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.