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BETWEEN:

BOWMAN BROTHERS LIMITED .....APPELLANT;

AND

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

Revenue—Excess profits tax—The Excess Profits Tax Act, 1940, S.C. 1940, c. 32, as amended, ss. 5(1), 5(3), 5(5), 13—Presumption of validity of assessment—Presumption that Board of Referees acted on proper principles—Board of Referees to decide whether standard profits to be determined on basis of capital employed or on some other basis—No jurisdiction in Court to review Board of Referees' decision—Evidence of subsequent decisions by Board of Referees inadmissible—Hearing before two members of Board permissible—Decision by majority of Board valid—Effect of words "final and conclusive" not limited to section under which application made.

The appellant applied to the Minister for a reference to the Board of Referees to determine its standard profits under The Excess Profits Tax Act, 1940. The application was made under section 5 of the Act, and the Board determined the standard profits under section 5(1). Its decision was approved by the Minister. Subsequently, the appellant made a second application under section 5(3) of the Act. The Department considered that the decision of the Board when approved by the Minister was final and conclusive and that the appellant did not have a right to have its claim re-heard. The appellant appealed from the assessment for 1944 based on the Board's decision.

Held: That the assessment carries with it a statutory presumption of validity until it has been shown to be erroneous in fact or in law and the onus of showing that it is erroneous lies on the taxpayer who appeals against it.

2. That it is to be assumed, in the absence of proof to the contrary, that the Board of Referees acted on proper principles and the onus of showing that it did not lies on the person who so alleges. Mere surmise or conjecture is not enough.

3. That the Court cannot determine that the appellant's claim came within section 5(3) of the Act and refer the assessment back to the Minister with instructions to refer the application to the Board of Referees for consideration under section 5(3).

4. That it was for the Board of Referees to decide whether the appellant's standard profits should be determined on the basis of the capital employed or on some other basis and the Court has no jurisdiction to pass judgment on the question.

5. That the appellant cannot show that the Board's determination of the appellant's standard profits on the basis of the capital employed was wrong by evidence that later a differently constituted Board determined the standard profits of similar companies on a basis other than that of the capital employed.

6. That evidence of what the Board of Referees did subsequently to its decision on the appellant's application was inadmissible.

7. That the Board of Referees could properly hold hearings before a panel of two members.

8. That the decision of the Board of Referees might validly be made by a majority of its members.

9. That when the Board of Referees has determined a company's standard profits and its decision has been approved by the Minister the decision is final and conclusive of the company's rights to standard profits at the time of its application regardless of whether the application was made under section 5 of the Act generally or under subsections 1 or 3 and a company which has applied for standard profits under section 5 and has received an award under subsection 1 cannot, on the same facts and without any change in its status or capital, have a second application for standard profits under a different subsection considered by the Minister or by the Board.

APPEAL from an assessment under The Excess Profits Tax Act, 1940, as amended.

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

H. G. Stapells K.C., H. H. Stikeman, R. B. Stapells and *A. L. Bissonette* for appellant.

E. G. Gowling K.C. and *T. Z. Boles* for respondent.

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

The PRESIDENT now (October 23, 1952) delivered the following judgment:

This is an appeal against the appellant's income tax and excess profits tax assessment for 1944 of which notice was given to it on March 1, 1947. On the assessment the Minister disallowed part of the appellant's claim for depreciation and used the standard profits determined by the Board of Referees and approved by the Minister as the base for the assessment of excess profits tax. On the opening of the hearing the appellant dropped its appeal against the disallowance of part of its depreciation claim so that the appeal is now only against the excess profits tax assessment.

The appeal raises important questions relating to the determination of standard profits under section 5 of The Excess Profits Tax Act, 1940, Statutes of Canada, 1940, chapter 32, by the Board of Referees appointed under section 13 of the Act and the effect of such decisions when approved by the Minister. It is, therefore, desirable to set

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out the relevant provisions of the Act. Subsection 1 of section 5 as it stood originally read as follows:

5. (1) If on the application of a taxpayer the Minister is satisfied:—

(*a*) that there were no profits in the standard period because the taxpayer was carrying on business at a loss or that the profits of the standard period were so low that it would not be just to ascertain the standard profits of the taxpayer by reference to such profits because either the business is of a class which during the standard period was depressed or because the business of the taxpayer was for some reason peculiar to itself abnormally depressed during the standard period when compared with other businesses of the same class, or

(*b*) that there were no profits in the standard period because the taxpayer was not carrying on business during such period, or that the profits of the standard period were so low that it would not be just to ascertain the standard profits of the taxpayer by reference to such profits because the business of the taxpayer was not in operation prior to January first, one thousand nine hundred and thirty-eight;

he may direct that the standard profits shall be ascertained by the Board of Referees as if the profits of the standard period were of such greater amount or such amount as they think just; provided that the decision of the Board shall not be operative until approved by the Minister, whereupon the said decision shall be final and conclusive.

And subsection 2 provided a limitation on the amount that the Board could determine, as follows:

5. (2) The standard profits ascertained by the Board, as provided in subsection one, in the case of taxpayers mentioned in paragraph (*a*) thereof, shall not exceed an amount equal to interest at such rate as the Board shall determine, not being less than five nor more than ten per centum per annum, on the amount of capital of the taxpayer computed by the Board in its sole discretion in accordance with the First Schedule to this Act.

Subsection 1 was amended on June 14, 1941, by section 6 of chapter 15 of the Statutes of 1940-41 and further amended on August 1, 1942, by section 3 of chapter 26 of the Statutes of 1942-43 to read as follows:—

5. (1) If a taxpayer is convinced that his standard profits were so low that it would not be just to determine his liability to tax under this Act by reference thereto because the business is either of a class which during the standard period was depressed or was for some reason peculiar to itself abnormally depressed during the standard period when compared with other businesses of the same class he may, subject as hereinafter provided, compute his standard profits at such greater amount as he thinks just, but not exceeding an amount equal to interest at ten per centum per annum on the amount of capital employed in the business at the

commencement of the last year or fiscal period of the taxpayer in the standard period computed in accordance with the First Schedule to this Act:

Provided that if the Minister is not satisfied that the business of the taxpayer was depressed or that the standard profits as computed by the taxpayer are fair and reasonable, he may direct that the standard profits be ascertained by the Board of Referees and the Board shall thereupon, in its sole discretion, ascertain the standard profits at such an amount as the Board thinks just, being, however, an amount equal to the average yearly profits of the taxpayer during the standard period or to interest at the rate of not less than five nor more than ten per centum per annum on the amount of capital employed at the commencement of the last year or fiscal period of the taxpayer in the standard period as computed by the Board in its sole discretion in accordance with the First Schedule to this Act, or the Minister shall assess the taxpayer in accordance with the provisions of this Act other than as provided in this subsection.

Subsection 3 of section 5 dealing with standard profits for cases where a capital standard is inapplicable was first enacted on June 14, 1941, by section 6 of chapter 15 of the Statutes of 1940-41 and amended on August 1, 1942, by section 3 of chapter 26 of the Statutes of 1942-43 to its present form which reads as follows:—

5. (3)If on the application of a taxpayer the Minister is satisfied that the business either was depressed during the standard period or was not in operation prior to the first day of January, one thousand nine hundred and thirty-eight, and the Minister on the advice of the Board of Referees is satisfied that because,

(*a*) the business is of such a nature that capital is not an important factor in the earnings of profits, or

(*b*) the capital has become abnormally impaired or due to other extraordinary circumstances is abnormally low

standard profits ascertained by reference to capital employed would result in the imposition of excessive taxation amounting to unjustifiable hardship or extreme discrimination or would jeopardize the continuation of the business of the taxpayer, the Minister shall direct that the standard profits be ascertained by the Board of Referees and the Board shall in its sole discretion thereupon ascertain the standard profits on such basis as the Board thinks just having regard to the standard profits of taxpayers in similar circumstances engaged in the same or an analogous class of business.

Finally, subsection 5 of section 5, as enacted on August 15, 1944, by section 4 of chapter 38 of the Statutes of 1944-45, provides:

5. (5) Notwithstanding anything in this section a decision of the Board given under this section shall not be operative until approved by the Minister whereupon the said decision shall be final and conclusive; Provided that if a decision is not approved by the Minister it shall be submitted to the Treasury Board who shall thereupon determine the standard profits and the decision of the Treasury Board shall be final and conclusive.

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Previously, this subsection was subsection 4 of section 5, as enacted on June 1, 1941, by section 6 of chapter 15 of the Statutes of 1940-41, and read as follows:

5. (4) Notwithstanding anything contained in this section the decisions of the Board given under subsections one, two and three of this section shall not be operative until approved by the Minister whereupon the said decisions shall be final and conclusive.

Provided that if a decision is not approved by the Minister it shall be submitted to the Treasury Board who shall thereupon determine the standard profits and the decision of the Treasury Board shall be final and conclusive.

And section 13 provided for the appointment of a Board of Referees as follows:

13. The Minister may appoint a Board of Referees to advise him and aid him in exercising the powers conferred upon him under this Act, and such Board shall exercise the powers conferred on the Board by this Act and such other powers and duties as are assigned to it by the Governor in Council.

The facts on which the appeal is based are not in dispute. The appellant is a corporation with its head office in Saskatoon in Saskatchewan and several other branches in that province. It operates a wholesale jobbing business in automotive parts and supplies and also handles automobile tires on consignment. On April 7, 1941, it prepared a standard profits claim under The Excess Profits Tax Act, 1940, on Form S.P. 1, addressed to the Minister of National Revenue by which it made application, pursuant to section 5 of the Act, for a reference to the Board of Referees to determine its standard profits of the standard period on the ground that its business was one of a class which during the standard period was depressed. Attached to the appellant's claim was its calculation of standard profits showing its average net capital and surplus for the four years of the standard period at $507,709 and the following statement:

Standard Profits estimated at 10 per cent would be $50,770 so a fair base for earnings could be calculated at $50,500.

There was also the following statement:

If we had not been confronted with the depressed conditions in 1937 and 1938, due to crop failures in Saskatchewan, we estimate that our base for the four year average would have been $59,000.

The application was signed by Mr. R. H. Bowman, who was then the appellant's secretary-treasurer, and filed in the office of the Inspector of Income Tax at Saskatoon on

April 8, 1941. Later, on May 16, 1941, Mr. Bowman answered the questions on S.P. 1 Questionnaire and delivered this form at the Saskatoon Office. On July 31, 1941, the Saskatoon Inspector of Income Tax sent the application and supporting documents to the Commissioner of Income Tax at Ottawa with a statement that it was believed that the appellant was one of a class that during the standard period was depressed and that the claim should be referred to the Board of Referees under section 5 of the Act. On August 12, 1941, the Commissioner of Income Tax, in the purported exercise of his discretion, determined that the appellant's business was not depressed during the standard period and that its claim would not be referred to the Board of Referees and on the same date the Head Office Committee of Review notified the Saskatoon Inspector of Income Tax that it did not concur in the recommendation that the file should be referred to the Board of Referees. On August 25, 1941, the Saskatoon Inspector of Income Tax notified the appellant of this decision. Mr. Bowman then instructed Mr. Arthur Moxon of Saskatoon to write to the Department of National Revenue and request a hearing before the Board of Referees. On September 5, 1941, the appellant wrote to the Inspector of Income Tax at Saskatoon renewing its request for a base of $50,500, which was just under 10 per cent of its capital, and on September 16, 1941, the Saskatoon Inspector of Income Tax notified the Commissioner of Income Tax accordingly. On April 28, 1942, the appellant wrote to the Saskatoon Inspector of Income Tax with further information and argument in support of its claim and on May 12, 1942, the Inspector sent a copy of this letter and other information to the Commissioner of Income Tax. On October 2, 1942, the Commissioner of Income Tax, acting under powers delegated to him by the Minister, pursuant to section 5 of The Excess Profits Tax Act, 1940, referred the appellant's claim to the Board of Referees.

For advice under Order-in-Council P.C. 6479 as to whether the business of the taxpayer was or was not depressed during the standard period and if depressed, for a determination of the Standard Profits.

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Subsequently, the appellant was notified that the time and place of the hearing by the Board had been fixed for April 21, 1943, at Regina, in Saskatchewan. The hearing took place before only two members of the Board of Referees, Mr. K. W. Dalglish and Mr. C. P. Fell, and the appellant was represented by Mr. R. H. Bowman, Mr. W. W. Miller, its accountant, and Mr. C. P. DeRoche, its auditor. At the hearing Mr. Bowman filed with the Board a letter dated April 20, 1943, showing the operating results of the appellant since its incorporation in 1915, givng particulars of its sales and earnings as well as other information in support of its request for a base of $50,500. This letter was accompanied by a comparative statement showing, *inter alia*, its sales, its earnings, its capital, its surplus and its net worth for each of the years of its existence. On April 28, 1943, the Board of Referees reported to the Minister of National Revenue as follows:

To

The Minister of National Revenue,
Ottawa, Ontario

Re: Bowman Brothers Limited, Saskatoon, Sask.

The Standard Profits Claim of the above-mentioned taxpayer was referred to the Board of Referees under date of 2nd October, 1942, in accordance with the provisions of The Excess Profits Tax Act, 1940, as amended.

The Board of Referees having examined the claim reports as follows:

Under the provisions of subsection one of section five of The Excess Profits Tax Act, 1940, as amended, the Board of Referees

(*a*) Finds that the business of the taxpayer was depressed during the Standard Period.

(*b*) Computes the Capital Employed by the taxpayer at 1st January, 1939, at .....$ 516,337.58

(*c*) Ascertains the yearly Standard Profits of the taxpayer at .....$ 50,500.00
being an amount equal to interest at approximately 9¾ per cent per annum on the Capital Employed as above.

Dated at Ottawa this twenty-eighth day of April, 1943.

Board of Referees,
W. H. Harrison, Chairman
G. P. Fell, Member
K. W. Dalglish, Member.

The decision of the Board of Referees was approved by the Commissioner of Income Tax, acting under the powers of the Minister, and on May 13, 1943, the Commissioner notified the appellant as follows:

Department of National Revenue

Office of the
Commissioner of Income Tax
Ottawa

May 13, 1943

Sir:—

Re Excess Profits Tax Act, 1940
Standard Profits Claim
Decision of the Board of Referees

Your application, pursuant to Section 5 of the Excess Profits Tax Act, 1940, has been considered by the Board of Referees.

The decision of the Board has been received and a copy thereof is set forth below.

The decision of the Board has been approved and becomes operative accordingly.

Yours truly,

Sgd. C. F. ELLIOTT
Commissioner of Income Tax

On May 22, 1943, the appellant wrote to the Commissioner of Income Tax as follows:

Saskatoon,
May 22, 1943.

C. F. Elliott, Esq.,
Commissioner of Income Tax,
Ottawa, Ontario.

Dear Sir:

Re Standard Profits Claim

Your letter of May 13th telling us of our Standard Profits base of $50,500 is gratefully acknowledged.

Your approval of the recommendation of the Board of Referees is another testimony of the spirit of fairness that has always characterized our dealings with the Income Tax Department.

Thanks a lot.

Yours very truly,

BOWMAN BROTHERS LIMITED,
Sgd. R. H. Bowman
Secretary-Treasurer.

It will be noted that the Board of Referees determined the appellant's standard profits at exactly the amount which it had requested.

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The appellant continued to be satisfied with the standard profits determined by the Board of Referees and approved by the Minister until late in 1946 when Mr. Bowman discovered that under subsection 3 of section 5 the determination of standard profits need not be limited to 10 per cent of the capital employed, that other factors than that of capital employed could be taken into account and that claims could be submitted for a much larger base than that which had been awarded to the appellant. Mr. Bowman learned this when he sat in on the preparation of the applications for standard profits of four companies in Western Canada, who were in the same line of business as itself, namely, Motor Car Supply Company of Canada Limited of Alberta, Mackenzie, White & Dunsmuir Limited of British Columbia, Gillis & Warren Limited of Manitoba and Vancouver, Parts Company Limited of British Columbia. These companies all carried on the same kind of business as that of the appellant and the manner of their operation was similar in all important respects. They all applied for a determination of their standard profits under subsection 3 of section 5 and all requested and were awarded a larger or relatively larger base of standard profits than that which the appellant had received. For example, Motor Car Supply Company of Canada Limited applied for standard profits of $126,000 on November 25, 1946 and was awarded $70,000 on September 18, 1947; Mackenzie, White & Dunsmuir Limited requested $87,583 on May 22, 1947, and was awarded $75,000 on September 18, 1947; Gillis & Warren Limited requested $30,000 on August 27, 1947 and was awarded $22,500 on May 5, 1948; and Vancouver Parts Limited requested $58,281 on August 28, 1947 and received $45,000 on May 5, 1948. The appellant then decided to follow the same course as these four companies and on August 28, 1947, it made a second application for the determination of its standard profits, this time under subsection 3 of section 5, in which it asked for standard profits of $157,614. On October 29, 1947, the Director of Income Tax at Saskatoon sent this second application to the Committee of Review at Ottawa and on November 4, 1947, the Director General of the Corporation Assessments

Branch of the Department of National Revenue at Ottawa sent the following letter to the appellant:

Committee of Review
H.P.F.
4th November, 1947.

Bowman Bros. Limited,
3rd Avenue & 24th Street,
SASKATOON, Sask.

Dear Sirs:—

The standard profits claim filed by your company on 29th August, 1947, has been forwarded to this office. It is noted that on the 28th April, 1943, the Board of Referees awarded the company a standard profits of $50,500 effective as at 1st January, 1939. It would appear that the present application is a resubmission of this claim upon which the Board of Referees has already given a decision.

Under Subsection five of Section five of the Excess Profits Tax Act a decision of the Board of Referees, when approved by the Minister, is considered to be final and conclusive and therefore your company is not considered to have the right to have its claim re-heard.

Yours faithfully,

for Director General
Corporation Assessments Branch.

HPF/BB

Under the circumstances the appellant felt aggrieved. Mr. Bowman, who had so cordially thanked the Commissioner of Income Tax for the fairness of the Department, now thought that the appellant's award was much too low as compared with that of the four other companies and considered that it had been discriminated against. The present appeal was brought accordingly in an effort to have its claim for a larger base of standard profits re-considered.

Reference should also be made to some further facts regarding the constitution of the Board of Referees, its membership and its operations. On November 1, 1940, the Minister, acting under the authority of section 13 of the Act, appointed a Board of Referees of three members under the chairmanship of Mr. Justice W. H. Harrison of the Supreme Court of New Brunswick, the other members being Mr. K. W. Dalglish and Mr. C. P. Fell, to advise and aid him in exercising the powers conferred upon him under the Act. By Order-in-Council P.C. 6479, dated November 16, 1940, certain powers and duties were assigned to the Board so appointed including the power and duty to report to the Minister in furtherance of the advice and aid sought

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by him from it and to determine the standard profits of any taxpayer or group of taxpayers that might be referred to it for consideration by the Minister.

There were no rules or regulations governing the procedure of the Board. Nor was there any requirement that it should hold oral hearings but it generally adopted the practice of holding such hearings at places where it would be convenient for taxpayers having standard profits claims under section 5 of the Act to appear and make representations. By the fall of 1942 the volume of the Board's work had so increased that an addition to its membership was considered necessary. On August 12, 1942, the Commissioner of Income Tax reported to the Minister recommending the appointment of Mr. Courtland Elliott, who had been the Board's economic adviser, as a member of the Board so that it could have dual hearings with two members to each hearing and on the same date the Minister, concurring in this report, recommended this appointment. This was made by Order in Council P.C. 90/8097 dated September 9, 1942.

Subsequently, by Order in Council P.C. 107/7934, dated October 14, 1944, Mr. Justice J. D. Hyndman was appointed to the Board and became its chairman on the retirement of Mr. Justice Harrison. Later, the Board was further increased in size to six members. From time to time there were changes in its membership so that by the time the Board dealt with the applications of the four companies referred to its personnel had completely changed from that which had existed on April 28, 1943, when the Board made its decision in the present case. All the earlier members of the Board had retired and been replaced by others.

Mr. T. N. Kirby, a former secretary of the Board and later a temporary member of it, gave evidence that there were many cases in which hearings had been held without a full attendance of all the members of the Board. There had been over 4,000 of such cases. There had been hundreds of hearings where only two members of the Board had been present and many cases where there had been no oral hearings, all of these latter, however, in cases where the taxpayer had consented. Mr. Kirby doubted whether the Board had ever sat as a whole when it consisted of six members.

Counsel for the appellant made conflicting arguments in support of the appeal. Mr. Stapells' main argument was that the Minister in considering the appellant's claim under subsection 1 of section 5 and not considering it under subsection 3 had proceeded on a wrong principle. His contention was that the application was made generally under section 5, without any request for consideration under subsection 1, that both the Minister and the Board knew of the existence of subsection 3, although the appellant did not, and that the application which, on the face of it, was made generally under section 5 should have been considered under the relevant subsection, that the application showed facts which would have warranted a disposition under subsection 3 but these were not discussed or considered at the hearing, that the fact that the appellant did not apply specifically under subsection 3 does not bar it from saying that the Minister did not determine the application under the proper subsection of section 5. Mr. Stapells stressed that it was not necessary that the appellant should make an application specifically under subsection 3 if it showed facts that brought the claim within the subsection, that the application stated that prior to the standard period the appellant had earned profits that were more than 10 per cent of its capital and would have earned more than 10 per cent in 1937 and 1938 but for the depressed conditions in those years, that these facts were sufficient material on which to ground a claim under subsection 3, even although the number of the subsection was not mentioned, that the obligation of the Board arose under section 13 of the Act, that it was not bound by the application but had the right and duty to discover independently what the appellant was entitled to and that if the Board and the Minister had put a proper interpretation on the figures in the application it would have been realized that the appellant was not a company that fell within subsection 1 of section 5 but came under subsection 3. Mr. Stapells urged that if it was shown in an application that a taxpayer had made profits above 10 per cent of his capital, as was the case here, there must have been factors that were more important than that of the capital employed, and that the Board should have come to the proper conclusion on the facts of the case and made its award on a basis other than that of the capital

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employed and that by reason of the failure to do so both the Board and the Minister acted on a wrong principle. It followed, according to Mr. Stapells, that the appeal should be allowed and the assessment referred back to the Minister with a direction to refer the appellant's standard profits claim back to the Board of Referees for consideration under subsection 3 of section 5.

It must be remembered that the assessment carries with it a statutory presumption of validity until it has been shown to be erroneous in fact or in law and that the onus of showing that it is erroneous lies on the taxpayer who appeals against it. *Vide Anderson Logging Co. Ltd.* v. *The King* (1); *Dezura* v. *Minister of National Revenue* (2); *Johnston* v. *Minister of National Revenue* (3); *Bower* v. *Minister of National Revenue* (4); *Goldman* v. *Minister of National Revenue* (5).

Thus the appellant must show that the assessment appealed against was erroneous. The error complained of is that it was based on the Board's decision determining the appellant's standard profits dated April 28, 1943, and that this decision was based on a wrong principle, namely, that the Board had determined the standard profits under subsection 1 of the Act without considering subsection 3. It is not to be assumed that the Board acted on a wrong principle. Indeed, it is to be assumed, in the absence of proof to the contrary, that it acted on proper principles and the onus of showing that it did not lies on the person who so alleges. Mere surmise or conjecture is not enough.

It is true that the appellant's application was made generally under section 5 of the Act, without any request for consideration under subsection 1. There is also the fact that the appellant did not make an application specifically under subsection 3 of section 5, prior to August 29, 1947, but that it did so then on the advice of Mr. Stapells. It is difficult to reconcile this fact with his argument that the appellant's application, having been made generally under section 5, should have been considered as if it had been made under subsection 3 in view of the fact that it contained

(1) (1925) S.C.R. 50.
(2) (1948) Ex. C.R. 10 at 15.
(3) (1947) Ex. C.R. 483; (1948) S.C.R. 486.
(4) (1949) Ex. C.R. 61 and 63.
(5) (1951) Ex. C.R. 274.

sufficient material on which to ground a claim under that subsection. If this argument is sound the application of August 29, 1947, was unnecessary.

While Mr. Stapells put his argument on the narrow ground that the Board and the Minister had proceeded on a wrong principle in that neither it nor he had considered the application under subsection 3, the real complaint is that the Board determined the appellant's standard profits on the basis of capital employed instead of on a basis other than that of capital employed. In effect, this Court is asked to review the finding of the Board and to declare that because the appellant stated, *inter alia,* in its application that it had earned more than 10 per cent of its capital, which could have warranted a determination of its standard profits on a basis other than that of the capital employed, the Board should have determined the appellant's standard profits under subsection 3 of section 5 and that in determining them under subsection 3 it had acted on a wrong principle. While Mr. Stapells did not ask the Court to declare the quantum of standard profits to which the appellant is entitled, that being clearly a matter for the Board and the Minister, it is obvious that the purpose of the appeal is to obtain for the appellant, through a directed reconsideration by the Board, a much larger standard profits base than the one awarded to it.

Thus the declaration sought in this case is substantially of the same nature as that which was unsuccessfully sought in *J. R. Moodie Limited* v. *Minister of National Revenue* (1) where it was held, *inter alia,* that the Court could not determine that the case came within section 5(3) and refer the assessment back to the Minister with instructions to refer the appellant's application to the Board for determination of its standard profits under section 5(3). While there are obvious differences between the *Moodie* case (*supra*) and this one several of the differences disappear if effect is given to Mr. Stapells' argument. For example, in the *Moodie* case (*supra*) there was an application specifically under subsection 3 of section 5 whereas in this case there was not. But when Mr. Stapells argued that the appellant's application was made generally under section

(1) (1948) Ex. C.R. 483; (1950) C.T.C. 61.

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5, that it was not necessary to make an application specifically under subsection 3 but that the application should have been considered under that subsection as if it had been made under it in view of the allegation that it contained sufficient material to make it tantamount to an application under it he put the appellant in exactly the same position as if it had made an application specifically under subsection 3 and so far as the application was concerned he made this case similar in principle to the *Moodie* case (*supra*). Mr. Stapells sought to distinguish this case from the *Moodie case* (*supra*) by pointing out that the references to the Board in the two cases were different. That is true, but it will be noted that the reference to the Board in this case was made generally under section 5 of the Act without reference to any subsection. The Board was not restricted to a determination of the appellant's profits on the basis of the capital employed but was left free to determine the standard profits on any basis permitted by section 5 which it considered warranted. That being so, the difference in the terms of the reference between this case and the *Moodie* case largely loses its importance. Moreover, the reports made by the Board in the two cases, apart from the figures involved, are almost identical.

Under the circumstances, Mr. Stapells has by his own argument put the two cases on substantially the same footing so that what was decided in that case is really applicable to this one so far as this argument is concerned. In the *Moodie* case (*supra*) the Board determined the standard profits as a percentage of the capital employed, although the appellant in that case had applied specifically under subsection 3, and it was held by this Court and unanimously by the Supreme Court of Canada that its determination on that basis should not be disturbed. I am of the same view in the present case. If it was open to the Board in the *Moodie* case (*supra*) to determine the standard profits on the basis of the capital employed, notwithstanding that there was an application under subsection 3 before it, how can it be said that it was not open to the Board in the present case to use the same basis particularly when the application itself was put on that basis and there was no request by the appellant for the use of any other basis?

Nor is there any reason to assume, even if the application had been made specifically under subsection 3, that the decision of the Board would have been different. It was for the Board to decide in this case, as in the *Moodie* case (*supra*), whether the standard profits should, on the facts, be determined on the basis of the capital employed or on some other basis. The Court has no jurisdiction to pass judgment on the question. Even if it be conceded that the Board was not bound by the appellant's application or its request but had the right and duty to determine independently what it was entitled to there is no reason to assume that the Board did not consider the facts that were said to be sufficient material on which to ground a claim under subsection 3 or consider the application under that subsection. While it was stated by Mr. Harmer in his examination for discovery as an officer of the Crown that the Minister had not considered the claim under subsection 3 because there was no claim under that subsection there is no evidence that the Board did not do so. There is only surmise to that effect.

Moreover, how could it be said in 1943 when the Board determined the appellant's standard profits at exactly the amount which it had requested that it had proceeded on a wrong principle?

Indeed, the reality of the case is that the only justification that Mr. Stapells could put forward for his contention that the Board had acted on a wrong principle in failing to use a basis other than that of the capital employed in determining the appellant's standard profits is that more than four years later a Board of Referees differently constituted determined the standard profits of four companies whose business positions and conditions were similar to the appellant's on a basis other than that of the capital employed, from which fact the Court is, in effect, asked to declare that the Board's decision in this case was wrong.

While it was natural that the appellant should feel aggrieved on finding that its standard profits were relatively very much lower than those determined for the four companies mentioned it does not follow that the decisions of the Board in these cases were necessarily right and that of the Board in the present case, therefore, wrong. Even if the evidence of what the Board determined in these cases

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was admissible no deduction ought to be drawn from their decisions other than that they show that the later members of the Board arrived at a different conclusion on similar facts from that reached by the earlier members in the present case. There is nothing anomalous in this for it is possible for two persons each hearing similar facts to draw different conclusions from them without one being necessarily right and the other wrong. How can this Court possibly find that the decisions of the later members were right and so deduce that the decision of the earlier members was wrong? It is not within the competence of this Court to pass any judgment on the correctness or otherwise of the decisions referred to. Certainly, they cannot be relied on as proof that the decision of the Board in the present case was wrong.

Moreover, I have reached the conclusion that the evidence of these decisions was inadmissible. Counsel for the respondent objected to it on the ground of irrelevance and I received it subject to such objection. I now hold that the objection ought to have been sustained. If the appellant had any right of appeal on the ground that the Board should have considered its claim under subsection 3 and determined its standard profits on a basis other than that of capital employed such right accrued immediately after the decision of the Board on April 28, 1943. If the appeal had been heard then or at any time prior to the applications of the four companies referred to and the decisions made on them counsel for the appellant could not have pointed to them as proof that the decision of the Board in the present case was based on a wrong principle. The appellant's position cannot be improved by the lapse of time.

The correctness of the Board's decision in the present case cannot be tested by what the Board with different members did in similar cases four years afterward. The appellant cannot derive any assistance from these decisions and Mr. Stapells is left without any support in fact or in law for his main argument that the Board acted on a wrong principle in determining the appellant's standard profits.

Mr. Stapells' next argument was that the decision of the Board of April 28, 1943, was a nullity or improper. This was his conclusion from a number of criticisms which he swept up together. For example, he urged that since

only two members of the Board had been present at the hearing in Regina there had been no hearing by the Board and the Minister had had the benefit of the knowledge of only two members instead of that of four. Furthermore, according to the argument, the hearing before the two members of the Board had been improperly conducted in that when the appellant was told that it had twenty minutes in which to present its case an inadequate time had been allotted and also that the members had been delinquent in failing to discuss the importance or unimportance of the basis of capital employed or to make any comparison with other companies or mention the distinction between subsections 1 and 3 of section 5 or that the appellant might have a claim under the latter. Then it was submitted that since Mr. Justice Harrison, the Chairman of the Board, had concurred in the so-called decision without having heard the evidence at the hearing and that since the so-called report of the decision had been signed by only three members of the Board instead of four it must be presumed that Mr. Courtland Elliott, the member who had not signed, had not considered the application, it must follow that there had been no decision by the Board as such. There was also the criticism that the document, dated April 28, 1943, was not a report in the ordinary sense and that consequently there was nothing to justify the decision by the Minister.

Finally, it was urged that the Board did not give the Minister the advice which section 13 of the Act contemplated, that the Minister had asked the Board to report on the question of depression and determine standard profits under section 5, that all the Board had done was to find depression and determine standard profits under subsection 1 of section 5 and that, consequently, the Minister did not have sufficient information or knowledge on which to base the proper exercise of his discretion. Coupled with these criticisms of the Board it was urged that there had been a failure of duty on the part of the Minister, that he should have been put upon enquiry when he received only a letter from three members of the Board instead of a report and saw that Mr. Courtland Elliott

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had not signed and that in treating the appellant differently from the four companies referred to he had discriminated against it.

For these reasons Mr. Stapells urged that the Court should declare that the purported decision of the Board of April 28, 1943, was null and void and that the matter should be referred back to the Minister with a direction to present the case again to the Board of Referees for a new hearing.

There is no substance in these criticisms. Only one of them requires consideration. There is no validity in the argument that the decision of the Board was a nullity because only two members were present at the hearing. In the first place, the Board was not restricted to evidence presented at an oral hearing and there was no requirement that there should be any oral hearing. Moreover, it is clear that the increase in the size of the Board from three members to four was intended for the purpose of enabling the Board to hold hearings before two panels of two members each in order to cope with the increased volume of its work. The balance of the complaint against the conduct of the hearing is wholly without merit. The contention that there had been no decision by the Board as such since only three members of the four-man Board had signed the report of April 28, 1943, might have carried weight if the members of the Board had been in the position of arbitrators between the appellant and the Minister but they were not. The Board was appointed by the Minister under the authority of section 13 of the Act and directed to exercise the powers conferred on it by the Act and also such other powers and duties as were assigned to it by the Governor in Council. Under these circumstances it seems to me that section 31(*c*) of the Interpretation Act, R.S.C. 1927, chap. 1, applies. This provides as follows:

> 31. In every Act, unless the contrary intention appears,
>
> (*c*) where any act or thing is required to be done by more than two persons, a majority of them may do it;

That is the situation here. Section 13 of the Act requires the Board to do certain things and a majority of the Board may do it. Consequently, even if Mr. Courtland Elliott did not consider the appellant's application a majority of the Board did: *Vide* also the decision of the Supreme

Court of Canada in *Glasgow Underwriters* v. *Smith* (1). Moreover, even if section 31(*c*) of the Interpretation Act does not apply there is no evidence that Mr. Courtland Elliott did not consider the application. Indeed, three members of the Board reported that the Board had examined the claim and in the absence of evidence to the contrary, it ought to be assumed that the Board did what it was supposed to do. The remaining criticisms of the conduct of the Board and of the Minister I dismiss summarily.

The prayer in the appellant's statement of claim that the decision of the Board of Referees be declared null and void and that the matter be referred back to the Minister with a direction to him to present the case again to the Board of Referees for a new hearing is, therefore, denied. There is no case for any such declaration or direction.

I now come to the appellant's prayer in the alternative that it be declared that although there has been an award of standard profits under subsection 1 of section 5 of the Act the Minister is not precluded from referring the appellant's further application for standard profits to the Board of Referees for advice and ascertainment of standard profits under subsection 3 of section 5. The argument in support of this alternative prayer was outlined by Mr. Stapells and elaborated by Mr. Stikeman. Mr. Stikeman's submission, as I understood it, was that the subsections of section 5 must be considered as if they were separate sections, that each gave a right to the taxpayer who came within its ambit, that there was no prohibition against a taxpayer qualifying under more than one subsection, notwithstanding the words "final and conclusive", that consequently a taxpayer who had received an award under subsection 1 was not precluded from making an application under subsection 3 and that the Minister was not precluded from entertaining such an application. The essence of the argument was that the decision of the Board when approved by the Minister was final and conclusive only in respect of the application on which the decision was made so that no further application under the same subsection could be considered. But, it was urged, the words

(1) (1924) S.C.R. 531.

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had no bearing in respect of an application under a different subsection. Therefore, while the decision of the Board was final and conclusive in respect of the appellant's application under subsection 1 and it could not have its claim reconsidered under that subsection, the provision did not bar the appellant's second application and there was nothing to preclude the Minister from entertaining it and referring it to the Board for advice and ascertainment of standard profits under subsection 3. Under this argument the appellant's application under subsection 1 and the award made under it may be disregarded and only the second application need be considered.

While the language of subsection 4 of section 5, as it stood prior to the amendment of 1944, is not as precise as might be desired and lends itself to the possibility of the interpretation put forward by Mr. Stikeman I am unable to agree with his interpretation. While there may be circumstances under which the decision of the Board although approved by the Minister is not final and conclusive of a company's standard profits, as, for example, when it has been re-classified or there has been a change in its status or capital set-up, it seems unreasonable to attribute to Parliament an intention that a company which has applied for standard profits under section 5 and received an award under subsection 1 should, on the same set of facts and without any change of status or capital, be able, when dissatisfied with its award, to make a second application for standard profits under another subsection of section 5. The possibility of being thus able to shift from one subsection to another should not be read into the subsection. Moreover, if the subsection is read as a whole, including its proviso, it will appear that no such multiplicity of applications for standard profits was intended. It is clear from the proviso that if the Board's decision as to standard profits is not approved by the Minister and it is submitted to the Treasury Board the latter will determine the standard profits and its decision will be final and conclusive, no matter under what subsection of section 5 the application for standard profits was made. It would be an anomalous situation if there should be a different result in cases where the Board's decision has been approved by

the Minister. In my view, the words "final and conclusive" have the same width of applicability whether the decision of the Board is approved by the Minister or the decision is made by the Treasury Board. They are not limited in their effect to the subsection under which the application was made. When the Board of Referees has determined a company's standard profits and its decision has been approved by the Minister the decision is final and conclusive of the company's rights to standard profits at the time of its application regardless of whether the application was made under section 5 generally or under subsections 1 or 3 and a company which has applied for standard profits under section 5 and has received an award under subsection 1 cannot, on the same facts and without any change in its status or capital, have a second application for standard profits under a different subsection considered by the Minister or by the Board.

The applicant's alternative prayer is, therefore, denied.

For the reasons given the appeal herein must be dismissed with costs.

Judgment accordingly,