages of mining of the Thompson mine, the problem is where to allocate the cost of constructing and establishing the Thompson Townsite. No one contends such cost should be allocated or considered a prospecting or exploration expense. The appellant contends such cost was a "development expense", whereas the respondent submits it was a production expense.

From the evidence, Exhibit A-4, which was put in evidence by the appellant and which, as stated, is entitled a "Brief History of the Development of Thompson Mine, Surface Plant and Townsite", the following chronology of events is found which is also relevant for such a categorization:

IN 1958

- The production stage of the Thompson mine began.
- The construction of the mill buildings was completed.
- The construction of the smelter building was commenced.
- Construction of the Townsite began.

IN 1959

- The production stage of mining progressed.

– The development stage of mining also progressed.
– Construction of the smelter buildings was completed.
– Construction of the refinery was commenced.
– Further construction of the Townsite progressed.

IN 1960

– The production stage of mining progressed.
– Both the mill and the smelter were in operation.
– The refinery construction progressed.
– The construction of the Townsite further progressed.

IN 1961

– The production stage of mining continued.
– Development commenced in a new area of the mine.
– The refinery commenced operation.
– The construction of the Townsite further progressed.

BETWEEN 1962 and 1965

– The Townsite was further constructed and finally completed in 1965.

Certain of the evidence however, is not relevant in categorizing the cost of constructing and establishing the Thompson Townsite for the purpose of construing the meaning of the words "development expenses" in section 83A(3)(*c*)(ii) of the *Income Tax Act* in relation to the Thompson mine. I am of opinion that the meaning given to those words by the witness Wright is not what Parliament intended. His meaning is much too wide and is one which may be acceptable and relevant in reference to the concept of an overall development of many projects being done today which may involve the establishment of a new town but it is not the concept of development which is applicable to the subject matter of this case. In my view, what Parliament intended in this subsection of the Act, was to confine "development expenses" to those expenses which are incurred at the development stage of mining as understood by people in the mining business which is, in my view, evidenced by the opinion of Mr. Cox and the dictionary definitions and the definitions from mining publications put in evidence.

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As a result, I am of opinion that "development expenses" within the meaning of section 83A(3)(*c*)(ii) of the *Income Tax Act* mean those expenses which are incurred in the opening up of an ore body by shafts, drives and subsidiary openings for the various purposes of subsequent mining such as, the valuation of deposits, the estimate of its tonnage and in due course, its extraction. This, in essence, is the meaning given to development by E. J. Pryor in his Dictionary of Mineral Technology above referred to.

Predicated on such a construction of those words, and on a consideration of the whole of the evidence, I am of the view and find as a fact, that the appellant's expenditures above referred to, on the Thompson Townsite in the Province of Manitoba are not of such a nature or kind as to fall within such meaning of "development expenses". I am further of the opinion that, in the main, they are production expenses of the mining of the Thompson mine. I say "in the main", because as some of the evidence indicates, there may be a slight overlapping between the development and the production stages in the subject mine, but such overlapping is minimal in this case and therefore immaterial for the purpose of these two findings of fact. It is immaterial for other reasons also namely, because the evidence in this case shows that "searching for minerals" in the Thompson mine during the development stages of its mining during the relevant taxation years was also minimal, if any was done at all; and that it shows that practically none of the personnel employed in the development work generally, (including any such "searching for minerals" in connection therewith) did live in the townsite; and it shows that it was never intended that they live in the townsite or enjoy any of its amenities (such as the school, the hospital and so forth, which were part of the costs of the townsite to the appellant).

The conclusion I reach is that it is impossible to relate the development work done by the appellant at its Thompson mine "in searching for minerals" during the relevant taxation years to the necessity for the appellant building the townsite and incurring the cost of doing so. Instead, the necessity for building such a townsite and incurring the cost of doing so, was to enable the appellant

to extract the ore at the production stage of mining this mine mainly, and also at the same time, as supplementary thereto, but to a relatively minor extent in relation to extracting ore, to search for minerals.

So much for the determination of the first issue.

As to the second issue namely, the appellant's contention that it can deduct the sum of $130,135.80 paid in 1961 to the Province of Manitoba under *The Mining Royalty and Tax Act*, R.S.M. 1954, c. 169 from its income which was subject to tax in that year, which income came from sources in the Province of Ontario and elsewhere other than in the Province of Manitoba, a determination of it is dependent on the application of section 11(1)(*p*)[13] of the *Income Tax Act* to the facts of this case.

Section 11(1)(*p*) of the *Income Tax Act* permits a deduction of such amount, of mining taxes paid from the taxable income, as may be allowed by regulation in respect to taxes on income for the year from mining operations. The relevant Regulation is 701[14].

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[13] 11. (1) . . . the following amounts may be deducted in computing the income of a taxpayer for a taxation year:

(*p*) Mining taxes.—such amount as may be allowed by regulation in respect of taxes on income for the year from mining operations;

[14] 701. (1) In computing his income for a taxation year, a taxpayer may deduct, under paragraph (*p*) of subsection (1) of section 11 of the Act, an amount equal to the lesser of

(*a*) the aggregate of the taxes paid, in respect of his income derived from mining operations in a province for the year,

(i) to the province, and

(ii) to a municipality in the province in lieu of taxes on property or any interest in property (other than his residential property or any interest therein), or

(*b*) that proportion of such taxes that his income derived from mining operations in the province for the year is of his income in respect of which the taxes were so paid.

(2) In this section,

(*a*) "income derived from mining operations" in a province for a taxation year by a taxpayer means,

(i) if the taxpayer has no source of income other than mining operations, the amount that would otherwise be his income for the year if no amount had been deducted in computing his income under paragraph (*b*) or (*p*) of subsection (1) of section 11 of the Act, section 83A of the Act, subsection (3) of section 85I of the Act or paragraph (*g*) of subsection (1) of section 1100 of these Regulations, or

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There is no question that the tax in the sum of $130,135.80 paid by the appellant in 1961 to the Province of Manitoba is a mining tax within the meaning of the language of section 11(1)(*p*) of the *Income Tax Act*. The question is, what amount, if any, is deductible on a true application of Regulation 701 to the facts of this case? Because of the language of Regulation 701, this involves finding the components of a fraction.

(ii) in any other case, the amount that would otherwise be his income for the year if no amount had been deducted in computing his income under paragraph (*b*) or (*p*) of subsection (1) of section 11 of the Act, section 83A of the Act, subsection (3) of section 85I of the Act or paragraph (*g*) of subsection (1) of section 1100 of these Regulations, minus the aggregate of

(A) his income for the year from all sources other than mining, processing and sale of mineral ores, minerals and products produced therefrom, and

(B) an amount equal to 8% of the original cost to him of properties described in Schedule B to these Regulations used by him in the year in the processing of mineral ores, minerals or products derived therefrom, or, if the amount so determined is greater than 65% of the income remaining after deducting the amount determined under clause (A), 65% of the income so remaining, or, if the amount so determined is less than 15% of the income so remaining, 15% of the income so remaining;

(*b*) "mine" includes any work or undertaking in which mineral ore is extracted or produced, including a quarry;

(*c*) "minerals" include every naturally occurring inorganic or fossilized organic substance which is mined, quarried or otherwise obtained from the earth at or below its surface but does not include petroleum or natural gas;

(d) "mineral ore" includes all unprocessed minerals or mineral bearing substances;

(*e*) "mining operations" means the extraction or production of mineral ore from or in any mine or its transportation to, or over any part of the distance to, the point of egress from the mine, including processing thereof prior to or in the course of such transportation but not including any processing thereof after removal from the mine; and

(*f*) "processing" as applied to mineral ores includes all forms of beneficiation, smelting and refining, and also transportation and distributing but does not include any of these operations that are performed with respect to mineral ore before it is removed from the mine.

(3) Nothing in this section shall be construed as allowing a taxpayer to deduct an amount in respect of taxes imposed under a statute or by-law which is not restricted to the taxation of persons engaged in mining operations.

Mr. Justice Cattanach, as reported in *Quemont Mining Corp. et al v. M.N.R.*[15] found the components of such a fraction in three cases which he tried together. In those three cases, each of the mining companies had income in one Province only and none of the mining companies had any deduction or exemption from income under section 83(5)[16] of the *Income Tax Act*. So, in these two respects at least, those cases are different from this case.

In this case, as before stated, for the taxation year 1961, the relevant year as to this second issue, the appellant was exempt from taxation under the Federal *Income Tax Act* on all its income from the Thompson mine in the Province of Manitoba. The amount of this income from the Thompson mine for the purpose of determining the provincial mining tax paid to the Province of Manitoba under *The Mining Royalty and Tax Act*, R.S.M. 1954, c. 169, is admitted and was $2,178,929.99.

The said sum of $130,135.80 is "the aggregate of (mining) taxes paid to the Province of Manitoba in respect to the (appellant's) income derived from mining operations in (the Province of Manitoba) for the year" 1961 within the meaning of those words in Regulation 701(1)(*a*). (Words in bracket are mine).

The problem is to ascertain which sum is the "lesser" namely, the said sum of $130,135.80 or the answer from the fraction that must be found in determining what is the sum in dollars of "that proportion of such taxes that ... (the appellant's) income derived from mining operations in the province for the year is of ... (the appellant's) income in respect of which the taxes were so paid" within the meaning of those words in Regulation 701(1)(*b*). (Words in bracket are mine).

Both parties agree and I find that the denominator of this fraction is the sum of $2,178,929.99 being the amount

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[15] [1967] 2 Ex. C.R 169.

[16] 83. Definitions.

. . .

(5) Exemption for 3 years. Subject to prescribed conditions, there shall not be included in computing the income of a corporation income derived from the operation of a mine during the period of 36 months commencing with the day on which the mine came into production.

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of the income earned in the Province of Manitoba by the appellant from the Thompson mine in 1961, (which, as stated, was used as a basis for computing the mining tax payable and paid by the appellant to the Province of Manitoba under and by virtue of the provisions of *The Mining Royalty and Tax Act*, R.S.M. 1954, c. 169, in that year in the said sum of $130,135.80).

The correct numerator of this fraction must next be found.

Regulation 701(2) defines "income derived from mining operations". The appellant says that such definition means something different than a definition (of which there is none) of "income derived from mining operations in a province" which are the words used in Regulation 701(1)(*a*) and also referred to in Regulation 701(1)(*b*) with the exception that the words "the province" are used instead of "a province". The appellant therefore says that on a true application of the definition contained in Regulation 701(2) to the words in Regulation 701(1)(*b*), the sum that should be used as the numerator of the fraction that must be found, is the appellant's income earned in 1961 outside the Province of Manitoba which is subject to income tax levied by the Government of Canada.

The respondent submits that the numerator of this fraction is zero, in that the computation of the appellant's income "derived from mining operations in the province for the year" within the meaning of Regulation 701(1)(*b*) in accordance with the said definition contained in Regulation 701(2)(*a*) requires a computation in accordance with the Federal laws of income tax and the results flowing therefrom.

I am of the view that in computing the deduction, if any, from taxable income under the Federal *Income Tax Act* section 11(1)(*p*) and Regulation 701, requires, in order that this statutory provision and regulation may be made to work in relation to the facts of this case, that the computation be limited to the income earned in the particular Province in respect to which a deduction from income for mining tax paid is being considered, for the purpose of finding the components of the fraction in applying Regulation 701. In other words, it is not correct, in finding the components of this fraction, to take the income

computed under the Federal *Income Tax Act* of the appellant from all sources outside the Province of Manitoba to create a bigger numerator than a denominator of the fraction required to be found in applying Regulation 701(1). To do otherwise by ignoring the words "in a province" in the application of the definition contained in Regulation 701(2)(*a*) of "income derived from mining operations" to the facts of a particular case such as this, would be to reach a conclusion contrary to the obvious intent of both Regulation 701(1)(*a*) and Regulation 701(1)(*b*).

In my view, the intent in reference to the facts of this case, was to permit a certain deduction in respect to the mining tax (in some cases this may be a deduction of the total tax paid) paid to the Province of Manitoba from the income earned and subject to tax under the Federal *Income Tax Act*, and derived from the appellant's mining operation in the Province of Manitoba. Such income in 1961 earned and subject to tax under the Federal *Income Tax Act* in this case was zero because of the exemption from such tax allowed the appellant under section 83(5) of the *Income Tax Act*. (See also section 139(1a)[17] of the *Income Tax Act*).

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[17] 139(1a) Income from a source. For the purposes of this Act,

(*a*) a taxpayer's income for a taxation year from a business, employment, property or other source of income or from sources in a particular place means the taxpayer's income computed in accordance with this Act on the assumption that he had during the taxation year no income except from that source or those sources, and was allowed no deductions in computing his income for the taxation year except such deductions as may reasonably be regarded as wholly applicable to that source or those sources and except such part of any other deductions as may reasonably be regarded as applicable to that source or those sources; and

(*b*) where the business carried on by a taxpayer or the duties performed by him was carried on or were performed, as the case may be, partly in one place and partly in another place, the taxpayer's income for the taxation year from the business carried on by him or the duties performed by him in a particular place means the taxpayer's income computed in accordance with this Act on the assumption that he had during the taxation year no income except from the part of the business that was carried on or the part of those duties that were performed in that particular place, and was allowed no deductions in computing his income for the taxation year except such deductions as may reasonably be regarded as wholly applicable to that part of the business or those duties and such part of any other deductions as may reasonably be regarded as applicable to that part of the business or those duties.

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The numerator component, therefore, of the fraction which must be found in this case in applying Regulation 701(*b*) in my view is zero.

As a result, the appellant is not entitled to deduct any of $130,135.80 paid to the Province of Manitoba as mining tax in 1961 from its other income subject to the Federal *Income Tax Act*, earned from sources outside the Province of Manitoba in that year.

On these two issues therefore, the appeal is dismissed.

As there was a third issue in respect to which the respondent admitted the appellant was correct, and to that extent the appellant succeeds on this appeal, the respondent is entitled to and may recover against the appellant only two thirds of the taxable costs herein.

On the third issue, the appeal is allowed and the assessments are referred back for the purpose of calculating the depletion allowance on the basis that in computing the aggregate of the appellant's profits for the purposes of section 1201 of the Regulations the amounts referred to in paragraph 11A of the respondent's reply to amended notice of appeal should not be deducted.

Toronto 1969 Jan. 16 — Ottawa Feb. 18

BETWEEN:

LEA-DON CANADA LIMITED .....APPELLANT;

AND

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

Income tax—Capital cost allowances—Non arm's length sale of asset below undepreciated capital cost to company not resident or carrying on business in Canada—Whether vendor deemed to have received market price of asset—Income Tax Act, secs. 17(2) and (7), 20(4).

A subsidiary company in the business of leasing out an aircraft which it owned sold the aircraft in 1963 to its parent company for $615,500 which was less than its undepreciated capital cost of $676,000. The parent company which neither resided nor carried on business in Canada leased the aircraft out for a few months, paid withholding tax on the rent received, and then sold the aircraft for $892,000.

Held, in the assessment of the subsidiary for 1963 capital cost allowance must be dealt with on the assumption that the subsidiary received the fair market value of the aircraft, as provided by s. 17(2) of the *Income Tax Act*. The sale to the parent was not within the application of s. 20(4).

SPECIAL CASE.

S. E. Edwards, Q.C. for appellant.

M. A. Mogan and *J. M. Halley* for respondent.

CATTANACH J.:—This is an appeal from the assessment to income tax by the Minister for the 1963 taxation year of Nassau Leasings Limited, a company incorporated pursuant to the laws of the Province of Ontario by letters patent dated January 25, 1960, with head office situate at Toronto, Ontario.

By order dated September 29, 1964, the Provincial Secretary of the Province of Ontario accepted an application for the surrender of the charter of Nassau Leasings Limited and declared it to be dissolved as of November 16, 1964.

By order of the Supreme Court of Ontario dated November 9, 1966, under the *Trustee Act,* R.S.O. 1960, c. 408, it was ordered that the right to appeal from this assessment by the Minister with respect to Nassau Leasings Limited should be vested in Lea-Don Canada Limited, named as appellant in the style of cause, which at the date of the order was known as Geo. W. Crothers Limited but which corporate name was changed by supplementary letters patent dated November 10, 1966, to Lea-Don Canada Limited.

Therefore, to all intents and purposes, Nassau Leasings Limited, the charter of which is surrendered, is, in actuality, the taxpayer and the appellant herein, although the proceedings are being carried on by and in the name of Lea-Don Canada Limited in lieu and stead of Nassau Leasings Limited.

In the pleadings the validity of the order of the Supreme Court of Ontario dated November 9, 1966, and the consequences which flowed therefrom as well as from the fact

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that Nassau Leasings Limited was dissolved as at November 16, 1964, by order of the Provincial Secretary dated September 29, 1964, were put in issue.

However the parties agreed to a question of law being raised for the opinion of the court by special case pursuant to Rule 151 in which the validity of the order and the effect of the dissolution of Nassau Leasings Limited were not put in issue.

The special case, stated by consent of the parties, reads as follows:

A. STATEMENT OF FACTS

1 The Appellant was incorporated under the name "Geo. W. Crothers Limited" on the 14th day of June, 1934, by Letters Patent pursuant to the provisions of The Companies Act, R.S.C. 1927, Chapter 27. By Supplementary Letters Patent dated the 10th day of November, 1966, the Appellant's name was changed to "Lea-Don Canada Limited".

2 Nassau Leasings Limited (hereinafter referred to as "Nassau") was incorporated on the 25th day of January, 1960, by Letters Patent pursuant to the provisions of The Corporations Act, 1953, Statutes of Ontario, Chapter 19. At all times material to this appeal, (a) the issued shares of both the Appellant and Nassau were beneficially owned by Lea-Don Corporation Limited (hereinafter referred to as the "Parent"), a corporation incorporated under the laws of the Bahama Islands; and (b) the Appellant, Nassau and the Parent were corporations which did not deal with each other at arm's length.

3. In 1960, Nassau purchased in an arm's length transaction an aircraft manufactured by Grumman Aircraft Engineering Corporation, and known as "Model G-159 Gulfstream" (hereinafter referred to as "the aircraft"). The purchase price of the aircraft was $786,232.17 and during 1961 and 1962, Nassau modified the interior and installed new radio and electronic equipment at an additional cost of approximately $218,500.00. This additional cost was "capitalized" and entered in the books of Nassau as an increase in the capital cost of the aircraft.

4. The principal business of Nassau in the period from 1960 to May 31, 1963, consisted of leasing the aircraft at a monthly rental of $14,000 00 to the Appellant and, at all times material to this appeal, Nassau was resident in Canada.

5 On June 12, 1963, Nassau sold the aircraft to the Parent for a price of $615,500 00. This was the only aircraft ever owned by Nassau and, at the time of the sale, the undepreciated capital cost of the aircraft on the books of Nassau was $676,088.32. In computing its income for the fiscal period January 1, 1963, to June 28, 1963, Nassau deducted from its revenue the sum of $60,588 32 (being the difference between $676,088.32 and $615,500.00) as a "terminal loss" on the disposition of the aircraft. Attached hereto and marked as Exhibit 1

is a copy of the T2 Corporation Income Tax Return and accompanying financial statements of Nassau for the fiscal period ending June 28, 1963.

6. Following the sale of the aircraft by Nassau to the Parent on June 12, 1963, the Appellant continued to lease the aircraft at a monthly rental of $14,000 00 until the 1st day of November, 1963, the lessor after June 12, 1963, being the Parent. During that period in 1963 from June to October inclusive, the Appellant paid to the Parent the sum of $70,000 00 as rental for the aircraft. Because the rental payments were directed to a non-resident, the Appellant deducted withholding tax from those payments and remitted that tax to the Respondent under Part III of the Income Tax Act.

7. By an Agreement dated the 24th day of September, 1963, the Parent agreed to sell to Denison Mines Limited for a price of $892,000 00 the aircraft which the Parent had purchased from Nassau and the actual sale of the aircraft was completed on the 1st day of November, 1963. The Parent and Denison Mines Limited are corporations which deal with each other at arm's length. Attached hereto as Exhibit 2 is a copy of the Agreement between the Parent and Denison Mines Limited dated the 24th day of September, 1963, and attached as Exhibit 3 is a copy of an Indenture dated the 1st day of November, 1963, between the same two parties.

8. At all times material to this appeal, the Parent was not resident in Canada and the Parent did not carry on business in Canada.

9. By Notice of Assessment dated January 29, 1965, the Respondent assessed tax with respect to Nassau's 1963 taxation year; disallowed the "terminal loss" in the amount of $60,588 32; and added recaptured capital cost allowance in the amount of $239,411.68. Attached hereto as Exhibit 4 is a copy of the Notice of Assessment together with the form T7W-C and a Capital Cost Allowance Schedule for Nassau.

10. By an Order dated the 29th day of September, 1964, the Provincial Secretary and the Minister of Citizenship for the Province of Ontario accepted the surrender of the charter of Nassau and declared that Nassau was to be dissolved on the 16th day of November, 1964. Attached hereto as Exhibit 5 is a copy of the said Order of the Provincial Secretary and Minister of Citizenship.

11. By an Order dated the 9th day of November, 1966, the Supreme Court of Ontario vested in the Appellant (under its original name) the right to appeal from any assessment made against Nassau. Attached hereto as Exhibit 6 is a copy of the said Order of the Ontario Supreme Court.

B. STATEMENT OF ISSUE AND STATUTORY PROVISIONS

12. When preparing its financial statements for the fiscal period January 1 to June 28, 1963, and when filing its T2 Corporation Income Tax Return for that fiscal period (Exhibit 1), Nassau assumed that the aircraft had been disposed of under such circumstances that

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subsection (4) of Section 20 of the Income Tax Act was applicable to determine the capital cost of the aircraft to the Parent for the purpose of Section 11(1)(a).

13. In making the assessment on January 29, 1965 (Exhibit 4) the Respondent assumed that subsection (2) of Section 17 of the Income Tax Act was applicable with respect to the disposition of the aircraft by Nassau to the Parent.

14. The relevant provisions of the Income Tax Act include the following:

> 11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:
>
> (*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;
>
> 17. (2) Where a taxpayer carrying on business in Canada has sold anything to a person with whom he was not dealing at arm's length at a price less than the fair market value, the fair market value thereof shall, for the purpose of computing the taxpayer's income from the business, be deemed to have been received or to be receivable therefor.
>
> 17. (7) Where depreciable property of a taxpayer as defined for the purpose of section 20 has been disposed of under such circumstances that subsection (4) of section 20 is applicable to determine, for the purpose of paragraph (*a*) of subsection (1) of section 11, the capital cost of the property to the person by whom the property was acquired, subsections (2), (5) and (6) are not applicable in respect of the disposition.
>
> 20. (4) Where depreciable property did, at any time after the commencement of 1949, belong to a person (hereinafter referred to as the original owner) and has, by one or more transactions between persons not dealing at arm's length, become vested in a taxpayer, the following rules are, notwithstanding section 17, applicable for the purposes of this section and regulations made under paragraph (*a*) of subsection (1) of section 11:
>
> (*a*) the capital cost of the property to the taxpayer shall be deemed to be the amount that was the capital cost of the property to the original owner;
>
> (*b*) where the capital cost of the property to the original owner exceeds the actual capital cost of the property to the taxpayer the excess shall be deemed to have been allowed to the taxpayer in respect of the property under regulations made under paragraph (*a*) of subsection (1) of section 11 in computing income for taxation years before the acquisition thereof by the taxpayer.
>
> 20. (5) In this section and regulations made under paragraph (*a*) of subsection (1) of section 11,
>
> (*a*) 'depreciable property' of a taxpayer as of any time in a taxation year means property in respect of which the tax-

payer has been allowed, or is entitled to, a deduction under regulations made under paragraph (*a*) of subsection (1) of section 11 in computing income for that or a previous taxation year;

139. (1) In this Act,

(*av*) 'taxpayer' includes any person whether or not liable to pay tax;

C. QUESTION FOR THE COURT

15. With reference to the sale of the aircraft by Nassau to the Parent, and with reference to the provisions of subsection (7) of section 17 of the Income Tax Act, was depreciable property of a taxpayer as defined for the purpose of section 20 "disposed of under such circumstances that subsection (4) of section 20 is applicable to determine, for the purpose of paragraph (*a*) of subsection (1) of section 11, the capital cost of the property" to the Parent?

D. DISPOSITION OF SPECIAL CASE

16. If the Court should answer the question in paragraph 15 in the affirmative, then the appeal shall be allowed with costs and the assessment (Exhibit 4) shall be varied by reducing the tax assessed from $123,396.76 to $396.74, and the said assessment shall be further varied by reducing the interest proportionately.

17. If the Court should answer the question in paragraph 15 in the negative, then the appeal shall be adjourned to a later date when the Court will be asked to determine the fair market value of the aircraft at the time of its sale from Nassau to the Parent; but the Respondent shall be entitled to his costs in respect of this special case.

The parties hereto concur in stating in the form of a special case the above question of law for the opinion of the Court.

DATED this 26th day of November A.D. 1968.

The issue, as outlined in paragraph 15 of the special case, thus turns upon a narrow point of law involving the interpretation of the pertinent sections of the *Income Tax Act*.

That issue can best be brought into sharp relief by summarizing the facts set forth in the special case and considering the pertinent provisions of the *Income Tax Act* in connection therewith.

Nassau Leasings Limited, hereinafter called Nassau, was resident in Canada. In 1960 it bought an aircraft, in an arm's length transaction, at a cost of $786,232.17 and made alterations to it costing $218,500. The aircraft was carried on the books of Nassau at a capital cost of $1,004,732.17.

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Nassau carried on business in Canada, its business being to lease the aircraft to Lea-Don Canada Limited, the nominal appellant herein, at a monthly rental of $14,000. This Nassau did from 1960 to May 1963.

On June 12, 1963, Nassau sold the aircraft to Lea-Don Corporation Limited, its parent company incorporated and resident in the Bahamas, for $615,500. At that time the undepreciated capital cost of the aircraft on the books of Nassau was $676,088.32. In computing its income for the taxation year Nassau deducted the amount of $60,588.32 as a terminal loss on the sale of the aircraft to its parent under section 1100 (2) of the *Income Tax Regulations*.

Nassau then distributed its assets and surrendered its charter.

The purchaser of the aircraft, Lea-Don Corporation Limited, the parent company, resident in the Bahamas, then leased the aircraft to Lea-Don Canada Limited, resident in Canada and also a wholly owned subsidiary of Lea-Don Corporation Limited, as was Nassau. Lea-Don Canada Limited, because the rental payments were made to a non-resident, deducted the withholding tax under Part III of the Act and remitted it to the Minister.

On November 1, 1963, Lea-Don Corporation Limited, the parent, sold the aircraft in an arm's length transaction to Denison Mines Limited for $892,000.

At all material times, Nassau, Lea-Don Corporation Limited, the parent, and Lea-Don Canada Limited were corporations which did not deal with each other at arm's length within the meaning of that term as defined in section 139(5) and (5a) of the *Income Tax Act*.

The Minister then assessed Nassau for its taxation year by adding back $300,000 to its declared income, being (1) by disallowance of $60,558.32 terminal loss claimed by Nassau and (2) by adding back the recapture of capital cost allowance of $239,411.68 which the Minister says was recaptured by Nassau.

The appellant takes the position that in June 1963 when Nassau sold the aircraft to Lea-Don Corporation Limited, its parent, the fair market value of the aircraft was $615,500, whereas the Minister takes the position that the fair market value of the aircraft at that time was $915,500. However Nassau says that the fair market value is immaterial.

In so assessing Nassau the Minister did so for the following reasons.

The cost of the aircraft to Nassau was $1,004,732.17.

Under section 11(1)(*a*) a taxpayer in computing his income is entitled to that part of the capital cost of property (here the aircraft) as is allowed by regulation.

Under Regulation 1100(1)(a) a taxpayer in computing his income may claim and deduct, for each taxation year, up to 40% of the undepreciated capital cost to him as of the end of the taxation year of property in class 16 in schedule "B" to the *Income Tax Regulations,* which makes specific mention of aircraft.

This Nassau had done in the taxation years prior to 1963. Nassau had so deducted $328,643.85 leaving an undepreciated cost of $676,088.32 being the capital cost of $1,004,732.17 less the depreciation claimed and allowed of $328,643.85.

By section 20(5)(*e*) "undepreciated capital cost" of property in a prescribed class means capital cost of all property in that class minus the aggregate of

(1) depreciation previously claimed and allowed and,

(2) proceeds of disposition from any sale of property in the class (up to but not exceeding the undepreciated capital cost of property in the class immediately before the sale).

On June 12, 1963, Nassau sold the aircraft to Lea-Don Corporation Limited, its parent, for $615,500.

Applying the formula in section 20(5)(*e*) Nassau determined the "undepreciated capital cost" as follows:

Cost of Aircraft		$1,004,732.17
Less (i) depreciation claimed & allowed	$328,643.85	
(ii) proceeds of disposition	615,500.00	
		944,143.85
Undepreciated capital cost after sale		$ 60,588.32

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By Regulation 1100(2) where, in a taxation year, all property of a prescribed class has been disposed of, a taxpayer is allowed a deduction for the year equal to the amount that would otherwise be the undepreciated capital cost to him of property in that class which is frequently termed the "terminal loss" provision.

Nassau therefore deducted the amount of $60,588.32, computed as above, as a terminal loss in computing its income for the fiscal period ending June 28, 1963, and in doing so relied on the provisions of Regulation 1100(2).

However section 17(2) provides that where a taxpayer has sold property to a person with whom he was not dealing at arm's length at a price less than the fair market value, the fair market value shall be deemed to have been received by the vendor.

Because Nassau and its parent, Lea-Don Corporation Limited were not dealing at arm's length and because Lea-Don Corporation Limited sold the aircraft in an arm's length transaction on November 1, 1963, for $892,000 the Minister assumed that,

(1) the fair market value of the aircraft on June 12, 1963, the date of its sale by Nassau to its parent was $915,500 and

(2) that Nassau, pursuant to section 17(2) had received the sum of $915,500 as proceeds of disposition upon the sale of its property.

The Minister, therefore, applied the "recapture of capital cost" provisions of section 20(1) to the effect that where property of a taxpayer in a prescribed class has been sold and the proceeds of disposition exceed the undepreciated capital cost of the property immediately prior to the sale, then the excess (up to the original capital cost) shall be included in computing the taxpayer's income. This resulted in the Minister including in Nassau's income for 1963 the sum of $239,114.68. This sum was arrived at by taking the capital cost of the aircraft, $1,004,732.17 and deducting therefrom the capital cost claimed and allowed

in the sum of $328,643.85 thereby giving an undepreciated capital cost of $676,088.32. The undepreciated capital cost of $676,088.32 was then deducted from $915,500 assumed by the Minister to have been the fair market value and deemed to have been received by Nassau by virtue of section 17(2) resulting in the above sum of $239,411.68. When the amount of $60,588.32 claimed by Nassau as a "terminal loss" and disallowed by the Minister is added to the sum of $239,411.68 added to Nassau's income as recaptured capital cost allowance, the net result is that Nassau's income was increased by $300,000 and it was assessed accordingly.

The appellant submitted that the provisions of section 17(2) are not applicable in respect of the disposition of the aircraft by Nassau because by section 17(7), section 17(2) is made not applicable to a transaction to which section 20(4) applies. As might be expected the appellant contended that section 20(4) was applicable to determine the capital cost of the aircraft to Lea-Don Corporation Limited, the parent of Nassau.

On the other hand, as also might be expected, the Minister contended that section 20(4) was not applicable to determine for the purposes of the regulations made under section 11(1)(*a*) the capital cost of the aircraft to Nassau's parent, Lea-Don Corporation Limited, and accordingly the provisions of section 17(7) do not apply to exclude the operation of section 17(2) by virtue of which the Minister assessed Nassau as he did.

Therefore whether section 17(7) applies is dependent on whether or not the circumstances contemplated by section 20(4) are existing in the circumstances of the present case.

This, in turn, gives rise to the question posed for the court in paragraph 15 of the stated special case which for the purpose of convenience I repeat here:

> 15. With reference to the sale of the aircraft by Nassau to the Parent, and with reference to the provisions of subsection (7) of section 17 of the Income Tax Act, was depreciable property of a taxpayer as defined for the purpose of section 20 "disposed of under such circumstances that subsection (4) of section 20 is applicable to determine,

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for the purpose of paragraph (*a*) of subsection (1) of section 11, the capital cost of the property" to the Parent?

The purpose of section 20(4) is two-fold:

(1) to ensure that the depreciable base of capital assets cannot be raised upon the transfer by one taxpayer to another in a transaction not at arm's length, and

(2) to ensure that the recapture of capital cost allowance cannot be avoided, the recapture is merely postponed until the property is sold to a stranger, presumably at the fair market value to the transferee. The effect of section 20(4) by stating that,

in a non-arm's length transaction, the capital cost of depreciable property to a new owner cannot exceed what was the previous owner's capital cost, despite the fact that the fair market value of the property may be greater, is the opposite to section 17(2) when the fair market value must be taken as the capital cost to the vendor and his income computed accordingly.

This conflict is resolved by section 17(7) which provides that when section 20(4) applies then section 17(2) does not apply and this gives rise to the dispute in the present case.

Whether section 20(4) applies gives rise to two crucial questions:

(1) is the purchaser of the aircraft, Lea-Don Corporation Limited, the parent of the vendor, a taxpayer, and

(2) was the property depreciable property in the hands of the parent?

As I understood the argument by counsel for the appellant it was that,

(1) the parent was clearly a "taxpayer" which word is defined in section 139(1)(av) as including "any person whether or not liable to pay tax". In any event the parent was a taxpayer because it paid the withholding tax of 15% on the amount that

Nassau paid to it as rent for the use of property in Canada, in accordance with section 106(1)(*d*) which was remitted to the Minister by Nassau;

(2) that the parent had income from rent even though it was a non-resident. He pointed out that section 2(2) provides that income tax shall be paid upon the income of a non-resident employed or carrying on business in Canada and that under section 31(1) a non-resident may have sources of income from outside Canada and inside Canada. He argued that revenue earned inside Canada is subject to those deductions as are applicable thereto. He also referred to section 110 by which a non-resident may elect to file an income tax return under Part I of the Act as prescribed for residents and be taxed as a resident subject to the conditions set forth in the section.

Sections 2(2) and 31(1) are applicable to income of a non-resident employed in Canada or carrying on business in Canada.

The parent was not employed in Canada, nor was it carrying on business in Canada. Its income was derived from property situate in Canada.

With respect to the parent being able to elect under section 110, that section is only applicable to income from rent on real property or a timber royalty situate in Canada. The aircraft is not realty.

However he referred to Regulation 1102(3) to the effect that where the taxpayer is non-resident the classes of property described in Part XI and Schedule "B" shall be deemed not to include property that is situate outside Canada. He, therefore concluded that the converse is that such property situated within Canada is subject to allowances in respect of capital cost. Therefore he said the test is not whether the taxpayer is carrying on business in Canada, but that it is whether the non-resident taxpayer owns property situate in Canada.

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Accordingly he submitted that capital cost allowance is deductible in computing the income and that there is no distinction between a resident and non-resident taxpayer in computing income except as to property owned by a non-resident situated outside Canada and that if a non-resident has property in Canada which falls within Schedule "B" (as the aircraft here involved does) then it is depreciable property within the definition of those words in section 20(5)(*a*) for the purposes of section 20 and the regulations under section 11(1)(*a*).

"Depreciable property" of a taxpayer is defined under section 20(5)(*a*) as meaning property in respect of which the taxpayer has been allowed, or is entitled to be allowed a deduction under the regulations under section 11(1)(*a*) in computing income.

For these reasons he contended that the aircraft is depreciable property in the hands of the parent company, Lea-Don Corporation Limited and if that be so then section 20(4) applies as does section 17(7) and section 17(2) does not, so that the question posed for the court in paragraph 15 of the special case must be answered in the affirmative.

As I understood the argument of counsel for the appellant it is based on two propositions.

His first proposition is that if a non-resident has income, that income is to be computed under the *Income Tax Act*. With this proposition I fully agree if the computation of a non-resident's income is necessary to compute the tax.

Here, however, the parent company was paying a tax under Part III of the Act, on a gross amount and accordingly the tax payable is not computed under Division B of Part I of the Act because there is no need to do so.

The clear inference from section 2(2) is that for a non-resident to be taxable under Part I he must be employed in Canada or carrying on business in Canada neither of which apply to the parent company.

Under section 3 the income of a taxpayer is for the purpose of Part I that from all sources inside or outside

Canada including that from business, property and employment, but section 31 is a special provision restricting a non-resident's income to that earned in Canada from employment or business subject to the appropriate deductions attributable thereto.

In section 1100(1) of the Regulations there is allowed to a taxpayer in respect of capital cost in computing income from property, but section 110 makes it clear that a non-resident taxpayer may only elect to file a return and pay tax under Part I with respect to rent on a real property or a timber royalty.

Therefore, the complete answer to the appellant's first proposition is a computation of the parent's Canadian income is neither necessary, nor relevant to assess tax under Part III for which the parent was liable.

The second proposition of the appellant, as I understood it, was that the parent company was entitled to a deduction under the Regulations under section 11(1)(*a*). Counsel placed particular reliance on Regulation 1102(3) to the effect that where the taxpayer is a non-resident person the classes of property set forth are deemed not to include property outside Canada.

Here the non-resident parent's property, the aircraft, is situate in Canada and it is depreciable property in the sense that it depreciates but the question is, is it property with respect to which the parent is entitled to claim deductions of a capital cost allowance in accordance with the Regulation under section 11(1)(*a*).

By Regulation 1100(1) allowances in respect of capital cost are deductible in computing income from property at the rates of the classes set out in Schedule "B".

Under Regulation 1102(3) for non-residents the classes of property are deemed not to include property situate outside Canada.

The reason is readily apparent because a non-resident taxpayer is not taxed on world income but only on income in Canada. Therefore a non-resident's property situate

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outside Canada is excluded from any class, but for a Canadian resident his outside property is included in a class.

I think the inference that, because a non-resident's property in Canada is not excluded from classes, the property is "depreciable property" is an unwarranted one. In my opinion the regulation means that a class is available for such non-resident owned property situated in Canada if the non-resident taxpayer is otherwise entitled to claim a capital cost allowance by reason of carrying on business in Canada or if the income from property in Canada brings the non-resident taxpayer within section 110 of the Act and allows him to elect to file a return under Part I and compute his taxable income accordingly.

In my opinion, therefore, the parent is not entitled to a deduction under regulations made under section 11(1)(*a*) of the Act in computing its income.

It follows that I answer the question posed for the Court in paragraph 15 of the special case in the negative and dispose of the matter as indicated in paragraph 17 thereof, that is to say, the appeal shall be adjourned to a later date when the Court will be asked to determine the fair market value of the aircraft at the time of its sale from Nassau to the parent and the Minister shall be entitled to his costs in respect of this special case.

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