

BETWEEN:

DAME GRACE ELLIOTT, ET AL, EXECU-
TORS OF THE WILL OF JOSEPH
CHARLES EMILE TRUDEAU (DE-
CEASED) } APPELLANTS;

1938
Nov. 28.
1940
Feb. 26.

AND

THE MINISTER OF NATIONAL
REVENUE } RESPONDENT.

Revenue—Income—Gift—Commission or fee—Payment for services or as part of purchase price—Income War Tax Act, R.S.C. 1927, c. 97, s. 3.

Appellants are the executors of the will of T., who died in 1935. T. owned the majority of the stock of a company which operated a chain of gasoline service stations. Harry Snyder Ltd., a wholesale gasoline company, entered into an agreement with T. whereby he undertook to deliver or cause to be delivered to it all the shares of the operating company. To complete his part of the agreement T. had to purchase the remaining outstanding shares of the company and these, together with his own, he sold to Harry Snyder Ltd., for the sum of \$1,150,000 of which S. received a commission of \$150,000. T. had wished to receive \$1,000,000 net for his stock in the operating company. Later he performed certain services for Harry Snyder Ltd, designed, or so stated to be, for the purpose of assisting that company to acquire all the outstanding shares of two gasoline companies T. accepted from Harry Snyder Ltd. cheques totalling \$25,000, which cheques had noted on them "Account of Services."

T's estate was assessed for income tax on this sum of \$25,000, which assessment was affirmed by the Minister of National Revenue, from which decision an appeal was taken to this Court. Appellants contended that the payment of \$25,000 to T. was by way of a supplement to the consideration paid to him for his stock in the operating company.

Held: That the \$25,000 payment was not part of the purchase price of T's stock but was a salary or commission for services rendered to Harry Snyder Ltd, and therefore income within the meaning of s 3 of the Income War Tax Act.

² That the \$25,000 received by T. was not a gift within the meaning of s 3 (a) of the Act.

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APPEAL under the provisions of the Income War Tax Act from the decision of the Minister of National Revenue.

The appeal was heard before the Honourable Mr. Justice Angers, at Montreal, P.Q.

J. G. Ahern, K.C. for appellants.

J. D. Kearney, K.C. and *J. R. Tolmie* for respondent.

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

ANGERS J., now (February 6, 1940) delivered the following judgment:

This is an appeal under sections 58 and following of the Income War Tax Act (R.S.C., 1927, chap. 97 and amendments) by Dame Grace Elliott, of the City of Outremont, Province of Quebec, widow of Joseph Charles Emile Trudeau, in his lifetime advocate of the same place, Hector H. Racine, merchant, and Georges Beauregard, notary, both of the City of Montreal, said province, acting in their quality of testamentary executors of the said late Joseph Charles Emile Trudeau, from the assessment made by the Commissioner of Income Tax on February 4, 1936, and affirmed by the Minister of National Revenue on April 26, 1938.

On or about April 29, 1933, the said Joseph Charles Emile Trudeau filed his income tax return for the taxation year 1932, showing a gross income of \$16,531.10 and a net taxable income of \$12,565.81 and paid a tax thereon of \$1,160.11.

On February 4, 1936, the Commissioner of Income Tax, pursuant to section 54 of the Act, sent to the taxpayer (then deceased) a notice of assessment adding to the gross income a sum of \$25,000, received by the taxpayer in the circumstances hereinafter related.

A notice of appeal, dated March 2, 1936, by the testamentary executors of the said Joseph Charles Emile Trudeau, was received by the Minister of National Revenue, as stated in the decision of the Minister. The notice of appeal formed part of the documents transmitted by the Minister to the Registrar of the Court and deposited in the record; this notice of appeal is not among the said

documents; an amended notice of appeal dated April 3, 1936, replaced it, which is included in the file received by the Registrar from the Minister.

On April 26, 1938, the Minister of National Revenue affirmed the assessment.

A notice of dissatisfaction dated May 4, 1938, was sent to the Minister. On June 7, 1938, the Minister sent his reply to the executors of the late Joseph Charles Emile Trudeau and to their solicitors confirming the assessment.

Pleadings were filed in compliance with an order of the 21st of September, 1938.

[The learned Judge referred to the pleadings and continued.]

By a letter dated October 24, 1932, Joseph Charles Emile Trudeau agreed to cause to be delivered to Harry Snyder, Limited, of Montreal, or its nominee all of the class A no-par value shares of Automobile Owners' Association, Limited, excepting 1,300 so-called life member shares and all of the class B no-par value shares of the said company for the sum of \$1,150,000. This letter, filed as exhibit 2, contains, among others, the following stipulations which seem to me relevant to the question at issue:

I hereby agree to cause to be delivered to you or your nominees all of the Class B N.P.V. shares of the Automobile Owners' Association Limited, incorporated 1929 (hereinafter referred to as the "A.O.A."), and all of the Class A N.P.V. shares of the said Company, excepting 1,300 so-called life-member shares, upon payment of the sum of One Million One Hundred and Fifty Thousand Dollars (\$1,150,000).

Receipt is hereby acknowledged by me, on account of the purchase price above mentioned, of the sum of Fifty-seven Thousand Five Hundred Dollars (\$57,500), the balance of the said purchase price amounting to One Million Ninety-two Thousand Five Hundred Dollars (\$1,092,500) to be paid by you on or before 12 o'clock noon, on Thursday, November 3, 1932, and in consideration of the foregoing I hereby undertake to forthwith deliver to you or your nominees, good and marketable deeds of title as well as contracts, undertakings and other documents and papers appertaining to the assets of the A.O.A., and to give to you or your nominees access to any and all books of statements concerning the Company, and to permit you or your nominee to visit the premises and properties owned by the Company and to facilitate in every way a thorough inspection by you of the affairs of the Company.

I further undertake that upon payment by you of the balance of purchase price of One Million Ninety-two Thousand Five Hundred Dollars (\$1,092,500), I will deliver to you at your office all the Class A and Class B N.P.V. shares as hereinabove mentioned. . . . If at any time within six months from the date upon which payment

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of the balance of the purchase price shall be paid, the Directors of the A.O.A. decide to redeem or otherwise purchase the whole or any part of the 1,300 Class A N.P.V. shares hereinabove referred to, I agree to pay to the A.O.A., for the said purpose, one-half of the redemption or purchase price of the said shares.

I hereby agree, upon payment of the balance of purchase price, to sign any and all contracts, transfers or other documents which you may consider necessary to give effect to the present undertaking.

Trudeau's offer was accepted by Harry Snyder, Limited, through Harry Snyder, its president, as appears by the subscription inserted at the bottom of the letter, exhibit 2.

On the same day Trudeau wrote to Harry Snyder the following letter (exhibit 3):

In connection with my letter to Harry Snyder Limited of even date regarding the purchase of all the shares of Automobile Owners' Association, Limited, I hereby agree to pay to you, out of the initial payment of Fifty-seven Thousand Five Hundred Dollars (\$57,500), if and when paid by Harry Snyder Limited, the sum of Twelve Thousand Five Hundred Dollars (\$12,500) for your services to date.

Should, for reasons mentioned in my letter of this date to Harry Snyder Limited, I be obliged to remit the first payment of Fifty-seven Thousand Five Hundred Dollars (\$57,500) it is understood that you will refund forthwith the Twelve Thousand Five Hundred Dollars (\$12,500) above mentioned to be paid to you for your services.

Should Harry Snyder Limited, or its assigns, pay me the balance of One Million Ninety-two Thousand Five Hundred Dollars (\$1,092,500) as mentioned in my letter to Harry Snyder Limited, I further agree to pay to you, as and when the said sum of One Million Ninety-two Thousand Five Hundred Dollars (\$1,092,500) is paid to me, an additional sum of One Hundred and Thirty-seven Thousand Five Hundred Dollars (\$137,500) as complete, full and final payment for all services rendered by you in connection with this matter.

This letter cancels my letter to you of August 5, 1932, and is in replacement thereof.

On the same day also, John M. Pritchard, who owned a certain number of shares of Automobile Owners' Association, Limited, wrote to Trudeau as follows (exhibit 6):

I hereby agree to deliver or cause to be delivered and transferred to you or your assigns or nominees all of the common and/or preferred shares appearing in my name in the Subscription Book of the Automobile Owners' Association (1929) for and in consideration of the sum of \$50,000, should you consummate your sale as outlined in letter of even date to Harry Snyder.

On November 3, 1932, Trudeau wrote to Harry Snyder, Limited, a letter of which the following passages are pertinent (exhibit 4):

In connection with my letter to you dated October 24, 1932, and which has been duly accepted by you, I hereby acknowledge to have

received payment of the sum of \$1,092,500 (One Million and Ninety-two Thousand Five Hundred Dollars), being the balance of purchase price mentioned in my letter of October 24 payable on all the Class "A" and Class "B" shares of Automobile Owners' Association Limited which you purchased from me.

As Mr. Snyder is aware, I am unable to-day to deliver the shares appearing in the Company's books in the name of John M. Pritchard and consisting of 625 Class "A" shares and 2,495 Class "B" shares. Mr. Pritchard has agreed in writing to deliver these shares to me but unfortunately he is in Toronto to-day and will not return to Montreal until to-morrow, but I will see to it, and Mr. Harry Snyder will assist me in this matter, that the shares in the name of Mr. Pritchard are delivered to you to-morrow.

The other shares which I undertook to deliver and consisting of 47,505 Class "B" shares and 11,875 Class "A" shares I herewith deliver to you.

Harry Snyder, president of Harry Snyder, Limited, called as witness on behalf of appellants, testified that Trudeau did not tell him that he wanted to get \$1,000,000 net for his shares of Automobile Owners' Association, Limited, and that, if he could not get it, he would not sell. Trudeau however stated that he would have to buy certain shares of the company in order to fulfil his agreement.

Snyder swore that he had not told Trudeau that he (Snyder) would see to it that Trudeau got back the \$50,000 which he would have to pay for the purchase of Pritchard's shares in Automobile Owners' Association, Limited.

According to witness, Trudeau never sent him any account for services rendered.

Sometime in October, 1932, Snyder met Joseph Elie, his sons and his solicitor at the Windsor Hotel in Montreal with regard to the acquisition of the shares of Lasalle Refinery, Limited; the price was discussed and an agreement was effected at the figure mentioned; this was the reason why Harry Snyder, Limited, paid \$10,000 to Trudeau.

As regards the purchase by Harry Snyder, Limited, of the shares of Excel Petroleum, Limited, Snyder's version is that Trudeau brought Alfred H. Paradis, the president of the company, from Victoriaville and introduced him to the witness. As a result of the latter's interview with Paradis, Harry Snyder, Limited, purchased the shares of Excel Petroleum, Limited, and paid \$15,000 to Trudeau in connection with this transaction.

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Photostat copies of two cheques signed by Harry Snyder, Limited, per Harry Snyder, president, payable to the order of J. C. E. Trudeau, one dated December 6, 1932, for \$15,000 and the other dated December 23, 1932, for \$10,000, were filed as exhibits A and B. These cheques appear to have been endorsed by Trudeau and paid by the Royal Bank of Canada on which they were drawn. The first cheque bears above the words "To the Royal Bank of Canada, Montreal," printed at the bottom of the left side of the cheque the words "Account of services," and the second one bears in the same position the words "Balance due on account of services rendered in connection with acquisition of La Salle, et al."

The only fee to which Trudeau was entitled in respect of the acquisition by Harry Snyder, Limited, of the shares of Lasalle Refinery, Limited, and of Excel Petroleum, Limited, was, according to Snyder, the sum of \$25,000. Snyder declared that it was indifferent to him as well as to his company whether this sum of \$25,000 was considered as a fee in accordance with the explanations furnished by the witness or whether it was looked upon as a payment on account of the A.O.A. shares.

It was important for Harry Snyder, Limited, to have the co-operation of Trudeau and the company, being satisfied of his co-operation, paid him the sum of \$25,000.

Snyder was asked to file a copy of the Income Tax Return of Harry Snyder, Limited, for the year 1932, indicating the names, addresses and remuneration of its employees; it was marked as exhibit C. The name of J. C. E. Trudeau is mentioned in this return; opposite his name, in the column headed "Wages, salary, commission, bonus or other remuneration paid during the calendar year ended 31st December, 1937" (ought to be "1932"), under the subheading "Total," appears the sum "\$25,000." Snyder said that this sum had been paid to Trudeau as salary or commission. I do not think that this return could bind Trudeau; in my opinion it has no bearing on the present case; it merely shows how Harry Snyder, Limited, for its own purpose, treated this payment.

Joseph Elie, president of Lasalle Refinery, Limited, called as witness by appellants, said that his company sold

all its interests to Harry Snyder, Limited, in 1932. According to him the sale was not made through the agency of Trudeau. Counsel for respondent objected to this evidence as tending to contradict the allegation contained in paragraph 12 of the statement of claim; judgment on the objection was reserved; after giving the matter due consideration, I have reached the conclusion that the objection is unfounded.

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Paradis, president of Excel Petroleum, Limited, heard on behalf of appellants, declared that Trudeau came to Victoriaville and asked him to see Snyder, which he did. According to the witness, that was all the conversation.

Raoul Leclerc, in 1932, was Trudeau's assistant and a director of A.O.A. He had knowledge of the dealings relative to the sale by Trudeau of his shares in the company. Trudeau told him that in virtue of his agreement with Harry Snyder, Limited, he was to get \$1,000,000. Trudeau added that he had to disburse \$50,000 to buy Pritchard's shares and that he had received \$25,000 on account thereof. Trudeau's only occupation in 1932 was the administration and management of the A.O.A.

Arthur Henry Rowland, inspector of Income Tax, Montreal Division, produced, as exhibit 1, a letter from Trudeau to him dated April 17, 1934, which reads in part as follows:

Preparing my 1933 income tax report reminds me of a fact which, I am told, should have been reported in my 1932 report.

Consequently, I wish to notify you that I have not reported an item of \$25,000 so-called commission received from Mr. Harry Snyder on or about the 3rd of November 1932.

As explained verbally, I was under the impression that it was part of another transaction, that is, the sale of my shares and interests in the Automobile Owners' Association Limited.

Recalled, the witness stated that he had checked his files and had found no record that Trudeau had made a return after April 29, 1933, showing the receipt of the sum of \$25,000.

Alfred Leroux, a clerk in the Office of the Peace in Montreal, was asked to file a copy of the information and complaint in a case of *The King v. J. C. E. Trudeau* (No. 15426) before the Court of Sessions of the Peace; it was marked as exhibit 5.

This information and complaint dated the 21st of September, 1934, laid by Sumner Ross Gordon, officer of the

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Income Tax Division of the Department of National Revenue in Montreal, states (*inter alia*) that "on or about the 1st day of May, 1933, Joseph Charles Emile Trudeau, of the City of Outremont, District of Montreal, did a return of his income for and in respect of the year 1932 and did then, therein and thereby make a false statement in such return, in that the said Joseph Charles Emile Trudeau declared his income to be in the sum of \$16,531.10, whereas his income for the said year was in excess of the said sum of \$16,531.10 and was approximately in the sum of \$41,000, the whole contrary to the provisions of the Income War Tax Act and in particular Section 33, in that respect made and provided."

Annexed to the information and complaint and forming part of exhibit 5 is a procès-verbal showing that on the 28th of September Trudeau appeared and pleaded not guilty; that the trial, fixed for the 5th of October, was, after three adjournments, held on the 30th of October; that after the evidence had been completed counsel for the accused made a motion for non-suit and that the case was continued to the 16th of November for judgment; that on the last-mentioned date the complaint was dismissed. In cross-examination Leroux was asked to file the judgment, which he did (see exhibit D).

I must say that, in my opinion, the above information and complaint should never have been laid. Trudeau was obviously of the opinion that the amount of \$25,000 received from Harry Snyder, Limited, was a part of the purchase price of his interests in Automobile Owners' Association, Limited, inasmuch as he wanted to obtain \$1,000,000 net for them and was not disposed to sell them for less. Now the evidence discloses that he had to pay \$50,000 for the shares of John M. Pritchard in the A.O.A. and this left him with only \$950,000.

It is extremely unfortunate that the assessment was deferred so long and that the Court was thus deprived of Trudeau's version. The Department of National Revenue was aware of the receipt by the taxpayer of the sum of \$25,000 as early as April, 1934 (see letter, exhibit 1), if not earlier, and the notice of assessment was sent only on

February 4, 1936; it is difficult for me to understand why the Commissioner waited almost two years, until after Trudeau's death, to make this assessment.

Be that as it may, it is my duty to determine, with the evidence of record, if the sum of \$25,000 in question is income within the meaning of the Act and as such subject to income tax.

It was submitted on behalf of appellants that the sum of \$25,000 was capital and not income and as such was not taxable; subsidiarily that it constituted a gift and was under paragraph (a) of section 3 exempt from taxation. The relevant part of section 3 reads as follows:

For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source, including

(a) the income from but not the value of property acquired by gift, bequest, devise or descent;

It was urged by counsel for appellants that paragraphs 6 and 7 of the statement of defence contained an admission that Trudeau was to receive \$1,000,000 net for the shares of the A.O.A. and that, when Harry Snyder, Limited, refused to raise the price to \$1,200,000 so as to take care of the sum of \$50,000 which Trudeau had to pay for the purchase of Pritchard's shares, Harry Snyder agreed to make up the difference. According to counsel, the declaration made in Court by Snyder contradicting the admission contained in paragraphs 6 and 7 did not destroy it; in support of his contention counsel relied on article 1245 C.C. (Que.), which reads as follows:

A judicial admission is complete proof against the party making it. It cannot be revoked unless it is proved to have been made through an error of fact.

I agree with counsel's contention that an admission made in a pleading cannot be set aside by verbal testimony, unless it be proved that the same was made through an

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error of fact. I must say however that I cannot see in paragraphs 6 and 7 an admission that Harry Snyder, Limited, agreed to give Trudeau a sum of \$50,000 to compensate him for the price he had to pay to Pritchard for his shares. The only admission I can find in these paragraphs is that Harry Snyder, Limited, through its president, Harry Snyder, proposed to Trudeau to pay him a sum of \$10,000 if he would act as its agent to facilitate the purchase of the shares of Excel Petroleum, Limited, and if, as a consequence, Harry Snyder, Limited, were able to buy the said shares at a satisfactory price and a further sum of \$15,000, if Trudeau would render the same assistance in acquiring the shares of Lasalle Refinery, Limited, and if Harry Snyder, Limited, as a result, were able to acquire them at a satisfactory price.

The allegations contained in paragraphs 6 and 7 imply that Trudeau did not wish to sell his interests in the A.O.A. for a price under \$1,000,000, but they do not imply that Harry Snyder, Limited, was to reimburse to Trudeau the sum of \$50,000 paid out for the acquisition of Pritchard's shares, so as to bring up the price to Trudeau for his interests in the A.O.A. to \$1,000,000 net.

With the evidence I have before me, it seems reasonable to believe that Harry Snyder, Limited, anxious to acquire all the shares of Automobile Owners' Association, Limited, was inclined to help Trudeau to get the sum of \$1,000,000 net for his interests therein, which he was apparently insistent on obtaining, and that, when it saw that the deal was liable to fall through on account of Trudeau having to pay \$50,000 to Pritchard, Harry Snyder, Limited, offered to Trudeau the opportunity of recouping a part of this disbursement by his assistance in acquiring the shares of Excel Petroleum, Limited, and of Lasalle Refinery, Limited. It is regrettable that the assessment was not made during the lifetime of Trudeau. His story might possibly have thrown a somewhat different light on the agreement made between him and Harry Snyder.

The statements relating to the sum of \$25,000 contained in the letter filed as appellants' exhibit 1, partly hereinabove reproduced, do not, in my judgment, constitute an admission that the sum of \$25,000 was a commission; it

is perhaps as true to say, on the other hand, that they are not equivalent to a formal denial. As already mentioned, Rowland declared that, having examined his files, he found no record that Trudeau had made a return after April 29, 1933, referring to the sum of \$25,000. It seems to me obvious that Trudeau considered this sum as forming part of the purchase price of his interests in the A.O.A. His testimony respecting this letter would certainly have been interesting.

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I must say that I doubt very much the truth of Snyder's assertion that Trudeau did not tell him that he wanted to get \$1,000,000 net for his interests in the A.O.A. and that, if he did not get it, he would not sell. If Trudeau had not made this statement to Snyder, I fail to see why the latter should have offered to compensate him for the sum of \$50,000 which he would have to pay for Pritchard's shares. My impression is that Snyder, who was to receive a commission of \$150,000 out of the purchase price payable by Harry Snyder, Limited, thought advisable to share this commission with Trudeau so as to prevent the transaction from falling through.

There remains the other assertion by Snyder that he did not tell Trudeau that he would see to it that he got back the \$50,000 which he would have to disburse for Pritchard's shares. This assertion seems to me more likely than the former. Snyder may very well have intimated to Trudeau that he would give him a chance of regaining the whole or at least a part of the sum of \$50,000 expended for the purchase of Pritchard's shares. When Harry Snyder, Limited, decided to acquire the business of Lasalle Refinery, Limited, and of Excel Petroleum, Limited, Snyder saw an opportunity of enabling Trudeau to recoup a part of his disbursement and charged him with the task of interviewing Elie and Paradis, respectively president of Lasalle Refinery, Limited, and Excel Petroleum, Limited, and letting them know that Harry Snyder, Limited, wished to buy the business of their companies and was well able to pay for the same.

As previously mentioned, Paradis declared that Trudeau came to Victoriaville on one occasion and asked him to see Snyder, which he did; according to the witness, that was all the conversation.

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Elie, on the other hand, testified that the sale of the shares of Lasalle Refinery, Limited, was not made through the medium of Trudeau. It looks to me as if Trudeau's intervention, in this case as well as in the case of Paradis, merely consisted in telling Elie that Harry Snyder, Limited, wanted to acquire the business of Lasalle Refinery, Limited, and asking him to see Snyder.

In addition to the declaration by Snyder that he did not tell Trudeau that he would see to it that Trudeau got back the \$50,000 he would have to pay for Pritchard's shares, there are, in support of the respondent's contention that the sum of \$25,000 was a commission or salary for services rendered, the two cheques filed as exhibits A and B, one bearing the words "Account of services" and the other the words "Balance due on account of services rendered in connection with acquisition of La Salle, et al."

It is quite manifest that Trudeau did not exert himself nor spend much time in connection with the transactions in question. Snyder nevertheless considered it was important to have his co-operation as he had organized a company, namely, Automobile Owners' Association, Limited, of which there was no other similar to it. Snyder said he was satisfied with Trudeau's co-operation and he paid him \$25,000.

There is no doubt that Trudeau made a success of the A.O.A. and that his advice must have carried great weight with Elie and Paradis, who were in the same trade.

Trudeau accepted the two cheques without any protest regarding the notes "Account of services" and "Balance due on account of services, etc.," written thereon, at least as far as disclosed by the evidence of record, and endorsed and cashed them. Did he fail to see these notes or did he not grasp their meaning and import? The first hypothesis does not appear likely but the second one, to my mind, is not at all impossible. This is another point on which the testimony of Trudeau might have been of some assistance.

After carefully perusing and weighing the evidence adduced, examining the law and jurisprudence and considering the reasons for and against the respective contentions submitted by counsel, I have arrived at the conclusion, not unhesitatingly I must say, that the sum of

\$25,000 received by Trudeau from Harry Snyder, Limited, cannot be considered as forming part of the purchase price of Trudeau's interests in Automobile Owners' Association, Limited, and that it is not a gift within the meaning of paragraph (a) of section 3 of the Act; it was, as I think, a salary or commission paid to Trudeau for his services in connection with the acquisition by Harry Snyder, Limited, of the business of Lasalle Refinery, Limited, and of Excel Petroleum, Limited.

The following decisions may be consulted profitably: *Ryall v. Hoare* (1); *Martin and Lowry* (2); *Morrison v. Minister of Customs and Excise* (3); *Capital Trust Corporation Ltd., et al., and Minister of National Revenue* (4); *Cooper v. Stubbs* (5); *Shipway v. Skidmore* (6).

For the reasons hereinabove set forth, I believe that the sum of \$25,000 in question is taxable as income in virtue of section 3 of the Act. The appeal is accordingly dismissed, with costs against appellants.

Judgment accordingly.

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